No. 17298

The University of the State of New York

The State Education Department

Before the Commissioner

Appeal of NICOLE WILLIAMS from action of the Board of Education of the City School District of the City of Poughkeepsie, Shereen Cader and John Sammon regarding teacher transfers.

Law Office of Stanley J. Silverstone, attorneys for petitioner, Stanley J. Silverstone, Esq., of counsel

Bond Schoeneck & King PLLC, attorneys for respondents, Howard M. Miller, Esq., of counsel

Petitioner appeals from a July 14, 2017 resolution of the Board of Education of the City School District of the City of Poughkeepsie ("respondent board") which placed a moratorium on all involuntary transfers of teachers and administrators for the 2017-2018 school year, as well as board directives issued on September 1, 2017 and actions taken by two tenured teachers, Shereen Cader ("respondent Cader") and John Sammon ("respondent Sammon") in conformity therewith. The appeal must be sustained in part.

At all times relevant to this appeal, petitioner was the superintendent, and respondents Cader and Sammon were tenured teachers within respondent board's district.

On July 16, 2015, Poughkeepsie Middle School ("PMS" or the "receivership school") in respondent's district, was designated a "struggling school" pursuant to Education Law

§211-f(1)(a).[1] Petitioner was vested with the authority of superintendent receiver with respect to PMS pursuant to Education Law §211-f(2) and continues to exercise such duties as of the time of this decision.[2]

On June 15, 2017, respondent Cader was informed by her building principal that she would be transferred from Krieger Elementary School to Warring Elementary School in respondent's district for the 2017-2018 school year. On the same day, respondent Sammon was informed by his building principal that he would be transferred from teaching fourth grade at Warring Elementary School to teaching fifth grade at Krieger Elementary School in respondent's district. Both teachers objected to their reassignments and did not comply with these directives.

On July 14, 2017, respondent board adopted Resolution 18-0013 which "place[d] a moratorium on all involuntary transfers of teachers and administrators for the 2017-2018 school year pending further study by the Board."

On August 28, 2017, petitioner issued six directives transferring teachers in respondent board's district to different school assignments. While respondents Cader and Sammon were informed in June 2017 that they would be transferred to different elementary schools, petitioner's August 28, 2017 directives transferred respondents Cader and Sammon to PMS. Four teachers complied with petitioner's directives; respondents Cader and Sammon did not.

Also on August 28, 2017, petitioner wrote to respondent board, informing it of the six transfers including those of respondents Cader and Sammon, and affirmatively stated that she was "exercising [her] authority" pursuant to Education Law §211-f to "[s]upersede a decision [i.e., the July 14, 2017 resolution] made by the Board of Education." Petitioner further explained, in her view, "why the [July 14, 2017] Board directive ... [wa]s legally impermissible." Attached to this letter was a

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[1] With respect to the takeover and restructuring of schools, the Education Law refers to "failing" and "persistently failing" schools while the Commissioner's regulations refer to such schools as "struggling" and "persistently struggling" schools. All references herein conform to the Commissioner's regulations.

[2] On or about October 26, 2017, the Commissioner notified petitioner that the Poughkeepsie Middle School made demonstratable improvement pursuant to Education Law §211-f.

document explaining, among other things, the reasons why petitioner ordered the involuntary transfers.[3]

On August 30, 2017, respondent board's president emailed petitioner on behalf of the board at 10:28 a.m., objecting to petitioner's directives and requesting that petitioner provide answers to five questions relating to each teacher's transfer by 5:00 p.m. that same day and reminded petitioner that the July 14 board resolution remained in effect. The questions included queries as to why petitioner ordered the August 28, 2017 transfers and why the transfers were proposed so close to the beginning of the school year. Petitioner responded to each of respondent board's questions within the requested timeframe. In her response, petitioner stated that she had ordered the transfers "[t]o support the Receivership school/Struggling school." With specific respect to respondent board's query as to why the transfers were proposed so close to the beginning of the school year, petitioner answered that the "[b]oard issued a moratorium."

On September 1, 2017, respondent board issued separate letters to respondents Cader and Sammon advising them "to disregard the letter[s] [they] may have received" from petitioner "and report to the same school building that you served in during the 2016-2017 school year that is NOT in 'Receivership'" (emphasis in original).[4,5] This appeal ensued.

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[3] Petitioner and respondents have submitted different versions of this document. Specifically, petitioner's version contains two notes with respect to respondents Cader and Sammon indicating that they "did not transfer" in June or August. These typed notations are not included in respondents' version. Respondents have submitted an affidavit from the district's director of technology attesting that the letter and attachment were sent via email, and that respondents' version represents what was received by respondents. Counsel for petitioner, in a submission which I have accepted pursuant to 8 NYCRR §276.5, indicates that the version of the document which he submitted was a digital version maintained by petitioner. Counsel for petitioner further admits that petitioner added the additional notations after she submitted the document to respondent board, but denies any wrongdoing in connection therewith. Therefore, I accept respondents' affidavit and evidence pursuant to 8 NYCRR §276.5 and have relied solely on the version submitted by respondents.

[4] A substantially identical copy of this letter was sent to another of the six teachers who was transferred by petitioner. However, that teacher complied with petitioner's directive and, thus, is not the subject of this appeal.

[5] On September 13, 2017, respondent Cader received an email from petitioner's secretary stating that she was suspended immediately and that her actions could result in potential charges under Education Law

Petitioner contends that respondent board's July 14, 2017 Resolution, imposing a moratorium on involuntary transfers for the 2017-2018 school year, interfered with her authority as superintendent receiver of PMS. She further asserts that the July resolution violates Education Law §§1711 and 2508 because those provisions give a superintendent authority to transfer teachers in the first instance. Petitioner also asserts that the six directives issued by respondent board in September 2017 violate her receivership authority under Education Law §211-f. Petitioner seeks a determination that respondent board's July 14, 2017 resolution and its September directives are null and void and petitioner requests that I confirm the validity and enforceability of all teacher transfers. Petitioner also seeks a determination that Board Policy 9420 is null and void to the extent it grants the board power to approve or disapprove teacher transfers beyond the authority granted by the New York State Education Law.

Respondents contend that respondent board's actions were "lawful and necessary to protect its students and staff." Respondents further argue that petitioner's August 28, 2017 transfers did not represent the best interests of the district; that petitioner did not immediately report the transfers to respondent board; and that petitioner acted with retaliatory or otherwise improper motives.[6] In

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§3020-a. On September 14, 2017, respondent board rescinded the suspension and returned respondent Cader to Krieger Elementary School.

[6] Respondent Cader also summarily asserts in her affidavit that she was transferred involuntarily and that her teaching location preference was disregarded in violation of a collective bargaining agreement ("CBA") between the Poughkeepsie Teachers' Association and respondent board. Respondents did not raise this claim in their answer. Accordingly, this claim is not before me for review. But even assuming, arguendo, that respondents had raised this claim in their answer, I would decline to address this claim because the Civil Service Law vests exclusive jurisdiction over complaints involving collective bargaining in the Public Employment Relations Board (Civil Service Law §205(5)(d); see New York City Transit Authority v. New York State Public Employment Relations Board, et al., 19 NY3d 876). Although the Commissioner has assumed jurisdiction over a CBA which explicitly contemplated an appeal pursuant to Education Law §310 as part of its grievance procedure, neither party has asserted that the CBA here includes such a provision (Appeal of Eastern Suffolk Bd. of Cooperative Educ. Svcs. Administrative/Supervisory Unit, 52 Ed Dept Rep, Decision No. 16,413). Therefore, the effect of the CBA on the challenged actions is not before me and will not be addressed herein. Moreover, Education Law §211-f(8) provides that, in order to maximize the rapid achievement of students at the applicable school, the receiver may request that the collective bargaining unit(s) representing teachers and administrators

their answer, respondents waived any defense as to timeliness and instead, requested a "'swift' determination on the merits."

First, I must address a procedural matter. Respondents' memorandum of law contains newly raised assertions. A memorandum of law should consist of arguments of law (8 NYCRR §276.4) and may not be used to add belated assertions or exhibits that are not part of the pleadings (Appeal of Bruning and Coburn-Bruning, 48 Ed Dept Rep 84, Decision No. 15,799; Appeal of Wright, 47 id. 202, Decision No. 15,668). Therefore, I have not considered any arguments which respondents raise for the first time in their memorandum of law.

Further, to the extent the parties dispute the validity of the June 2017 transfers of respondents Cader and Sammon, such claims must be dismissed as moot. The Commissioner will only decide matters in actual controversy and will not render a decision on a state of facts which no longer exist or which subsequent events have laid to rest (Appeal of a Student with a Disability, 48 Ed Dept Rep 532, Decision No. 15,940; Appeal of M.M., 48 id. 527, Decision No. 15,937; Appeal of Embro, 48 id. 204, Decision No. 15,836). The June 2017 orders transferring respondents Cader and Sammon to Warring Elementary School and Krieger Elementary School, respectively, have been superseded by petitioner's August 28, 2017 directives which transferred respondents Cader and Sammon to PMS. Therefore, to the extent the parties raise claims or defenses with respect to the June 2017 transfers, this issue has been rendered academic by petitioner's August 28, 2017 directives and need not be addressed.

Additionally, in their answer respondents request that petitioner be removed as superintendent and receiver pursuant to Education Law §306. However, respondents have not filed a removal application pursuant to that section or cited any authority or basis for petitioner's removal "as receiver" in an appeal pursuant to Education Law §310 and,

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and the receiver, on behalf of the board of education, negotiate a receivership agreement that modifies the applicable collective bargaining agreement(s) with respect to any struggling schools in receivership applicable during the period of receivership. Neither party has addressed whether such a receivership agreement was in effect for PMS.

therefore, I need not address respondents' contentions in this regard.[7]

Turning to the merits, in an appeal to the Commissioner, a petitioner has the burden of demonstrating a clear legal right to the relief requested and the burden of establishing the facts upon which petitioner seeks relief (8 NYCRR §275.10; Appeal of Aversa, 48 Ed Dept Rep 523, Decision No. 15,936; Appeal of Hansen, 48 id. 354, Decision No. 15,884; Appeal of P.M., 48 id. 348, Decision No. 15,882).

Petitioner first contends that respondent board's July 14, 2017 resolution prohibiting involuntary transfers in the 2017-2018 school year violates Education Law §2508. I agree. With specific respect to city school districts with less than one hundred twenty-five thousand inhabitants, pursuant to Education Law §2508(5), a superintendent within such a district has the authority:

> to transfer teachers from one school to another, or from one grade of the course of study to another grade in such course, and to report immediately such transfers to such board for its consideration and action.

The plain language of Education Law §2508 bestows the superintendent with the authority "to transfer teachers from one school to another." Moreover, the authority of a superintendent to assign teachers "has been held to be absolute in the absence of contractual provision otherwise or of malice, bad faith, gross error or prejudice" (Alderstein v. Bd. of Educ. of the City of New York, 64 NY2d 90). Although such decisions must be "report[ed] immediately" to the board "for its consideration and action," a board may not circumvent this procedure by removing the superintendent's authority to make such transfers in the first instance. While respondent board argues that the resolution was "lawful and necessary to protect its students and staff," respondent board has not explained how it was prohibited from "protect[ing]" its students and staff under the existing statutory procedure,

[7] Additionally, there is no basis in the record to, as respondents request, initiate a proceeding pursuant to Part 83 of the Commissioner's regulations regarding petitioner's moral character.

where it retained ultimate authority to disallow any such transfer. Therefore, I find that the July 14, 2017 "moratorium on all involuntary transfers of teachers and administrators" conflicts with the superintendent's general authority to transfer teachers in the first instance under Education Law §2508 and must be annulled.

Moreover, I find that respondent board's September 1, 2017 directives to these teachers unlawfully interfered with petitioner's powers as a superintendent receiver to supersede a board's decision pursuant to Education Law §211-f. In April 2015, the Legislature enacted Subpart H of Part EE of Chapter 56 of the Laws of 2015 which added a new section (211-f) to the Education Law pertaining to school receivership. Section 211-f designates a school that has been identified as a "priority school" in each applicable year of the three consecutive school year period comprising 2012-2013, 2013-2014 and 2014-2015,[8] as "failing schools" (referred to in §100.19[a][1] of the Commissioner's regulations, and hereinafter, as "struggling schools") and vests the superintendent of the district with the powers of an independent receiver. As relevant to this appeal, PMS was designated a struggling school and petitioner, as a "superintendent receiver," was given two years to improve student performance. If it failed to demonstrate improvement at the conclusion of the two-year period, an independent receiver would be appointed. On October 27, 2017, the Commissioner notified petitioner that PMS made demonstrable improvement and therefore, the school continues to operate under the authority of petitioner, as superintendent receiver.

Education Law §211-f provides persons or entities vested with the powers of a receiver new authority to, among other things, develop a school intervention plan; convert schools to community schools providing wrap-around services; reallocate funds in the school's budget; expand the school day or school year; establish professional development plans; replace teachers and administrators, including school leadership who are not appropriately licensed or certified; establish steps to improve hiring, induction, teacher evaluation, professional development, teacher advancement, school culture and organizational

[8] The law provides an exception for one school year in which the school was not identified because of an approved closure plan that was not implemented.

structure; order the conversion of the school to a charter school consistent with applicable state laws; remove staff and/or require staff to reapply for their jobs in collaboration with a staffing committee.

In addition, and as relevant to this appeal, a receiver, including a superintendent receiver,

> shall [also] be authorized to manage and operate the failing or persistently failing school and shall have the power to supersede any decision, policy or regulation of the superintendent of schools or chief school officer, or of the board of education or another school officer or the building principal that in the sole judgment of the receiver conflicts with the school intervention plan; provided however that the receiver may not supersede decisions that are not directly linked to the school intervention plan, including but not limited to building usage plans, co-location decisions and transportation of students (Education Law §211-f[2][b] [emphasis added]).

A receiver may invoke the power to supersede so long as the receiver notifies the board of education, superintendent of schools or chief school officer, and the principal in writing "not fewer than 10 business days prior to the effective date of the supersession of the specific decision, policy or regulation that the receiver plans to supersede" (8 NYCRR §100.19[g][7]; see generally Education Law §211-f[2][b]). In such a written notice of supersession, the receiver must provide:

> [T]he reasons for supersession; the specific decision, policy, or regulation that will replace the one that shall be superseded; and the time period during which the supersession shall remain in effect (8 NYCRR §100.19[g][7]).

Petitioner asserts in an affidavit that she became "aware in August 2017 of more staff vacancies at

Poughkeepsie Middle School [i.e., the receivership school] than anticipated." She also states that she decided to transfer two teachers out of the receivership school due to their poor performance pursuant to her receivership authority under Education Law §211-f.[9] Petitioner further states in her reply affidavit that:

> Ensuring that there are effective teachers in the classrooms in [the receivership school], as well as all schools in the district is the single most important strategy I have as a superintendent receiver and the superintendent of [respondent board's district] for increasing student learning and academic achievement. Matching skill to the needs is critically important.

On August 28, 2017, petitioner wrote to respondent board, informing it of the six transfers, including those of respondents Cader and Sammon, and affirmatively stated that she was "exercising [her] authority" pursuant to Education Law §211-f to "[s]upersede a decision [i.e., the July 14, 2017 resolution] made by the Board of Education." Petitioner further explained, in her view, "why the [July 14, 2017] Board directive ... [wa]s legally impermissible." Attached to this letter was a document explaining, among other things, the reasons why petitioner ordered the involuntary transfers. With respect to respondent Cader, petitioner stated: "[r]eceivership needs/skill set match for the sixth (6) grade. Certification is aligned with the instructional needs at PMS." With respect to respondent Sammon, petitioner indicated: "[r]eceivership needs/skill set match for the sixth (6) grade. Certification is aligned with the instructional needs at PMS as a former instructional ELA coach."

In an email to petitioner dated August 30, 2017, the board president stated: "[t]his will acknowledge receipt of your letter dated August 28, 2017 regarding teacher transfers." Petitioner's position, as expressed in the August 28, 2017 letter to the board and on appeal, is that the July 14, 2017 resolution violated the Education Law.

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[9] Petitioner asserts in her reply affidavit that it is not uncommon to transfer teachers in August because circumstances may change after the end of the school year.

Petitioner also advised respondents of the "time period during which the supersession would remain in effect"; i.e., the 2017-2018 school year (8 NYCRR §100.19[g][7]). Thus, the record demonstrates that petitioner followed the supersession procedure outlined in 8 NYCRR §100.19(g)(7).

I also find that the August 28, 2017 transfers were "directly linked to the school intervention plan" as required by Education Law §211-f(2)(b). The school intervention continuation plan for PMS for the 2017-2018 school year explicitly identified "excessive teacher absences and turnover" as a concern, and noted that "staffing continues to be a challenge." The plan also includes a summary of concerns/recommendations from the community engagement team established pursuant to 8 NYCRR §100.19(b), which included, among other things, that teachers at PMS were teaching two or more subjects. Thus, I find that the board's July 14, 2017 and September 1, 2017 decisions to prohibit involuntary transfers directly conflicted with the school intervention plan by prohibiting petitioner from ensuring that there was adequate staff to address shortages and staffing at the receivership school (Education Law §211-f[2][b]).

Respondents also assert that the transfers were not in the best interest of the district and did not serve any educational purpose. However, the record reflects that petitioner became aware of more staff vacancies than expected at PMS in August 2017 and that she decided to transfer two low-performing teachers out of the receivership school. Respondents admit in their answer that respondents Cader and Sammon are "two of the [d]istrict's most accomplished elementary educators [and] members of their respective school's Transformation Teams," and it is beyond cavil that these accomplished educators' skills would aid the receivership school. Further, in her August 28, 2017 letter, petitioner indicated that respondents Cader and Sammon were transferred based upon the "[r]eceivership needs" of PMS and the fact that their "skill set[s]" were a "match for the sixth (6) grade" and that their certifications were "aligned with the instructional needs at PMS." Petitioner also asserted in this letter that respondent Sammon's experience as a "former instructional ELA coach" matched the needs at PMS.

Respondent Cader argues that petitioner's transfer order was irrational because respondent Cader has never taught a sixth-grade classroom and has never taught at PMS. Respondent Sammon argues that he was asked to teach a subject he had never taught before. However, petitioner refutes these assertions. In her reply affidavit, petitioner states as follows:

> [B]oth teachers are properly certified to teach 6th grade. In the 6th grade, teachers receive professional development daily, so they would have been brought up to the level of competence quickly as the focus is on literacy strategies, which is across grade levels. In the middle school, Cader and Sammon would have been part of a team with only one subject to prepare for as opposed to all the core subjects in elementary school. We use an interdisciplinary literacy approach, so they would have been well prepared to support a humanities team approach. Mr. Sammon, with his background and experience in academic coaching, would not have had difficulty in transferring to the middle school on short notice.

Petitioner further asserts that respondent Cader has taught "every summer in the transitional 6th grade summer program" for at least the past three years.[10]

While I acknowledge that the record contains conflicting evidence as to the benefits and appropriateness of petitioner's transfers, this evidence does not demonstrate that petitioner acted with such malice, bad faith, gross error or prejudice which might justify setting the transfers aside (Alderstein v. Bd. of Educ. of the City of New York, 64 NY2d 90; see Matter of Woicik, 2 Ed Dept Rep 171, Decision No. 7,019). Respondents further assert

[10] Respondent also submits an affidavit from the principal of Warring Elementary School, who provides that the "last minute decision to transfer Mr. Sammon makes no educational sense". I find this affidavit uncompelling. The principal does not provide any reason/rationale as to why the transfer was illegal and/or how the transfer would not made for the educational benefit of the students in PMS. On the contrary, the principal himself merely states that respondent Sammon is "Warring's top educator" and as a result should not be transferred to PMS.

that petitioner's August 28 transfer orders constituted retaliation for certain actions, including respondent Sammon's declination of "a position in central administration," which petitioner "conveyed to [him] through another administrator." However, petitioner denies that she offered respondent Sammon such a position, and the record contains no proof substantiating respondent Sammon's allegations in this regard.[11] Therefore, I find that respondents have failed to demonstrate that petitioner's actions were committed with such malice, bad faith, gross error or prejudice which might justify setting the transfers aside.

I am similarly unpersuaded by respondents' argument that Education Law §211-f does not permit the challenged transfers because they would "eviscerate critical resources from every other school building in the [d]istrict." Education Law §211-f sets forth two limitations on a receiver's supersession powers: (1) any supersession must be "directly linked to the school intervention plan"; and (2) a supersession cannot relate to a superintendent's employment status (see Education Law §211-f[1][c][i], [2][b]). Given this unambiguous language, I decline to read additional exceptions into the statute. In any event, I note that respondents have submitted no proof to support a finding that, in fact, the transfers threatened the resources of every school building in respondent board's district. Therefore, I find respondents' arguments without merit.

Petitioner additionally requests that I declare Board Policy 9420 null and void insofar as it permits the board to unilaterally effectuate teacher transfers. Respondent board's Policy 9420 provides, in pertinent part:

> Within the provisions of the appropriate negotiated contracts and state laws, the Superintendent of Schools will assign, transfer and reclassify district personnel subject to Board of Education approval.

[11] Petitioner admits, however, that respondent Sammon was given an opportunity to create a teachers' center at Warring Elementary School in the 2013-2014 school year, and that after this program was discontinued in 2015-2016, respondent Sammon returned to his position as a classroom teacher.

Since respondent board's Policy 9420 includes language that says "[w]ithin the provisions of . . . state laws," I find that any superintendent transfers must be conducted in accordance with Education Law §§2508 and 211-f, as well as any other applicable State laws. Therefore, I decline to declare Board Policy 9420 null and void.

Respondents Cader and Sammon have requested certificates of good faith pursuant to Education Law §3811. Such certification is solely for the purpose of authorizing the board to indemnify a respondent for legal fees and expenses incurred in defending a proceeding arising out of the exercise of his or her powers or performance of duties as a board member or other title listed in §3811(1). It is appropriate to issue such certification unless it is established on the record that the requesting respondent acted in bad faith (Application of Valentin, 56 Ed Dept Rep, Decision No. 17,014; Application of Paladino, 53 id., Decision No. 16,594; Application of Lieberman, 52 id., Decision No. 16,483). However, Education Law §3811 applies only to board members, certain school officers and "non-instructional district employees." Respondents Cader and Sammon are tenured teachers and, thus, do not fall within the scope of Education Law §3811. Accordingly, they are not entitled to the requested certificate.

Finally, I am compelled to comment on the acrimonious relationship between petitioner and respondents detailed in the record. Although petitioner and respondent board reached differing conclusions as to the permissibility of the teacher transfers, it is troubling that the parties resorted to issuing competing directives, thereby forcing

the affected teachers to decide whether they should obey the superintendent or the board. Further, the nature and tenor of the serious accusations made as part of this appeal reveal an unacceptable level of rancor that is not conducive to the effective governance of a public school district. I admonish the parties to take all steps necessary to ensure that this controversy does not continue and that the district's leadership and resources are focused on the paramount goal of providing successful outcomes for students. To this end, I am directing my Office of Innovation and School Reform to provide guidance and technical assistance to the district in order to ensure that all parties understand, and are in compliance with, the requirements related to the receivership school.

In light of the above disposition, I need not address the parties' remaining contentions.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that respondent board's July 14, 2017 resolution is hereby annulled; and

IT IS FURTHER ORDERED that respondent board's September 1, 2017 directives are hereby annulled; and

IT IS FURTHER ORDERED that petitioner's August 28, 2017 transfer orders by given full legal force and effect.

IN WITNESS WHEREOF, I, MaryEllen Elia, Commissioner of Education of the State of New York, for and on behalf of the State Education Department, do hereunto set my hand and affix the seal of the State Education Department, at the City of Albany, this 22nd day of December 2017.

MaryEllen Elia

Commissioner of Education