

DAVID SIMS, :
PETITIONER, : COMMISSIONER OF EDUCATION
V. : DECISION
BOARD OF EDUCATION OF THE :
CITY OF HACKENSACK, :
BERGEN COUNTY, :
RESPONDENT. :

SYNOPSIS

The petitioner – who is employed as a non-tenured instructional aide in respondent Board’s school district – contended that the Board violated his rights under *N.J.S.A. 18A:6-8.3* when it suspended him without pay from June 5, 2014 until the conclusion of the 2013-2014 school year, for a total of thirteen work days. The Board asserted that *N.J.S.A. 18A:6-8.3* does not prohibit the disciplinary action it took against petitioner, which came in the aftermath of a finding that he had engaged in unbecoming conduct. The parties filed cross motions for summary decision.

The ALJ found, *inter alia*, that: the issue to be determined was whether *N.J.S.A. 18A:6-8.3* prohibits the Board from placing petitioner on unpaid status until after he has exhausted all available appeals of the Board’s determination; there are no material facts in dispute, and the matter is ripe for summary decision; the plain language of *N.J.S.A. 18A:6-8.3* prohibits the Board from suspending the pay of an employee during the pendency of the contractual grievance process and any appeals therefrom; and the statute makes it clear that a suspension must be with pay until an investigation is completed, or the employee is indicted or served with formal tenure charges; accordingly, that an unpaid suspension of thirteen days may only be imposed on the petitioner after his appeals of the discipline imposed upon him have been exhausted. The ALJ concluded that the Board violated the provisions of *N.J.S.A. 18A:6-8.3* when it suspended the petitioner without pay for thirteen days in June 2014, and ordered the Board to reimburse petitioner for all lost salary, benefits and emoluments of employment during that period.

Upon review, the Commissioner concurred with the ALJ’s findings and conclusions, and adopted the Initial Decision as the final decision in this matter.

<p>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.</p>

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Before the Commissioner is a demand from petitioner, David Sims, for reimbursement of salary which was withheld by respondent Hackensack Board of Education during a thirteen-day suspension imposed upon petitioner for alleged unbecoming conduct. Petitioner contends that the suspension without pay violated his rights under *N.J.S.A. 18A:6-8.3*. After review of the record and Initial Decision of the Office of Administrative Law (OAL), the Commissioner agrees.

As was found by the Administrative Law Judge (ALJ) in an Initial Decision dated December 5, 2014, petitioner is employed by respondent as an instructional aide. As a result of a May 1, 2014 police report describing remarks allegedly made by petitioner to a police officer, respondent's Superintendent of Schools, Karen Lewis, suspended petitioner with pay pending an investigation into the alleged unbecoming conduct. A disciplinary hearing took place before Superintendent Lewis on June 5, 2014, at which she found that petitioner had engaged in unbecoming conduct. Lewis suspended petitioner without pay for the balance of the school year,

i.e., thirteen days, and directed petitioner to participate in sensitivity training. The suspension without pay precipitated the instant petition to the Commissioner on June 13, 2014.

Thereafter, petitioner was granted a third-step grievance hearing before the respondent board to appeal the discipline imposed by Lewis – in accordance with the grievance procedures contained in the collective bargaining agreement (CBA) between respondent and the Hackensack Education Association. At the conclusion of the July 29, 2014 hearing, the respondent board upheld Superintendent Lewis’ findings, as well as the thirteen-day suspension without pay. Petitioner appealed respondent’s decision and, pursuant to the CBA, said appeal is scheduled to be heard by an arbitrator on January 21, 2015.

During the same time period, petitioner’s appeal to the Commissioner progressed in the OAL via cross motions for summary disposition. The ALJ closed the record on November 24, 2014 and issued the above-referenced Initial Decision on December 5, 2014. The decision granted summary disposition to petitioner, ordering respondent to reimburse petitioner “for all lost salary, benefits, and emoluments of employment during the period of his thirteen-day suspension in June 2014.” (Initial Decision at 6)

Having first determined that the matter was appropriate for summary decision, the ALJ studied the wording of – and intent behind – *N.J.S.A. 18A:6-8.3*, which provides that:

[a]ny employee or officer of a board of education in this State who is suspended from his employment, office or position, other than by reason of indictment, pending any investigation, hearing or trial or any appeal therefrom, shall receive his full pay or salary during such period of suspension, except that in the event of charges against such employee or officer brought before the board of education or the Commissioner of education pursuant to law, such suspension may be with or without pay or salary as provided in chapter 6 of which this section is a supplement.

She concluded that since the statute applies to all employees of public school boards, it barred respondent from withholding petitioner’s pay until all proceedings regarding petitioner’s alleged

unbecoming conduct, including any appeal therefrom, came to a conclusion. (Initial Decision at 5) Noting that an arbitration concerning the allegations of unbecoming conduct was still pending, the ALJ found that petitioner's salary had been prematurely withheld. (*Ibid.*) The ALJ also reviewed the collective bargaining agreement between respondent and the Hackensack Education Association, and found that it contained no provisions that would allow respondent to impose discipline upon petitioner before the proceedings regarding his behavior – including his appeal – were resolved. (*Id.* at 5-6)

Respondent filed exceptions to the Initial Decision on December 19, 2014. They are, on the whole, without merit. However, the Commissioner will address respondent's contention that it was not required to pay petitioner a salary during his suspension – by virtue of the provision in *N.J.S.A.* 18A:6-8.3 that allows boards of education to impose unpaid suspensions where “charges” against the employees have been “brought before the board of education or the Commissioner of Education.”

As mentioned above, *N.J.S.A.* 18A:6-8.3 protects a suspended board of education employee from the deprivation of his salary while – as in this case – an investigation, hearing and/or appeal process progresses, unless one or both of the following two exceptions are present: 1) an indictment has been brought against him, or 2) charges against him have been brought before the board of education or Commissioner – in which case the board may issue a suspension with or without pay. Respondent does not assert that petitioner has been the subject of an indictment. Rather, it contends that “charges” against petitioner were brought before the board of education, thereby implicating the above-identified second exception in *N.J.S.A.* 18A:6-8.3.

Respondent's analysis begins with the premise that because district superintendents are described, in *N.J.S.A.* 18A:17-20(a), as members of boards of educations, the

transmission to respondent's Superintendent Lewis of information about alleged infractions by petitioner somehow constituted the institution of 'charges' before the board of education.

Relying on this premise, respondent urges that Lewis's consideration of the report of petitioner's alleged unbecoming conduct falls into the above-articulated second category of exceptions to the general rule that suspended employees must be paid salary pending investigations, hearings or trials. (Respondent's Exceptions at 2.) The Commissioner cannot agree.

At the outset, "charges" are generally understood to be formal accusations against tenured employees, not instructional aides such as petitioner – who are not tenure eligible. The imposition of discipline against instructional aides proceeds pursuant to the parameters of the relevant collective bargaining agreement. It is undisputed that 1) such contractual proceedings were held for petitioner – before Superintendent Lewis and before the respondent board, 2) petitioner appealed the resulting suspension, and 3) that an arbitration has been scheduled – pursuant to the procedures set forth in the collective bargaining contract.

Second, discipline of tenured employees is meted out solely by voting members of boards of education:

After consideration of the charge, statement of position and statements of evidence presented to it, the board shall determine by majority vote of its full membership whether there is probable cause to credit the evidence in support of the charge and whether such charge, if credited, is sufficient to warrant a dismissal or reduction of salary.

N.J.S.A. 18A:6-11. [Emphasis added.]

[A] district board of education shall determine by a majority vote of its full membership . . . whether there is probable cause to credit the evidence in support of the [tenure] charges and whether such charges are sufficient to warrant a dismissal or reduction of salary."

N.J.A.C. 6A:3-5.1(b)(4) [Emphasis added.]

In light of the clear directive of *N.J.S.A.* 18A:17-20(a) that a superintendent of schools "shall have no vote" as to educational matters at board meetings, superintendents are not board members for purposes of the prosecution of "charges." Thus, the fact that the allegations against

petitioner were brought to Superintendent Lewis, and adjudicated by her at the first step, signifies that the matter was governed by contractual disciplinary and grievance procedures – not by the statutory requirements governing the adjudication of “charges.”

In summary, the transmission to Lewis of a May 1, 2014 report of petitioner’s remarks to a police officer was not a “charge,” and her investigation and hearing of the matter did not constitute a proceeding “before the board of education.” The second exception in *N.J.S.A.* 18A:6-8.3 may therefore not be invoked by respondent.

Accordingly, summary disposition is granted in favor of petitioner and respondent’s cross-motion for summary disposition is denied. The Initial Decision is adopted, and respondent will reimburse petitioner for all lost salary, benefits, and emoluments of employment during the period of his thirteen-day suspension in June 2014.

IT IS SO ORDERED.¹

COMMISSIONER OF EDUCATION

Date of Decision: January 20, 2015

Date of Mailing: January 22, 2015

¹ This decision, as the final decision of the State administrative agency, may be appealed to the Superior Court, Appellate Division pursuant to *N.J.S.A.* 18A:11-3 and *N.J.A.C.* 6A:3-7.6.