

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER**

**In the Matter of an
Article 78 Proceeding**

CAMILLO M. SANTOMERO,

Petitioner,

- against -

**BOARD OF EDUCATION
OF THE BEDFORD CENTRAL SCHOOL DISTRICT,
SUSAN ELION WOLLIN, as President of the BOARD
OF EDUCATION OF THE BEDFORD CENTRAL
SCHOOL DISTRICT,
CAROLE LACOLLA, as District Clerk of the BOARD
OF EDUCATION OF THE BEDFORD CENTRAL
SCHOOL DISTRICT
and DR. DEBRA JACKSON,**

Respondents.

Index No. 2008 – 25405

PETITIONER'S REPLY MEMORANDUM OF LAW

**Law Office of ROBERT A. STERNBACH
Attorneys for Petitioner
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New York, New York 10016
(212) 661-4040**

PRELIMINARY STATEMENT

In framing their opposition to the Petition, Respondents begin with the fallacious premise that Petitioner's request for information is limited to vaguely defined "draft disciplinary charges" that the Board now admits exist but were never proffered against Dr. Jackson. *Without* any Affidavits affirmatively swearing that no other relevant records relating to the "dispute" exist, the Board spends its entire opposition arguing that these "draft disciplinary charges" should be exempt from disclosure.

First, the Board needs to make clear exactly what these "draft disciplinary charges" are and give some rational explanation for why these materials should be withheld in the context of the extraordinary seven-figure settlement agreement the Board reached with Dr. Jackson, in keeping with Respondents' burden to prove these materials fit within the "narrowly construed" FOIL exemptions. *See Hanig v. State Dept. of Motor Vehicles*, 79 N.Y.2d 106, 109, 580 N.Y.S.2d 715, 717 (1992). Respondents have not done so.

Second, Respondents cannot hide behind their failure to affirmatively identify the other relevant materials that, Petitioner has good reason to believe, must exist. Consequently, the Court should order Respondents to identify and disclose all materials relating to the dispute. Further, because the existence of such information is solely within the knowledge and control of Respondents, the Court should grant Petitioner leave to conduct discovery, pursuant to CPLR 408.

ARGUMENT

At the outset, Respondents contend that the Petition should be denied because disclosure of the "draft disciplinary charges" would constitute an unwarranted invasion of privacy. *See Memorandum of Law in Opposition to Petition ("Opp. Mem.")* at pp. 4-6. Respondents' reliance

on the Second Department's decisions in *LaRocca v. Board of Educ. of Jericho Union Free School Dist.*, 220 A.D.2d 424, 632 N.Y.S.2d 576 (2d Dept. 1995) and *Western Suffolk Bd. of Co-op. Educational Services v. Bay Shore Union Free School Dist.*, 250 A.D.2d 772, 672 N.Y.S.2d 776 (2d Dept. 1998) to support their position is misplaced.

First, in both of those cases, Respondents were forced to turn over the requested materials, albeit in redacted form.¹ Second, unlike in *LaRocca* and *Western Suffolk*, this case does not involve disciplinary charges that were denied, not admitted and/or unproven. To the contrary, Respondents point to vaguely defined "draft" charges that were never even proffered against Dr. Jackson. Moreover, the information sought here is much broader than that at issue in the *LaRocca* and *Western Suffolk* cases. The present case is not principally about determining what the alleged "draft disciplinary charges" against Dr. Jackson were. Petitioner seeks all records relating to the dispute, so that the rationale for the extraordinary expenditure of public funds at issue here may be revealed to the public.

The other decisions referenced by Respondents are equally inapposite. *Sinicropi v. Nassau County*, 76 A.D.2d 832, 428 N.Y.S.2d 312 (2d Dept.), *lv. to appeal denied*, 51 N.Y.2d 704, 432 N.Y.S.2d 1028 (1980), is diametrically opposite to Respondents' position: in *Sinicropi*, Petitioner "was given access to the charges preferred against [a probation officer], her answer, the demand and bill of particulars and the stipulation of settlement." 76 A.D.2d at 833, 428 N.Y.S.2d at 313 (emphasis added). Only after the charges had been supplied to Petitioner did the Court hold that disclosure of other materials would be "unnecessary and ... improper." Here, unlike in *Sinicropi*, Petitioner has been given nothing other than the settlement agreement. Additionally, in *Sinicropi*, there was no issue regarding the extraordinary nature of the settlement

¹ Also note, *LaRocca* contained a lengthy opinion by Judge O'Brien, concurring in part and dissenting in part from the majority's opinion, setting forth a persuasive argument that the respondent agency should have been ordered to disclose the settlement agreement there at issue in its entirety.

agreement, as is the case here. *Johnson Newspaper Corp. v. Melino*, 77 N.Y.2d 1, 564 N.E.2d 1046, 563 N.Y.S.2d 380 (1990) was not even a FOIL case, but instead involved the issue of public access to a professional disciplinary hearing.²

Also unpersuasive is Respondents' continued assertion that Petitioner should be denied access to documents concerning the dispute because the alleged "draft disciplinary charges" constitute intra-agency material immune from disclosure. Here, the materials Petitioner seeks were clearly were not merely "preliminary and non-final in nature," as Respondents argue, but antecedent to and conclusive of a final Settlement Agreement. *See* Petitioner's Memorandum Of Law at pp. 7-8.

Moreover, as Petitioner detailed in his opening memorandum, here the acknowledged "dispute" on its face encompasses facts and circumstances that go well beyond mere unproved allegations against Dr. Jackson, and may involve the conduct of parties other than Dr. Jackson, such as the Board itself.

Consequently, none of the decisions or advisory opinions referenced by Respondents meet their burden of proving that any of the materials relevant to this dispute, including the "draft" disciplinary charges, warrant application of an exemption to FOIL disclosure.

² Respondents' citation to provisions of the Education Law and to Committee on Open Government advisory opinions are equally deficient in that they simply relate to Respondents' contention that "unproven disciplinary charges may be withheld from FOIL disclosure," which as detailed above, is not dispositive here.

Moreover, as discussed below, it appears that documents in addition to the “draft disciplinary charges” exist that are relevant to Petitioner’s FOIL request, but which Respondents fail to identify.

**THE COURT SHOULD ORDER RESPONDENTS TO IDENTIFY
AND DISCLOSE ALL MATERIALS RELATING TO THE DISPUTE
AND GRANT PETITIONER LEAVE TO CONDUCT DISCOVERY**

Here, the Petitioner, Camillo M. Santomero, was in the past himself a member of the Respondent Board. In Petitioner’s experience as, *inter alia*, a member of the Board, there was never any circumstance where disciplinary charges were contemplated, issued, and/or settled by the Board where only two documents were prepared — in this case, the only two documents mentioned by the Board being “draft” disciplinary charges and the Settlement Agreement.

Based upon Petitioner’s experience with similar prior matters, here there should exist, at a minimum, additional information (notes, memoranda, etc.) on the settlement reached with Dr. Jackson, relating to its costs/benefits, the life-time medical coverage afforded Dr. Jackson and her family, deliberations of the Board, and similar issues.

As noted in the Petition, the settlement the Board reached with Dr. Jackson is truly extraordinary. It is beyond credulity to believe that only two documents were ever prepared related to the parties’ alleged “dispute.” Upon information and belief, additional documents exist, but have not been disclosed and are not subject to any FOIL exemptions.

Accordingly, the Court should order Respondents to identify and disclose all materials that relate to the “dispute” which is the subject of Petitioner’s FOIL request.

Further, because the existence of such records is entirely within the knowledge of Respondents, the Court should grant Petitioner leave to conduct discovery in this proceeding, including, but not limited to, leave to depose Respondents, pursuant to CPLR § 408.

CONCLUSION

As the Court of Appeals acknowledged in *Capital Newspapers Div. of Hearst Corp. v. Burns*, 67 N.Y.2d 562, 565-66, 505 N.Y.S.2d 576, 578, 496 N.E.2d 665 (1986):

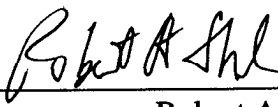
The Freedom of Information Law expresses this State's strong commitment to open government and public accountability and imposes a broad standard of disclosure upon the State and its agencies. The statute [is intended as] *an effective tool for exposing waste, negligence and abuse on the part of government officers* [internal citations omitted].

Here, Respondents seek to hide behind an undefined and unintelligible identification of "draft disciplinary charges" and have apparently failed to identify all documents relevant to the dispute, thus preventing any rational investigation into whether or not exemptions are warranted. The public is entitled to an explanation for this settlement with a public officer that will result in the expenditure of \$1 million of taxpayer funds.

For the reasons stated herein, as well as those stated in Petitioner's opening memorandum of law, the Petition should be granted in its entirety.

Dated: New York, New York
January 28, 2009

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By: 
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Robert A. Sternbach, Esq.
Of Counsel

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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-against-

BOARD OF EDUCATION OF THE BEDFORD
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BOARD OF EDUCATION OF THE BEDFORD
CENTRAL SCHOOL DISTRICT,
CAROLE LACOLLA as District Clerk of the
BOARD OF EDUCATION OF THE BEDFORD
CENTRAL SCHOOL DISTRICT
and DR. DEBRA JACKSON,
Respondents.

**REPLY AFFIDAVIT OF
CAMILLO M. SANTOMERO
IN FURTHER SUPPORT OF
PETITION**

Index No. 2008-25405

Justice Barbara Gunther Zambelli

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

CAMILLO M. SANTOMERO, being duly sworn deposes and says:

1. I respectfully submit this Reply Affidavit in response to the opposing affidavits and memorandum of law submitted by Respondents in this matter and in further support of my Petition.

2. In their papers submitted in opposition to my Petition, Respondents acknowledge the existence of only one document (other than the Settlement Agreement) related to the “dispute” between the Board and Dr. Jackson that is the subject of my FOIL request: to wit, alleged “draft disciplinary charges” prepared by the Board against Dr. Jackson.

3. However, it must be emphasized that nowhere do Respondents specifically deny that other documents relevant to my FOIL request exist.

4. As stated in the Petition, I am a former member of the Board of Education of the Bedford Central School District, having served from Spring 1995 through Spring 1998.

5. In my experience as, *inter alia*, a member of the Board, there was never any circumstance where disciplinary charges were contemplated, issued, and/or settled by the Board where only two documents were prepared. Based upon my experience with similar prior matters, here there should exist, at a minimum, additional information (notes, memoranda, etc.) on the settlement reached with Dr. Jackson, relating to its costs/benefits, the life-time medical coverage afforded Dr. Jackson and her family, deliberations of the Board, and similar issues.

6. As noted in the Petition, the settlement the Board reached with Dr. Jackson is truly extraordinary. It is beyond credulity to believe that only two documents were ever prepared related to the parties' alleged "dispute." Upon information and belief additional documents exist, but have not been disclosed and are not subject to any FOIL exemptions.

7. Moreover, Respondents' reference to "draft disciplinary charges" is inexplicable in and of itself. How did these chargers come into being? How many "drafts" of the "draft charges" were prepared? Who drafted them? How were they prepared?

8. Accordingly, Respondents should be directed to produce and disclose any and all documentation relating to the dispute between the Board and Dr. Jackson.

9. Moreover, the existence of additional relevant documentation is solely within the knowledge and control of Respondents. Hence, I am advised that the Court should grant me leave to conduct discovery in this matter.

10. The accompanying Reply Memorandum of Law contains legal argument and

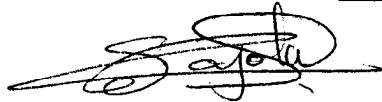
citations in further support of my Petition.

WHEREFORE, Petitioner respectfully requests that a judgment be entered pursuant to CPLR Article 78:

- (a) annulling the final determination of respondents dated August 7, 2008, which denied Petitioner's request for access to records he requested on June 12, 2008, pursuant to Public Officers Law Article 6;
- (b) directing Respondents to provide Petitioner with all such records;
- (c) ordering Respondents to pay the reasonable attorney's fees and other costs incurred by Petitioner in connection with this proceeding; and
- (d) granting Petitioner such other and further relief as the Court deems just and proper.


CAMILLO M. SANTOMERO
Petitioner

Sworn to before me this 27th day of January, 2009


Notary Public

SAHID A. LOYOLA
Notary Public - State of New York
No. 01LO6165629
Qualified in Westchester County
My Commission Expires May 14, 2011

AFFIRMATION OF SERVICE

ROBERT A. STERNBACH, an attorney duly admitted to practice in the courts of New York, affirms under the penalties of perjury as follows:

That deponent is a principal of the Law Office of Robert A. Sternbach, is over 18 years of age, is not a party to the within action, and resides in the State of New York. And that, on January 28, 2009, he served the within

PETITIONER'S REPLY AFFIDAVIT; REPLY MEMORANDUM OF LAW

KEANE & BEANE, P.C.

Attorneys for Respondents

BOARD OF EDUCATION OF THE BEDFORD CENTRAL SCHOOL DISTRICT, SUSAN ELION WOLLIN, as President of the BOARD OF EDUCATION OF THE BEDFORD CENTRAL SCHOOL DISTRICT, and CAROLE LACOLLA, as District Clerk of the BOARD OF EDUCATION OF THE BEDFORD CENTRAL SCHOOL DISTRICT

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the foregoing addresses having been designated for such purpose by the preceding papers in this action, by depositing true and correct copies of the same, enclosed in properly addressed post-paid wrappers to each such address, in an official depository maintained and exclusively controlled by the United States Post Office in New York City.

Dated: New York, New York
January 28, 2009


ROBERT A. STERNBACH