WILLIAM B. CHANDLER III
CHANCELLOR

**COURT OF CHANCERY
OF THE
STATE OF DELAWARE**

COURT OF CHANCERY COURTHOUSE
34 THE CIRCLE
GEORGETOWN, DELAWARE 19947

Submitted: November 3, 2008
Decided: November 21, 2008

Frederick H. Schranck
Deputy Attorney General
P.O. Box 778
Dover, Delaware 19903

James E. Liguori
Liguori Morris & Yiengst
46 The Green
Dover, Delaware 19901

Re: *Delaware Dep't of Educ. v. Doe*
Civil Action No. 4088-CC

Dear Counsel:

I have read the briefs and reviewed the evidence presented with regard to the pending cross motions for summary judgment. Because I am essentially presented with simultaneous motions for summary judgment and in keeping with Court of Chancery Rule 56(h), I deem the parties to have stipulated to a decision on the merits based on the record submitted to the Court. For that reason, oral argument on the motions is unnecessary. Accordingly, this letter constitutes the Court's ruling.

The record alleges professional misconduct by Jane Doe in 2007 while employed as a public school teacher. Doe's school district employer notified the Delaware Department of Education ("Department") of its intent to dismiss Doe for the alleged professional misconduct and requested that her educator license be revoked. The Department sent a notice of revocation to Doe, giving her an opportunity for a hearing before the Professional Standards Board ("Board"), to which she agreed. Before the scheduled Board hearing, the Department and Doe engaged in settlement discussions, facilitated by Jeffrey M. Taschner, Esquire,

general counsel to the Delaware State Education Association and Mary Cooke, a Deputy Attorney General assigned to represent the Department.

The issue before me is whether the settlement discussions between the two attorneys resulted in a binding settlement agreement. The evidence on which my decision must be based is derived from the email correspondence between or originating from Taschner and Cooke as well as their respective affidavits.

Whether a settlement agreement was reached depends on the objective, overt manifestations of the parties, rather than their subjective intent.[1] The overt manifestations of agreement must be viewed from the perspective of a "reasonable negotiator" who must conclude that the agreement contained all terms essential to the parties and that the agreement concluded the negotiations.[2]

If an agent is performing the negotiations, the agent must possess authority to act in the stead of the client in order for any negotiations between agents to be binding.[3] Although "an attorney of record in a pending action who agrees to the settlement of [a] case is presumed to have lawful authority to make such an agreement,"[4] it is well understood that "questions of agency are not subject to absolute rules but, rather, turn on the facts of the individual case."[5] An agent's authority must either be express, implied, or apparent. Express authority must be evident from an oral or written agreement. Implied authority is derived from actual authority and allows the agent to act "based on the agent's reasonable interpretation of the principal's manifestation in light of the principal's objectives and other facts known to the agent."[6] Apparent authority can be demonstrated when the principal "knowingly permits the agent to assume"[7] authority to act on its behalf so "as to preclude a denial of its existence."[8]

After reviewing the briefs and evidence submitted, I conclude that neither Taschner nor Doe overtly manifested intent to agree to the settlement. I also conclude that Taschner did not possess express, implied, or apparent authority to unilaterally commit Doe to an alleged agreement. Taschner consistently

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[1] *Loppert v. WindsorTech, Inc.*, 865 A.2d 1282, 1287 (Del. Ch. 2004).
[2] *Id.*
[3] *See Dweck v. Nasser*, C.A. No. 1353, 2008 WL 4809031, at *7 (Del. Ch. July 2, 2008).
[4] *Id.* at *6 (quoting *Aiken v. Nat'l Fire Safety Counsellors*, 127 A.2d 473, 475 (Del. Ch. 1956)).
[5] *Id.* at *7, (quoting *Fisher v. Townsends, Inc.*, 695 A.2d 53 (Del. 1997)).
[6] *Id.* (quoting RESTATEMENT (THIRD) OF AGENCY § 2.01 (2006)).
[7] *Id.* at 10 (quoting *Liberty Mut. Ins. Co. v. Enjay*, 316 A.2d 219, 223 (Del. Super. Ct. 1974)).
[8] *Id.* at 7 (quoting *Liberty Mut. Ins.*, 316 A.2d at 219).

represented that any agreement by Taschner was an "agreement in context" subject to review and approval by Doe.[9] Throughout the negotiations, Taschner repeatedly advised Cooke that any terms must be discussed and agreed upon by Doe.[10]

For example, on March 4, 2007, Taschner indicated to Cooke that:

- He wanted clarification on the terms Cooke and Taschner had previously discussed "before speaking with [Doe]."[11]

Again, by way of example, on May 19, 2007, the date of the alleged agreement, Taschner indicated in several emails:

- That he had one point to clarify with David "and then I will be discussing the whole matter with [Doe];"[12]

- That he was "waiting to hear from [Doe] after she discusses the situation with her family;"[13]

- That he would "be meeting with [Doe] at 2 p.m. and will let [Cooke] know [Doe's] decision after that meeting. . . . [B]ut I can't promise anything."[14]

The Department points to the May 19, 2009 email sent at 3:33 p.m. from Taschner to Paula Fontello, counsel for the Professional Standards Board, as proof that Taschner, if not Doe, had agreed to the settlement terms.[15] The email reads in part: "[T]he parties ([Department] and [Doe]) have reached an agreement resolving the [dispute] and the hearing scheduled for tomorrow and Wednesday will no longer be necessary."[16] Consistent, however, with Taschner's position that only an agreement in concept subject to Doe's approval had been reached, he states within the same email that he would "draft the agreement . . . [and] review[] the

[9] Taschner Aff. at ¶ 2.
[10] *See* Def.'s Brief Exs. 3, 7, 10, 12, 13, 14.
[11] Def.'s Brief Ex. 3.
[12] Def.'s Brief Ex. 10.
[13] Def.'s Brief Ex. 12.
[14] Def.'s Brief Ex. 13.
[15] Def.'s Brief Ex. 14.
[16] *Id.*

draft agreement with [Doe]," even though the parties had allegedly just reached an agreement.[17]

Taschner's other statements within the same email further demonstrate that the settlement was an agreement in concept conditioned upon Doe's approval. Instead of cancelling the hearing before the Board as he would have done if the agreement had been finalized, Taschner only requests that the hearing "be postponed until the parties have finalized and signed the agreement."[18] Only after the signatures were obtained was Taschner willing to "withdraw the petition submitted on behalf of [Doe]."[19]

Taschner's actions stand in stark contrast with the actions of the agent in *Dweck v. Nasser*.[20] In *Dweck* the attorney was deemed to possess the authority to ultimately conclude the negotiations.[21] His authority was evidenced in part by his cancellation of the defendant's deposition immediately after the settlement had been orally agreed upon by counsel.[22] In contrast, rather than cancel the hearing as was done in *Dweck*, Taschner conditioned the cancellation of the hearing upon obtaining Doe's ultimate consent via her signing the settlement agreement.

Based on this indisputable record, I conclude that there was no overt manifestation of agreement to the settlement and Taschner never possessed authority to finalize the agreement. First, any suggestion that Taschner or Doe overtly manifested consent to the settlement terms is overshadowed by Taschner's explicit and continuous statements that Doe must review and approve the draft settlement agreement before it would be final. Taschner's statement that "the parties ([Department] and [Doe]) have reached an agreement resolving the [Doe dispute]" cannot be properly understood in isolation. The "reasonable negotiator" must consider other statements made within the same email and throughout the negotiations. Throughout the settlement discussions and even within the same email in which Taschner stated there was an agreement, Taschner conditioned the agreement subject to Doe's approval. Read objectively, the emails only show an agreement to agree in principal subject to Doe's approval, which was never obtained.

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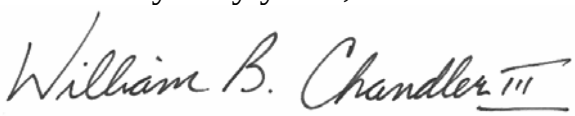
[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] *Dweck v. Nasser*, 2008 WL 4809031.
[21] *Id.* at *8
[22] *Id.*

Second, from the above communications, the evidence shows that the agency relationship between Doe and Taschner required Taschner to obtain approval of any negotiated term from Doe until the terms had been memorialized in writing. By constantly stating his need to obtain consent, Taschner implied to the Department that he did not have the requisite authority to conclude the settlement. Therefore, any manifestation of assent by Taschner had to be viewed as conditional and subject to Doe's ultimate signed approval.

I hold that no settlement agreement exists between Doe and the Department. Doe's motion for summary judgment is granted and the Department's motion for summary judgment is denied.

IT IS SO ORDERED.

Very truly yours,



William B. Chandler III

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