OPHELIA FETTER,	:	IN THE COURT OF COMMON PLEAS OF
	:	LYCOMING COUNTY, PENNSYLVANIA
Appellant	:	
	:	
vs.	:	NO. 04-00,581
	:	
	:	
	:	
JERSEY SHORE AREA SCHOOL,	:	
	:	
Appellee	:	LOCAL AGENCY APPEAL

Date: January 12, 2005

OPINION and ORDER

Before the Court for determination is the local agency appeal of Appellant Ophelia Fetter (hereafter "Fetter") filed April 13, 2004. The Court will grant the appeal.

BACKGROUND

The appeal has its origin in ***Fetter v. Jersey Shore Area School District***, which was No. 02-00,730 (Lycoming Cty.). In that action this court by order of September 26, 2002 directed the Jersey Shore Area School District (hereafter "the School District") to hold a hearing to determine if Fetter had abandoned her position as an elementary school principal. That order was affirmed by the Commonwealth Court. On remand the Jersey Shore Area School District School Board held a hearing which resulted in their determination that Fetter had abandoned her position as of June 29, 2001. Fetter now appeals that decision. In determining this appeal on the record from the School Board hearing this court will initially review the full background of the proceedings which have brought the dispute to this point.

Fetter had been employed by the School District since 1993 and served as an elementary school principal since 1994. On December 5, 2000, Fetter sent a letter to the School District requesting medical leave for three months to begin on December 5, 2000. The School District responded via a letter dated December 12, 2000 stating that her request could not be acted upon until additional and sufficient medical information was supplied. A number of correspondences took place between Fetter and the School District following the pattern of the December 5 and December 12, 2000 letters. In a letter from the School District's solicitor dated June 29, 2001, Fetter was informed, through her attorney, that the School District considered her to have abandoned her position as an elementary school principal. In a subsequent letter dated February 22, 2002, the School District's solicitor iterated that the School District considered Fetter to have abandoned her position by her "… previous failures to document, in an appropriate way, her leave during the second half of the prior school year."

After receiving the last letter, Fetter attempted to secure a hearing on the abandonment issue. Fetter's requests for a hearing were denied because the School District viewed the appeal of the abandonment determination to be untimely. The School District based this conclusion on the June 29, 2001 letter from the School District's solicitor to Fetter's former counsel, Jonathan Williams, Esquire. The School District was of the opinion that the June 29, 2001 letter expressed its view that Fetter had abandoned her position and that the letter constituted an adjudication. Fetter filed a Petition for Review on May 3, 2001 with this Court to case number 02-00,750 in which she asserted that she did not abandon her position, that the School District had not made a determination as to whether she abandoned her position, and

that the School District had wrongly failed to provide her with a hearing so that she could address the abandonment claim.

On September 26, 2002, a hearing regarding the Petition for Review was held before this Court. The focal point of the hearing became the June 29, 2001 letter. The issue was whether the letter constituted an adjudication by the School District that Fetter had abandoned her position. Notes of Testimony, 12-14 (September 26, 2002). The Court determined that the letter did not constitute an adjudication. Id. at 36-37. Based on this determination, the Court entered an Order dated September 26, 2002 granting Fetter's request for a hearing. The Court remanded the matter to the Board of School Directors of the Jersey Shore Area School District "… to conduct a full and fair hearing on the issue as to whether or not the Petitioner Ophelia Fetter abandoned her position with the Jersey Shore Area School District on or before June 29, 2001." September 26, 2002 Order, ***Fetter v. Jersey Shore Area School District***, no. 02-00,730 (Lycoming Cty.). The School District appealed this Order by filing a Notice of Appeal on October 23, 2004.

By a decision filed October 7, 2003, to No. 2600 C.D. 2002, the Commonwealth Court affirmed the September 26, 2002 Order and held that the June 29, 2001 letter did not constitute an adjudication. The case was then remanded to the School District for a hearing as directed by our September 26, 2002 Order.

On January 29, 2004, a hearing was held before the Jersey Shore Area School District School Board (hereafter "the Board") addressing the abandonment issue. On March 15, 2004, the Board issued its adjudication finding that as of June 29, 2001, Fetter had abandoned her position as an elementary school principal when she failed for three months to

comply with the requests of the School District for medical certification of her illness by providing inadequate responses and then responded with three months of silence. Fetter has now appealed that determination.

ISSUES TO BE RESOLVED

Fetter raises three issues on appeal. Fetter first contends that the Board erred in finding that she had abandoned her position, because it ignored the law and relied upon irrelevant and unsubstantiated facts. Fetter's second contention is that the Board denied her due process when it failed to provide her with a fair adjudicatory hearing. Fetter thirdly contends that the Court should order that she be reinstated as principal with full back pay and benefits, retroactive to February 25, 2002 (the day she was ready to return) and the School District to pay her attorney fees and costs associated with finally obtaining the hearing to address the abandonment claim.

The Court now concludes that the Board erred as a matter of law in finding that Fetter had abandoned her position as an elementary school principal with the School District. The Court also now finds that the necessary findings of fact made by the Board in support of its conclusion that Fetter had abandoned her position are not supported by substantial evidence. Because of this determination, the Court will not address Fetter's due process issue since the Court believes it to be moot. In light of the Board's errors, the Court believes that Fetter should be reinstated with full back pay and benefits, but does not find that an award of attorney's fees and costs is warranted.

DISCUSSION

The main issue before the Court is whether the record substantiates that Fetter abandoned her employment contract with the School District. Therefore, the focus of the Court's inquiry must be on the evidence of her conduct. The communications between Fetter and the School District are therefore of paramount importance. They appear as Exhibit 5 through 23 of the certified record filed July 16, 2004. The Court believes it is best to look at the letters and documents in chronological order as follows:

> -- ***December 5, 2000***. Fetter sent a letter to the School District requesting medical leave based upon the recommendation of her physician. The requested duration of the leave was three months, which was to begin on December 5, 2000. The letter was accompanied by a note from Fetter's physician, Alexander R. Nesbitt, M.D., stating that, "In my medical opinion, she should be granted this requested medical leave." Certified Record, Ex. 5 (Fetter Ex. 2).
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> -- ***December 12, 2000***. The School District responds to the December 5, 2000 request via a letter from Superintendent Peter K. Uhling, Sr., Ph.D. The letter informed Fetter that the School District would not take action on the request until additional medical information was provided. The letter enclosed a copy of Board Policy 334 and directed Fetter's attention to the requirement under it for the applicant to show cause justifying an extended leave. The policy states under §334, "B. Proof of Disability. Any administrator absent on sick leave may be required to submit a physician's written statement certifying his/her disability." The letter further informed Fetter that it was the School District's policy to require, at a minimum, "…physician's certification and diagnosis, a projection as to duration of the condition, and a determination of a causal relationship between the illness and the applicant's inability to perform the essential functions of her position." The letter also stated that Fetter's request for leave would be treated as a request for leave for health restoration purposes under the Family Medical Leave Act (FMLA). Certified Record, Ex. 6 (Administration Ex. 2).

-- ***December 22, 2000***. Fetter responds to the December 5, 2000 letter from Dr. Uhling. Fetter again requests medical leave. She requests that the leave begin on January 3, 2001 and last until at least March 5, 2001. The letter was accompanied by a note on letterhead from Dr. Nesbitt stating, "In my medical opinion, she should be granted this requested medical leave due to stress related problems. It should start January 3, 2001 and continue until at least March 5, 2001." Certified Record, Ex. 7 (Fetter Ex. 7).

-- ***January 4, 2001***. The School District responds to the December 22, 2000 letter via a letter from its solicitor, J. David Smith, Esquire, faxed to Fetter's counsel at the time, Jonathan Williams, Esquire. The letter informed Fetter, through her counsel, that the note from Dr. Nesbitt still fell short of being a certification of a serious medical illness consistent with the School District's policy and the FMLA. It stated, "At minimum, there must be some certification of a recognized illness together with some more definitive prognosis with respect to the treatment involved." Certified Record, Ex. 8 (Administration Ex. 4).

-- ***January 11, 2001***. Fetter sends a letter to the School District's Business Manager, Adrienne Craig. In the letter Fetter requests "…the appropriate materials and procedures for application of sabbatical leave for restoration of health." Certified Record, Ex. 9 (Fetter Ex. 4).

The School District's solicitor sends a letter to Fetter's counsel, Attorney Williams. The solicitor inquires about Fetter's response to his letter of January 4, 2001 regarding her request for leave. Certified Record, Ex. 10 (Administration Ex. 5).

-- ***January 17, 20001***. A note was sent to the School District's Superintendent's Office from Fetter's physician, Vijay-Kumar Rekhala, M.D. The note contained Dr. Rekhala's letterhead and stated, "I am recommending that she be on sick leave starting January 2, 2001, until further notice. I do concur with the decision of Dr. Nesbitt to put this patient on sick leave." Certified Record, Ex. 12 (Fetter Ex. 6).

-- ***January 22, 2001***. A letter faxed to Fetter's counsel, Attorney Williams, from the School District's solicitor. The solicitor inquired as to Fetter's response to his letters of January 4 and 11, 2001. The letter informed Fetter's counsel that the School District needed to have a completed submission, with the necessary

medical information, by February 2, 2001 in order to make a decision regarding her request. Certified Record, Ex. 13 (Administration Ex. 7).

-- ***February 7, 2001***. A letter faxed to Fetter's counsel, Attorney Williams, from the School District's solicitor. The letter informed Fetter's counsel that the "… most recent physician submission still falls short of the requirements necessary for the District to consider her request." To remedy the deficiencies in the submissions, the solicitor suggested that Fetter's medical provider fill out the Standard Department of Labor medical leave certification form, a copy of which was sent with the letter. The information needed to be submitted by February 15, 2004, so the Board could act upon the request at its February 19, 2001 workshop meeting. The letter advised Fetter's counsel that if the School District did not receive a request supported by the necessary documentation, then it could not approve the leave nor refer the request for reimbursement to the School District's sick bank. Certified Record, Ex. 14 (Administration Ex. 8).

-- ***February 8, 2001***. A letter from Fetter to Dr. Uhlig. In the letter, Fetter states that she has enclosed a letter from her doctor stating the nature of her illness, as per the instructions of the School District's solicitor. On his letterhead, Dr. Rekhala states that, "I am recommending that she be placed on sick leave as she suffers from depression." He further states that, "Continued employment in her present occupation, at this time, could interfere in her recovery." Dr. Rekhala recommended that Fetter be placed on leave for at least six weeks commencing on January 2, 2001. He then stated, "A definite return to work date for this patient can only be recommended after further medical observation and treatment." Certified Record, Ex. 15 (Fetter Ex. 7).

-- ***February 15, 2001***. A telephone call between the School District's solicitor and Attorney Williams. The February 7, 2001 letter of the solicitor was discussed. Attorney Williams acknowledged the need to fill out the Department of Labor form, and requested an extension to complete the form and submit the appropriate medical documentation. Certified Record, Ex. 16 (Administration Ex. 16).

-- ***March 2, 2001***. The School District Superintendent's Office received a letter from Fetter dated March 1, 2001. In the letter, Fetter again request leave for restoration of health based upon her

doctor's recommendations. She requests that the leave be effective retroactive to January 22, 2001 until the end of the school year. She further advised the School District that any concerns regarding communications with her physicians should be addressed to her counsel, Attorney Williams. The letter was accompanied by a letter, on letterhead, from Dr. Rekhala. His letter stated that Fetter was still under his care and that he was recommending that she be on sick leave until further notice, because of her depression. Certified Record, Ex. 17 (Fetter Ex. 8).

-- ***March 19, 2001***. A telephone conversation between the School District's solicitor and Attorney Williams in which the solicitor advised Attorney Williams that Fetter had still not submitted the appropriate documentation regarding her leave request. Certified Record, Ex. 18 (Administration Ex. 15).

-- ***June 13, 2001***. A request from Fetter for uninsured health expenses incurred from May 5, 2000 to May 25, 2001. The request was accompanied by statements from the insurance provider documenting the type of medical treatment, the date of treatment, and the cost. At least 15 physician or counselor visits from January 2001 through May 25, 2004 are verified. Certified Record, Ex. 19 (Fetter Ex. 9), Ex. 20 (Fetter Ex. 10).

-- ***June 20, 2001***. A letter from Fetter to the School District Superintendent, Dr. Uhlig. In the letter, Fetter informed the School District that she would need to extend her leave to one year. The letter was accompanied by a letter from Dr. Rekhala. In his letter, he advised that Fetter was under his care and that he was recommending that she be put on sick leave until further notice. Certified Record, Ex. 21 (Fetter Ex. 11.).

-- ***June 27, 2001***. A letter from Attorney Williams to the School District's solicitor. In the letter, Attorney Williams asserted that Fetter had appropriately notified the School District of her need for medical leave pursuant to the FMLA, and that under the FMLA, the School District could not substitute its opinion in interpreting the need for leave. The letter further asserted that Fetter had repeatedly sought leave, but the School District failed to respond to those requests. Certified Record, Ex. 22 (Fetter Ex. 11) (emphasis added).

-- ***June 29, 2001***. A letter from the School District's solicitor faxed to Attorney Williams. The letter was a response to the June

> 27, 2001 letter from Attorney Williams. The letter asserted that: (1) any leave requested under the FMLA was not granted because the request never met the threshold requirements necessary for the Board to review the request (the request was not supported by appropriate documentation; the Department of Labor medical leave certification form was not completed and submitted); (2) Fetter had failed to comply with the reasonable requests made by the School District for medical documentation of her illness; (3) that the School District viewed her refusal to supply the requested documentation as evidence that Fetter did not have a legitimate medical condition and that she had abandoned her position with the School District; (4) that Fetter was in an unapproved and unpaid leave status since January 4, 2001 and that effective July 1, 2001 all paid benefits would cease. Certified Record, Ex. 23 (Administration Ex. 12).
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> -- ***February 22, 2002***. A letter from the School District's solicitor to Fetter's present counsel, Elliot A. Strokoff, Esquire. The letter was a response to a phone message left the day before by Attorney Strokoff informing the solicitor that Fetter was ready to return to work at her previous position on Monday, February 25, 2002. The letter advised Attorney Strokoff that the School District considered Fetter "… to have abandoned her position by her previous failures to document, in an appropriate way, her leave during the second half of the prior school year." The letter further advised that Fetter should not report to work on the 25th. Certified Record, Ex. 24 (Fetter Ex. 12).

Initially, the Court must note that a school district is deemed to be a local agency for purposes of judicial review. ***J.S. v. Bethlehem Area Sch. Dist.***, 807 A.2d 847, 853 (Pa. 2002); *see also*, ***Kearns v. Lower Merion Sch. Dist.***, 346 A.2d 875, 878 (Pa. Cmwlth. 1975). "Any person aggrieved by an adjudication of a local agency who has a direct interest in such adjudication shall have the right to appeal therefrom to the court vested with jurisdiction of such appeals by or pursuant to Title 42 (relating to judiciary and judicial procedure)." 2 Pa.C.S.A. §752. A court of common pleas has jurisdiction to hear an appeal from an

adjudication of a local agency. 42 Pa.C.S.A. §933(a)(2); ***Quinn v. Southeastern Pennsylvania Transp. Auth.***, 659 A.2d 613, 616 (Pa. Cmwlth. 1995).

"In reviewing a local agency determination, an appellate court must affirm the local agency's judgment unless the local agency has made a constitutional error; committed an error of law; there has been a procedural irregularity; or the necessary findings of fact are not supported by substantial evidence." ***Bethlehem Area***, 807 A.2d at 853; *see also*, 2 Pa.C.S.A. §754(b). If the court does not affirm the adjudication of the local agency, then "…the court may enter any order authorized by 42 Pa.C.S. §706 (relating to disposition of appeals)." 2 Pa.C.S.A. §754(b). "An appellate court may affirm, modify, vacate, set aside or reverse any order brought before it for review, and may remand the matter and direct the entry of such appropriate order, or require such further proceedings to be had as may be just under the circumstances." 42 Pa.C.S.A. §706.

It is undisputed that Fetter meets the criteria of being a professional employee as defined by the Pennsylvania Public School Code. *See*, 24 P.S. §11-1101(1). Under the Public School Code, the employment relationship between the professional employee and the school district can be terminated in only two ways – written resignation by the employee and official written notice by the School District. ***West Shore Sch. Dist. v. Bowman***, 409 A.2d 474, 478 (Pa. Cmwlth. 1979). The Public School Code provides that the contract between the professional employee and the school district will continue year after year:

> … unless terminated by the professional employee by written resignation presented sixty (60) days before resignation becomes effective, or by the board of school directors (or board of public education) by official written notice presented to the professional employee: Provided, that the said notice shall designate the cause for the termination and shall state that an opportunity to be heard

> shall be granted if the said professional employee, within (10) days after receipt of the termination notice presents a written request for such hearing.

24 P.S. §11-1121(c). In ***Jacobs v. Wilkes-Barre Township School District***, 50 A.2d 354, 356 (Pa. 1947), the Pennsylvania Supreme Court enunciated a third method of termination of the employment relationship – mutual rescission.

As noted by the Supreme Court in ***Jacobs***, it has long been the law in this Commonwealth that parties to an agreement can mutually terminate and modify or abandon the agreement in whole or in part. ***Trustees of First Presbyterian Church v. Oilver-Tyrone Corp.***, 375 A.2d 193, 196 (Pa. Super. 1977). For the rescission of the contract to be effective, there must be a mutual agreement to rescind. ***Johnston v. Johnston***, 495 A.2d 48, 51 (Pa. Super. 1985); ***Kirk v. Brentwood Manor Homes, Inc.***, 159 A.2d 48, 51 (Pa. Super. 1960). That mutual agreement need not be in writing, but may be inferred from the conduct of the parties. ***Wathem v. Brown***, 189 A.2d 900, 902 (Pa. Super. 1963).

In the context of a contract between a professional employee and a school district, mutual rescission of the contract occurs when the employee expresses a definite intention to abandon the contract and the employer performs an act acquiescing in the abandonment. ***Jacobs***, 50 A.2d at 356; ***Bowman***, 409 A.2d at 478. A professional employee expresses a definite intention to abandon her position when she fails to take "… the precautions to guard her job which a reasonably prudent person would take." ***Bowman***, 409 A.2d at 479; ***Bruckner***, 467 A.2d at 436 (Crumlish, P.J., dissenting).

In order to get a sense of what precautions a professional employee should take to preserve her employment status, the Court will examine three cases – ***Jacobs***, *supra*,

Bowman, *supra*, and ***Bruckner***, *supra*. In ***Jacobs***, the employee failed to take the necessary precautions and was held to have abandoned her position, which abandonment the school district acquiesced to by hiring a replacement, thereby mutually terminating the contract. In both ***Bowman*** and ***Bruckner*** it was held the employee's conduct did not amount to abandonment of employment under Pennsylvania Law.

In ***Jacobs***, a former teacher of the Wilkes-Barre Township School District sought reinstatement and back pay. 50 A.2d at 355. The teacher and the school district had entered into a contract on August 29, 1940. On February 25, 1941, without notice, the teacher failed to report for work and did not return for the remainder of the school year. ***Ibid***. The teacher gave birth to her first child on July 30, 1941. In September 1941, the teacher resumed her teaching position with the school district and completed teaching the 1941-42 school year. In September 1942, the teacher again failed to report for work. The teacher sent a letter dated September 1, 1942 to the school board requesting a sabbatical leave. ***Ibid***. The school board took no action on the request. In September 1943, the teacher still had not reported to work, and was contacted by the school district. The school district inquired as to her intentions regarding her teaching duties and the contract. ***Ibid***. The teacher told the school district that she would inform the board of her decision within two weeks. The teacher never contacted the board, so the school district filled the vacancy left by the teacher. ***Ibid***. In January 1944, the teacher gave birth to her second child. On September 5, 1944, the teacher reported to work, but was not permitted to resume her previous duties.

The Pennsylvania Supreme Court held that the actions of the teacher demonstrated a definite intention on her part to abandon the contract. It stated,

> Appellant's failure to report for two consecutive years, the failure to avail herself of the rules governing maternity leaves, of which she had knowledge, and, more specifically, her refusal or failure to notify Davis or the board of her intention regarding the contract after Davis had contacted her, are facts necessarily leading to the conclusion that she has expressed, through her actions, a definite intention to abandon the contract.

Id. at 375 (emphasis added). Clearly in ***Jacobs***, the teacher failed to take any measures designed to ensure that her position would be available upon her return.

In ***Bowman***, a former teacher of the West Shore School District sought reinstatement. 409 A.2d at 476. The teacher had been employed by the school district since 1964. In June 1975, the teacher requested a medical sabbatical leave for the fall term of the 1975-76 school year based on the advice of her physician. ***Ibid***. The request was approved and later extended to include the spring semester. The teacher was unable to return to her position at the start of the 1976-77 school year because of continued medical problems. ***Ibid***. The teacher used her accumulated sick leave, which was exhausted on November 4, 1976. On November 3, 1976 the teacher requested a one year leave without pay for medical reasons. The school district approved this request. ***Id***. at 477. In August 1977, the teacher informed the school district that she would be unable to return to teaching at the beginning of the 1977-78 school year, but planned to return on November 4, 1977, the expiration date of her unpaid leave. ***Ibid***. The teacher did not report on November 4, 1977. On that same date the superintendent of the school district wrote the teacher informing her that she was no longer employed by the school district. ***Ibid***. The teacher eventually had a hearing before the Secretary of Education on a tenure violation issue and was reinstated. The School District appealed to the Commonwealth Court from that decision.

The Commonwealth Court held that the teacher had not abandoned the employment contract. ***Bowman***, 409 A.2d at 479. Distinguishing the facts of ***Bowman*** from ***Jacobs***, the Commonwealth Court said that the teacher's actions did not demonstrate a definite intention to abandon the contract since she repeatedly sought leave and kept the school district apprised of her intentions and state of health. ***Ibid***. Here, the professional employee took steps to ensure that her job would be available upon her return.

In ***Bruckner***, the plaintiff had been a former teacher at the Lancaster County Area Vocational-Technical School. 467 A.2d at 433. The starting point of the case was January 27, 1978, the last day the teacher reported for work. He did not go to work because of medical problems referred to as a nervous condition or mental illness. ***Ibid***. In a letter dated February 3, 1978, the Director of the Lancaster County Area Vocational-Technical School ("school director") asked the teacher to supply a doctor's excuse for his absences. ***Ibid***. In a February 10, 1978 letter, the teacher informed the school that he was scheduled to be admitted to the Philadelphia Veterans Hospital on February 13, 1978 to begin treatment and expressed his intention to return to work as soon as possible. The letter was accompanied by a statement from a physician verifying the teacher's illness. ***Id***. at 434.

By a letter dated February 28, 1978, the school director requested that the teacher supply additional documentation of his illness. In response, a March 8, 1978 letter from one of the teacher's physicians stated that he was unable to determine exactly when the teacher would be able to return to work. ***Bruckner***, 467 A.2d at 434. In a letter dated March 10, 1978, the school director told the teacher that his sick leave would expire March 13, 1978 and that from March 14, 1978 he would be carried on a no pay basis. In a letter dated April 27,

1978, the school's business manager sent checks to the teacher for accumulated salary and sick leave. ***Ibid***. In a letter dated May 5, 1978 the teacher informed the business manager, and copied the director, that he would be discharged from the Veterans Hospital on May 5, 1978, that his condition was " 'somewhere in the recuperative and therapeutic stages…'," and that he hoped to return to teaching in the fall. ***Ibid***.

In a letter dated May 30, 1978, the school director told the teacher that if he wished to remain employed, the teacher must request an extended medical leave within ten days and if such request was not received his employment would be considered terminated. ***Bruckner***, 467 A.2d at 434. On June 5, 1978, the teacher sent the school director a copy of his May 5, 1978 letter to the school's business manager, upon which he wrote that this was his response to the school director's May 30, 1978 letter. On June 22, 1978, the Lancaster Area Vocational Technical Joint School Operating Committee placed the teacher on medical leave until August 1, 1978. On June 26, 1978, the director of the school informed the teacher of his medical leave status and instructed the teacher to provide, no later then August 1, 1978, "… either a written request for extended medical leave or, in the alternative, complete documentation as to his medical condition and his inability to perform his teaching duties." ***Ibid***. The letter ended "with the admonition that if these requirements were not complied with, 'we will assume that you have resigned and terminated your employment.'" ***Ibid***.

The teacher did not personally respond to this letter. ***Bruckner***, 467 A.2d at 434. He showed it to a doctor at the Veterans Hospital, who in turn wrote a letter received by the school director on July 27, 1978 stating that the teacher left the Hospital on May 8, 1978, contrary to his physician's advice, and at that time it was recommended that the teacher allow a

period of three to four months before returning to work. ***Ibid***. On August 24, 1978, the School Committee adopted a resolution that the teacher had resigned because no response to the June 26, 1978 letter had been received. The teacher was notified of this by letter on August 29, 1978. The teacher responded with a letter dated August 28, 1978 informing the school director that he still intended to teach during the fall semester. ***Ibid***. On September 5, 1978, the first day of the fall semester, the teacher showed up for work with a letter from the acting clinical director of the Philadelphia Veterans Hospital setting forth his opinion that the teacher was capable of teaching full time and could do so for the 1978-79 school year. ***Ibid***. The school director referred the teacher to the August 24, 1978 resolution, and the teacher was prohibited from teaching. ***Ibid***.

The Commonwealth Court held that the teacher did not demonstrate a definite intention to abandon the contract. ***Bruckner***, 467 A.2d at 435-36. Unlike the professional employee in ***Jacobs***, *supra*, the Commonwealth Court stated that the teacher faithfully responded to the inquiries of the school concerning his health and intentions regarding a return, as he consistently expressed his intention to return by the 1978 Fall semester. ***Ibid***. The Commonwealth Court found the facts to be more analogous to those of ***Bowman***, *supra*. Like the professional employee in ***Bowman***, the teacher had kept the school informed about his state of health and intentions. ***Id***. at 436. As in ***Bowman***, the professional employee took steps to ensure that his position would be there when he was ready to return.

Applying the forgoing legal principles to the uncontested facts of this case, the Court concludes as a matter of law that the legal requirements for abandonment cannot be found to exist from Fetter's actions and inactions, as Fetter's conduct does not demonstrate the

requisite definite intention to abandon the contract. Furthermore, the Court also concludes that the Board's finding of fact of abandonment is not supported by substantial evidence.

The facts of this case are more closely analogous to those of ***Bowman*** and ***Bruckner***, then to those of ***Jacobs***. From Fetter's initial request for leave on December 5, 2000 Fetter and her counsel communicated repeatedly with the School District and furnished to them of physician statements attesting to Fetter's medical status. This continued until March 1, 2000. Granted, there was then a three month hiatus until June 2000. but this is nothing like the hiatus of silence in ***Jacobs*** in which the teacher was initially unheard of for a period of twelve months and then unheard of for a period of two consecutive school years. As in ***Bowman*** and ***Bruckner***, Fetter took precautions to guard her job by continually seeking leave and furnishing physicians' letters attesting to her inability to work. These actions preclude a finding as a matter of law that Fetter abandoned her position.

In ***Bowman***, the teacher had communicated in August of 1977 that she would return in November of 1977 at a specific date and on that date the School District attempted a termination on abandonment when she did not return. Similarly Fetter was silent for three months from March to June. In her March 2, 2001 letter, although Fetter did not state a specific date that she would be returning, she did request leave to the end of the school year which would occur in June. This request was accompanied by her physician's letter that she would be on sick leave due to her depression until further notice. Her next communication on June 13 to the school district business manager clearly established her continued use of prescriptions and continuing regular visits in March, April and May to physicians for treatment.

Fetter did not return at the end of the school year, but instead sent a June 20 letter which indicated that she could not return in June but would need to extend her leave for a year. Certainly this was not abandoning her position. It was a request to remain on leave through the following January. Seeking to be on leave can only be consistent with maintaining an employment relationship – not abandoning it. The School District then declared an abandonment by the June 29, 2001 letter from their solicitor.

This June 29, 2001, letter declares that abandonment was being declared because Fetter had not supplied sufficient medical documentation of illness and that therefore the illness was determined to be non-legitimate. At that time the only document Fetter had not supplied was the Department of Labor form which was previously suggested as a manner of supplying the requested information. Even though this form was not a document required by the school district written policy, the failure to submit that form or other sufficient medical information may have been the basis for the School District to deny Fetter's request for medical leave or other discipline action against her. Instead the School District declared abandonment. The law does not support that action.

The School District letter of June 29, 2001 did not state a specific date of abandonment, but says that all benefits would cease as of July 1, 2001. As in ***Bowman*** the declaration of abandonment occurred when Fetter failed to report as of the end of the 2000-2001 school year which Fetter had referred to as her expected return date when she wrote to the district in March. When Fetter found she could not report at the time she had indicated she would, supplied a further request for continued leave supported by a doctor's statement. This was unlike the teacher in ***Bowman*** who without notice did not return to work on the intended

date. If the teacher in ***Bowman*** cannot be said to have expressed a definite intention to abandon her contract then Fetter's actions as a matter of law do not constitute an abandonment.

The factual finding by the Board that Fetter had abandoned her position on June 29, 2001 is not supported by substantial evidence. The undisputed facts are clear that Fetter continually sought medical leave. Fetter was diagnosed as suffering from depression and was under the care of a physician who recommended that she did not work. Fetter attempted to obtain leave for medical purposes by sending the School District written requests. Fetter informed the School District as to her state of health by providing letters and notes from her physicians, Dr. Nesbitt and Dr. Rekhala. These letters and notes informed the School District that Fetter was suffering from depression and that it was in their medical opinions that she be placed on leave. Fetter also tried to give the School District an estimate as to when she might be able to return to her duties, and when that estimate was untenable due to her current state of health Fetter so informed the School District and provided them with a new estimate. This is clear evidence Fetter took the necessary precautions to protect her position by requesting leave, keeping in communication with the School District concerning her status, and responding to the inquiries of the School District.

It is the sufficiency of Fetter's communications and responses that that School District focuses on. The School District argues that Fetter did not take the necessary precautions a reasonable person would because she did not provide the School District with the specific information it requested concerning her medical condition. The School District's written policy, sent to Fetter in December 2000 by the superintendent in his initial response to

her request for leave, indicates only that the absent administrator ***may*** be required to submit a physician's statement in writing certifying the disability. There is no question that Fetter did so on numerous occasions.

The Superintendent's December 12, 2000 letter indicated at a minimum that he wanted a diagnosis and a projection as to duration of condition and a determination of the cause or relationship between the illness and the applicant's inability to perform essential functions of her position. The initial response of Fetter on December 22, 2000 through her physician Dr. Nesbitt essentially complies with the superintendent's request in that the doctor states that she has stress related problems, which in his medical opinion required her to have medical leave from January 3, 2001 through at least March 5, 2001. On January 4, 2001, the School District's solicitor then wrote questioning whether this was a sufficient certification of a "serious medical illness" and requested at a minimum the certification of a recognized illness with some more definite prognosis with respect to the treatment involved. Within two weeks Fetter responded with a written note of another physician, Dr. Rekhala dated January 17, 2001, concurring with Dr. Nesbitt's decision to put her on sick leave and attesting that she was under his care. The School District determined this was not sufficient by follow-up correspondence from their solicitor. Fetter than supplied the written statement from Dr. Rekhala dated February 8, 2001 that states Fetter had the specific medical condition of depression and that her continued employment in her position could interfere with her recovery. Dr. Rekhala recommended six weeks minimum sick leave with a return to work date only being possible to predict after further medical observation and treatment.

Granted, Fetter had failed to fill out and submit the Standard Department of Labor medical leave certification form that was faxed to her counsel along with the February 7, 2001 letter, but the record does not disclose the reason that Fetter did not do so. An examination of the form indicates that it defines a serious health condition as one where incapacity lasts for three consecutive calendar days and involves treatment two more times by a health care provider. Clearly the information supplied by Fetter indicates that she suffered from such a serious condition. The form also contains a series of questions as to whether or not intermittent work at something less than full time could be feasible. The correspondence Fetter did supply indicates to the School District superintendent that she was to be off all work. The physician's statements also clearly indicate that they cannot predict when Fetter would be able to return to work. Unfortunately, the School District appears to distrust whether or not Fetter was suffering from an illness that prevented her from working. It may be that in such situations more detailed medical information should be forthcoming; however, it is well recognized that conditions relating to psychological-psychiatric matters, including those such as depression are regarded as private health matters, the details of which are not necessarily revealed to others. Certainly if there is a diagnosis of cancer, it would not be necessary for the disabled teacher to supply specific information as to the number of lymph nodes or other things concerning the details of the illness. The medical leave form which the School District sought to use did not require that type of detail. To do absolutely everything required by the employer, Fetter would have had to insist her physicians complete and return the medical leave form. Evidence of compliance with every absolute requirement of an employer is not a

fact that ***Bowman*** and ***Bruckner*** require as a demonstration of reasonable precautions in the context of abandonment.

In ***Bruckner***, the Vo-Tech School had requested from the teacher additional documentation of his illness in support of his request for leave. 467 A.2d at 434. The final request was a June 26, 1978 letter that required the teacher to submit a written request for extended medical leave or complete documentation of his medical condition and ability to perform his teaching duties. ***Ibid***. The teacher's responses to these requests consisted of a March 8, 1978 letter from a physician stating that he was unable to determine when the teacher would be able to return to work and a July 27, 1978 letter from a physician stating that the teacher left the Veterans Hospital on May 8, 1978 against medical advice and that it was recommended to the teacher that he not return to work for three to four months. ***Ibid***.

Despite the teacher's submissions not being exactly what the school requested or sufficient in its eyes, the Commonwealth Court did not view this failure as evidencing a definitive intent to abandon the contract. The Commonwealth Court stated, "…as the correspondence as we have recorded earlier shows, during his absence he faithfully responded to the School Committee's repeated inquiries as to his health and prospects …." ***Bruckner***, 467 A.2d at 435. What must be taken from this statement and the holding of ***Bruckner*** is that whether or not the professional employees' responses and submissions are sufficient to grant him leave under the school district's leave policy is not determinative of whether the professional employee has demonstrated a definitive intention to abandoned the contract.

What is determinative is that the professional employee actually took action designed to protect her job. When a person abandons a contract she is saying that she no

longer wishes to be bound by it. She no longer wishes to have the benefits of the promises made to her under the contract, and she no longer wishes to perform the promises she made. In professional employee terms, the individual is saying that she no longer wishes to be bound by the requirement to perform her teaching duties. When a professional employee attempts to comply with the leave policy of the school district, thereby seeking the benefits of her employment relationship, it cannot be said that she no longer wishes to be bound by the contract, even if her attempts are inadequate under the terms of the employer's policy. If one is taking steps to maintain her employment, then she must intend to keep that job. Why else would she be doing it? Under ***Bruckner***, and to a lesser extent, ***Bowman*** and ***Jacobs***, the *sine qua non* of whether a professional employee has demonstrated an intent to abandon the contract is whether the employee took measures to protect her position and not the effectiveness of those measures.

The Court recognizes that there was a three month hiatus of communication from Fetter to the School District between March 2000 and June 2000. However, the period of silence is nothing like that found in ***Jacobs*** where the teacher was initially unheard of for a period of twelve months and then unheard of for a period of two consecutive school years. As such, the Court does not find abandonment in Fetter's silence following her March 1, 2001 letter to the School District Superintendent's office. The letter requested medical leave for the remainder of the school year. The letter was also accompanied by a note from Dr. Rekhala in which he stated that Fetter was under his care and that she should be placed on leave until further notice because of her depression. On June 13, Fetter also submitted insurance forms to the School District indicating her medication use and 15 visits to health care providers between

January and May 2001. In a June 20, 2001 letter, Fetter informed the School District that she would need to extend the leave to one year. Again, the letter was accompanied by a letter from Dr. Rekhala recommending that Fetter be placed on leave until further notice.

The gap in the communication from Fetter to the School District has more to do with her health status then it does with an intention to abandon the contract. In the March 1, 2001 letter, Fetter sought leave until the end of the school year, roughly June 2001. By this request, it can be inferred that Fetter was expecting to be fit for duty by this time. As such, the silence is more attributable to Fetter's convalescence then to any abandonment. When the projected date arrived, Fetter's health prevented her from meeting that expectation and in fact was worse then she had anticipated requiring her to seek leave for one year. In this instance, Fetter provided the School District with an update of her health status and projected recuperation time. The Court does not consider the silence to be evidence of an intent to abandon the contract when it is viewed in light of Fetter's March 1, 2001 request and the state of her health in June 2001.

After having determined the Board erred in finding that Fetter had abandoned the contract, the question becomes what is the appropriate remedy. If a professional employee succeeds in appealing her termination, then she is entitled to reinstatement and back pay. ***Burger v. Bd. of Sch. Dirs. of the McGuffey Sch. Dist.***, 805 A.2d 663, 666 (Pa. Cmwlth. 2002); ***Bowman***, 409 A.2d at 480-81. However, "… the award of back pay must be limited to the period of time during which the [the professional employee] would have been physically able to teach." ***Bowman***, 409 A.2d at 481.

As such, Fetter is entitled to be reinstated to her former position as an elementary school principal and to receive back pay and benefits. Fetter contends that she was fit for duty as of February 22, 2002. However, the Court must remand the matter to the Board so that a hearing may be conducted to determine the period of time during which Fetter would have been physically able to perform her duties as principal.

As to the claim for attorney's fees and costs, the Court concludes that they shall not be awarded. "Generally, a litigant cannot recover counsel fees or costs from an adverse party unless the General Assembly has expressly authorized such an award." ***Dep't of Environmental Protection v. Bethenergy Mines, Inc.***, 758 A.2d 1168, 1173 (Pa. 2000). Neither the Public School Code nor the Local Agency Law provide for the awarding of attorney's fees or costs upon the successful appeal of a termination.

However, attorney's fees may be awarded as sanctions for conduct during the pendency of an action. Pursuant to 42 Pa.C.S.A. §2503(7), a trial court may award attorney's fees "…as a sanction against another participant for dilatory, obdurate or vexatious conduct during the pendency of a matter." An appellate court may award attorney's fess "… if it determines that an appeal is frivolous or taken solely for delay or that the conduct of the participant against whom costs are to be imposed is dilatory, obdurate or vexatious." Pa.R.A.P. 2744; *see also*, ***Thunberg v. Strause***, 682 A.2d 295, 302 (Pa. 1996). However, "[s]anctions should be granted sparingly lest they have a chilling effect on the right of all parties … to litigate a controversy to conclusion." ***Commonwealth v. Josh Int'l, Inc.***, 847 A.2d 125, 134 (Pa. Cmwlth. 2001).

The Court cannot conclude that the School District's conduct in this matter has been dilatory, obdurate or vexatious. The fact that this Court and the Commonwealth Court disagreed with the School District's position concerning the timeliness of Fetter's original appeal and request for a hearing does not render its conduct sanctionable. Therefore, the Court will not award Fetter attorney's fees and costs associated with obtaining her hearing on the abandonment claim

Accordingly, Fetter's appeal is granted and the matter will be remanded to determine the appropriate amount of back pay and benefits to which she is entitled.

O R D E R

The Appeal of Ophelia Fetter from the determination of the Jersey Shore Area School District School Board filed April 13, 2004 is GRANTED.

Fetter shall be reinstated to her previous position as an elementary school principal with the Jersey Shore Area School District.

The matter is remanded to the Jersey Shore Area School District School Board. The Board shall conduct a hearing to determine the period of time when Fetter was physically capable of performing her principal duties and the appropriate amount of back pay and benefits to which Fetter is entitled.

No attorney's fees or costs shall be awarded to Fetter related to the prosecution of her claim for a hearing regarding the abandonment issue.

BY THE COURT:

William S. Kieser, Judge

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