

AGENCY DKT. NO. 287-8/97

FRANK CARNEY, :
 :
 PETITIONER, :
 :
 V. : COMMISSIONER OF EDUCATION
 :
 BOARD OF EDUCATION OF THE CITY : DECISION
 OF UNION CITY, HUDSON COUNTY, :
 :
 RESPONDENT. :
 :

The record and initial decision issued by the Office of Administrative Law have been reviewed. Respondent's exceptions, which, pursuant to *N.J.A.C. 1:1-18.4*, were due to be filed with the Commissioner no later than August 2, 1999, were erroneously filed with the Director of the Office of Administrative Law. The exceptions were accepted for consideration by the Commissioner on August 12, 1999 so that the Board would not be prejudiced by the erroneous filing. *See* State Board of Education decision, *Arthur Krupp v. Board of Education of Union County Regional High School District No. 1, Union County*, 1991 *S.L.D.* 2568. Petitioner's reply exceptions were filed in accordance with the requirements of *N.J.A.C. 1:1-18.4*.

Respondent's exceptions aver that the Administrative Law Judge (ALJ) erred in concluding that "[a]s the [public forfeiture] statute now reads, without the order being issued the

mere conviction for an offense touching employment is not sufficient to effectively forfeit the employment.” (Initial Decision at p. 6) The Board argues that this interpretation ignores the

clear language of the forfeiture statute, *N.J.S.A. 2C:51-2 et seq.*, that the court was mandated to order forfeiture and reiterates its legal position that the Commissioner has the authority and responsibility to correct the municipal court judge's refusal and/or failure to order petitioner's forfeiture. In support thereof, respondent cites a number of decisions issued by other State agencies, such as the Department of Human Services and the Department of Corrections, which, respondent avers, continue to litigate issues of public forfeiture.

Respondent also excepts to the ALJ's conclusion on page seven of the initial decision that "[The tenure process] is unfortunately necessary if the Board intends to remove this miscreant," maintaining that this conclusion of law ignores the inherent authority of the Commissioner to terminate employment of a tenured employee found guilty of a forfeitable offense. With respect to the aforementioned, respondent contends, *inter alia*, that to require tenure removal proceedings in this matter would be nothing more than a waste of public funds, with the subsequent cost being borne by educational programs. It states:

Although [the] tenure law (*N.J.S.A. 18A:6-10 et seq.*) demands an administrative hearing prior to a tenured employee's termination, the criminal statute (*N.J.S.A. 2C:51-2 et seq.*) does not. The filing of tenure charges to effectuate the obvious conclusion that Carney committed a forfeitable offense is legally unnecessary and burdensome. The only purpose to be served by requiring a tenure hearing under the circumstances of this case would be to impose a two year back pay burden on the school system. (Respondent's Exceptions at p. 7)

Petitioner's reply exceptions, which incorporate those arguments previously set forth in the original brief to the ALJ in this matter, aver, *inter alia*, that respondent appears to be arguing that "common sense" requires that forfeiture be automatic, notwithstanding the specific language of *N.J.S.A. 2C:51-2(g)*, enacted in 1995, which states:

The fact that a court has declined to order forfeiture shall not preclude the public officer or public entity having authority to

remove the person convicted from seeking to remove or suspend the person from office, position or employment on the ground that the conduct giving rise to the conviction demonstrates that the person is unfit to hold the office, position or employment.

(Reply Exceptions at pp. 1-2)

Of this, petitioner states “[b]y the theory argued by Respondent, even in a situation such as that herein, where a prosecutor seeks a ruling that an individual convicted of a violation has forfeited his public employment, and the court declines to issue such a ruling, employment is forfeited regardless, rendering the amendment to *N.J.S.A. 2C:51-2* in Subsection (g) meaningless.” (Reply Exceptions at p. 2)

Upon review of the record and pleadings of the parties, including the exceptions filed by the parties, the Commissioner concurs with and adopts the recommended decision of the ALJ granting petitioner’s motion for summary decision, with the exception of one modification indicated below. In affirming the grant of summary decision to petitioner, the Commissioner notes for the record that the ALJ’s conclusions of law are consistent with the holdings of the Commissioner in prior cases such as *In the Matter of the Tenure Hearing of Robert Morton, School District of the City of Camden, Camden County*, decided July 30, 1999; *In the Matter of the Tenure Hearing of Alan P. Tighe, School District of the Township of Old Bridge, Middlesex County*, decided May 3, 1999; *In the Matter of the Tenure Hearing of Neal Ercolano, School District of the Township of Branchburg, Somerset County*, decided June 25, 1998; *In the Matter of the Tenure Hearing of Robert R. Vitacco, School District of the Borough of Lincoln Park, Morris County*, 97 N.J.A.R.2d (EDU) 449, appeal pending State Board; *In the Matter of the Tenure Hearing of Leonard J. Marano, School District of the Borough of Lincoln Park, Morris County*, decided February 13, 1997, appeal pending State Board, and others, all of which determined that the Commissioner does not have jurisdiction under *N.J.S.A. 2C:51-2* to enter

orders for forfeiture of public employment. Notwithstanding respondent's vigorous legal arguments otherwise, the Commissioner finds and determines that the ALJ correctly concluded that if a court declines to act to order forfeiture of public employment, then the only means for a board to seek removal of that individual from its employ is through the certifying of tenure charges pursuant to *N.J.S.A. 18A:6-10 et seq.* To hold otherwise would be contrary to the express statutory language of *N.J.S.A. 2C:51-2(g)*.

The Commissioner does not, however, adopt that portion of the ALJ's order which directs that any monies and benefits owed to petitioner be paid within 15 days of the issuance of the Commissioner's final decision. Certainly, any back pay and benefits which may be owed to petitioner must be paid by the Board in a reasonable period of time; however, to place a requirement that such payment be made by the Board within 15 days is simply too restrictive. Once the precise amount of the award is determined, petitioner may invoke the regulations for payment of post-hearing interest, *N.J.A.C. 6:24-1.16*, should the Board fail to satisfy the award within 60 days.

Accordingly, summary judgment is granted to petitioner, except as modified herein relative to the time frame for payment of back pay and benefits.*

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

AUGUST 30, 1999

*This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A. 18A:6-27 et seq.* and *N.J.A.C. 6:2-1.1 et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.