

#167-13 (OAL Decision: Not yet available online)

JASON NEWBY, :  
PETITIONER, :  
V. : COMMISSIONER OF EDUCATION  
BOARD OF EDUCATION OF THE : DECISION  
TOWNSHIP OF HILLSIDE,  
UNION COUNTY, :  
RESPONDENT. :

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SYNOPSIS

Petitioner – formerly employed as a security guard in respondent’s school district – alleged that he was illegally suspended without pay by the Board following the certification of tenure charges for unbecoming conduct which were ultimately dismissed by the Commissioner for lack of subject matter jurisdiction; the Commissioner determined that there is no statutory entitlement for security guards under the tenure laws. The Board subsequently, on November 15, 2012, converted petitioner’s suspension to a retroactive termination effective August 30, 2012. The petitioner sought reinstatement to his position with full back pay and benefits for the period from August 13, 2012 to November 15, 2012. The parties filed cross motions for summary decision.

The ALJ found, *inter alia*, that: the Hillside Education Association (Association) filed a grievance on behalf of petitioner challenging his termination by the Board; the Association also filed a request for an arbitrator with the Public Employment Relations Commission; the arbitrator assigned to hear the matter will determine if the Board had just cause to terminate petitioner effective August 30, 2012; petitioner’s allegation that his suspension was illegal pursuant to *N.J.S.A. 18A:6-8.3* is now moot because the suspension was converted to a termination, and this statute applies to suspensions, not terminations; *N.J.A.C. 18A:6-30* provides for compensation for the period covered by an illegal dismissal or suspension, if such dismissal or suspension is determined to have been without good cause; in this case, the arbitrator alone will make the determination of whether petitioner’s termination was warranted. The ALJ concluded that since the issue of whether petitioner was illegally terminated is contingent on the determination of whether he was terminated without good cause, this must be determined by the arbitrator. Accordingly, the ALJ granted respondent’s motion to dismiss the petition.

Upon comprehensive review, the Commissioner concurred with the ALJ findings and conclusions, and adopted the Initial Decision as the final decision in this matter. In so doing, the Commissioner noted that the grievance arbitrator will determine whether the petitioner’s termination was without just cause under the collective bargaining agreement and, subsequently, will determine the validity of the Board’s decision to retroactively terminate the petitioner.

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.

May 10, 2013

OAL DKT. NO. EDU 16311-12  
AGENCY DKT. NO. 334-11/12

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The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions filed pursuant to *N.J.A.C.* 1:1-18.4 by the petitioner, Jason Newby, and the Board of Education's (Board) reply thereto.

In his exceptions, the petitioner reiterated the arguments advanced below contending that the ALJ erroneously granted summary decision in favor of the Board. The petitioner maintains that the ALJ misapplied the law to the facts of this case and reached the wrong conclusions. The petitioner argues that by stating there was no implication of *N.J.S.A.* 18A:6-8.3, the ALJ essentially determined as a matter of law that his termination was effective August 30, 2013. The petitioner contends that the Board was not authorized to terminate his employment retroactive to August 30, 2012, and that the Commissioner has jurisdiction to determine if he is entitled to pay back for the period from August 30, 2012 to November 15, 2012. Although the petitioner agrees with the ALJ that the arbitrator assigned to the Public Employment Relations Commission (PERC) will decide whether his termination was for just cause as required by the Collective Bargaining Agreement (CBA), the petitioner maintains that the arbitrator will not decide whether his unpaid suspension from August 30, 2012

to November 15, 2012 was lawful under school law. Therefore, the petitioner asserts that the ALJ erroneously dismissed the petition.

In reply, the Board maintains that the Initial Decision should be adopted asserting that the ALJ properly dismissed the petition. The Board maintains that pursuant to the CBA the grievance arbitrator will determine if the petitioner's termination was without just cause, and if it was the arbitrator is fully authorized to award reinstatement back pay. As a result the Board asserts that the ALJ properly determined that it is the arbitrator who will ultimately determine whether petitioner's termination was proper in accordance with the terms of the CBA.

Upon a comprehensive review of the record in this matter, the Commissioner concurs with the ALJ that the Board is entitled to summary decision. The Commissioner is also in accord with the ALJ's determination that the grievance arbitrator will determine whether the petitioner's termination was without just cause under the CBA and the validity of the Board's decision to retroactively terminate the petitioner. Therefore, at this point in time the petitioner's recourse remains with PERC.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter and the petition is hereby dismissed.

IT IS SO ORDERED.<sup>1</sup>

COMMISSIONER OF EDUCATION

Date of Decision: May 10, 2013

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<sup>1</sup> Pursuant to *P.L. 2008, c. 36 (N.J.S.A. 18A:6-9.1)*, Commissioner decisions are appealable to the Superior Court, Appellate Division.