

#144-16R (OAL Decision: Not yet available online)

FELICIA PUGLIESE, :
 :
 PETITIONER, :
 :
 V. : COMMISSIONER OF EDUCATION
 :
 STATE-OPERATED SCHOOL DISTRICT : DECISION
 OF THE CITY OF NEWARK, :
 ESSEX COUNTY, :
 :
 RESPONDENT. :

SYNOPSIS

Petitioner was removed from her tenured position subsequent to the issuance of an arbitrator’s decision on February 15, 2013, which sustained tenure charges of inefficiency. Following appeal proceedings, the Appellate Division issued a decision entitled *Felicia Pugliese v. State-Operated School District of the City of Newark and Edgard Chavez v. State-Operated School District of the City of Newark*, 440 N.J. Super 501 (App. Div. May 19, 2015), which remanded the matter to the Commissioner, and – as a result – the tenure charges filed against the petitioner are once again pending before the same arbitrator. Petitioner asserted herein that she has been suspended without pay from her position as a tenured teacher in respondent’s school district since September 12, 2012; that the tenure charges against her are still pending and remain unresolved; and, accordingly, she requested full salary beginning from the 121st day of her suspension, as required by the plain language of N.J.S.A. 18A:6-14, and prospectively until the pending tenure charges are resolved. The school district asserted that the Appellate Division’s remand of this matter was not a reversal of the original arbitration decision, and that when tenure charges have been sustained on the original hearing, the suspension may be continued unless and until that determination is reversed. The parties filed opposing motions for summary decision.

The ALJ found, *inter alia*, that: there are no genuine issues of material fact in this case, and the matter is ripe for summary decision; the Appellate Division’s decision remanding the case to the Commissioner effectively reversed the original arbitration decision; had there been no remand to the Commissioner, petitioner would be entitled to her job back; however, the arbitration of this matter began “anew” with the Commissioner’s re-assignment of this matter to the arbitrator. The ALJ concluded that petitioner is entitled under N.J.S.A. 18A:6-14 to reinstatement of salary retroactive to the 121st day after her unpaid suspension commenced, even though she is not entitled to reinstatement to her teaching post. Accordingly, the ALJ granted petitioner’s motion for summary decision, and denied respondent’s opposing motion.

Upon comprehensive review, the Initial Decision of the OAL was rejected in part. The Commissioner concurred that petitioner is entitled to back pay, less mitigation, for the period beginning on the 121st day of her suspension through the date of the original arbitration decision, which sustained the tenure charges against her. However, the Commissioner found and determined that: the Appellate Division’s remand of this matter did not dismiss the tenure charges against petitioner; rather, the matter was remanded as part of the petitioner’s appeal process – which is still ongoing; under TEACHNJ, the February 2013 arbitrator decision was a final decision and accordingly ended the petitioner’s entitlement to full pay under the 120-day provision. If petitioner is ultimately successful in having tenure charges reversed on appeal, she would at that juncture be entitled to full back pay, up to the date of reinstatement to her teaching position.

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.

April 12, 2016

OAL DKT. NO. EDU 14409-15
AGENCY DKT. NO. 194-7/15

FELICIA PUGLIESE, :
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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 State-Operated School District of the City of Newark (District) and the petitioner, Felicia Pugliese's reply thereto.

This matter involves a request by the petitioner for full salary and benefits retroactive to the 121st day after she was suspended without pay while tenure arbitration proceedings are ongoing. The stipulated facts and the procedural history were thoroughly outlined in the Initial Decision and will not be repeated here; however, a brief summary of the procedural history is required to provide the necessary context for the instant matter. On February 15, 2013, Arbitrator Daniel Brent issued a decision sustaining tenure charges filed against the petitioner and removing the petitioner from her tenured position with the District. The petitioner appealed the February 15, 2013 decision to the New Jersey Superior Court Chancery Division, who confirmed Arbitrator Brent's award. Thereafter, the petitioner filed an appeal with the Superior Court, Appellate Division. On May 19, 2015, the Appellate Division issued a decision remanding the matter to the Commissioner with directions to provide certain

guidance to arbitrators in tenure cases. *Felicia Pugliese v. State-Operated School District of the City of Newark and Edgard Chavez v. State-Operated School District of the City of Newark*, 440 *N.J. Super* 501 (App. Div. May 19, 2015). As a result of the remand by the Appellate Division, the tenure charges filed against the petitioner are currently again pending before Arbitrator Brent.

The Administrative Law Judge (ALJ) found that – based on the Appellate Division’s May 19, 2015 decision – the arbitration must begin “anew” and as a result, under *N.J.S.A.* 18A:6-14, the petitioner is entitled to reinstatement of her salary retroactive to the 121st day after her unpaid suspension commenced and up until Arbitrator Brent issues a second decision on the pending tenure charges. The ALJ also determined that since the matter was remanded, the petitioner is not entitled to reinstatement of her teaching post.

In its exceptions, the District contends that the Initial Decision should be rejected because the ALJ incorrectly interpreted *N.J.S.A.* 18A:6-14. The District argues that without a dismissal of the tenure charges against the petitioner or a reversal of the sustained charges, no portion of *N.J.S.A.* 18A:6-14 authorizes the resumption of salary or back pay to the 121st day of petitioner’s suspension. The District maintains that the decisions that the ALJ relied upon to support her ruling are inapplicable because they were issued prior to the enactment of the Teacher Effectiveness and Accountability for the Children of New Jersey Act, *N.J.S.A.* 18A:6-117 *et seq.* (TEACHNJ).

The District stresses that the tenure charge hearing procedures and specifically the procedural posture of this case are different because of the enactment of TEACHNJ. Prior to TEACHNJ tenured employees were entitled to full pay after the 120th day of suspension until the Commissioner rendered a final decision – even if an ALJ recommended sustaining the tenure charges. Now, in contrast, arbitrator decisions are “final and binding”, subject to judicial review

and enforcement as provided in the New Jersey Arbitration Act, *N.J.S.A.* 2A:24-7 through -10. Further, pre-TEACHNJ case law provides no justification for ignoring the final sentence of *N.J.S.A.* 18A:6-14, which provides that when the charge is sustained on the original hearing, the suspension may be continued unless and until that determination is reversed. Finally, the District asserts that the ALJ failed to properly address its arguments as to the ripeness of this dispute.

In reply, the petitioner contends that the Initial Decision is correct and should be adopted in its entirety. The petitioner argues that the District inexplicably misconstrues the Appellate Division's decision in an attempt to demonstrate that the court's remand of the case to the Commissioner to be considered "anew" somehow means that the initial arbitration award is still intact. The ALJ properly determined that the February 15, 2013 decision of Arbitrator Brent was reversed by the Appellate Division and therefore is null, void and has no force or effect. The petitioner emphasizes that upon remanding the matter, the court directed the Commissioner to "inform the arbitrator what legal standards to utilize, after which the arbitrators must review the facts anew within this legal framework." The petitioner maintains that the ALJ was correct in concluding that the determination which sustained the tenure charges has been appealed, sustained, appealed, and then reversed. Therefore – because there has yet to be a determination of the charges by Arbitrator Brent – in accordance with the plain language of *N.J.S.A.* 18A:6-14, the petitioner is entitled to her salary beginning on the 121st day of her suspension and until such time as the tenure charges against her are resolved.

The petitioner also contends that the pre-TEACHNJ cases relied upon by the ALJ are applicable to the instant case because the substance of *N.J.S.A.* 18A:6-14 requiring payment be made to a teacher whose tenure charges are outstanding after 120 days remains unchanged. That an arbitrator's decision under TEACHNJ is now a final decision does not change the fact

that Arbitrator Brent's February 15, 2013 decision was reversed and remanded. Moreover, since the charges against the petitioner have been reversed and remanded, the last sentence of *N.J.S.A.* 18A:6-14 does not apply despite the District's argument to the contrary. Finally, the petitioner states that the ALJ's interpretation of *N.J.S.A.* 18A:6-14 is consistent with the statute's purpose and legislative history. The Legislative purpose of the statute is to provide financial assistance to the employee who finds herself in protracted legal proceedings until the tenure charges are decided. Therefore, the Initial Decision should be adopted and the petitioner should receive her full salary retroactive to the 121st day of her unpaid suspension, plus any increments she would have been entitled to, and prospectively until a determination on the tenure charges is made by Arbitrator Brent.

As a threshold matter, the Commissioner finds that the petitioner is entitled to her full salary, subject to mitigation from any substituted employment or unemployment compensation, from day 121 of her suspension until Arbitrator Brent issued his original arbitration award on February 15, 2013, which sustained the inefficiency tenure charges filed against the petitioner and removed her from her tenured position.¹ The Commissioner further finds that the ALJ erroneously interpreted *N.J.S.A.* 18A:6-14 to find that the petitioner is entitled to full back pay retroactive to the 121st day of her suspension until there is a second decision issued by Arbitrator Brent. Accordingly, that portion of the Initial Decision is rejected.

It is undisputed that under *N.J.S.A.* 18A:6-14, tenured employees are entitled to receive full salary and benefits starting with the 121st day of their suspension until a determination on the tenure charges is made by an arbitrator. *N.J.S.A.* 18A:6-14 also provides

¹ In the Initial Decision, the ALJ indicated that the 121st day was on or about January 14, 2013; however, the tenure charges were certified to the Commissioner on September 13, 2012. If the petitioner was suspended without pay upon certification of the charges to the Commissioner as permitted by *N.J.S.A.* 18A:6-14, then the 121st day would be January 12, 2013.

that, “[s]hould the charge be sustained on the original hearing or an appeal therefrom, and should such person appeal from the same, then the suspension may be continued unless and until such determination is reversed, in which event he shall be reinstated immediately with full pay as of the time of such suspension.” In this case, there was a determination by Arbitrator Brent on February 15, 2013 sustaining the charges of inefficiency at the original hearing. Those charges have not been dismissed on appeal thereby triggering the reinstatement of the petitioner with full pay as of the time of her suspension pursuant to *N.J.S.A. 18A:6-14*; rather, the matter was remanded as a part of the petitioner’s appeal process.² A tenured employee who is appealing from sustained charges may not fall back on the 120-day provision during the appeal process; instead, if the employee is successful in getting charges dismissed the employee is entitled to be reinstated with full pay as of the date of suspension. Moreover, the Appellate Division’s reversal and remand of these proceedings did not re-trigger the 120-day rule because there is no mechanism for such contained within *N.J.S.A. 18A:6-14*. Therefore, the remedy available to the petitioner at this juncture is reinstatement and back pay *if* she is ultimately successful in having the tenure charges dismissed.

The cases relied on by the ALJ to support her determination that the petitioner is entitled to full pay retroactive to the 121st day of her suspension were issued before TEACHNJ and are distinguishable. For example, in *In the Matter of the Tenure Hearing of William Thomas, Plainfield School District, Union County*, Commissioner Decision No. 242-08, decided May 23, 2008, the ALJ made a recommendation on the charges and the Commissioner

² As the Appellate Division pointed out, the concern in this unique matter was the procedures for teachers who have received tenure charges after the effective date of the TEACHNJ, alleging poor performance that occurred prior to the implementation of the statute’s new standards. *Pugliese, supra*, 440 *N.J. Super* at 512. The motivation for the remand by the Appellate Division in this case will not occur in the future because all future tenure charges filed against tenured employees will be based on performance that occurred after the enactment of TEACHNJ. The Appellate Division did not state in the May 19, 2015 decision that the petitioner should receive full pay retroactive to the 121st day of her suspension until a decision on the tenure charges is issued.

remanded to the matter to the OAL for a factual hearing. Despite the fact that the Commissioner ultimately sustained the tenure charges, the tenured employee was entitled to full pay during the remand in accordance with the 120-day rule because there was not a final decision issued by the Commissioner at that stage of the proceedings. Importantly, prior to TEACHNJ, the tenure decisions of ALJs were simply recommendations to the Commissioner: they were not final decisions for purposes of the 120-day rule. Here, the decision of Arbitrator Brent on the original proceedings was a final decision, as opposed to a recommendation, and that February 15, 2013 decision ended the petitioner's entitlement to full pay under the 120-day provision.

Despite the petitioner's argument to the contrary, the Legislative history of *N.J.S.A. 18A:6-14* does not dictate a different result. In her exceptions, the petitioner cites to *In the Matter of the Tenure Hearing of Grossman*, 127 *N.J. Super* 13 (App. Div. 1974), to stress the purpose and Legislative intent behind *N.J.S.A. 18A:6-14*:

It seems clear that in enacting [*N.J.S.A. 18A:6-14*] the Legislature must have had in mind the economic hardship endured by teachers and other board of education employees suspended without pay pending the outcome of charges filed against them and certified for hearing to the Commissioner of Education. We are certain, moreover, of the Legislature's awareness that in many instances, because of the volume of matters awaiting hearing, a prompt disposition is not feasible. Thus, the obvious intent and purpose of the amendment was to alleviate the financial plight of those affected by providing for the payment of their full salary ... from the 121st day following the certificate of charges until the determination thereof by the Commissioner. [*Id.* at 35-36]

Since the enactment of TEACHNJ, the arbitrator has stepped into the shoes of the Commissioner in that the arbitrator's decision is now deemed to be a final decision. The Legislative intent behind the 120-day rule remains in effect to help prevent economic hardship to the employee until the arbitrator makes a determination. However, once there is a determination by an arbitrator sustaining the tenure charges on the original hearing, the tenured employee is no longer

entitled to full pay under the 120-day provision in *N.J.S.A.* 18A:6-14, which is consistent with the result of final Commissioner decisions and the Legislative intent prior to the enactment of TEACHNJ.

Accordingly, the Initial Decision is rejected in part. The District is directed to pay the petitioner back pay for the period beginning on the 121st day of her suspension through Arbitrator Brent's February 15, 2013 award.

IT IS SO ORDERED.³

COMMISSIONER OF EDUCATION

Date of Decision: April 12, 2016

Date of Mailing: April 12, 2016

³ 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.