

STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION

In the Matter of Tenure Charges

ELIZABETH BOARD OF
EDUCATION, UNION COUNTY,

Petitioner,

-and-

NIKITA CLARKE-HUFF,

Respondent.

AGENCY DOCKET

NO.: 290-9/15

DECISION AND AWARD
ON MOTIONS
TO DISMISS CHARGES I-IV

BEFORE: RUTH MOSCOVITCH, Arbitrator

Appearances:

For the Petitioner:

John G. Geppert
Schwartz Simon Edelstein & Celso, LLC
100 South Jefferson Road, Suite 200
Whippany, NJ 07931

For the Respondent:

Sheldon H. Pincus
Bucceri & Pincus
300 Broadacres Dr, Suite 210
Bloomfield, NJ 07003

This matter comes before me on the Respondent's twin motions to dismiss with prejudice respectively Charge II and Charges I, III and IV, which, together, represent all of the tenure charges pending against Respondent. The tenure charges at issue here were filed with the Bureau of Controversies and Disputes on September 22, 2015. I was appointed the arbitrator to adjudicate this matter on October 16, 2015.

The Respondent filed two Briefs in support of its motions on October 5, 2015; Petitioner filed a Brief in opposition on November 2, 2015; and Respondent filed a Reply Brief on November 6, 2015. In the preparation and issuance of this Decision and Award I have given careful consideration to the extensive briefing by the parties including the legal authorities cited therein. For the reasons set forth below, Respondent's Motion to Dismiss Charge II is denied. Her Motion to Dismiss Charges I, III and IV is granted in part and denied in part.

MOTION TO DISMISS CHARGE II

In Charge II, consisting of two Counts, the Board charges Respondent with "Neglect, Misbehavior or Other Offense, Including But Not Limited To Unbecoming Conduct Or Other Just Cause Related to Respondent Falsifying Her Child's Residency." Specifically, in Count 1, the Board charges Respondent with falsely declaring, including in a document she executed under penalty of perjury, that during the period from July 1, 2014 to July 30, 2015 she placed her child in the care of a temporary guardian residing within the City of Elizabeth when, in fact, she and her child resided together in a home in Edison. In Count 2, the Board charges that the same facts constituted theft by deception of tuition costs in an approximate amount of \$17,283.00.

Respondent moves to dismiss these charges on the basis that the Commissioner and this Arbitrator have no jurisdiction to adjudicate charges regarding student residency because the legislature provided an exclusive administrative procedure to determine these issues in N.J.S.A. 18A:38-1. In her briefs, Respondent makes the following additional points: (1) By failing to follow

the mandatory procedures in residency cases, the Board has deprived Respondent of due process of law; further, since the process mandated by the statute provides greater procedural protections than TEACHNJ, the Board was required to provide those procedural protections to Respondent; (2) The Board failed to exhaust its administrative remedies regarding the residency violations and thus is barred from filing tenure charges based upon those issues; (3) The Board abandoned and waived its right to pursue residency claims against Respondent when it chose not to pursue statutory charges; (4) The Board admits that it exercised its discretion not to pursue residency charges against Respondent and her child because the child was in the senior year of high school; the Board has accordingly waived its rights and is estopped from taking any action against Respondent now; (5) Having decided not to invoke the state residency process, the Board cannot claim that Respondent has deprived it of tuition; the theft of service charge based upon a charge of obtaining free educational services she was not entitled to must therefore be dismissed.

In response, the Board argues that it is entitled to pursue tenure charges for conduct unbecoming for filing false statements and for theft of services, because those charges are separate and distinct from the issues of whether the Board had a right to remove Respondent's child from the school or obtain tuition for the child's year of education. In its brief, the Board makes the following additional points: (1) The statute invoked by Respondent deals with the process for determining whether a child is entitled to a free education in a particular district and, if not, whether the child will be removed or whether tuition must be

collected; the statute does not concern the question at issue here, which is whether a tenured employee lied to the District, an act which is conduct unbecoming a tenured employee; further, there was no obligation on the part of the Board to pursue or exhaust administrative remedies regarding the residency issue before pursuing these entirely separate tenure charges; (2) Respondent has not been deprived of any property interest with regard to the residency issue without due process; rather, the Board exercised its discretion not to pursue those charges and permitted Respondent's child to complete its senior year without charge; (3) Respondent is now receiving all of the process to which she is due as a tenured employee; the Board never abandoned its right to bring tenure charges based upon false declarations; the Commissioner and this Arbitrator have full authority to decide whether there were false declarations and, if so, whether they constitute unbecoming conduct meriting removal of tenure.

Having considered all of these arguments and having reviewed the residency statute and the other authorities cited by the parties, I must agree with the Board that the issue of whether Respondent made false statements – and whether those false statements constitute conduct unbecoming – is properly before me. While there is certainly some factual overlap between the question of whether Respondent's child actually lived in Elizabeth and hence was entitled to a free education, and whether Respondent falsely made such a claim, the legal issues are separate and distinct. I have no jurisdiction over the question of the child's residency for the purpose of determining if it was entitled to complete its senior year without tuition. Yet, certainly the Board is entitled to pursue tenure

charges based upon any tenured employee making false declarations, particularly false declarations related to the business of the Board. Here, the alleged false declaration concerned where the child resided, but whatever the subject matter of the declaration, the Board may consider that the making of false declarations is conduct unbecoming. Whether she in fact made a false statement and whether that conduct warrants the termination of her tenure are issues clearly within my purview. Accordingly, I deny Respondent's motion with respect to Charge Two, Count 1.

The count related to theft of service provides a similar, but not identical, issue. The Board appears to claim that if it proves Respondent filed a false declaration, it will also be proving that she was stealing services in the form of tuition. However, the Board actually must take some additional steps: it must prove that Respondent received services to which she was not entitled and that she did so knowingly. Theft of services could constitute conduct unbecoming an employee. It might also be a criminal offense, as, of course, filing a false statement might be. But it may require more proof than simply whether Respondent made a false declaration.

I am reluctant to dismiss any charge at this early stage if proofs may be yet presented to sustain it. Accordingly, I will not dismiss Count 2 of Charge I. Respondent may renew her motion to dismiss either or both of the counts of Charge I if the Board fails to sustain its burden going forward.

MOTION TO DISMISS CHARGES I, III AND IV

In Charges I, III and IV, the Board charges Respondent with acts of “insubordination, neglectful, flagrant and defiant refusal to comply” with Board policies, regulations and directives from supervisors over a ten-year period “commencing with the 2001-2002 school year and through the 2010-2011 school year.” (Board Charges, Background Information Common to All Charges, p. 3.) In addition, the Board charges Respondent with a “longstanding pattern of chronic absenteeism and tardiness.” (Id. p. 4.) Specific instances of these behaviors is set forth in the Charges over the course of ten pages, the earliest dating from November 2001 (p. 4) and the latest from June 2011 (p. 13). In June 2011 the Board adopted a Resolution adjusting Respondent’s salary by withholding the 2011-2012 increment for “performance and/or attendance.” Respondent filed a grievance on November 8, 2011 challenging the Board’s decision to withhold her increment; the grievance was assigned to Arbitrator Jeffrey Tener for binding arbitration. However, the parties reached a settlement of this grievance, and the Board restored Respondent’s increments and adjusted her salary to make her whole at its meeting on October 17, 2013.

In Charge I, the Board charges Respondent with “Neglect, Misbehavior or Other Offense, Including But Not Limited To Unbecoming Conduct or Other Just Cause Related to Repeated Acts of Dishonesty Arising From Respondent Falsifying a Document and Altering a District Records Without Authority.” The specifics are spelled out in two counts: Count 1 recites an incident on or about November 4, 2010; and Count 2 an incident on or about March 18, 2011. Both of

these incidents pre-date and were part of the June 2011 increment withholding decision.

In Charge III, the Board charges Respondent with "Chronic Absenteeism." There are 18 Counts within Charge III, all specifying absenteeism. Counts 1 through 14 cover the years 1996 through 2011 and were part of the June 2011 increment withholding decision. Counts 15 through 18 concern absences during the 2011-12, 2012-13, 2013-14 and 2014-15 school years. Those matters were not addressed in the 2011 increment withholding.

In Charge IV, the Board charges Respondent with "Insubordination, Neglect, Misbehavior and/or Other Just Cause for Dismissal, Related to a Pattern of Conduct." This charge incorporates all of the facts and charges in Counts I, II, III and IV and asserts that the conduct alleged "manifests a pattern of numerous infractions over an extended period of time" and therefore warrants a termination of Respondent's tenure and employment.

The Respondent argues that all of the charges that were addressed prior to and as part of the increment withholding in 2011 may not be the subject of further disciplinary action because (1) the doctrine of double jeopardy applies in labor relations and bars penalizing an employee for incidents that were previously the subject of discipline; (2) the Board's subsequent decision to revoke the increment withholding is an admission that the conduct did not constitute misconduct; further the revocation constitutes a waiver of the right to impose discipline; the Board is now barred and estopped from seeking discipline based on the matters raised in its pursuit of an increment withholding; the doctrines of

waiver and estoppel apply in labor relations matters; (3) the principle of res judicata bars the Board from seeking further discipline based upon matters it previously settled. As to the charges of misconduct in Count III that allegedly occurred after 2011, Respondent argues that those “are extension of the recycled allegations” previously made by the Board: they are “nothing more than the Board’s attempt to veil its intent to impose a double punishment” upon Respondent. (Respondent’s Reply Brief, p. 13.)

The Board, on the other hand, argues that it is not barred from seeking discipline for the matters that were the subject of the increment withholding because: (1) the concept in industrial relations of double jeopardy does not preclude this tenure proceeding; as the NJ Commissioner of Education has previously held, the Board is not precluded from certifying tenure charges based upon the same conduct for which an increment was withheld; (2) the Board never issued written reprimands for the conduct referred to in Counts I, III or IV, it merely sought to withhold an increment; hence the Board may proceed with tenure charges based upon that conduct now; (3) the older charges demonstrate that Respondent’s behavior did not improve after the increment withholding, that is, she has not responded to progressive discipline; (4) the decision to reverse the increment withholding was a business decision, made to avoid the expense and uncertainty of litigation; it was not a disavowal of the Board’s position; accordingly it does not constitute waiver or estoppel; (5) the concept of res judicata does not apply, since there was never a final adjudication of Respondent’s grievance protesting the increment withholding; (6) certain of the

allegations, in any event, occurred after the increment withholding and cannot be barred; the events prior to that show a pattern of continuing misconduct meriting the loss of tenure.

I cannot agree that the Board is entitled to pursue tenure charges based upon misconduct allegations that formed the basis of an increment withholding that was subsequently settled and withdrawn. I hold the Board is barred from seeking discipline now for any of the matters that predate June 2011 and were the subject of the original decision to withhold Respondent's increment. The Board asserts that it made a business decision to settle those charges, which does not preclude it from pursuing the same factual allegations now. But that is not how settlement works. I do not know, nor am I entitled to know, why the Board settled those charges – perhaps it was a business decision, as the Board now asserts, or perhaps it was because the Board expected to lose the arbitration and wanted to save face, or perhaps some other factors came into play. The nature of a settlement is that the reasons each side has for entering into settlement are off limits in future proceedings.

Nor do I accept the Board's argument that because it sought an increment withholding, rather than wrote up formal reprimands for the same conduct, the conduct may now be the subject of tenure charges. The Board sought to discipline Respondent in 2011 for ten years worth of alleged misconduct, including insubordination, incompetence and poor attendance. The vehicle chosen for the discipline was an increment withholding. When the Respondent challenged the discipline by filing a grievance, the Board decided to settle, rather

than litigate. By so doing, the Respondent was deprived of the opportunity to clear her name. Of course, the Respondent, too, could have refused to settle, but in the event, both parties, as they were entitled to do, chose settlement. That closed the matter.

Accordingly, I dismiss with prejudice all of Charge I, and those counts of Charge III, namely Counts one through 14, that predate and were included in the increment withholding proceeding of 2011. I will take judicial notice that the earlier charges put the Respondent on notice that her conduct was judged unsatisfactory by her supervisors in the matters alleged in 2011. However, I will not entertain any evidence regarding the events and charges themselves: I will not allow the Board to prosecute those claims, nor will the Respondent be required to defend herself against them. As to Count IV, to the extent that it restates and incorporates matters prior to 2011, it is also dismissed.

To be clear, the Board may proceed with Charge II, counts 1 and 2, and Charge III, counts 15 through 18. To the extent that the Board is able to prove a pattern of conduct over time based upon the remaining charges, it may proceed with Charge IV as well.

AWARD

For the reasons set forth above, the Respondent's Motion to Dismiss Charge II is denied. The Respondent's Motion to Dismiss Charges I, III and IV is granted in part and denied in part. Charge I is dismissed in its entirety, as is Charge III, counts one through 14. Respondent's Motion to Dismiss Charge III, counts 15 through 18 is denied, as is its Motion to Dismiss Charge IV as to those matters subsequent to June 2011.




Ruth Moscovitch, Arbitrator

Dated: November 16, 2015

ACKNOWLEDGMENT

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

On November 16, 2015, RUTH MOSCOVITCH, whom I know, came before me and acknowledged that she executed the foregoing as and for her Opinion and Award in the above-captioned matter.



Notary Public
My Commission expires 03/21/2019