

New Jersey Commissioner of Education

Final Decision

Marian DeJesus,

Petitioner,

v.

New Jersey Department of Education, Office of
Student Protection, and Board of Education of
the City of Vineland, Cumberland County,

Respondents.

Synopsis

Petitioner – a school bus driver for the Vineland Board of Education (Vineland) – challenged the suspension of her school bus endorsement by the New Jersey Department of Education, Office of Student Protection (OSP), and the termination of her employment by Vineland. These actions followed an incident that occurred in September 2019, wherein a three-year-old preschool student remained on the bus after petitioner had disembarked at the end of her route. The respondents filed separate motions to dismiss the petition, which petitioner opposed.

The ALJ found, *inter alia*, that: pursuant to *N.J.S.A.* 18A:39-28, school bus drivers are required to conduct a visual inspection at the end of their transportation route to confirm that no pupils are left on the bus; there is no dispute that a preschool student was left on the bus after petitioner finished her route on September 13, 2019; petitioner admittedly left the bus at the garage and proceeded to use the restroom and pick up her updated schedule before she was informed by a maintenance worker that a preschooler was still on petitioner’s bus; *N.J.S.A.* 18A:39-29 mandates a six-month suspension of petitioner’s school bus endorsement for such actions; Vineland is a civil service jurisdiction, and petitioner’s rights and duties are governed by the Civil Service Act and accompanying regulations; and the Civil Services Commission issued a final agency decision terminating petitioner from her employment effective September 18, 2019. The ALJ concluded that: petitioner’s school bus endorsement was properly suspended pursuant to *N.J.S.A.* 18A:39-29; and the Commissioner lacks jurisdiction to decide whether petitioner’s termination by Vineland was proper. The petition was dismissed.

Upon review, the Commissioner concurred with the findings of the ALJ and adopted the Initial Decision of the OAL as the final decision in this matter. The petition was dismissed and OSP was directed to notify the Motor Vehicle Commission of its obligation to suspend petitioner’s school bus endorsement for six months pursuant to *N.J.S.A.* 18A:39-26 *et seq.*

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.

December 2, 2020

New Jersey Commissioner of Education
Decision

Marian DeJesus,

Petitioner,

v.

New Jersey Department of Education, Office of
Student Protection, and Board of Education of the
City of Vineland, Cumberland County,

Respondents.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties did not file exceptions.

On September 13, 2019, petitioner, a bus driver for respondent Vineland Board of Education (Vineland), transported pre-school students home from school pursuant to her afternoon bus route. Near the end of the route, petitioner pulled over to assist a child off the bus, then walked the length of the bus to confirm that B.A. was not on board before proceeding to drop off the last two students. Petitioner then returned to the garage and disembarked from the bus for five minutes to use the restroom and pick up her updated bus route. During that time, a maintenance worker saw a student on the bus, and petitioner subsequently found B.A. standing in the aisle.

Thereafter, respondent New Jersey Department of Education, Office of Student Protection (OSP) notified petitioner that her "S" endorsement to operate a bus would be suspended for six months as she failed to conduct a visual inspection at the end of her transportation route to confirm that no pupils were left on the bus, as required by *N.J.S.A.* 18A:39-28. Additionally, Vineland notified petitioner that it was seeking to remove her from her position as a bus driver.

Following a Board hearing, Vineland issued a final notice of disciplinary action removing petitioner. As Vineland opts to be governed by the Civil Service Act, *N.J.S.A. 11A:1-1 et seq.*, petitioner appealed that decision to the Civil Service Commission, where it was dismissed as untimely. Petitioner filed the instant appeal with the Commissioner challenging both the suspension of her “S” endorsement and her termination.

Upon review, the Commissioner concurs with the ALJ that petitioner failed to inspect the bus as required, which resulted in a student being left on the bus at the end of her route. As such, the Commissioner agrees with the ALJ’s conclusion that *N.J.S.A. 18A:39-29* mandates a six-month suspension of petitioner’s school bus endorsement as this was her first offense. Additionally, the Commissioner is in accord with the ALJ that the Commissioner lacks jurisdiction over petitioner’s termination, which has already been the subject of a final agency decision by the Civil Service Commission.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter and the petition is hereby dismissed. OSP is directed to notify the Motor Vehicle Commission of its obligation, pursuant to *N.J.S.A. 18A:39-28 et seq.*, to suspend petitioner’s school bus “S” endorsement on her driver’s license for six months. Additionally, should petitioner be hired by a new employer, OSP is directed to notify the employer that petitioner is ineligible during the period of suspension to continue employment as a school bus driver.

IT IS SO ORDERED. ¹

ACTING COMMISSIONER OF EDUCATION

Date of Decision: December 2, 2020
Date of Mailing: December 2, 2020

¹ This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L. 2008, c. 36 (N.J.S.A. 18A:6-9.1)*.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION ON
SUMMARY DECISION

OAL DKT. NO. EDU 16890-2019
AGENCY DKT. NO. 267-10/19

MARIAN DEJESUS,
Petitioner,

NEW JERSEY DEPARTMENT OF EDUCATION,
OFFICE OF STUDENT PROTECTION AND
BOARD OF EDUCATION OF THE CITY OF
VINELAND, CUMBERLAND COUNTY, Respondent.

Louis M. Barbone, Esq. for petitioner (Jacobs and Barbone, P.A., attorneys)

Amna T. Toor, Deputy Attorney General, for respondent New Jersey Department
of Education — Office of Student Protection (Gurbir S. Grewal, Attorney
General of New Jersey, attorney)

Nicole J. Curio, Esq., for respondent Vineland Board of Education (Gruccio,
Pepper, DeSanto and Ruth, P.A., attorneys)

Record Closed: September 25, 2020

Decided: October 19, 2020

BEFORE CATHERINE A. TUOHY, ALJ:

STATEMENT OF THE CASE

Petitioner, Marian DeJesus, challenges the suspension of her school bus endorsement by respondent New Jersey Department of Education, Office of Student

Protection (OSP), and the termination of her employment by respondent City of Vineland

New Jersey is an Equal Opportunity Employer

Board of Education (VBE). At issue is whether petitioner's school bus endorsement should be suspended for six months pursuant to N.J.S.A. 18A:39-28 and whether petitioner's termination of employment by the VBE is properly before the Commissioner of Education.

PROCEDURAL HISTORY

By letter dated September 17, 2019, respondent OSP advised petitioner that it intended to suspend her "S" endorsement to operate a school bus, pursuant to N.J.S.A. 18A:39-28, which provides for a six month suspension in a first instance of a driver's failure to conduct the required visual inspection of the bus at the end of a transportation route to assure that no pupil is left on the bus. Petitioner filed a Petition of Appeal with the Commissioner of Education on September 26, 2019 and October 3, 2019.

Respondent OSP filed a motion to dismiss petitioner's appeal on November 12, 2020. Respondent VBE filed a motion to dismiss in lieu of an answer on November 21, 2019, pursuant to N.J.A.C. 6A:3-1.10. By letter brief dated December 2, 2019 petitioner opposed both respondents' motions.

The matter was transmitted by the Department of Education Office of Controversies and Disputes to the Office of Administrative Law (OAL) as a contested matter where it was filed on November 27, 2019 pursuant to N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. The undersigned conducted an initial telephone pre-hearing conference on July 8, 2020 after being reassigned the case. Both respondents requested that their prior motions to dismiss be converted into motions for summary decision. Respondents were directed to provide petitioner with discovery. On September 8, 2020, petitioner filed a brief in opposition to respondents' motions for summary decision. Both respondents filed reply letter briefs on September 24, 2020.

FACTUAL DISCUSSIONS AND FINDINGS

Based on the documents submitted by the parties in support of and in opposition to the motions for summary decision, I FIND the following as FACT:

On September 13, 2019, petitioner was performing her duties as a VBE bus driver assigned an afternoon bus route to transport approximately thirty, three-year old children home (Verified Petition, paragraph 2, petitioners September 8, 2020 brief, Exhibit 1).

Towards the end of the bus route and prior to the stop for child B.A., petitioner pulled over with lights flashing to assist another child off the bus. Prior to returning to the operation of the bus, petitioner walked through the length of the bus in order to confirm that B.A. was not on the bus for drop off. Petitioner then completed the remainder of the bus run, dropping off and assisting the last two students left on the bus (Verified Petition, paragraph 3, Exhibit 1 of Petitioner's September 8, 2020 brief).

Thereafter, petitioner drove the bus back to the District's bus facility and pulled her bus into the garage in front of the bay because she had to pickup her updated bus route and use the restroom. Petitioner got off the bus, got her updated route and used the bathroom and was off the bus for approximately five minutes when a maintenance worker advised her there was a student on the bus. Petitioner saw B.A. standing in the center of the aisle, fastened him in his seat and drove him home, explaining the delay to his mother (Verified Petition, paragraph 4, Exhibit 1 of petitioner's September 8, 2020 brief).

A "Report of a Student Left Unattended on the School Bus" was filled out and reported to the Executive County Superintendent on September 13, 2019. The form indicates that "A student is considered to have been left unattended on the school bus at the end of the route when the driver has left the vicinity of the bus." Under the description of the incident, the form indicates: "Bus 182 left a Pre School student on the bus at the bus garage while she used the restroom at 5:09 p.m. The driver, Marian DeJesus came back to the bus approximately fifteen minutes later, someone from maintenance department informed her that there was a student on the bus. She immediately got back into the bus and took the student home. He arrived home at 5:40 p.m." (Respondent OSP's November 12, 2019 Brief, Exhibit A)

By letter dated September 17, 2018, respondent OSP notified petitioner that it had determined that she had left a child on the school bus to which she was assigned and failed to conduct a visual inspection at the end of her transportation route to assure that no pupil has been left on the bus, as required by N.J.S.A. 18A:39-28. For a first

offense, the statute directed a six-month suspension of petitioner's "S" endorsement to operate a school bus.

(Respondent OSP's November 12, 2019 Brief, Exhibit B)

The VBE is a district that has opted to be a Civil Service jurisdiction covered by the Civil Service Act, N.J.S.A. 11A:1-1et seq. The position of school bus driver is a classified career service position in civil service (Exhibit A, Respondent VBE's November 21, 2019 brief).

On September 18, 2019, petitioner was personally served by her employer VBE with a Preliminary Notice of Disciplinary Action form (PNDA) seeking her removal on charges of

N.J.A.C. 4A:2-2.3(a)(1), incompetency, inefficiency or failure to perform duties; N.J.A.C. 4A:2-2.3(a)(6), conduct unbecoming a public employee; N.J.A.C. 4A:2-2.3(a)(7), neglect of duty; and N.J.A.C. 4A:2-2.3(a)(12), other sufficient cause. The incident giving rise to the charges set forth in the PNDA were as follows: "On September 13, this driver left a preschool child on a bus with engine running while using restroom in the diesel garage area." (Exhibit D, respondent VBE's November 21 , 2019 brie0.

On September 18, 2019 petitioner was afforded an opportunity for a hearing with the appointing authority and was represented by two union representatives (Exhibit A, respondent VBE's November 21 , 2019 brief).

On September 24, 2019, a Final Notice of Disciplinary Action form (FNDA) seeking petitioner's removal effective September 18, 2019 on the same charges set forth in the PNDA was served on petitioner via certified and regular mail at her address of record (Exhibits A and F, respondent VBE's November 21, 2019 brie0.

The FNDA specified that petitioner had twenty days from receipt of the FNDA to file an appeal with the Civil Service Commission and that any appeal postmarked after the twenty-day statutory time limit will be denied (Exhibit F, respondent VBE's November 21, 2019 brief).

Petitioner's letter of appeal was postmarked January 21 , 2020 (Exhibit 2, petitioner's September 8, 2020 brief).

By final administration decision dated January 27, 2020 and issued January 28, 2020, the Civil Service Commission denied as untimely, petitioner's request for a hearing, appealing her removal from her position of School Bus Driver with respondent VBE, effective September 18, 2019 (Exhibit 2, petitioner's September 8, 2020 brief).

LEGAL ANALYSIS

The respondent, OSP and respondent, VBE both seek relief pursuant to N.J.A.C. 1:1-12.5.

OSP seeks summary decision affirming its determination that on September 13, 2019 petitioner, while working as a bus driver for VBE, failed to conduct a visual inspection of her bus at the end of her route, exited the bus at the Vineland bus facility and left a child on the bus, thereby triggering the mandatory six month suspension of her "S" endorsement to operate a school bus pursuant to N.J.S.A. 18A:39-28. Petitioner opposes OSP's motion arguing that petitioner had not yet ended her bus tour and had not yet conducted her final visual inspection of the bus.

VBE seeks summary decision dismissing the petition for lack of jurisdiction, since petitioner's rights regarding her employment by VBE are governed by the Civil Service Commission and not the Commissioner of Education. The Civil Service Commission, by final administration determination issued January 28, 2020 denied petitioner's request for a hearing to appeal her removal from her position as a school bus driver for VBE, effective September 18, 2019, for failing to file a timely appeal. Petitioner argues that the determination of the Civil Service Commission was in error and should be vacated and that the Commissioner of Education has the predominant interest to decide whether petitioner's "S" endorsement should be suspended for six months.

N.J.A.C. 1:1-12.5 provides that summary decision should be rendered "if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." Our regulation mirrors R. 4:46-2(c) which provides that "the judgment or order sought shall be rendered if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law."

A determination whether a genuine issue of material fact exists that precludes summary decision requires the judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the allegedly disputed issue in favor of the non-moving party. Our courts have long held that "if the opposing party offers .. .

only facts which are immaterial or of an insubstantial nature, a mere scintilla, 'fanciful frivolous, gauzy or merely suspicious,' he will not be heard to complain if the court grants summary judgment." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 529 (1995) (citing Judson v. Peoples Bank and Trust co., 17 N.J. 67, 75 (1954)).

The "judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Brill, 142 N.J. at 540 (citing Anderson v. Liberty Lobby, 477 U.S. 242, 249, 106 S. Ct. 2505, 2511, 91 L. Ed. 2d 202, 213 (1986)). When the evidence "is so one-sided that one party must prevail as a matter of law," the trial court should not hesitate to grant summary judgment. Liberty Lobby, 477 U.S. at 251-2, 106 S. Ct. at 2512, 91 L. Ed. 2d at 214.

Following the Brill standard, after considering all the papers and evidence filed in support and in opposition to respondents' motions for summary decision, I CONCLUDE that there are no genuine issues of material fact that require a plenary hearing and that both respondent OSP and VBE are entitled to summary decision as a matter of law.

OSP's Motion for Summary Decision

N.J.S.A. 18A:39-28 requires that the school bus driver "shall visually inspect the school bus to which he is assigned at the end of the transportation route to determine that no pupil has been left on the bus." N.J.S.A. 18A:39-28.

There is no dispute that B.A. was left on the bus after petitioner finished her route. Petitioner admittedly finished her route and went to the garage where she parked her bus and left the bus to use the restroom and pick up her bus route. Although she stated that she inspected the bus to look for B.A. prior to her last stop, she had not yet conducted her final inspection at the end of the route and therefore cannot be found liable under the statute. This argument lacks merit as it would make no sense, from a safety perspective, to permit her to return to the bus garage, leave the vicinity of the bus with a child unattended on the bus, use the restroom and pickup paperwork,

and then to come back to the bus and do a final inspection to make sure there was no child left on the bus.

The Commissioner has made it clear that the law requires that an inspection be conducted when the last child is dropped off during the route, and not after the vehicle has finished its drop-offs and has returned to its garage or depot. Vickery v. N.J. Dep't of Ed. Crim. Hist. Rev. Unit, OAL Dkt. No. EDU 00083-2015, Initial Decision, (June 2, 2015), adopted, Comm'r, Final Decision, (July 9, 2015); Klein v. New Jersey State Dep't of Educ. Crim. Hist. Rev. Unit, EDU 00852-11, Initial Decision (January 5, 2012), rev'd, Comm'r (February 21, 2012), <<http://njlaw.rutgers.edu/collections/oal/>>. There, the Commissioner determined that the "'end of route' . terminates at the point where all of the children in that group leave the bus to enter their school and the bus is empty of riders, and before the driver moves on to her next route." In language expressly dismissing the argument made by petitioner here, the Commissioner held that "[a]ccepting petitioner's argument that the inspection did not have to take place until the bus returned to the depot at the end of day defies reason and eviscerates the fundamental purpose of the statute — to protect our children and ensure their safety." See also Firman v. N.J. Dep't of Educ., Crim. Hist. Rev. Unit, EDU 04415-10, Initial Decision (February 7, 2011), adopted, Comm'r (March 24, 2011), <<http://njlaw.rutgers.edu/collections/oal/>>.

Having determined that petitioner indeed failed to inspect her bus in the manner required by the statute and that accordingly, a student was left on the bus after the end of her route, N.J.S.A. 18A:39-29 mandates a six-month suspension of petitioner's license.

It provides as follows:

In the event that, after notice and opportunity to be heard, a school bus driver is found to have left a pupil on the school bus at the end of his route, his school bus endorsement shall be:

- a. suspended for six months, for a first offense
- b. permanently revoked, for a second offense

[N.J.S.A. 18A:39-29.]

Petitioner offers various mitigating factors, including her length of service, the tinted windows and black flooring on the bus, the lack of assistance provided to her, the dark clothing the child B.A. was wearing and the fact that B.A. was not supposed to be on the bus that day. However, the statute does not permit me to consider mitigating

circumstances. The statute speaks in the imperative and the law does not permit me to alter the penalty expressly required by law.

For the reasons stated above, I CONCLUDE that petitioner failed to inspect her bus in the manner required by the statute and that accordingly, a student was left on the bus after the end of her route which mandates a six-month suspension of petitioner's license pursuant to N.J.S.A. 18A:39-29.

VBE's Motion for Summary Decision

VBE is a civil service jurisdiction. Petitioner's rights and duties are governed by laws including the Civil Service Act and accompanying regulations. A civil service employee who commits a wrongful act related to her employment may be subject to discipline, and that discipline, depending upon the incident complained of, may include a suspension or removal. N.J.S.A. 11A:1-2, 1 1A•.2-6, 11A:2-20; N.J.A.C. 4A2-2.

A review of the relevant Uniform Administrative Procedure Rules (UAPR), and past civil service case law involving appeals of disciplinary actions indicate that the appointing authority must provide due process prior to depriving the employee of her continued employment. In relevant part, "an employee must be served with a PNDA setting forth the charges and statement of facts supporting the charges (specifications) and afforded the opportunity for a hearing prior to imposition of major discipline N.J.A.C. 4A:22.5(a). Next, "the employee may request a departmental hearing within five days of receipt of the PNDA." N.J.A.C. 4A:2-2.5(c). If the departmental hearing is requested, it "shall be held within thirty days of the PNDA unless waived by the employee or a later date as agreed to by the parties." N.J.A.C. 4A:2-2.5(d). Further, it "shall be held before the appointing authority or its designated representative" and "the employee may be represented by an attorney or authorized union representative." N.J.A.C. 4A:2-2.6 (a) to (b). "Within twenty days of the hearing, or such additional time as agreed to by the parties, the appointing authority shall make a decision on the charges and furnish the employee either by personal service or certified mail with a FNDA." N.J.A.C. 4A:2-2.6 (d). The employee may appeal this FNDA to the Civil Service Commission "within twenty days of receipt of the Notice." N.J.A.C. 4A:2-2.8 (a).

In this case, petitioner was served with a PNDA specifying the charges against her. She requested and had a hearing with her union representatives present. Following the hearing, she was served with a FNDA upholding the charges set forth in the PNDA

and terminating her employment as a school bus driver with respondent, effective September 18, 2019. Petitioner had twenty days after receipt of the FNDA to file an appeal with the Civil Service Commission. She did not file a timely appeal and was denied a de novo hearing. Therefore, the Civil Service Commission did not transfer this matter to the OAL to be heard as a contested case. Since the Civil Service Commission did not transfer this matter to the OAL, there is no jurisdiction to hear this case. Therefore, there can be no predominant interest analysis, as petitioner would argue, since the Commissioner of Education lacks jurisdiction to hear civil service disciplinary appeals and petitioner did not timely appeal her civil service termination.

Untimely appeals of FNDAs are "fatal" procedural failures because an "employee is statutorily barred from filing an untimely administrative appeal." Shaquaya Lane v. Trenton Psychiatric Hospital, CSV 8595-11, Initial Decision (July 27, 2012), <<http://njlaw.rutgers.edu/collections/oal>>, citing N.J.S.A. 11A:2-15; Monice Lawrence v. Montclair State University, OAL Dkt. No. CSV 15428-18, Initial Decision (October 10, 2019).

The twenty-day statutory time limitation for filing an administrative disciplinary appeal is jurisdictional and mandatory. See Borough of Park Ridge v. Salimone, 21 N.J. 28 (1956). In such cases, "it may be extended only by the legislature, not by an agency or the courts." Mesqhali v. Bayside State Prison, 334 N.J. Super. 617, 622 (App. Div. 2000), citing Schaible Oil Co. v. New Jersey Dep't of Env'tl. Protection, 246 N.J. Super. 29, 31, 586 A.2d 853 (App Div.).

The Civil Service Commission's January 27, 2020 decision was a final administrative decision in the matter and any further review had to be pursued in a judicial forum. Petitioner had forty-five days to file an appeal from the final administrative decision with the Appellate Division. Since she did not, petitioner remains terminated from her position as a school bus driver for the VBE, effective September 18, 2019.

Therefore, based on the above, I CONCLUDE that the Commissioner of Education lacks jurisdiction to decide whether petitioner's termination from the VBE was proper, as the Civil Service Commission has previously issued a final agency determination denying petitioner's request for a hearing and there was no subsequent appeal to the Appellate Division.

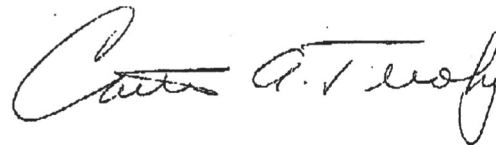
ORDER

It is hereby ORDERED that the motions for summary decision filed by respondents OSP and VBE are GRANTED and the petition of appeal is DISMISSED.

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, IOO Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 086250500, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.



CATHERINE A. TUOHY,
ALJ

October 19
2020_____

DATE

October 19, 2020
(emailed)_____

Date Received at Agency:

October 19, 2020
(emailed)_____

Mailed to Parties:

/mel

APPENDIX

List of Exhibits

For Petitioner:

December 2, 2019 letter brief in opposition to respondents' motion

September 8, 2020 Brief in Opposition to Motions for Summary Decision
by

OSP and VBE, with attached Exhibits 1 and 2

For Respondents:

November 12, 2019 Letter Brief in support of respondent OSP's Motion to
Dismiss, with attached Exhibits A and B

November 21 , 2019 Brief in support of respondent VBE's Motion to
Dismiss, with attached Exhibits A through G

September 24, 2020 Reply Letter Brief of OSP

September 24, 2020 Reply Letter Brief of VBE