UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

March 9, 1999

LYDIA ANNELLA ANDERSON, Complainant,	)
v.	) 8 U.S.C. § 1324b Proceeding
	) OCAHO Case No. 97B00009
NEWARK PUBLIC SCHOOLS, Respondent.	)

ORDER GRANTING IN PART AND DENYING IN PART RESPONDENT'S MOTION FOR SUMMARY DECISION

I. *PROCEDURAL HISTORY*

This is an action under the Immigration and Nationality Act, as amended, 8 U.S.C. § 1324b (INA), in which Lydia Annella Anderson (Anderson) is the complainant and Newark Public Schools (the school district) is the respondent. Anderson filed a complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) in which she alleged that the Newark Public Schools discriminated against her on the basis of her national origin and her citizenship status by terminating her from her job as an elementary school teacher. The complaint alleged further that she was qualified for her job but was fired, while similarly situated individuals of different nationalities or citizenship status were not fired and/or were given pretermination hearings while she was not. A timely answer was made denying the material allegations of the complaint and asserting in defense that Anderson was terminated for good cause, that under New Jersey law only tenured teachers are entitled to pretermination hearings, and that only United States citizen teachers are eligible for tenure. Accordingly, the school district alleges that the disparity between Anderson's treatment and that of tenured teachers was required by New Jersey law.

Discovery and motion practice followed. The school district's motion for partial dismissal was subsequently granted on the grounds

that this office lacked jurisdiction over Anderson's claim of national origin discrimination (unpub.). The school district then filed a second motion to dismiss accompanied by supporting materials and addressed to the remainder of the allegations, to which Anderson responded, also with supporting materials. I notified the parties of my intent to convert the second motion to dismiss to a motion for summary decision as both parties had presented evidence beyond the pleadings. In the same order (unpub.) I made further inquiry inviting the school district to address the question of whether its conduct was required or merely permitted by New Jersey law, and requesting Anderson to explain with specificity in what way she was treated less favorably than any other similarly situated individual having a different citizenship status. Both parties filed timely responses to the inquiry and the school district filed a motion for summary decision to which Anderson made timely response. That motion is ripe for ruling.

II. *STANDARDS TO BE APPLIED IN RULING ON THE MOTION*

OCAHO rules[1] provide that the Administrative Law Judge may enter a summary decision in favor of either party if the pleadings, affidavits, or other record evidence show that there is no genuine issue of material fact and that a party is entitled to judgment as a matter of law. 28 C.F.R. § 68.38(c). This rule is similar to and based upon Rule 56(c) of the Federal Rules of Civil Procedure, which provides for the entry of summary judgment in federal cases. Accordingly OCAHO jurisprudence looks to federal case law interpreting the federal rule for guidance in determining when summary decision is appropriate. *See United States v. Candlelight Inn*, 4 OCAHO 611, at 222 (1994).[2]

The party seeking a summary decision has the initial burden of demonstrating the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). An issue of fact is genuine only if it has a real basis in the record. *Matsushita*

[1] Rules of Practice and Procedure for Administrative Hearings, 28 C.F.R. Pt. 68 (1998).

[2] Citations to OCAHO precedents reprinted in bound Volumes 1 and 2, *Administrative Decisions Under Employer Sanctions and Unfair Immigration-Related Practices Laws of the United States*, and Volumes 3 through 7, *Administrative Decisions Under Employer Sanctions, Unfair Immigration-Related Employment Practices and Civil Penalty Document Fraud Law of the United States*, reflect consecutive pagination within those bound volumes; pinpoint citations to those volumes are to the specific pages, seriatim, of the specific *entire* volume. Pinpoint citations to other OCAHO precedents subsequent to Volume 7, however, are to pages within the original issuances.

Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586–87 (1986). An issue of fact is material only if, under the governing law, it might affect the outcome of the suit. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

Because the inquiry involved necessarily implicates the substantive evidentiary standard of proof that would apply at trial, the evidence must be viewed "through the prism of the substantive evidentiary burden" in the particular case. *Id.* at 254. That burden of proof in an employment discrimination case is governed by the framework set out in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) and its progeny, as elaborated in *Texas Dep't of Comm. Affairs v. Burdine*, 450 U.S. 248 (1981). *Jalil v. Avdel Corp.*, 873 F.2d 701, 706 (3d Cir. 1989), *cert. denied*, 493 U.S. 1023 (1990). The paradigm for a *prima facie* discriminatory discharge claim requires a plaintiff to show that he was fired from a job for which he was qualified while others in a different class were treated more favorably. *See generally Sheridan v. E.I. DuPont de Nemours and Co.*, 100 F.3d 1061, 1066 n.5 (3d Cir. 1996) (en banc), *cert. denied*, _____ U.S. _____, 117 S.Ct. 2532 (1997).[3]

The establishment of a *prima facie* case creates a presumption of discriminatory intent by the employer. *Stewart v. Rutgers, the State Univ.*, 120 F.3d 426, 432 (3d Cir. 1997). Therefore, once a plaintiff has succeeded in making out a *prima facie* case, the burden of production shifts to the defendant to dispel the inference of discrimination by articulating a legitimate nondiscriminatory reason for the employee's discharge. *Id.* A plaintiff may then overcome the employer's articulation and prevail by proving that the employer's proffered reason was pretextual and that the defendant intentionally discriminated. *Burdine*, 450 U.S. at 253.

Because the plaintiff in an employment discrimination case bears the burden of persuasion at trial, a defendant moving for summary decision may meet its burden[4] by showing that the evidentiary materials, if reduced to admissible form, would be insufficient to

[3] There appears to be some controversy in the Third Circuit as to whether a discriminatory discharge showing also requires proof that the discharged person was replaced by someone outside the plaintiff s class. *Simpson v. Kay Jewelers, Div. of Sterling, Inc.*, 142 F.3d 639, 644 n.5 and 649 (concurring opinion) (3d Cir. 1998). *But see Bray v. Marriott Hotels*, 110 F.3d 986, 990 n.5 (3d Cir. 1997) (elements may vary depending upon factual posture of case).

[4] The burden to demonstrate the absence of material fact issues always remains with the moving party regardless of which party would have the burden of persuasion at trial.

carry the nonmovant's burden of proof at trial. *Chipollini v. Spencer Gifts, Inc.*, 814 F.2d 893, 896 (3d Cir.), *cert. dismissed*, 483 U.S. 1052 (1987), citing *Celotex*, 477 U.S. at 327. A demonstration that the plaintiff could not carry the burden of proof at trial may be accomplished in one of two ways: a defendant may show that the plaintiff is unable to establish *prima facie* case or, if a *prima facie* case is shown, the defendant may demonstrate that the plaintiff could not produce sufficient evidence of pretext to undermine the employer's nondiscriminatory reason for the discharge. *Jalil*, 873 F.2d at 707.

A plaintiff in an employment discrimination case will not survive a motion for summary decision simply by showing that the employer's decision was incorrect or mistaken; the question is whether the employer intentionally discriminated against the employee, not whether the employer's decision was wrong, mistaken, wise, shrewd, prudent, or even competent. *Fuentes v. Perskie*, 32 F.3d 759, 765 (3d Cir. 1994). Thus there must be some evidence of disparate treatment presented from which a fact finder could reasonably draw an inference of discrimination. It is the function of the *prima facie* case to compel the production of such evidence.

III. *EVIDENCE CONSIDERED*

Both parties have submitted extensive documentary evidence in connection with the various motions and with their preliminary exhibit lists. In some instances, multiple copies of the same exhibits appear at different points in the record bearing different exhibit numbers or designations. In the interests of clarity I therefore refer to the exhibits by their full description rather than by their letter or number designations at different points in the record.

In addition to the pleadings, I have also considered the certification of Pietro Petino dated August 25, 1998, two certifications of Perry L. Lattiboudere dated February 16, 1998 and August 29, 1998, the transcript of recorded testimony in an administrative hearing conducted before the New Jersey Office of Administrative Law on August 10, 1998 and August 11, 1998 captioned as "Lydia Anderson, Petitioner, v. State Operated School District of the City of Newark, OAL Docket EDU 1509–96," [containing the transcribed testimony of Lydia Anderson, S.N.J. (a child), A.L.M. (S.N.J.'s uncle, who is also erroneously identified in the record as "E."L.M.), Robert L. Copeland, and Wilma Findley], and the following documents submitted by the parties:

the charge Anderson filed with the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC), together with a letter from OSC authorizing her to file a complaint;

a letter dated March 23, 1992 on letterhead of the Vailsburg Middle School, signed by August J. Alamo,

a Teacher Annual Evaluation Report and Professional Improvement Plan for Lydia Anderson dated June 1994,

Teacher Annual Evaluation Reports and Professional Improvement Plans for Lydia Anderson purportedly for 1993 and 1995,

a collective bargaining agreement entitled "Agreement Between the Board of Education of the City of Newark and the Newark Teachers Union, Local 481 A.F.T./AFL-CIO July 1, 1991—June 30, 1994,"

a memorandum to Lydia Anderson-Powell from Principal Wilma Findley dated November 16, 1995 captioned "Request for Written Statement,"

a letter from Lydia A. Anderson-Powell to Mrs. Findley dated November 15, 1995,

a letter dated November 22, 1995 from Beverly L. Hall, Acting State District Superintendent, to Lydia Anderson,

a copy of the Newark Board of Education Policy on Child Abuse and Neglect 5141.4 consisting of four pages,

a letter dated December 14, 1995 to Ms. Lydia Anderson from John A. Nolan, Acting State District Assistant Superintendent bearing the heading, "Notice of Termination,"

handwritten letters addressed to Mrs. Findley dated October 5, 1995, October 18, 1995, October 24, 1995, and November 15, 1995 and signed L. Anderson, L.A. Anderson-Powell, or L. Powell,

a partially legible Police Department Incident Report apparently dated October 27, 1995, and

a document captioned "Report of Incident Called In" dated October 26, 1995.

IV. *STATEMENT OF FACTS*

Based upon the evidence submitted by the parties it appears undisputed that Lydia Anderson is and has been at all times relevant a licensed teacher in the state of New Jersey. Anderson, formerly a citizen and national of Jamaica, became a lawful permanent resident of the United States on October 1, 1990 and became a naturalized United States citizen on June 5, 1996. Anderson has also been known by the names Lydia Anderson-Powell and Lydia Powell.

Anderson was initially employed by the Newark Board of Education as a part-time teacher. On or about September 8, 1992, her employment status changed to that of a regular elementary school teacher under contract with the Newark Public Schools. Anderson thereafter received annual teacher evaluations of satisfactory or better for the ensuing school years 1992–93, 1993–94, and 1994- 95. At the time of the events in question, Anderson was assigned to the position of a fourth grade teacher at the Bragaw Avenue Elementary School. A full-time teacher will ordinarily attain tenure after more than three consecutive years of satisfactory full-time teaching. N.J.S.A. § 18A:28–5. However, Anderson was not eligible for tenure under New Jersey law because N.J.S.A. § 18A:28–3 provides that, "No teaching staff member shall acquire tenure unless he is, or until he shall become, a citizen of the United States." New Jersey caselaw holds that the requirements for tenure must be precisely met. *Breitwieser v. State Operated Sch. Dist. of Jersey City*, 670 A.2d 73, 76 (N.J. Super. Ct. App. Div. 1996). But for her lack of United States citizenship, it appears that Anderson would have attained tenure status prior to November 1995.

Newark Public Schools at all times relevant to this action was a state-operated school district pursuant to N.J.S.A. § 18A:7A–1 to 52 (1989), *repealed in part by* Comprehensive Education Improvement and Financing Act, P.L. 1996, ch. 138, § 85. After a decade of oversight and monitoring, the state of New Jersey, on the recommendation of the Commissioner of Education, removed Newark's local school board and assumed control of the school system pursuant to state law on July 12, 1995. *See Cortini v.*

Board of Educ. of Newark, 668 A.2d 434, 437–38 (N.J. Super. Ct. App. Div. 1995), *cert. denied*, 678 A.2d 713 (N.J. 1996).[5]

At the time of the events leading up to this action, Wilma Findley was the Principal of the Bragaw Avenue Elementary School; Lillian Burke-Baldwin was the Vice Principal; John A. Nolan was the Acting State District Assistant Superintendent of Schools; Beverly Hall was the Acting State District Superintendent of Schools then became the Superintendent; and Robert L. Copeland was Acting Assistant Executive Superintendent of Schools responsible for the general administration of 16 schools located primarily in the south ward of the city of Newark.

An incident took place in Anderson's classroom on November 15, 1995, the surrounding circumstances of which are disputed by the parties. The dispute centers around the beating of a fourth grade girl by a male relative in the classroom in the presence of both Anderson and the child's classmates. Documents in the record referring to the incident include a memorandum from Findley addressed to Anderson dated November 16, 1995 captioned "Request for Written Statement," which reads:

> It has come to my attention that a child was publicly whipped in your presence with a leather belt by an adult male relative.
>
> I require a written statement from you concerning this matter. Please forward a statement to my office by Friday November 17, 1995.

A letter dated November 15, 1995 from Anderson to Findley reads:

> You accompanied [S.J.]'s uncle to my classroom this afternoon during my instructional teaching time.
>
> You will recall that you told [S.J.] that she had to remove the marks she placed on the wall in the hallway. These marks were in close proximity to the ceiling in the hallway. In order for her to remove the marks, she had to stand on a chair and climb on the door.
>
> You will recall that you spent a considerably (sic) length of time talking with [S.J.]'s uncle at my classroom door.
>
> After you left my classroom door [S.J.]'s uncle whipped her in the classroom with a belt.

[5] *Cortini* sets out the history of the monitoring and eventual takeover of the local school district and the judicial challenges thereto. Despite the takeover, the state operated school district has not alleged that it is an arm of the state entitled to Eleventh Amendment immunity and I do not reach this issue.

The second letter exists in both handwritten and typed form. Anderson testified that the handwritten version was delivered to Findley the same day as the incident, and the typewritten version the next day (Tr. Vol. I pp. 19–21).

On November 22, 1995, Anderson was issued a notification letter signed by Beverly L. Hall, then the Acting Superintendent, stating that she was suspended with pay from her job effective immediately pending an investigation of allegations of inappropriate conduct. Anderson testified that this letter was hand delivered to her in her classroom (Tr. Vol. I pp. 14–15). On December 14, 1995, she was sent a mailed Notice of Termination, effective immediately, signed by John A. Nolan, Acting State District Assistant Superintendent.

According to the dismissal letter her discharge was for gross misconduct based upon "unprofessional and inappropriate conduct as a teacher." Two specific incidents of alleged gross misconduct were cited in the letter: (1) failure to prevent an adult relative from beating a pupil in her class on November 15, 1995 and failure to report that incident to her principal or to the Division of Youth and Family Services (DYFS), and (2) a dispute in her classroom on October 26, 1995 involving a punishment of two pupils and a resulting "tug-of-war" with one of those pupils. The parties differ in their views as to whether any investigation was conducted by the school district between November 22 and December 14, 1995, but it is undisputed that Lydia A. Anderson was provided neither a presuspension nor a pretermination hearing as to the validity of the allegations which led to her dismissal.

V. *DISCIPLINARY PROCEDURES APPLICABLE TO NEW JERSEY TEACHERS*

Under New Jersey law, there are two sets of statutory procedures dealing with discipline or dismissal of public school teachers. In addition, Anderson raises the school district's Child Abuse and Neglect Policy, 5141.4 which addresses suspension of teachers resulting from accusations of child abuse.

1. *Dismissal of Tenured Teachers*

The Tenure Employees Hearing Law, N.J.S.A. § 18A:6–10 et seq., provides that no tenured teacher may be dismissed:

> except for inefficiency, incapacity, unbecoming conduct, or other just cause, and then only after a hearing held pursuant to this subarticle [the Tenure Employees Hearing Law], by the commissioner, or a person appointed by him to act in his behalf. . . .

N.J.S.A § 18A:6–10. Section 18A6–11 further provides that a charge made against a tenured employee of the board of education must be filed in writing with the secretary of the board with a written statement presented under oath setting out the evidence to support the charge. After the board considers the evidence and statement of position, the board determines by majority vote whether there is probable cause to credit the evidence, and whether a dismissal or reduction of salary is warranted. If so, the board then forwards the written charge to the Commissioner of Education for the formal hearing. However, the Commissioner of Education or his appointee has the authority to hear and adjudicate only a limited class of cases, *Newark Teachers Union v. Board of Educ., Newark*, 373 A.2d 1020, 1023 (N.J. Super. Ct. Ch. Div. 1977), and this authority does not extend to cases involving the termination of nontenured teachers. *Id.* at 1024.

2. *Dismissal of Nontenured Teachers*[6]

The Employer-Employee Relations Act, N.J.S.A. 34:13A–1 et seq. Section 34:13A–5.3 requires New Jersey state employers to negotiate written policies for grievance and disciplinary review procedures which provide binding arbitration as the terminal step for disputes over reprimands and discipline. The statutory definition of discipline specifically excludes tenure charges filed under the Tenure Employees Hearing Law. N.J.S.A. § 34:13A–22.

Discipline procedures affecting nontenured teachers in the Newark system are set out in Articles III and V of an Agreement Between the Board of Education of the City of Newark and the Newark Teachers Union, Local 481 A.F.T./AFL-CIO July 1, 1991-June 30, 1994 (the Agreement), evidently negotiated pursuant to The Employer-Employee Relations Act. Article III, Section 2 sets out a four- step grievance procedure consisting of 1) discussion with a supervisor, 2) a written grievance and meeting, 3) an appeal to and meeting with the Executive Superintendent of Schools, and 4) binding arbitration.

[6] The nonrenewal of an nontenured employee's contract is not a dismissal or a disciplinary action. N.J.S.A. § 18A: 27–4.1 provides that nonrenewal entitles the nontenured teacher to an "informal appearance" before the board.

Article V, Section 2 of the Agreement further provides:

> B. No nontenured employee shall be suspended or discharged or separated from employment unless an informal conference has been held with the employee and his/her representative with the appropriate administrator. At the conference the employee shall be apprised of the reasons of (sic) the conference and given an opportunity to respond.

3. *Teachers Charged with Acts Involving Child Abuse*

There is yet a third set of procedures with limited application to tenured or nontenured teachers charged with acts involving child abuse. The school district's Child Abuse and Neglect Policy, 5141.4 states that:

> [d]ue process rights will be provided to school personnel or volunteers who have been reassigned or suspended as a result of an accusation of child abuse. Temporary reassignment or suspension of school personnel . . . shall occur if there is reasonable cause to believe that the life or health of the alleged victim or other children is in imminent danger due to continued contact between the employee and a child."

The term "due process rights" is not otherwise defined, nor does the policy address any issues other than suspension or reassignment; it makes no reference to termination.

VI. *QUESTIONS PRESENTED*

Although Anderson has raised a number of allegations, the sole issues cognizable or justiciable in this proceeding are 1) whether the Newark Schools discriminated against Anderson by discharging her from employment on the basis of her citizenship status, and 2) if so, whether such discrimination was protected because it was, as the school district asserts, required in order comply with New Jersey state law.

It must initially be emphasized that this is not an appropriate forum for the general review of personnel decisions, or for the adjudication of issues of due process in termination proceedings, or for deciding whether the school district fully complied either with the collective bargaining agreement or with its policy on child abuse or neglect. Neither does OCAHO jurisdiction extend to determining in the abstract whether or not the school district conducted

a timely or sufficient investigation[7] whether the charges made against Anderson were factually true, or whether her treatment was fair. Thus Anderson's repeated appeal for due process is addressed to the wrong forum. Due process emphasizes fairness between the state and the individual, regardless of how others in the same situation may be treated. *Ross v. Moffett*, 417 U.S. 600, 609 (1974). Employment discrimination, in contrast, by its nature emphasizes disparity in treatment between similarly situated persons on some prohibited basis.

VII. *DISCUSSION*

As a lawful permanent resident, Anderson was a member of the class protected by 8 U.S.C. § 1324b(a)(3). She was licensed as a teacher by the state of New Jersey and qualified for employment as such. She received satisfactory performance evaluations by the school system in the three years immediately preceding her suspension and discharge from employment. Thus it appears that she readily meets the first three requirements of a *prima facie* case: she is a member of a protected class, she was qualified for her job and she was fired. The final question, whether other similarly situated employees of different citizenship status received more favorable treatment than she did, requires an initial determination of who is "similarly situated." Not every potential comparator is necessarily an appropriate one. The record suggests several groups of potential comparators.

1. *Tenured Teachers*

Tenured teachers having the protection of N.J.S.A. § 18A:6–11 would by definition, necessarily be United States citizens. It is clear that this group of individuals enjoyed procedural protections denied to Anderson. Anderson was by law ineligible for tenure and the statutory procedures were thus unavailable to her even though she had the required length of service and, but for her citizenship status, would probably attained the tenure prior to her termination.

The INA, 8 U.S.C. § 1324b(a)(1), provides *inter alia* that it is an unfair immigration-related employment practice for an employer

[7] This appears to be the principal focus of the state administrative proceeding.

to discriminate against a protected individual[8] with respect to discharge from employment because of the individual's citizenship status. However, the statute also provides an exception where such discrimination "is otherwise required in order to comply with law, regulation, or executive order, or required by Federal, State, or local government contract. . . ." 8 U.S.C. § 1324b(a)(2)(C). It is well established in OCAHO jurisprudence that a state statute is a "law" within the meaning of the exception clause. *Elhajomar v. City & County of Honolulu*, 1 OCAHO 246, at 1589 (1990).

The school district correctly asserts that the New Jersey state law with respect to tenure of teachers is within the exception clause of 8 U.S.C. 1324b(a)(2)(c). While Anderson asserts in her OSC charge that INA "preempts" the state statute, it appears, rather, that the intent of § 1324b was quite the reverse: the INA defers to the *state* law. In *Elhajomar* it was observed that the author of most of the key provisions of § 1324b had stated:

> Mr. Chairman, in the first place, if you had requirements that you have to have citizens imposed by some state law or some federal contract, you would be O.K. The amendment makes provision for that.

1 OCAHO 246, at 1590, quoting 132 Cong. Rec. H 9708 (daily ed. Oct. 9, 1986) (emphasis added). As was observed in *Tovar v. USPS*, 3 F.3d 1271, 1274 (9th Cir. 1993), the intent was that § 1324b should apply broadly to private employers with only a few exceptions, but to governmental functions only where public employer had not adopted contravening regulations. *See also Sosa v. USPS*, 1 OCAHO 115, at 760–61 (1989).

With respect to Anderson's attack on the constitutionality of this result, I note only that state statutes, like federal statutes, are entitled to the presumption of constitutionality. *Davies Warehouse Co. v. Bowles*, 321 U.S. 144, 153 (1944). Moreover, so long as *Ambach v. Norwich*, 441 U.S. 68 (1979) remains good law, it is doubtful that New Jersey's limitation of teacher tenure to citizens would be found to be constitutionally infirm.[9]

The school district's failure to follow the procedures set out in N.J.S.A. 18A:6–10 et seq. in terminating Anderson did not violate

[8] The term, "protected individual" includes both a person lawfully admitted for permanent residence as Anderson was at the time of the events in question, and a United States citizen, which she became on June 5, 1996. 8 U.S.C. § 1324b(a)(3) (A) and (B).

[9] *Ambach* found no constitutional impediment to a New York statute limiting teacher certification to citizens and intending citizens.

8 U.S.C. § 1324b because the New Jersey teacher tenure law falls with the exception clause of 8 U.S.C. § 1324b. Tenured teachers do not constitute an appropriate group for comparison to Anderson because they are not similarly situated.

2. *Nontenured Teachers*

Nontenured teachers, citizens or not, who invoked the grievance procedures set forth in Article III, Section 2 of the collective bargaining agreement, were also treated more favorably than Anderson was. With respect to this group, however, it was Anderson's own action (or lack of it) and not any conduct of the school district that deprived her of the benefit of the contractual grievance procedures; she simply failed to file a grievance. Anderson's OSC charge alleged that she was entitled to a hearing under the contract even if she is not tenured, but this appears to be a limited hearing, and then only if the grievance process is initiated. It appears undisputed that Anderson did not file a grievance with the union or invoke the procedures set out in Article III. [Her actual testimony was that she did not recall filing a grievance (Tr. Vol. I pp. 28–29).] The failure to accord Anderson the procedural protections of Article III while providing them to teachers who filed grievances would not violate 8 U.S.C. § 1324b because she is not similarly situated to those teachers either.

On the other hand, I find nothing in the collective bargaining agreement which limits the application of Article V to employees who invoke the grievance procedures in Article III. While neither of the parties specifically addressed this question, the text of the contract appears to require an informal conference with a union representative and the appropriate administrator prior to termination, whether or not Article III procedures are invoked. According to Principal Wilma Findley, such a conference took place in the latter part of November 1995. Findley testified that she met with Anderson and Ella Taylor, the union representative for the Bragaw Avenue building, in the latter part of November 1995 at which time she informed them that the incident had been reported both to Copeland and to DYFS (Tr. Vol II, pp. 15, 23). Anderson denied that any such conference took place in November 1995 and asserted that the only meeting she ever had with Findley and Taylor took place on October 13, 1995 at 1:40 p.m. in the Vice Principal's office and dealt entirely with other matters (Tr. Vol. II, pp. 41, 53).

While there is a genuine issue as to whether such a conference took place, Anderson has identified no individual of another citizenship status who had the benefit of such a conference and it thus appears that the disputed issue is not one of material fact because no similarly situated person is identified who was treated any differently.

3. *Teachers Charged Under the Child Abuse Policy*

Anderson was suspended with pay on November 22, 1995 as a result of an accusation that she permitted an abusive act to take place in her classroom. It does not appear that she was ever herself charged with child abuse. Nevertheless, she urges that the due process referred to in the policy required that she be provided a hearing, citing to dictum in *Ufheil Constr. Co., Inc. v. Borough of Oradell*, 302 A.2d 533 (N.J. Super. Ct. App. Div. 1973). *Ufheil* held that a county board was not required to conduct a hearing before enacting an ordinance governing weight limitations on county roads because legislative action, unlike judicial action, does not require a hearing. Notwithstanding Anderson's insistence that due process necessarily calls for a hearing, *Ulfheil* provides little support for the proposition that the suspension of a public employee with pay requires a presuspension hearing.[10] In any event, Anderson has not specifically identified any other employee of another citizenship status whom she claims was provided a presuspension hearing pursuant to this policy either. Accordingly, she has failed to establish a *prima facie* case as to the school district's application of the Child Abuse policy.

4. *Nontenured Citizen Teachers Given an Opportunity to Defend*

A final group of potential comparators consists of persons referred to in the certification of Pietro Petino, only one of whom is identified by name. His certification asserts that he is responsible for representing teachers who have been suspended with pay pending investigations of unprofessional conduct, that he has personal knowledge of Anderson's suspension and termination, and that Dr. Nolan informed him that because Anderson was not a citizen she would not be given the opportunity either to be told the subject of the investigation or to explain her actions. Petino

[10] Federal caselaw clearly suggests otherwise. *See, e.g., Gilbert v. Homar*, 520 U.S. 924 (1997) (Third Circuit erred in concluding that suspension of a public employee, even one with property rights in the job, and even without pay, must always be preceded by notice and hearing.).

states further that nontenured citizen teachers do have the opportunity to tell their version of events to Board employed investigators, Assistant Superintendents, or representatives of DYFS. Specifically he stated that Margaretta Urguhart, a nontenured United States citizen teacher, was interviewed with respect to allegations of student physical abuse prior to a board decision and was permitted to defend herself with representation, while Anderson was summarily terminated.

The school district urges that Anderson failed to provide sufficient details or evidence regarding the Urguhart incident to withstand summary judgment, but has not contested the factual allegations. Neither has it contested Petino's assertion that Dr. Nolan informed him that because Anderson was not a citizen she would not be given the opportunity either to be told the subject of the investigation or to explain her actions. These facts are taken as true for purposes of ruling on the motion for summary decision. *Aman v. Cort Furniture Rental Corp.*, 85 F.3d 1074, 1080 (3d Cir. 1996) (facts asserted by the nonmoving party must, if supported by affidavits or other evidentiary material, be regarded as true).

In evaluating whether a nonmoving plaintiff has established each necessary element of a case, that party must be granted the benefit of all reasonable inferences. *Knaube v. Boury Corp.*, 114 F.3d 407, 410 n.4 (3d Cir. 1997). A dispute of fact is genuine whenever there is evidence from which a rational person could conclude that the party bearing the burden of proof on the disputed issue is correct. *Horowitz v. Federal Kemper Life Assurance Co.*, 57 F.3d 300, 302 n.1 (3d Cir. 1995). Therefore, before summary judgment may issue, it must be clear that the record as a whole could not lead a rational trier of fact to find for the nonmoving party. *Cf. Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). That standard is not met here.

VIII. *CONCLUSION*

The school district's reply brief urges that it is entitled to judgment as a matter of law because the termination procedure it used was within the exception clause of 8 U.S.C. § 1324b(a)(2)(C) and because Anderson failed to raise a sufficient issue of fact as to the contention that she was treated less favorably than similarly situated nontenured teachers. As to the first of these claims, the school district is correct. As to the second, it is not. Anderson

has satisfied all four elements of a *prima facie* case with respect to more favorable treatment of a nontenured citizen teacher, namely Margaretta Urguhart.

The "legitimate nondiscriminatory reason" which the school district articulated in response to Anderson's allegations of differential treatment is that its actions in terminating her were required by state law. While this reason is clearly responsive to her assertions based on differential treatment of tenured teachers, it is wholly unresponsive to the assertion that nontenured citizen teachers received more favorable treatment. As Judge Easterbrook has pointed out:

> When the defendant pronounces a reason unrelated to the plaintiff ("a midget can't do the job", followed by silence on the plaintiff's height), it has not adequately articulated a neutral reason within the meaning of *Burdine*. The employer's burden of production means that it must introduce facts sufficient in principle to explain what happened. The [defendant] did not need to "prove" the validity of its explanation, but it did need to give one.

Mister v. Illinois Cent. Gulf R.R. Co., 832 F.2d 1427, 1434–35 (7th Cir. 1987).

That the school district has neither denied nor explained the different treatment of Margaretta Urguhart does not entitle Anderson to partial summary decision on this issue for two reasons: 1) the evidence establishing the fourth element of her *prima facie* case is not presently in a form which would be admissible at a hearing, and 2) I am not permitted at this stage, as I would be at a hearing, to weigh the credibility of the evidence.

IX. *FINDINGS OF FACT AND CONCLUSIONS OF LAW*

I have considered the pleadings, memoranda, affidavits, certifications, and exhibits submitted by the parties in support and opposition to the motion for summary decision, on the basis of which I make the following findings of fact and conclusions of law:

> Lydia A. Anderson is a teacher licensed as such by the state of New Jersey since at least 1989.
>
> On or about September 8, 1992, Anderson became a full-time elementary school teacher under contract with the Newark Public Schools.

Anderson was employed by as a fourth grade teacher at the Bragaw Avenue School from 1992 until December 14, 1995.

Anderson was suspended from her job with pay on November 22, 1995 and terminated on December 14, 1995.

Anderson was charged with two instances of unprofessional and inappropriate conduct as a teacher.

At no time prior to her suspension or termination was Anderson given a hearing.

A tenured teacher charged with the same conduct as Anderson would have been entitled to a hearing prior to being terminated.

Margaretta Urguhart, a nontenured United States citizen teacher, was interviewed with respect to allegations of student physical abuse and was permitted to defend herself with representation, while Anderson was summarily terminated.

Lydia A. Anderson filed a charge with the Office of Special Counsel (OSC) on February 10, 1996.

On June 17, 1996 OSC sent Anderson a letter authorizing her to file a complaint with the Office of the Chief Administrative Hearing Officer.

Lydia Anderson filed a timely complaint which was received on September 17, 1996 but not docketed until October 9, 1996 owing to misdirection of the delivery in the building.

Lydia A. Anderson became a lawful permanent resident of the United States on October 1, 1990.

Lydia A. Anderson became a United States citizen on June 5, 1996.

On July 12, 1995, the state of New Jersey removed the Newark local school board and assumed control of the Newark school system.

All jurisdictional prerequisites to this proceeding have been satisfied.

Newark Public Schools at all times relevant to this action was a state operated school district under N.J.S.A. § 18A:17A–1 to 52 (1989).

Lydia A. Anderson at all times relevant to this action was a protected individual within the meaning of 8 U.S.C. § 1324b(a)(3).

N.J.S.A. § 18A:28–3 provides that in order to acquire tenure as a teaching staff member in the state's public schools, an individual must be or become a citizen of the United States.

N.J.S.A. § 18A:28–3 is a state law within the exception clause of 8 U.S.C. § 1324b(a)(2)(C).

The school district's failure to follow the procedures set out in N.J.S.A. § 18:A 6–10 et seq. in discharging Anderson did not violate 8 U.S.C. § 1324b.

Anderson has stated a genuine issue of material fact as to whether nontenured U.S. citizen teachers, including Margaretta Urguhart, were more favorably treated than she was.

ORDER

Summary decision is granted in part for the Newark Public Schools in that its action failing to provide Lydia Anderson with the same hearing procedures provided to tenured teachers did not violate 8 U.S.C. § 1324b. Summary decision is denied as to the allegation that the school district treated nontenured United States citizen teachers more favorably than Anderson in termination proceedings.

Preliminary witness and exhibit lists will become final if not altered or amended prior to April 1, 1999. Any party objecting to a proposed exhibit shall note such objection prior to April 1, 1999.

A hearing will be held on April 15, 1999 in Newark, New Jersey to resolve the remaining issues. In the meantime, the parties are encouraged to continue settlement discussions.

SO ORDERED.

Dated and entered this 9th day of March, 1998.

Ellen K. Thomas
Administrative Law Judge