

304-01

RUBIN GONZALEZ, PAUL J. O'DONOHUE, :
CLAUDE CRAIG AND STEVEN G. BLOCK, :

PETITIONERS, :

:

COMMISSIONER OF EDUCATION

V. :

DECISION

STATE-OPERATED SCHOOL DISTRICT OF :
THE CITY OF NEWARK, ESSEX COUNTY, :

RESPONDENT. :

:

SYNOPSIS

Petitioners, employees of the Newark Board prior to takeover, argued they were terminated without notice, contrary to *N.J.S.A.* 18A:7A-44b and c. They sought reinstatement with back pay.

ALJ determined that petitioners' employment was terminated by the discretionary action of the State superintendent rather than abolishment of their positions pursuant to the takeover statute and, as at-will employees, they are not entitled to relief. Commissioner adopted findings and determination in initial decision as his own. Matter was dismissed.

The State Board reversed, holding that the State Superintendent did not have discretion to terminate petitioners under the circumstances of the case and that petitioners were entitled to the salary each would have earned from the time of termination until effectuation of reorganization, plus 60 days pay. The district appealed the State Board's determination to the Appellate Division and sought a stay of the State Board's decision, which was granted by the Court in December 2000. The Court also remanded the matter to the State Board for a calculation of damages within 30 days, the time for which was subsequently extended by the Court to October 5, 2001.

The case was sent to OAL for an initial calculation of damages pursuant to the directive of the State Board's remand decision issued in response to the Appellate Division decision. The ALJ determined the amounts due petitioners based on the proofs submitted by the parties.

The Commissioner affirmed the ALJ's decision with modification, noting that the lack of proofs and the time constraints imposed by the Appellate Division prohibited him from applying broader mitigation principles than those utilized by the ALJ. However, the Commissioner did reduce the award to petitioner Block by the amount of his salary earned while working for the Education Law Center during the period at issue.

September 14, 2001

OAL DKT. NOS. EDU 1588-01, 12388-95, 12390-95,
12391-95 AND 12394-95
AGENCY DKT. NOS. 441-11/95, 442-11/95,
443-11/95 AND 444-11/95

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RESPONDENT. :
_____ :

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioners' exceptions and the District's reply thereto are duly noted as submitted in accordance with *N.J.A.C.* 1:1-18.4.¹

Petitioners' exception arguments contend that: (1) respondent should not have been credited for unemployment benefits paid to petitioners; (2) the failure to award petitioners post-judgment interest for the period after May 3, 2000, the date upon which the State Board of Education determined that they were entitled to relief, is "incomprehensible;" and (3) petitioners are entitled to reinstatement in their former positions with the District. (Petitioners' Exceptions at 1-3)²

¹ The District's submission consists primarily of what it termed "cross-exceptions." However, upon review, the Assistant Commissioner finds that the District's arguments do not counter issues raised by petitioners' exceptions, but, instead, take exception to the ALJ's factual findings and conclusions of law. Therefore, they should have been filed in accordance with *N.J.A.C.* 1:1-18.4(a), and must be rejected as untimely. Accordingly, these arguments are neither summarized nor considered herein.

² Petitioners additionally object to the ALJ's dicta on page 12 of the Initial Decision, in which she opines that petitioners submitted pertinent documents to the record in an untimely fashion. In its single reply exception, the District notes its agreement with the ALJ's characterization.

Upon careful and independent review, the Assistant Commissioner, to whom this decision was delegated pursuant to *N.J.S.A.* 18A:4-34c, determines to affirm the Initial Decision of the ALJ, with modification, as set forth below.

As a preliminary matter, the Assistant Commissioner notes that the ALJ's Interlocutory Order of May 30, 2001 limits the question of mitigation by petitioners in this matter to any income during the period in question, but does not consider efforts by petitioners to secure alternative employment, or any efforts that petitioners arguably should have undertaken in this regard. (Initial Decision at 4-5) The ALJ bases her order upon her interpretation of the State Board of Education's Decision on Remand, issued on February 7, 2001, also finding that "*Goodman [v. London Metals Exchange, Inc., 86 N.J. 19 (1981)]* involved a civil rights matter, and I am not persuaded that the principles articulated therein, regarding mitigation efforts, are applicable to education matters." (Interlocutory Order, May 30, 2001 at 2) Although the Assistant Commissioner does not take issue with the ALJ's reliance upon her reading of the State Board's remand decision to support her order, he is compelled to note that, indeed, broader mitigation principles have been applied in education matters involving the award of back pay.³ However, while the Assistant Commissioner is mindful of his power to review, and, if necessary, reverse the ALJ's Order pursuant to *N.J.A.C.* 1:1-14.10(j),⁴ he is, in this instance, constrained by

³ See, *West Orange Supplemental Instructors Assoc., et al., v. Bd. of Ed. of the Township of West Orange*, 92 *N.J.A.R.2d* (EDU) 287, 298, wherein the Commissioner determined that: "(1) an individual must exercise reasonable diligence and ordinary care to mitigate damages, (citation omitted); (2) honest attempts to mitigate should be liberally construed; (3) the burden of the facts in mitigation of damages rests with the breaching employer, (citation omitted); and (4) the amount of an award to a wrongfully discharged employee is also subject to mitigation by the amount which could have been earned by the employee, (citation omitted)." (*West Orange, supra* at 298) As to the fourth finding, the State Board of Education elucidated: "[I]f it is shown that any of the Petitioners could have secured other employment by reasonable efforts, but did not, then the Board is entitled to have such Petitioners' back pay awards *reduced* by the salary they should have earned had they exercised the required diligence. (citation omitted)" (emphasis in text)

⁴ The Initial Decision states, "[t]he parties did not file interlocutory appeals, pursuant to *N.J.A.C.* 1:1-14.10, and that ruling is also binding, at this time." (Initial Decision at 5) However, the Assistant Commissioner underscores that, in accordance with *N.J.A.C.* 1:1-14.10(j), and except as limited by *N.J.A.C.* 1:1-14.10(m):

the Appellate Division's impending deadline in this matter⁵ to avoid a remand to the OAL to consider broader mitigation principles.⁶ In any event, as the ALJ noted, neither party appealed her interlocutory order when it was issued, nor does any party take exception to that order at this stage of the proceedings. Therefore, the District can fairly be said to have conceded to the ALJ's decision to limit mitigation in this matter.

The Assistant Commissioner adopts as final the relief calculated by the ALJ at pages 23 and 24 of the Initial Decision,⁷ with one exception. As petitioner Block concedes, respondent clearly should be credited for the money Block earned working at the Education Law Center (Petitioners' Exceptions at 1), during the period at issue. Therefore, the Assistant Commissioner concludes that Block's award shall be reduced by \$32,500. (Initial Decision at 13)

As to the issue of petitioners' entitlement to compensation for accumulated sick, vacation and/or personal leave, even assuming petitioners' request for the award of back pay may fairly encompass such a claim, and further assuming that petitioners are legally entitled to this relief, like the ALJ, the Assistant Commissioner finds that "there is insufficient information in the record upon which to calculate the relief to which petitioners would be entitled pertinent to

[A]ny order or ruling reviewable interlocutorily is subject to review by the agency head *after the judge renders the initial decision in the contested case*, even if an application for interlocutory review: 1. Was not made; 2. Was made but the agency head declined to review the order or ruling; or 3. Was made and not considered by the agency head within the established time frame. (*N.J.A.C.* 1:1-14.10(j)) (emphasis added)

⁵ The Appellate Division's Order of June 29, 2001 extends this time for decision in this matter by the Commissioner and the State Board of Education to October 5, 2001. Oral argument in the Appellate Division is set for October 22, 2001.

⁶ The Assistant Commissioner notes in this connection that the Initial Decision was delivered to him August 21, 2001; the file followed thereafter on August 31, 2001. Additionally, the ALJ's recommended decision left the record open until September 7, 2001 (see *infra*). Thus, the time for review of this matter has been compressed and, indeed, *cannot* even extend to the 45 days that he is ordinarily accorded by law. *N.J.S.A.* 52:14B-10.

⁷ The Assistant Commissioner notes in this connection that petitioners' awards were properly reduced by their respective amounts of unemployment compensation. (See, *West Orange, supra* at 301)

accrued leave time.” (Initial Decision at 21) In this regard, the Assistant Commissioner specifically notes that the ALJ permitted the record to remain open through September 7, 2001 to accommodate additional submissions directly to the Commissioner relative to this issue, but that neither party made a submission in response to this opportunity. (Initial Decision at 24)

Finally, the Assistant Commissioner finds that petitioners are not entitled to an award of postjudgment interest subsequent to May 3, 2000, where conclusions on *specific* damages were not reached in the State Board’s May 3, 2000 decision, where the Appellate Division subsequently issued an order on December 8, 2000 granting the District’s motion for stay of the State Board’s decision (Initial Decision at 2) and where the “precise amount of such claim” remained to be established in the record before the Commissioner, pursuant to *N.J.A.C. 6A:3-1.17*

Accordingly, the Initial Decision of the ALJ is affirmed with modification as set forth herein.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: 9/14/01

Date of Mailing: 9/14/01