

STATEMENT OF FACTS

On August 10, 2023, Respondent, Rossana Allen Markarian, submitted a letter of resignation with the effective date of January 1, 2024 from Kearney School District, Bergen County (see Petitioner's Exhibits III and IV). On September 29, 2023, Respondent Markarian filed an Amended Complaint against the Town of Kearney School District for religious discrimination in violation of the New Jersey law against discrimination. On October 26, 2023, the School District submitted a Certificate of Service and Final Salary Form to New Jersey, confirming the Respondent's resignation. The record reflects that nonetheless on November 12, 2023, the Town of Kearney School District brought tenure charges against the Respondent.

ISSUES

- (A) Whether or not the Kearney School District had a right to bring tenure charges against a teacher who has resigned?**
- (B) Whether or not such resignation renders the tenure charges moot and should be dismissed?**

PERTINENT PROVISIONS

N.J.A.C. 6A:3, Controversies and Disputes

6A:3-5.6 Withdrawal, settlement, or mootings of tenure charges

- (a) Once tenure charges are certified to the Commissioner, they may be withdrawn or settled only with approval. Any proposed withdrawal or settlement, whether submitted to the Commissioner or to the arbitrator, shall address the following standards established by the State Board of Education in the matter entitled In re Cardonick, State Board decision of April 6, 1983 (1990 School Law Decisions (S.L.D.) 842, 846):**
 - 1. Accompaniment by documentation as to the nature of the charges;**

2. Explication of the circumstances justifying settlement or withdrawal;
3. Consent of both the charged and charging parties;
4. Indication the charged party entered into the agreement with a full understanding of the charged party's rights;
5. A showing the agreement is in the public interest; and
6. If the charged party is a teaching staff member, a showing the teaching staff member has been advised of the Commissioner's duty to refer tenure determinations resulting in loss of position to the State Board of Examiners for possible suspension or revocation of certificate.

POSITIONS OF THE PARTIES

It is the position of the Kearney School District, Bergen County (hereinafter called "Petitioner") that when Rossana Allen Markarian (hereinafter called "Respondent") was negotiating a settlement with the Petitioner that she never mentioned that she had a pending civil discrimination lawsuit against the Petitioner. Thus, the Petitioner asserts that the Respondent negotiated her settlement in bad faith. Moreover, the Petitioner also asserts that the Respondent deliberately omitted advising the Petitioner of this pending lawsuit to the detriment of the Petitioner. Hence, the Petitioner further argues that she should not now be rewarded by a dismissal of the tenure charges.

In addition, the Petitioner maintains that it had no notice of this lawsuit. Moreover, the Petitioner's offer of settlement to her was premised on what it now knows was a lie of omission. Therefore, the Petitioner reasons that the Respondent failed to negotiate in good faith, violated the implied covenant of fair dealing and actively misled the Petitioner with regard to this situation. Correspondingly, the Petitioner urges the Arbitrator that the

Respondent should not be rewarded for her willful and wanton misbehavior by allowing the tenure charges filed against her to be dismissed.

In response to the Respondent that these tenured charges are moot due to her prior resignation, the Petitioner vehemently disagrees. That is, the Respondent explains that she did not unilaterally resign when she filed a lawsuit that she had been terminated. Moreover, the Petitioner argues that this view is too narrow and fails to take into consideration the numerous issues surrounding a tenure charge.

In addition, the Petitioner also asserts that to allow the Respondent to continue to teach elsewhere would be against public policy and the public interest. In sum, the Petitioner argues that she takes no responsibility for her actions, but instead blames everyone else. Based on the foregoing, the Petitioner urges the Arbitrator to allow it to pursue these tenure charges against the Respondent.

On the other hand, it is the Respondent's view that this dispute is moot because her resignation was accepted prior to the activation of the current tenure charges. That is, the Respondent asserts, these charges are in retaliation for her pending civil suit against the Petitioner for religious discrimination. It is important to note, the Respondent asserts, that the Petitioner had the opportunity to insert an operative provision into the prior settlement agreement, making her resignation contingent upon her forbearance of filing a civil lawsuit. However, the Respondent points out that the Petitioner forgot to include such a provision. As such, the Respondent maintains, that the Petitioner is now estopped from retroactively inserting such a clause by requesting this remedy of allowing tenure charges to prevail against the Respondent.

In addition, the Respondent also rebuts the allegation and argument that she violated the covenant of fair dealing and good faith as the Petitioner alleges. In response to the Petitioner that she has a duty to disclose that she filed a civil lawsuit, the Respondent vehemently disagrees. Instead, the Respondent further asserts that it is the Petitioner who has the duty to be vigilant and current with pertinent information of such a relevant and pending lawsuit, not her. Based upon the foregoing, the Respondent requests that this Motion to Dismiss these tenure charges be granted.

FINDINGS AND DISCUSSION

After a careful review of the record in its entirety and having had an opportunity to weigh and evaluate the positions of the Parties and pertinent case law, this Arbitrator finds that this Motion to Dismiss should be granted for the following reasons.

First, the transcript of the settlement specifically states the following regarding the agreement:

One [you will] save your license; two [this will] let you retire without any consequence whatsoever; three, [this will] restore your increment and; four, [this agreement will] let you go on and teach anywhere else you want to go, but you're going to be leaving Kearney (see Petitioner's Exhibit II).

This agreement was consummated and submitted by the Respondent's letter of resignation on August 10, 2023, but later became effective on January 1, 2024 from the Kearney School Board of Education (see Petitioner's Exhibits III and IV). The record reflects on October 26, 2023, the School District submitted a Certificate of Service and Final Salary Form to New Jersey, confirming the Respondent's resignation.

Clearly, the substance of this agreement constitutes a quid pro quo transactional arrangement. Here, the Respondent agrees to resign, and the Petitioner willingly gives her in return the usage of her license, monetary relief through her increment and allows her to continue to teach “anywhere else” but not “Kearney.” This is a mutual agreement, not a unilateral resignation.

Second, on September 29, 2023, the Respondent filed an amended complaint against the Town of Kearney School District for religious discrimination in violation of the New Jersey law of discrimination. Subsequently, the Petitioner brought tenure charges against the Respondent on November 12, 2023.

The Petitioner now argues that the Respondent failed to mention this pending civil matter during the settlement discussion to the detriment of the Petitioner. Thus, the Petitioner further argues that such actions by the Respondent was in bad faith and violated the implied covenant of fair dealing. However, this Arbitrator disagrees with this assessment.

The prevailing case law supports this Arbitrator’s conclusion that the Respondent has no duty to disclose to the Petitioner that she filed a civil lawsuit. The Estate of Fischer, N.J. Super. 2011 WL 2314353 App. Div. 2011 (Respondent’s Exhibit B) correctly notes that due to their “adversarial relationship,” as opposed to a fiduciary relationship, that the Petitioner is on “notice to conduct [one’s] due diligence” of a pertinent pending lawsuit (also see on this issue, United Jersey Bank and Kensey, 306 N.J. Super. 540, 551 (1997)).

Third, as to the breach of the Respondent’s duty of good faith and fair dealing, the Respondent resigned as agreed to by the quid pro quo arrangement in the valid settlement

agreement (see Restatement (Second) of Contracts §205 (1981)). That is, the Respondent did not destroy or injure the right of the Petitioner to receive the fruits of the contract.

Fourth, the real issue is that the Petitioner omitted to include a pertinent provision in its agreement with the Respondent by prohibiting her ability to pursue past or future civil claims. This omission took away the Petitioner's possibly viable claim against the Respondent.

In the Respondent's Certification, she states as follows describing the terms of the settlement agreement:

6. At no time was there ever any discussion about me not being able to file a civil lawsuit if I retired. The entire negotiation was limited to the potential tenure charges and how they could be avoided.

In light of the Petitioner's lack of inclusion of such a provision demanding forbearance, the Respondent's analysis prevails. Correspondingly, due to the Petitioner's omission, the Petitioner now seeks to retaliate with these tenure charges after accepting the Respondent's valid resignation.

Fifth, based upon the foregoing, this is a non-justiciable dispute. All of the issues raised are academic or hypothetical because the Respondent has resigned. Moreover, she is no longer teaching anywhere. Thus, this Arbitrator finds that this dispute is moot. The leading case on this issue is: In the Matter of the Tenure Hearing of Louis Melillo, School District of the City of Elizabeth, Union County, OAL DICT NO EDU 11969-13; Agency Rep. No: 363-10/14, State of New Jersey, Office of Administrative Law, June 19, 2014.

In response to the Petitioner's argument that the public exception applies and is an exception to the mootness doctrine, this Arbitrator disagrees. That is, that particular

exception has a very high standard requiring “great public importance,” as such is not applicable to our instant case (see Nini v. Mercer County College, 202 N.J. 98, 2010; compare this with the instant case of the Respondent with the dissimilarities of the criminal due process proceedings as exhibited by State v. Bell, 241 N.J. 552 (2020), as the Petitioner argues). Based on the foregoing, the Respondent must prevail.


DECISION

This Motion to Dismiss is granted. Correspondingly, the tenure charges must be dismissed due to its mootness because of a valid settlement agreement and a subsequent resignation of the Respondent, certified by the School District.

AFFIRMATION

I, Dr. Andrée McKissick, do hereby affirm that I am the individual who executed this instrument, which is my Decision for this Motion to Dismiss.

DATE OF AWARD: June 12, 2024



ARBITRATOR