

352-02

JOHN SCOTT AND CHARLES :
YARNALL, :

PETITIONERS, :

V. :

BOARD OF EDUCATION OF THE :
CITY OF TRENTON, MERCER :
COUNTY, AND BOARD OF :
EDUCATION OF THE MERCER :
COUNTY VOCATIONAL TECHNICAL :
SCHOOL DISTRICT, MERCER COUNTY, :

RESPONDENTS, :
AND :

COMMISSIONER OF EDUCATION

JAMES PUPALAIKIS, AUGUSTINE :
SPAGNOLA AND EDWARD SCHMIDT, :

DECISION

PETITIONERS, :

V. :

BOARD OF EDUCATION OF THE :
CITY OF TRENTON, MERCER :
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COUNTY VOCATIONAL TECHNICAL :
SCHOOL DISTRICT, MERCER COUNTY, :

RESPONDENTS. :

SYNOPSIS

Teaching staff members reduced in force in violation of their tenure/seniority rights sought reinstatement, back pay, interest and damages. During course of proceedings, several Petitioners settled and the Board conceded the employment claims of the two remaining Petitioners. However, issues remained for those two Petitioners with respect to pre-judgment interest, offset of back pay by unemployment benefits received and awarding of consequential damages.

ALJ awarded pre-judgment interest due to constructive bad faith on the part of the Board, denied consequential damages because the Commissioner lacked authority to award them, and directed that Petitioners' back pay awards not be offset by unemployment benefits received, but rather that the Board transmit any monies owed by Petitioners to the Department of Labor after award of back pay and entry of all appropriate contributions to pension, social security, and so forth.

Commissioner affirmed with modification to the recommended extent of pre-judgment interest and directed that Petitioners' back pay be offset by unemployment benefits received, with the Board to reimburse the Department of Labor.

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.

September 30, 2002

OAL DKT. NOS. EDU 10333-96 and EDU 6748-97 (CONSOLIDATED)
AGENCY DKT. NOS. 480-10/96 and 256-7/97

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The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. Timely exceptions were filed by Petitioners and respondent (“the Board”) in accordance with *N.J.A.C.* 1:1-18.4.¹

¹ As set forth in the Initial Decision at 2, the only parties remaining in this matter are Petitioners Yarnall and Pupalaikis and respondent Trenton Board of Education.

In exceptions relying on the arguments of their post-hearing brief, Petitioners urge that the Administrative Law Judge (ALJ) erred in failing to find bad faith on the part of the Board with respect to Petitioner Yarnall notwithstanding that pre-judgment interest was awarded him on other grounds, and in ruling that the Commissioner lacked jurisdiction to award consequential damages to a prevailing party. (Petitioners' Exceptions at 1-2) Petitioners also claim that the amount of lost wages due Petitioner Pupalaikis is \$31,301.50, not \$31,031.50 as stated in the Initial Decision. (Petitioners' Exceptions at 1)

The Board in turn urges rejection of any award of pre-judgment interest to Petitioners, arguing that the ALJ erred in finding constructive bad faith with regard to Petitioner Pupalaikis and misapplied the law with regard to Petitioner Yarnall by awarding him interest on equitable grounds rather than requiring a showing of bad faith. (Respondent's Exceptions at 1-5) The Board characterizes Pupalaikis' 1997 memo of objection to the Board's determination of his status as akin to a petition of appeal, so that there was no bad faith in the Board's failure to acquiesce to his claims forthwith. (Respondent's Exceptions at 6) The Board contends that it has been willing to pay Petitioners since March 30, 1998, excepting Petitioner Yarnall's payment for the period between September 1, 1997 and January 22, 1998,² but that no demand for payment was made. (Respondent's Exceptions at 5)

The Board also objects to the ALJ's determination that back pay owed to Petitioners should not be offset by monies received in unemployment compensation. The Board argues that the more appropriate procedure, as accepted by the Commissioner for parties to this matter who settled their claims, is to have the Board reduce the amount of

² That entitlement was not conceded until July 2, 2002.

back wages by the amount of unemployment compensation received and then remit this amount to the Department of Labor upon demand by that agency. (Respondent's Exceptions at 7)

Finally, the Board notes that Petitioners' contention with respect to the amount of lost wages due Petitioner Pupalaikis is clearly contrary to the Joint Stipulation of Fact (J-1 in Evidence). (Respondent's Exceptions at 7)

Upon careful review and consideration, the Commissioner adopts the Initial Decision with modification as set forth below.

With respect to the amount of lost wages due Petitioner Pupalaikis, Petitioners' objection is readily resolved. Throughout the record of this matter, the calculation included in the Joint Stipulation of Fact (J-1 in Evidence), and incorporated into the Initial Decision at 8, recurs undisputed. The sole exception is found in the January 23, 2001 Brief of Petitioners at 3, wherein the calculation appears as follows:

Lost Salary: 09/01/97 through 02/09/98

Contract earnings 1997-98	\$56,891.00
Paid 10 payments @\$2,585.95	\$25,589.50 (<i>sic; should be \$25,859.50</i>)
Balance for 09/01/97 - 02/09/98	\$31,301.50

Thus, the amount represented in the body of Petitioners' brief, and presumably relied upon in their exceptions, results from an error in transposition not found elsewhere in the record; indeed, the actual stipulation document included in the Appendix to that same brief shows the Balance as \$31,031.50 (Appendix of Petitioners at Pa1). Therefore, the calculation set forth in the Initial Decision is affirmed.

With respect to the question of the Commissioner's authority to award consequential damages, Petitioners offer nothing more on exception than the single citation previously presented to the ALJ. Like the ALJ, the Commissioner finds

Petitioners' argument unpersuasive, and he fully concurs with, and adopts as his own, the discussion of the Initial Decision at 12-13.

With respect to the awarding of pre-judgment interest, the Commissioner concurs with the substantive thrust of the ALJ's reasoning, but modifies the recommended conclusions of the Initial Decision. Initially, the Commissioner concurs that the Board's failure to return Petitioner Pupalaikis to employment prior to the beginning of the 1997-98 school year satisfies the regulatory standard for awarding of interest, in that Pupalaikis' April 1997 memorandum (Initial Decision at 7) is not a legal argument or allegation of wrongdoing, akin to a petition of appeal as claimed by the Board, but rather a series of immediately verifiable factual statements, the application of which undeniably accorded Pupalaikis a seniority status higher than that of persons being continued in employment. Under these circumstances, the Commissioner agrees with the ALJ that the Board's failure to act on this information until its error was conceded and Pupalaikis returned to employment in February 1998 represents a knowing disregard of the law amounting to constructive bad faith.

The Commissioner further agrees that a similar conclusion can *not* be supported with respect to Petitioner Yarnall. Yarnall's letter protesting his termination, set forth in full in the Initial Decision at 4-6, makes a series of allegations inviting investigation and adjudication; unlike Pupalaikis' communication, it does not present specific factual information enabling ready correction of calculation and placement errors. Indeed, with respect to employment information, Yarnall does no more than state that the Board's purported concern with cost was belied by the fact that "teachers without a Bachelors Degree, untenured with less seniority and/or without traditional certification's (*sic*) were not terminated prior to [his] release." (Initial Decision at 5,

quoting C-1 in evidence) Under these circumstances, the Commissioner, like the ALJ, cannot find that interest should be paid for the period prior to the Board's concession of Yarnall's entitlement.

Once Yarnall's entitlement was conceded, however, the two Petitioners shared substantially the same posture, as recognized by the ALJ. Whatever other issues may have remained in dispute among the parties, there was no dispute about Petitioners' respective entitlements to at least that portion of back pay not affected by unemployment compensation offset, and there appears to be no reason why the Board could not and should not have remitted these monies to Petitioners forthwith. While the Board did on various occasions offer to make payment as it claims, the offers on record are all couched in terms of *settlement*, acceptance of which would have implied or required Petitioners' concession on the still-disputed issues of interest, offset for unemployment compensation and damages. Under these circumstances, the Commissioner finds awarding of pre-judgment interest fully consistent with applicable rule. However, the Commissioner finds that such interest should not be awarded on the entire amount of back pay withheld from Petitioners, but only on the difference between that amount and unemployment compensation payments received, since Petitioners have had the benefit of those payments and the question of the Board's entitlement to an offset for them remained (indeed, still remains) in dispute.

Finally, as to the question of whether the back pay award owed to Petitioners should itself be offset by the amount of monies received in unemployment compensation, the Commissioner fully concurs with the ALJ that neither Petitioners nor the Board should be unjustly enriched by operation of the unemployment compensation system. However, the Commissioner also notes that, historically, where issues of back

pay have arisen between a board and a prevailing employee, the Commissioner and State Board have directed the board to offset the amount of back pay awarded to the employee by the amount of unemployment compensation received, with the board in turn reimbursing the Department of Labor, Division of Unemployment Compensation, for such amount. See, for example, *Rita Hibo and Susan Arillo v. Board of Education of the West Essex Regional School District, Essex County*, decided by the Commissioner December 29, 1997; *Telford Berkebile et al. v. Board of Education of the Borough of South River, Middlesex County*, decided by the Commissioner July 28, 1997; *Tracy Summers v. Board of Education of the City of Union, Hudson County*, decided by the Commissioner August 7, 1997; and *Ruben Gonzalez et al. v. State-Operated School District of the City of Newark, Essex County* decided by the Commissioner September 14, 2001, affirmed by the State Board October 3, 2001) In *Berkebile, supra*, the Commissioner expressly noted in modifying the ALJ's determination to allow Petitioners to arrange for reimbursement to the Department of Labor on their own rather than having their back pay awards offset by the board, that he "favor[ed] such approach as efficient and consistent with the approach set forth in *Willis v. Dyer, supra*, wherein the Appellate Division held that unemployment benefits received by plaintiff should be deducted by the township from the back pay due him. See also *Labor and Industry Dept. v. Smalls*, 153 *N.J. Super.* 411 (App. Div. 1977)." (Slip Opinion at 15)³

Accordingly, the Initial Decision of the Office of Administrative Law is affirmed with modification as set forth herein, and the respondent Board of Education is directed to remit compensation to Petitioners as follows:

³ The Commissioner notes that *N.J.S.A.* 43:21-5(b), which pertains to individuals returned to employment with back pay following disciplinary proceedings, provides that unemployment benefits received by such individuals shall be returned to the Division but does not establish a specific mechanism for such return; neither is any mechanism of this type set forth in rule.

James Pupalais

Lost wages 9/1/97 through 2/9/98	\$31,031.50
Medical Bills - Cobra Payments	+2,023.38
Less unemployment insurance benefits	<u>-11,594.00</u>
Total	\$21,460.88

Pre-judgment interest calculated from September 1, 1997 in accordance with *N.J.A.C.* 6A:3-1.17(d) shall also be awarded on the total above. Petitioner and the Board shall cooperate in obtaining a determination from the Division of Unemployment Insurance as to Petitioner's entitlement to the \$3,366 in benefits paid for July and August (\$11,594 - \$8,228). Should it be determined that Petitioner was entitled to these monies, the Board shall remit them to him forthwith, since Petitioner's back salary award was offset by this amount; otherwise, they shall be reimbursed to the Division in accordance with its ruling.

Charles Yarnall

Lost wages 11/26/96 through 6/30/97	\$37,152.30
Medical Bills/Insurance	<u>+4,491.75</u>
Total	\$41,644.05
1997-98 lost wages	+29,045.60
Less unemployment insurance benefits	<u>-18,824.00</u>
Total	\$51,865.65

Pre-judgment interest calculated from May 30, 1998 in accordance with *N.J.A.C.* 6A:3-1.17(d) shall also be awarded on the 1996-97 total above, *after* that portion of Petitioner's unemployment insurance award attributable to this period, including the July-August amount of \$2896 (\$18,824 - \$15,928), has been deducted. Pre-judgment interest calculated from August 31, 2002 in accordance with *N.J.A.C.* 6A:3-1.17(d) shall also be awarded on any amount of 1997-98 wages still remaining unpaid, *after* the portion of Petitioner's unemployment insurance award attributable to this period has been deducted. Petitioner and the Board shall cooperate in obtaining a determination from the Division of Unemployment Insurance as to Petitioner's entitlement to the \$2,896 in benefits paid

him for July and August. Should it be determined that Petitioner was entitled to these monies, the Board shall remit them to him forthwith, since Petitioner's back salary award was offset by this amount; otherwise, they shall be reimbursed to the Division in accordance with its ruling.

A copy of this decision shall be forwarded to the Department of Labor, Division of Unemployment Compensation, so as to ensure prompt reimbursement of monies owed by the Board.

IT IS SO ORDERED.⁴

COMMISSIONER OF EDUCATION

Date of Issue: September 30, 2002

Date of Mailing: October 1, 2002

⁴ This decision, as the Commissioner's final determination 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. 6A:4-1.1 et seq.* Commissioner decisions are deemed filed three days after the date of mailing to the parties.