

DANIEL FLYNN, :
 :
 PETITIONER, :
 :
 V. : COMMISSIONER OF EDUCATION
 :
 BOARD OF EDUCATION OF THE : DECISION
 FREEHOLD REGIONAL SCHOOL :
 DISTRICT, MONMOUTH COUNTY, :
 :
 RESPONDENT. :

SYNOPSIS

Petitioner, a tenured teacher, filed a petition and an application for emergent relief challenging respondent's decision to suspend him without pay following alleged criminal offenses involving one or more of his students. Petitioner contended that, pursuant to *N.J.S.A. 18A:6-14*, he cannot be suspended without pay unless tenure charges have been filed or an indictment has been handed up to a grand jury.

The ALJ found that the petitioner did not meet the criteria for emergent relief, as he failed to establish irreparable harm, and his motion for emergent relief was denied.

The Commissioner determined to reach a decision which would dispose of both the emergent relief application and the underlying petition of appeal, and found that: respondent had no basis to suspend petitioner without pay; the law applicable to this controversy is clear and the uncontested facts allow summary decision; and the only issue presently before her is whether respondent may withhold petitioner's pay where there is no indictment and where respondent has failed to certify tenure charges against petitioner. The Commissioner directed respondent to provide petitioner with back pay commencing May 1, 2009, and with prospective pay until such time as certified tenure charges and/or an indictment are brought against petitioner.

<p>This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.</p>

August 3, 2009

OAL DKT. NO. EDU 4760-09
AGENCY DKT. NO. 97-5/09

DANIEL FLYNN, :
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V. : COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE : DECISION
FREEHOLD REGIONAL SCHOOL :
DISTRICT, MONMOUTH COUNTY, :
RESPONDENT. :

Petitioner Daniel Flynn filed both a petition and an application for emergent relief challenging the respondent Freehold Regional School District Board of Education’s decision to suspend him without pay.

Flynn, a tenured teacher, had been charged on April 22, 2009 with certain criminal offenses allegedly involving one or more of his students. Respondent initially put him on paid administrative leave but, as of May 1, 2009, changed petitioner’s status to unpaid administrative leave. As of May 1, 2009 petitioner had not been indicted and no tenure charges had been certified against him. That was still the case on the date of petitioner’s emergent hearing in the Office of Administrative Law (OAL) – June 15, 2009.

The OAL hearing addressed only petitioner’s emergent application for immediate reinstatement of pay during his administrative leave. The application was denied because the ALJ determined that one of the four regulatory requirements for the granting of emergent relief – *i.e.*, the requirement of *N.J.A.C. 6A:3-1.6(b)(1)* that petitioner show that respondent’s actions will cause him irreparable harm – was not satisfied. Petitioner had been given two days post-hearing to present proof of harm that would not be curable by back pay, and he failed to do so.

While no determination concerning the ultimate issue of this controversy was made at the June 15, 2009 hearing, the parties' papers and the recorded discussion between the Administrative Law Judge (ALJ) and the parties revealed that both petitioner and respondent acknowledge the applicability of *N.J.S.A. 18A:6-14* to this case. The Commissioner of Education's (Commissioner) review of the record also indicates that the material facts are not in dispute. In consideration of the foregoing, the Commissioner has resolved to reach a decision which will dispose of both the emergent application and the underlying petition of appeal.

The circumstances under which a tenured employee's compensation may be withheld are outlined in *N.J.S.A. 18A:6-14* and *N.J.S.A. 18A:6-8.3*.

N.J.S.A. 18A:6-14 provides as follows:

Upon certification of any charge to the commissioner, the board may suspend the person against whom such charge is made, with or without pay, but, if the determination of the charge by the Commissioner of Education is not made within 120 calendar days after certification of the charges, excluding all delays which are granted at the request of such person, then the full salary (except for said 120 days) of such person shall be paid beginning on the one hundred twenty-first day until such determination is made. Should the charge be dismissed, the person shall be reinstated immediately with full pay from the first day of such suspension. Should the charge be dismissed and the suspension be continued during an appeal therefrom, then the full pay or salary of such person shall continue until the determination of the appeal. However, the board of education shall deduct from said full pay or salary any sums received by such employee or officers by way of pay or salary from any substituted employment assumed during such period of suspension

[Emphasis added.]

N.J.S.A. 18A:6-8.3 instructs that:

Any employee or officer of a board of education in this State who is suspended from his employment, office or position, other than by reason of indictment, pending any investigation, hearing or trial or any appeal therefrom, shall receive his full pay or salary during such period of suspension, except that in the event of charges against such employee or officer brought before the board of education or the Commissioner of Education pursuant to law, such

suspension may be with or without pay or salary as provided in chapter 6 of which this section is a supplement.

[Emphasis added.]

Thus, “a tenured employee may be suspended without pay only if indicted or if tenure charges have been preferred and certified to the Commissioner of Education. In all other circumstances, a suspension must be with pay.” *Gregory Slater v. Board of Education of the Ramapo Indian Hills Regional High School District*, 237 N.J. Super. 424, 426 (App. Div. 1989).

It is undisputed that no tenure charges have been certified against petitioner,¹ and – as of July 17, the date of respondent’s correspondence to this office objecting to summary decision – no indictment appears to have been brought against him. Respondent consequently has had no basis to suspend petitioner without pay.

In response to the Commissioner’s invitation to the parties to comment upon the Commissioner’s inclination to dispose of the ultimate issue posed in the instant appeal, respondent has articulated two objections. First, respondent urges that the willingness of the ALJ to expeditiously entertain dispositive motions on the ultimate issue renders a ruling by the Commissioner unnecessary. The Commissioner finds, however, that the law applicable to this controversy is clear and the uncontested facts allow summary decision.

Second, respondent suggests that rather than decide this controversy, the Commissioner should consolidate it with another appeal filed by petitioner, *i.e.*, a challenge to a May 8, 2009 determination by the Department of Education’s Criminal History Review Unit

¹ At the OAL hearing, the ALJ asked counsel for respondent why – notwithstanding respondent’s purported investigation into the charges against petitioner – respondent did not certify tenure charges to the Commissioner. Counsel was not able to provide an answer.

(CHRU) that petitioner may not execute his employment responsibilities pending the resolution of the criminal charges.² Respondent reasons that:

...the relief requested in the second action directly impacts and relates to the Board's actions as alleged in the initial filing. Accordingly, it is the Board's contention that both Petitions should be consolidated and the entire matter set down for a plenary hearing to consider and adjudicate both issues.

Respondent's Correspondence, July 17, 2009, at 2.

The Commissioner does not agree. The issue before her is whether respondent may withhold petitioner's pay where there is no indictment, let alone conviction, and where respondent has failed to certify tenure charges against him. The answer is no, and represents an issue independent of the question of whether petitioner may perform his teaching duties while the criminal charges are pending.

Accordingly, the Commissioner grants the relief requested in the petition. More specifically, respondent is directed to provide petitioner with back pay commencing on May 1, 2009, and with prospective pay until such time as certified tenure charges and/or an indictment are brought against petitioner. Petitioner's application for emergent relief is dismissed as moot.

IT IS SO ORDERED.³

COMMISSIONER OF EDUCATION

Date of Decision: August 3, 2009

Date of Mailing: August 3, 2009

² The record presented to the Commissioner in this appeal contains no reference to the subsequent proceedings initiated by petitioner against the CHRU.

³ This decision may be appealed to the Superior Court, Appellate Division, pursuant to *P.L. 2008, c. 36* (*N.J.S.A. 18A: 6-9.1*).