

EDU # 6138-98
C # 140-00
SB # 31-00

IN THE MATTER OF THE TENURE HEARING :
OF NEAL A. ERCOLANO, SCHOOL DISTRICT :
OF THE TOWNSHIP OF BRANCHBURG, :
SOMERSET COUNTY, :
AND :
NEAL A. ERCOLANO, : STATE BOARD OF EDUCATION
RESPONDENT/PETITIONER- :
CROSS/APPELLANT, : DECISION ON MOTION
V. :
BOARD OF EDUCATION OF THE TOWNSHIP :
OF BRANCHBURG, SOMERSET COUNTY. :
PETITIONER/RESPONDENT-APPELLANT. :
_____ :

Remanded by the Commissioner of Education, June 25, 1998

Decision on Motion by the Commissioner of Education, April 17, 2000

Decided by the Commissioner of Education, May 1, 2000

For the Respondent/Petitioner-Cross/Appellant, David B. Rubin, P.C. (David B. Rubin, Esq., of Counsel)

For the Petitioner/Respondent-Appellant, Rand, Algeier, Tosti & Woodruff (John F. Croot, Jr., Esq., of Counsel)

The matter now before us involves an appeal and a cross-appeal from a decision by the Commissioner of Education that directed that Neal A. Ercolano (hereinafter "respondent") be dismissed from his tenured employment as a sixth-grade teacher in

Branchburg and that he be paid back salary for a portion of the period of his suspension commencing in February 1998. The tenure charges that led to the Commissioner's directive of dismissal had their genesis in an incident that resulted in the respondent's conviction in municipal court for simple assault. In addition to the tenure charges, the respondent's conviction also led the district board to seek the forfeiture of his position under N.J.S.A. 2C:51-2. This added to the procedural complexity of the matter now before us.

Both the municipal court proceedings and the tenure charges stemmed from a single incident that occurred on January 17, 1996. That incident involved a sixth-grade student who was out of his classroom without permission. The student was running in the hallway when physical contact occurred between the respondent and the student. On October 10, 1996, the student's mother filed an assault charge in municipal court against the respondent.

On April 23, 1997, a trial was conducted before the Honorable William T. Kelleher. After hearing the testimony of the witnesses, Judge Kelleher found that the respondent had grabbed the student, pushed him against the wall and placed him in fear of bodily harm. Judge Kelleher therefore found that the respondent was guilty of simple assault in violation of N.J.S.A. 2C:12-1(a).

On June 16, 1997, the Board of Education of the Township of Branchburg (hereinafter "Board") voted to withhold the respondent's salary increments for the 1997-98 school year based on the assault conviction. On September 2, 1997, the Board certified tenure charges against the respondent and suspended him without pay.

Prior to certifying the tenure charges, the Board had asked the municipal court to declare a forfeiture of the respondent's position pursuant to N.J.S.A. 2C:51-2(a)(2). However, when the court was informed that tenure charges had been filed, the court declined to exercise jurisdiction over the forfeiture issue.

On September 9, 1997, the respondent petitioned the Commissioner seeking restoration of his increment.

On December 18, 1997, the parties participated in a telephone conference with the Administrative Law Judge ("ALJ") assigned to hear the tenure charges. In a letter dated December 19, 1997, David B. Rubin, Esq., counsel for the Board, memorialized the ALJ's directives from that conference. The first directive was to consolidate the respondent's challenge to the withholding of his increment with the tenure matter. The other three directives involved resolving the forfeiture issue and, related thereto, addressed the question of a stay of the Board's obligation to continue to pay the respondent's salary. As set forth in Mr. Rubin's letter:

2. Before ruling on the Board's forfeiture motion, [the ALJ] has afforded [respondent] thirty days to ask the Attorney General or the Somerset County Prosecutor to apply to the Branchburg Municipal Court to waive the mandatory forfeiture provisions of the statute. If they decline to make that application [the ALJ] would then proceed to rule on forfeiture.

3. If such an application is made to the Municipal Court, all proceedings before [the ALJ] will be stayed until the Municipal Court rules on that application or otherwise relinquishes jurisdiction.

4. In the meanwhile, the Board's obligation to continue Mr. Ercolano's salary will be stayed effective January 17, 1998 and until the forfeiture issue is disposed of by either [the ALJ] or the Municipal Court Judge.

By letter dated January 20, 1998, the Somerset County Prosecutor's Office advised that it had decided not to apply for a waiver of forfeiture. By letter of February 20, 1998, the State Attorney General's Office advised that it had also determined not to apply for such waiver.

The record closed on February 27, 1998, and, on April 7, 1998, the ALJ issued her initial decision, holding that respondent had forfeited his position.

On June 25, 1998, the Commissioner rejected the ALJ's determination, finding that the ALJ did not have jurisdiction over the forfeiture issue. Accordingly, the matter was remanded to the ALJ for disposition on the merits.

On March 13, 2000, the ALJ granted the Board's Motion for Summary Decision, recommending that the tenure charges against the respondent be sustained and that he be dismissed from his tenured position. The ALJ also directed that the respondent's back salary be paid retroactive to February 27, 1998.

On May 1, 2000, the Commissioner adopted the ALJ's initial decision.

The Board then appealed to the State Board of Education from the Commissioner's determination that the respondent was entitled to salary payments retroactive to February 27, 1998. Respondent cross-appealed from that portion of the Commissioner's decision sustaining the tenure charges and directing his dismissal.

Adding to the procedural complexity of this matter, the Board, following the Commissioner's determination of June 25, 1998 that he did not have the authority to declare a forfeiture of the respondent's position, renewed its motion seeking such declaration from the municipal court. After reviewing the matter, the municipal court

judge entered an order declaring a forfeiture, effective as of the date of the respondent's conviction.

Respondent appealed to the Law Division from the municipal court's determination. The Law Division reversed the municipal court's order of forfeiture, concluding that a district board did not have the authority to seek a declaration of forfeiture.

The Board then appealed to the Appellate Division from the Law Division's determination. As a result of that appeal, on November 28, 2000, the Appellate Division reversed the Law Division's determination and held that a district board does have the authority under N.J.S.A. 2C:51-2(g) to seek an order of forfeiture. In its decision, the Appellate Division also reinstated the municipal court's order declaring a forfeiture of respondent's employment, effective April 23, 1997, the date of his conviction. The respondent sought review of the Appellate Division's decision from the New Jersey Supreme Court. However, on March 20, 2001, the Supreme Court denied his petition for certification.

The Board then filed a motion with the State Board of Education, seeking dismissal of the matter before us on the grounds that both the appeal and cross-appeal are now moot by virtue of the judicial resolution of the forfeiture issue. No response to the motion was submitted on behalf of the respondent.

We agree with the Board that the Appellate Division's decision renders moot both the appeal and the cross-appeal in this matter. That decision settles that termination of respondent's tenured employment was proper. Further, in that the effective date of the forfeiture of respondent's employment, April 23, 1997, predates the certification of the

tenure charges against him and his suspension on September 2, 1997, there is no basis upon which he can claim salary for any portion of his suspension.

We therefore grant the Board's motion and dismiss the appeals in this matter.

June 6, 2001

Date of mailing _____