114-20

New Jersey Commissioner of Education

Final Decision on Remand

Luiz Vazquez,

Petitioner,

v.

Board of Education of the Borough of Roselle, Union County,

Respondent.

Audley Bridges,

Petitioner,

v.

Board of Education of the Borough of Roselle, Union County,

Respondent.

Rebecca Richardson,

Petitioner,

v.

Board of Education of the Borough of Roselle, Union County,

Respondent.

Danaayaal Salaam,

Petitioner,

v.

Board of Education of the Borough of Roselle, Union County,

Respondent.

Mary Repousis,

Petitioner,

v.

Board of Education of the Borough of
Roselle, Union County,

Respondent.

Synopsis

In this consolidated matter on remand, the petitioners – all tenured teachers – challenged salary reductions imposed upon them by the respondent Board as a penalty pursuant to the Board's policy regarding tardiness. Petitioners asserted that the reduction in pay violated their tenure rights. The parties filed cross motions for summary decision. An Initial Decision was issued by the Office of Administrative Law (OAL) in November 2019. Subsequent to a review of the case, the Commissioner remanded the matter to the OAL in February 2020 to allow the parties to submit reply briefs regarding their cross motions for summary decision.

On remand, the ALJ found, *inter alia*, that: there are no material facts at issue in this case, and the matter is ripe for summary decision; all petitioners are tenured teachers and were reduced in salary without any hearing based upon the Board's Policy 3151 regarding tardiness; such action violated the requirements of *N.J.S.A.* 34:13A-24, as Policy 3151 was not negotiated with the appropriate collective bargaining unit; and the Board's action in reducing petitioners' salaries must be reversed. Accordingly, the ALJ granted the petitioners' motion for summary decision and denied respondent Board's cross motion.

Upon review, the Commissioner rejected the Initial Decision of the OAL and granted summary decision to the Board. In so doing, the Commissioner found, *inter alia*, that the docking of petitioners' salaries was consistent with the law, as *N.J.S.A.* 34:13A-24(c) provides that "[f]ines and suspensions for minor discipline shall not constitute a reduction in compensation pursuant to the provisions of *N.J.S.A.*18A:6-10," and this provision is not limited to minor discipline defined by a negotiated collective bargaining agreement. The Commissioner further found that, consistent with *Ferreiro v. Bd. of Educ. of the City of Elizabeth, Union Cty.*, Commissioner Decision No. 185-19 (July 22, 2019), the docking of petitioners' pay is the type of minor discipline contemplated by *N.J.S.A.* 34:13A-24; as such, the docking of petitioners' pay for excessive tardiness was not a violation of their tenure rights pursuant to *N.J.S.A.* 18A:6-10. The petition was dismissed.

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.

May 11, 2020

OAL Dkt. No. EDU 01933-20
(EDU 09004-19, 09007-19, 09009-19, 09096-19, and 09103-19 on Remand)
Agency Dkt. Nos. 127-6/19, 126-6/19, 125-6/19, 129-6/19, and 130-6/19

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Roselle, Union County,

Respondent.

Mary Repousis,

Petitioner,

v.

Board of Education of the Borough of
Roselle, Union County,

Respondent.

The record of this matter, the March 26, 2020 Initial Decision of the Office of Administrative Law (OAL), the exceptions filed by respondent pursuant to *N.J.A.C.* 1:1-18.4, and the reply thereto by petitioners have been reviewed.[1] This matter concerns a challenge by petitioners, who are tenured teachers, to the Board's decision to reduce their salaries pursuant to a Board policy regarding tardiness. The Administrative Law Judge (ALJ) found that the Board's action in reducing petitioners' salaries must be reversed because there was no collective

[1] This case was remanded to the OAL in February 2020 following the Commissioner's consideration of an Initial Decision dated November 25, 2019. The Commissioner remanded the matter to allow the parties to submit reply briefs regarding their cross motions for summary decision.

bargaining agreement addressing excessive tardiness; accordingly, the ALJ granted petitioners' motion for summary decision and denied the Board's motion for summary decision.

In its exceptions, the Board argues that the relevant statute specifically provides that fines for minor discipline do not constitute a reduction in compensation under the Tenure Act and that such fines are permissible. The Board further contends that the statute's plain language allows these fines even in the absence of a negotiated collective bargaining agreement. The Board cites to *Ferreiro v. Bd. of Educ. of the City of Elizabeth, Union Cty.*, Commissioner Decision No. 185-19 (July 22, 2019), which held that the docking of pay for excessive tardiness is the type of minor discipline contemplated by the statute. According to the respondent, the ALJ improperly relied on the fact that the petitioner in *Ferreiro* was subject to a negotiated collective bargaining agreement that addressed excessive tardiness as a reason to distinguish that matter from the one at issue here.

In reply, petitioners argue that fines for minor discipline are only permissible when derived from a collectively negotiated agreement. According to petitioners, because there is no agreement in place, the Board may only impose discipline that is not prohibited by law; here, because reductions in compensation are prohibited by tenure law, the Board cannot impose any fines.

Upon review, the Commissioner disagrees with the ALJ and concludes that the Board's action in docking the petitioners' salaries was consistent with the law. *N.J.S.A.* 34:13A-24(c) provides that "[f]ines and suspensions for minor discipline shall not constitute a reduction in compensation pursuant to the provisions of *N.J.S.A.* 18A:6-10." This provision is not limited to minor discipline defined by a negotiated collective bargaining agreement. Furthermore, *N.J.S.A.* 34:13A-22 defines minor discipline as including "various forms of fines and

suspensions, but does not include tenure charges . . . or the withholding of increments . . . letters of reprimand, or suspensions with pay[.]" Consistent with the *Ferreiro* decision, *supra*, the Commissioner finds that the docking of the petitioners' pay is the type of minor discipline contemplated by *N.J.S.A.* 34:13A-24. As such, the docking of the petitioners' pay for excessive tardiness is not a violation of their tenure rights under *N.J.S.A.* 18A:6-10.[2]

Accordingly, the Initial Decision of the OAL is rejected; summary decision is granted in favor of the Board and petitioners' motion for summary decision is denied. The petition of appeal is hereby dismissed.

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: May 8, 2020
Date of Mailing: May 8, 2020

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[2] Because the Commissioner bases this decision on the provisions of *N.J.S.A.* 34:13A-24, there is no need to reach the question of whether petitioners waived their right to contest Board Policy 3151 regarding excessive tardiness.

[3] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A* 18A:6-9.1).

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDU 01933-20

(ON REMAND EDU 09004-19, et al)

LUIZ VAZQUEZ, AUDLEY BRIDGES, REBECCA RICHARDSON, DANAAYAAL SALAM & MARY REPOUSIS,

Petitioners,

v.

BOROUGH OF ROSELLE BOARD OF EDUCATION, UNION COUNTY.,

Respondent.

Nicholas Poberezhsky., Esq. on behalf of petitioners (Caruso Smith Picini, attornyes)

Margaret A. Miller, Esq. on behalf of respondent Board of Education of the Borough of Roselle

Record Closed: March 13, 2020 Decided: March 26, 2020

BEFORE: **KIMBERLY A. MOSS,** ALJ:

These matters were filed at the Office of Administrative Law (OAL) and consolidated (under OAL Docket Number EDU 09004-19, et al) on August 28, 2019. On October 31, 2019, both parties filed a motion for summary decision. I rendered a Summary Decision on November 25, 2019.

By Order dated February 4, 2020, the Commissioner remanded the matter to the back to the OAL ". . . . to allow the parties to submit reply briefs regarding cross motions for summary decision"

On February 7, 2020, these matters were remanded to the OAL. By email dated February 14, 2020, under my direction, my assistant contacted the parties, via email, requesting the parties submit simultaneous replies in accordance with the remand. Petitioners were reduced in salary due to respondent's policy regarding tardiness. Both parties state that there were no material questions of fact.

FACTUAL DISCUSSION

The following are uncontested facts:

Luis Vasquez (Vasquez)is a tenured member of the teaching staff that has been employed by the Borough of Roselle Board of Education (Board) for twelve years. Audley Bridges (Bridges) is a tenured member of the teaching staff that has been employed by the Board for twenty years. Rebecca Richardson (Richardson) is a tenured member of the teaching staff that has been employed by Board for sixteen years. Danaayaal Salaam (Salaam)is a tenured member of the teaching staff that has been employed by the Board for five years. Mary Repousis (Repousis) is a tenured member of the teaching staff that has been employed by the Board for sixteen years.

On or About January 6, 2014, the Board adopted District Policy 3151 "Assessment of Pay" (Policy 3151) which acknowledges the proper performance of a teaching staff member's professional duties, requires the punctual commencement of his/her assigned duties to properly discharge his/her professional duties, imposes a list of penalties to be imposed against a staff member who routinely fail to timely report for work each day.

The Roselle Education Association (REA) is a duly organized employee representative and the negotiation representative for all teachers. The Board and REA are parties to collective negotiation agreement from July 1, 2014 through June 30, 2017.

The successor agreement which would extend from July 1, 2017 to June 30, 2021 has not been finalized.

In accordance with Policy 3151, on March 15, 2019 and March 30, 2019, Vasquez salary was reduced by $266.30 and $56.06 respectively because he was tardy fourteen times during the 2018-2019 school year. In accordance with Policy 3151, on March 29, 2019 and April 15, 2019, Bridges salary was reduced $1,243.09 for each pay period because she was tardy eighty-five times during the 2018-2019 school year. In accordance with Policy 3151, on March 29, 2019, Richardson's salary was reduced by $521.65 because she was tardy nineteen times during the 2018-2019 school year. In accordance with Policy 3151, on March 29, 2019 and April 15, 2019 Salaam's salaray was reduced by $329.34 and $232.50 respectively because he was tardy twenty-four times during the 2018-2019 school year. In accordance with Policy 3151 on March 15, 2019 Repousis salary was reduced by $151.18 because she was tardy twenty-four times.

Petitioners contend that the collective bargaining agreement between the Board and REA does not authorize the Board to impose minor disciplinary action in the form of fines or reduction of compensation. Petitioners contend that they and REA did not accept, negotiate for or agree to adhere to Policy 3151. Petitioners also contend that they were not afforded a hearing or an opportunity to challenge or dispute the fines imposed upon them. They were not brought up on tenure charges or subject to criminal indictment.

LEGAL ANALYSIS AND CONCLUSION

The rules governing motions for summary decision in an OAL matter are embodied N.J.A.C. 1:1-12.5. When there is no genuine dispute as to any material fact and the moving party demonstrates that it is entitled to judgement as a matter of law, its motion for summary judgment should be granted. Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67 (1954) Under N.J.A.C. 1:1-12.5(b), the determination to grant summary judgment should be based on the papers presented as well as any affidavits, which may have been filed with the application. In order for the adverse, i.e., the non-moving party to prevail in such an application, responding affidavits must be submitted

showing that there is indeed a genuine issue of fact, which can only be determined in an evidentiary proceeding. The Court in Brill v. Guardian Life Insurance Co. of American, 142 N.J. 520, 523 (1995), set the standard to be applied when deciding a motion for summary judgment. Therein the Court stated:

> The determination whether there exists a genuine issue with respect to a material fact challenged requires the Motion Judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party… are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party.

To avoid entry of summary judgment, the non-moving party must come forward with legally competent facts essential to proving an element of its cause of action. Brill 142 N.J. at 536-537. If non-movant fails to do so, the moving party is entitled to summary judgment. Moreover, even if the non-movant comes forward with some evidence, the Courts must grant summary judgment if the evidence is "so one-sided that [movant] must prevail as a matter of law." Brill 142 N.J. 536. If the non-moving party's evidence is merely colorable, or is not significantly probative, summary judgment should not be denied. See Bowles v. City of Camden, 993 F. Supp. 255, 261 (D.N.J. 1998). The New Jersey Supreme Court's standard for summary judgment is thus designed to "liberalize the standards so as to permit summary judgment in a larger number of cases" due to the perception that we live in "a time of great increase in litigation and one in which many meritless cases are filed. Brill 142 N.J. 536, 539 (1995). Even where a statute calls for a "hearing," where a motion for summary decision is made and supported by documentary evidence and where the objector submits no evidence to demonstrate a genuine issue of material fact, the motion procedure constitutes the hearing and no trial-type hearing is necessary. Contini v. Newark Bd. of Educ., 286 N.J. Super. 106, 120-21 (App. Div. 1995), certif. denied, 145 N.J. 372 (1996); see also South Brunswick Asphalt v. Dep't of Envtl. Prot., No. A-693-98T5 (App. Div. April 10, 2000), certif. denied, 165 N.J. 487 (2000).

An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the

issues to the trier of fact. The determination of domicile as well as family hardship requires that I make credibility determinations regarding the critical facts.

Based upon documentation presented by the petitioners as well as the respondent's, I **CONCLUDE** that there are no genuine issues of material fact in this matter.

N.J.S.A. 18A:6-10 provides:

> No person shall be dismissed or reduced in compensation,
> (a) if he is or shall be under tenure of office, position or employment during good behavior and efficiency in the public-school system of the state, or
>
> (b) if he is or shall be under tenure of office, position or employment during good behavior and efficiency as a supervisor, teacher or in any other teaching capacity in the Marie H. Katzenbach school for the deaf, or in any other educational institution conducted under the supervision of the commissioner; except for inefficiency, incapacity, unbecoming conduct, or other just cause, and then only after a hearing held pursuant to this subarticle, by the commissioner, or a person appointed by him to act in his behalf, after a written charge or charges, of the cause or causes of complaint, shall have been preferred against such person, signed by the person or persons making the same, who may or may not be a member or members of a board of education, and filed and proceeded upon as in this subarticle provided.

Nothing in this section shall prevent the reduction of the number of any such persons holding such offices, positions or employments under the conditions and with the effect provided by law.

I **CONCLUDE** that all petitioners are tenured teachers and had a reduction in salary based on Policy 3151 without a hearing being held.

N.J.S.A. 34:13A-24 provides:

> a. Notwithstanding any other law to the contrary, and if negotiated with the majority representative of the employees in the appropriate collective bargaining unit, an employer shall have the authority to impose minor discipline on employees. Nothing contained herein shall limit the

authority of the employer to impose, in the absence of a negotiated agreement regarding minor discipline, any disciplinary sanction which is authorized and not prohibited by law.

b. The scope of such negotiations shall include a schedule setting forth the acts and omissions for which minor discipline may be imposed, and also the penalty to be imposed for any act or omission warranting imposition of minor discipline.

c. Fines and suspensions for minor discipline shall not constitute a reduction in compensation pursuant to the provisions of N.J.S. 18A:6-10.

Policy 3151 was not negotiated between the majority representative of the employees REA <in the appropriate collective bargaining unit with the Board. The facts in this matter can be distinguished from Guadalupe Ferreiro v. Board of Education of the City of Elizabeth, EDU3865-19 Initial Decision (June 11, 2019) adopted Comm'r (July 22, 2019) < http://lawlibrary.rutgers.edu/oal/search.html>. In Ferreiro, the petitioner alleged that the respondent Board violated her rights by docking her salary for excessive tardiness. In Ferreiro there was a collective bargaining agreement (CBA) that addressed excessive tardiness. There was no such provision in the agreement between the Board and the REA.

I **CONCLUDE** that the previous collective bargaining agreement did not address excessive tardiness and there was no collective bargaining agreement in effect when the reductions in the petitioners salaried was enforced.

Respondent argues that petitioners' rights to object to Policy 3151 were waived. The CBA between REA and the Board did not address excessive tardiness. Policy 3151 became effective on or about January 6, 2014. This was prior to the CBA between REA and the Board which ran from July 1, 2014 thru June 30, 2017. There is presently no successor CBA agreement. Respondents rely on the cases of In the Matter of Upper Saddle River Board of Education 2004 NJ PERC LEXIS 252 and In the Matter of the Township of Middletown PERC NO 98-77. In Upper Saddle, the Upper Saddle River Education association wanted mid-contract negotiations over the Board unilaterally implementing a sick leave policy. The unilateral sick leave policy had been applied seven times before the association demanded the renegotiation of the CBA.

In the Middletown matter, the township unilaterally changed the practice of placing new police officers with academy training and one-year police experience at step three of the salary guide. In that case, it was alleged that the the township violated the duty to negotiate in good faith. It lists three types of cases involving allegations of employment conditions being changed, which are:

> 1. Cases where the majority representative claims an express or implied contractual right to prevent a change
>
> 2. Cases where an existing working condition is changed and neither party claims an express or implied right to prevent ot impose the change
>
> 3. Cases where the employer alleges that the representative has waived any rights to negotiate, usually expressly or impliedly giving the employer the right to impose change.

In Middletown the township alleged that the Middletown PBA waived its right to negotiate by its acquiescence. However, when the township previously deviated from the practice of placing new officers with academy training and one year of experience at step three, the PBA filed an unfair practice charge which was settled.

In this matter, there is no evidence that Policy 3151 was applied prior to the petitioners' salary being reduced. There presently is no CBA between the REA and the Board. This matter analogous to the Township of Middleton case since once Policy 3151 was enforced against petitioners, they contested its application.

In both the Middletown and Upper Saddle matters, the organized employee representative brought the charges. In this matter, the petitioners are teaching staff members in Roselle.

I **CONCLUDE** that petitioners did not waive their rights to challenge Policy 3151. Having reviewed respondents' reply brief to petitioner's cross motion for summary decision and petitioner's brief dated March 13, 2020, my decision remains as it was on November 25, 2019, for the reasons stated in that decision.

It is **ODERED** that petitioners' motion for Summary Decision is **GRANTED** and Respondents Motion for Summary Decision is **DENIED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

March 26, 2020	
DATE	**KIMBERLY A. MOSS**, ALJ
Date Received at Agency:	March 26, 2020
Date Mailed to Parties:	March 26, 2020

ljb