

EDU # 12388-95, 12390-95, 12391-95 and 12394-95 (consolidated)  
C # 172-99  
SB # 29-99  
App. Div. # A-5434-99T5  
App. Div. # M-1209-00  
App. Div. # M-2527-00  
EDU # 1588-01  
C # 304-01

RUBEN GONZALEZ, PAUL J. O'DONOHUE, :  
CLAUDE CRAIG AND STEVEN G. BLOCK, :  
PETITIONERS-APPELLANTS, : STATE BOARD OF EDUCATION  
V. : DECISION ON REMAND  
STATE-OPERATED SCHOOL DISTRICT :  
OF THE CITY OF NEWARK, ESSEX :  
COUNTY, :  
RESPONDENT-RESPONDENT. :  
\_\_\_\_\_ :

Decided by the Commissioner of Education, June 1, 1999

Decided by the State Board of Education, May 3, 2000

Remanded by the Appellate Division, December 8, 2000

Order on motion by the Appellate Division, February 2, 2001

Remanded by the State Board of Education, February 7, 2001

Order on motion by the Appellate Division, June 29, 2001

Decision on remand by the Assistant Commissioner of Education,  
September 14, 2001

For the Petitioners-Appellants, Medvin & Elberg (Philip Elberg, Esq., of Counsel)

For the Respondent-Respondent, Sills, Cummis, Radin, Tischman,  
Epstein & Gross (Cherie L. Maxwell, Esq., of Counsel)

The petitioners, who were employed by the Board of Education of the City of Newark at the time of the creation of a State-operated school district, claimed that their employment was terminated on August 17, 1995 without notice contrary to N.J.S.A. 18A:7A-44 and N.J.S.A. 18A:27-4.1, and they sought reinstatement with back pay. On May 3, 2000, the State Board of Education reversed the determination of the Commissioner of Education that the petitioners were not entitled to relief under N.J.S.A. 18A:7A-44, concluding that the State District Superintendent did not have the discretion to terminate the petitioners' employment under the facts presented by this case. Under the circumstances, however, we limited their relief to the salary that each of the petitioners would have earned from the date of their termination in August 1995 until effectuation of the reorganization on July 19, 1996, plus 60 days' pay in lieu of notice as provided for by N.J.S.A. 18A:7A-44(c).

On December 8, 2000, the Appellate Division granted the State-operated District's motion for a stay, pending determination of the appeal or further order of the Court, and remanded the matter to the State Board for computation of the amount of damages. The Court directed that the remand be completed within 30 days.<sup>1</sup>

On February 7, 2001, we remanded the matter to the Commissioner with the direction that he determine the amount of mitigation for each petitioner and calculate the damages due each of them. We indicated in so doing that:

As set forth in their proposal, petitioners contend that, as a matter of law, the damages in this case should be decided solely on the basis of the record that was developed before the Office of Administrative Law. According to petitioners, on that basis, they would be entitled to be paid at least the difference between what they actually earned prior

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<sup>1</sup> The deadline was subsequently extended until October 5, 2001.

to September 17, 1996, which was sixty days after the reorganization became "official," and what they would have earned had they not been terminated....

It is the District's position that the issue of damages was not settled during the proceedings before the Administrative Law Judge ("ALJ"). Although the District does not take issue with the annual salaries earned by petitioners at the time of their termination as set forth in the record that has been developed thus far, it does dispute whether there has been mitigation. It is the District's position that calculation of damages must include consideration of all alternative income received, as evidenced by tax returns and supporting documentation, and that because the record does not include the necessary information, it must be expanded in order to justify an award of any relief beyond payment in lieu of sixty days' notice....

Further, review of the record that was developed during the proceedings before the ALJ shows that it does not provide a sufficient basis upon which to calculate the damages that are due petitioners. Tr. 5/9/97 at 86-24 through 89-15; Tr. 7/7/98 at 99-21 through 102-19. Although the record indicates that petitioners did receive other income during the relevant period before they secured permanent employment, tr. 5/9/97 at 86-12, 88-16, 89-6; tr. 7/7/98 at 101-6, it does not include the information necessary to establish the total amount of income each received following his termination. In this respect, we stress that although the certification submitted by each petitioner after the close of hearing sets forth the amount of his salary prior to termination and the date and the salary of any permanent employment, none of the certifications include any information pertaining to other income, such as amounts received in the form of unemployment benefits. [Footnote omitted.] Consequently, although we did not specifically order petitioners to produce their tax returns when they submitted their proposal, we anticipated that counsel for petitioners would include this information along with some form of supporting documentation to evidence the accuracy of the information. Counsel, however, did not do so, and included instead only the certifications that were put into the record in September 1998 and his letter of November 20, 1998 to the ALJ setting forth his calculation of damages based on those certifications.

In short, the submissions of the parties reflect that there is a dispute between them concerning whether petitioners received income during the pertinent period in addition to the salary amounts set forth in their certifications that must be considered in calculating any damages. We find that the record establishes that petitioners did receive such income and conclude that the amounts that they received must be considered in calculating the damages to which they are entitled. Goodman v. London Metals Exchange, Inc., 86 N.J. 19 (1981). We further find that because the record before us does not establish the amount of additional income that each petitioner received, we are unable to calculate the damages without further development of the record.

State Board's Decision, slip op. at 3-5.

On August 17, 2001, the ALJ, following an additional hearing, concluded that if the petitioners ultimately prevailed, they were entitled to relief in the following amounts: O'Donohue—\$83,506.11; Craig—\$57,444; Gonzalez—\$88,353.98; and Block—\$80,863.89. In arriving at such computations, the ALJ offset the petitioners' damages by the full amount of unemployment compensation which they each had received in 1995 and 1996.

On September 14, 2001, the Assistant Commissioner adopted with modification the computation established by the ALJ. The Assistant Commissioner reduced the damages to which petitioner Block would be entitled by an additional \$32,500, finding that, as Block conceded, the State-operated District should have been credited for money he had earned while working at the Education Law Center following the termination of his position.

After a thorough review of the record, including all of the exceptions filed with the Assistant Commissioner, we affirm the decision of the Assistant Commissioner as modified herein.

Like the Assistant Commissioner, we stress that the broad mitigation principles applied in Goodman v. London Metals Exchange, Inc., 86 N.J. 19 (1981), have been held to be applicable to education matters. West Orange Supplemental Instructors Association v. Board of Education of the Township of West Orange, decided by the State Board of Education, April 1, 1992 [previous and subsequent agency history omitted], aff'd, Docket #A-4864-96T1 (App. Div. 1998). However, as the Assistant Commissioner correctly observed, it would not be appropriate to remand this matter at this point for the purpose of applying those principles even if we were not faced with the Appellate Division's impending deadline. The State-operated District did not file an appeal from the ALJ's interlocutory order limiting the question of mitigation to any income earned by the petitioners during the period at issue, nor has it challenged that determination in the instant appeal or provided any evidence relevant to broader mitigation principles.

We also concur with the Assistant Commissioner's determination that the record does not permit the computation of the accrued leave time to which the petitioners claim entitlement. Although the ALJ provided the petitioners with ample opportunity to submit information to the Assistant Commissioner that would be sufficient to calculate the monetary value of such leave time, they failed to do so. Nor have they offered any such information to the State Board, despite being given the opportunity to file an additional submission.<sup>2</sup>

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<sup>2</sup> By letter dated September 14, 2001, the Director of the State Board Appeals Office, noting the "severe time limitations" imposed by the Appellate Division, provided the parties with the opportunity to make any additional submissions to the State Board by September 25, 2001. In a letter dated September 19, 2001, Philip Elberg, Esq., counsel for the petitioners, indicated that he was not able to comply with that request,

However, we find that the petitioners' damages should not be reduced by unemployment benefits which were paid to them for any period after September 17, 1996. It is axiomatic that the damages to which the petitioners are entitled would be offset under mitigation principles only by earnings, including unemployment benefits, during the period in which they were entitled to damages. In our decision of May 3, 2000, we expressly limited the petitioners' relief to the salary that each of them would have earned from the date of their termination on August 17, 1995 until effectuation of the reorganization on July 19, 1996, plus 60 days' pay in lieu of notice as provided for by N.J.S.A. 18A:7A-44(c). Consequently, the period for which the petitioners would be entitled to damages ended on September 17, 1996. Similarly, any earnings, including unemployment compensation, for any period after that date cannot be used by the State-operated District to offset the amount of the petitioners' damages under mitigation principles.

Unfortunately, the petitioners did not provide any documentation or other evidence during the proceedings on remand before the ALJ that would be sufficient to establish how much, if any, of the unemployment compensation they received represented payments for the period subsequent to September 17, 1996.<sup>3</sup> Nor did the

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stating, "...I think it is unfair to ask me to put other matters and clients aside to handle this on an emergent basis. In the absence of a legal basis for such a requirement, I will not do it."

Nonetheless, on October 1, Mr. Elberg submitted a letter brief on behalf of the petitioners in which he maintained, inter alia, that the lack of adequate information resulted from the State-operated District's "refusal to provide that information and not anything the petitioners' [sic] have done. The petitioners had no additional information they could provide."

<sup>3</sup> Pursuant to their testimony and as documented on their tax returns, the petitioners received the following amounts as unemployment compensation in 1996: O'Donohue—\$9,204; Craig—\$7,434; and Gonzalez—\$4,248. During his testimony, Craig indicated that his unemployment benefits had been received "throughout the year 1996." Tr. 6/4/01, at 69. Block did not receive any unemployment benefits in 1996 since he was working full-time.

State-operated District elicit information regarding the specific amounts of unemployment benefits that represented payments for the period prior to that date that could be used to offset the petitioners' damages. Hence, the record does not permit us to compute the exact amount of the unemployment benefits received by petitioners Gonzalez, O'Donohue and Craig which could be used to reduce their damages under mitigation principles.

In addition, we reject the State-operated District's contention that the consulting income earned by petitioner Block in 1995 and 1996 should reduce the amount of damages to which he might otherwise be entitled. Block testified that his wife, who operated an educational publishing business, paid him a consulting fee in 1995 and 1996 on the advice of her accountant as a way to reduce her tax obligation. According to Block, the accountant had advised them that he could be a legal tax shelter for his wife since they regularly discussed tax matters and since he advised her on a number of matters with regard to her business. Tr. 6/4/01, at 85-87, 89-92. The ALJ found that the State-operated District had failed to establish that Block's testimony was not credible or that his tax returns reflected data contrary to his testimony. Under these particular circumstances, we conclude that such payments, which were designed to provide a tax shelter for his wife, do not constitute earned income for purposes of mitigation. See Ford v. Board of Review, 287 N.J. Super. 281 (App. Div. 1996). Thus, since Block did not receive any unemployment compensation in 1996, we agree with the Assistant Commissioner's computation of his damages.

The State-operated District also argues that any damages to which petitioner Gonzalez might be entitled should be reduced by the consulting income he received in

1996. Gonzalez testified that he had performed consulting work for the Hartford, Connecticut school district during the second half of 1996. Tr. 6/4/01, at 38, 40, 43, 52. As with the other petitioners, the ALJ found that the State-operated District had failed to establish that the testimony of Gonzalez was not credible or that his tax returns reflected data contrary to his testimony. Under the circumstances – in which we had directed that the petitioners be compensated for the salary that each of them would have earned in the State-operated District from the date of their termination in August 1995 until effectuation of the reorganization in July 1996, and the State-operated District has provided no evidence to counter the ALJ’s credibility determination regarding Gonzalez’s testimony that his consulting income had been received in the second half of 1996 – we conclude that only the consulting income received by Gonzalez prior to September 17, 1996 could be used to offset any damages to which he might be entitled. Again, however, we are not able to calculate on the basis of the record before us the amount of the consulting income earned by Gonzalez prior to September 17, 1996.

We recognize that the Court, in remanding this matter, charged us with the task of computing the amount of damages. However, as reflected in our decision, the record established by the parties in the Office of Administrative Law does not permit us to calculate with specificity 1) the amount of unemployment benefits received by petitioners Gonzalez, O’Donohue and Craig which represented payments for the period prior to September 17, 1996, and 2) whether Gonzalez had earned any consulting income prior to that date which could be used to offset his damages. Therefore, we cannot calculate the exact amount of damages to which those petitioners might be entitled. Ordinarily, we would remand this matter to the Commissioner for further



proceedings. However, as stated, the Court directed that the computation of damages be completed by October 5, 2001. Given this time restriction,<sup>4</sup> we are not able to direct a remand. However, by our decision today, we have established with specificity the framework under which a final calculation can be made.

Accordingly, as modified herein, we affirm the decision of the Assistant Commissioner.

October 3, 2001

Date of mailing \_\_\_\_\_

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<sup>4</sup> We note that the ALJ issued her initial decision on remand on August 17, 2001 and that the Assistant Commissioner issued his decision on September 14. The State Board could not begin its review until after the Assistant Commissioner had rendered his decision.