317-21

New Jersey Commissioner of Education

Final Decision

Adrian McConney,

Petitioner,

v.

Board of Education of the Township of Piscataway, Middlesex County,

Respondent.

Synopsis

In this case on remand, petitioner – formerly employed as a tenured physical education teacher – sought an order requiring the respondent Board to reimburse him for salary that was withheld between September 1, 2013 and March 1, 2014, a period corresponding to the time between when petitioner was suspended following a criminal indictment and the date upon which he was reinstated to the payroll after the indictment was dismissed. The indictment involved allegations that petitioner had engaged in sexual relations with an 18-year-old student who attended Piscataway High School. The Commissioner previously remanded this matter to the OAL for determination of whether petitioner was entitled to back pay from September 1, 2013 through March 1, 2014 and whether such determination should include "weighing of the equities" and consideration of "fundamental fairness."

On remand, the ALJ, *inter alia*, denied petitioner's request for back pay, finding that given the negative inference placed on petitioner as a result of his invocation of the Fifth Amendment in this proceeding and his refusal to answer interrogatories and requests for admission during discovery, the Board had presented sufficient evidence that petitioner was guilty of misconduct by a public school teacher. Accordingly, the ALJ found that the equities side with the Board and fundamental fairness leads to the conclusion that the Board should not have to pay petitioner for the period of time he was suspended without pay.

Upon review the Commissioner agreed with the ALJ that fundamental fairness and equity dictate that petitioner is not entitled to back pay for the period that the indictment was pending, September 1, 2013 through February 4, 2014. However, for the period after the indictment was dismissed until the Board reinstated petitioner to the payroll – February 4, 2014 through March 1, 2014 – the Commissioner determined that he was entitled to back pay since no indictment was pending and no tenure charges had been filed, so there was no basis for the Board to withhold petitioner's salary. *N.J.S.A.* 18A:6-8.3. Accordingly, the Board was directed to reimburse petitioner for compensation withheld during that period.

317-21
OAL Dkt. No. EDU 13422-17
(EDU 05769-14 ON REMAND)
Agency Dkt. No. 111-5/14

New Jersey Commissioner of Education

Decision on Remand

Adrian McConney,

Petitioner,

v.

Board of Education of the Township of Piscataway, Middlesex County,

Respondent.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions filed pursuant to *N.J.A.C.* 1:1-18.4 by the petitioner. The Board did not file reply exceptions, but rather indicated that it would rely on its arguments presented in briefs at the OAL.

In this matter, petitioner – a tenured physical education teacher – seeks back pay from September 1, 2013 (the date he was suspended without pay following his indictment) to March 1, 2014 (the date he was reinstated to payroll following the dismissal of his indictment). By way of background, petitioner was indicted in August 2013 on charges relating to allegations that he had engaged in sexual relations with an 18-year-old student who attended Piscataway High School. The Board suspended petitioner without pay pursuant to *N.J.S.A.* 18A:6-8.3 on September 1, 2013. Thereafter, the indictment was dismissed by a Superior Court judge on February 4, 2014, and the Board reinstated petitioner to the payroll on March 1, 2014.

Petitioner then resigned from his position on April 13, 2014. On February 9, 2015, the indictment was reinstated by the Appellate Division. Following a trial, a jury returned a verdict of not guilty on February 21, 2017. In a decision dated August 21, 2017, the Commissioner remanded this matter to the OAL for a determination on whether petitioner is entitled to back pay from September 1, 2013 to March 1, 2014, and whether such determination should include "weighing of the equities" and consideration of "fundamental fairness."

On remand, the Administrative Law Judge (ALJ) denied petitioner's request for back pay. The ALJ found that, given the negative inference placed on petitioner as a result of his invocation of the Fifth Amendment in this proceeding and his refusal to answer interrogatories and requests for admission during discovery, the Board had presented sufficient evidence that petitioner was guilty of misconduct by a public school teacher. As such, the ALJ found that the equities side with the Board and fundamental fairness leads to the conclusion that the Board should not have to pay petitioner for the period of time he was suspended without pay.

In his exceptions, petitioner argues that he was entitled to back pay from February 4, 2014 through March 1, 2014 because the indictment had been dismissed during this period and he was not the subject of tenure charges because they were never filed against him. Petitioner also contends that he is entitled to back pay for the period of September 1, 2013 through February 4, 2014 because the balance of the equities does not favor the Board as it never filed tenure charges. Petitioner maintains that he should not have been denied reimbursement because of a negative inference of conduct unbecoming, given that the Board failed to present any residuum of evidence to support its argument.

Accordingly, petitioner urges the Commissioner to reject the Initial Decision and order that petitioner is entitled to his full claim of back pay.

Upon review, the Commissioner agrees with the ALJ that petitioner is not entitled to back pay for the period when he was under indictment, September 1, 2013 through February 4, 2014, due to fundamental fairness and the weighing of the equities. The Commissioner has found that based on fundamental fairness and equity, where a tenured employee seeks to recover salary that was withheld during an indictment in which the employee later obtained a favorable outcome, but where in tenure proceedings the employee has subsequently been found to have committed the same conduct that was the subject of the criminal charges, the employee should not recover the salary that was withheld while the indictment was pending. *Board of Education of the City of Camden, Camden County v. John Hovington*, EDU 6675-97, Initial Decision (February 9, 1998), adopted by Commissioner's Decision No. 147-98R, decided March 30, 1998; *In the Matter of the Tenure Hearing of Brian Yatauro, School District of the Township of Lacey, Ocean County*, EDU 00793-99, Initial Decision (July 12, 1999), adopted as modified by Commissioner's Decision No. 322-99R, decided October 13, 1999.

While tenure charges were not filed in this matter, a negative inference was imposed on petitioner arising from his invocation of the Fifth Amendment in this administrative proceeding. Specifically, petitioner refused to answer the following interrogatories:

> 1. State whether you engaged in sexual relations with a student enrolled at Piscataway High School, as alleged in the criminal indictment that was the subject of this action.
> 2. If so, set forth the following information: a) student's name; b) when and where sexual relations occurred; c) your understanding of the student's age at the time sexual

> relations occurred; d) your understanding with respect to whether sexual relations with said student were a violation of your professional responsibilities as employee of the Piscataway Township School District.

Petitioner also did not answer the following requests for admissions:

1. you engaged in sexual relations with a female student enrolled in Piscataway High School.
2. you repeatedly engaged in sexual relations with a female student enrolled in Piscataway High School.
3. you engaged in sexual relations with a female student enrolled in Piscataway High School on Piscataway High School or other Piscataway School District property.

The record demonstrates that petitioner has stipulated that the board remains entitled to an adverse interest regarding his conduct due to his refusal to respond to discovery requests. The petitioner had the opportunity to deny the allegations against him, but he chose not to answer discovery. As such, in this proceeding, the Commissioner agrees with the ALJ that, considering the negative inference, it is presumed in this matter that petitioner engaged in the conduct alleged. While the conduct did not amount to criminal conduct, presumably due to the age of the student, such conduct nevertheless violates the behavioral standards expected of a teacher. Accordingly, the Commissioner agrees with the ALJ for the reasons thoroughly stated in the Initial Decision that fundamental fairness and equity lead to the conclusion that petitioner is not entitled to back pay for the period that the indictment was pending, September 1, 2013 through February 4, 2014.

The Commissioner does not find petitioner's exceptions on this issue to be persuasive. Although no tenure charges were filed, the conduct is deemed to have been committed due to the adverse inference applied against petitioner. As such, this matter is analogous to *Hovington*

and *Yatauro*, *supra*, and fundamental fairness and equity support the denial of back pay for the time that the indictment was pending.

However, with respect to the period after the indictment was dismissed until the Board reinstated petitioner to the payroll – February 4, 2014 through March 1, 2014 – the Commissioner agrees with the petitioner that he is entitled to back pay. During that time, no indictment was pending and no tenure charges had been filed, so there is no basis for the Board to withhold petitioner's salary. *N.J.S.A.* 18A:6-8.3; *see Slater v. Board of Education of the Ramapo-Indian Hills Regional School District*, 237 *N.J. Super.* 424, 426 (App. Div. 1989) (stating that "a tenured employee may be suspended without pay only if indicted or if tenure charges have been preferred and certified to the Commissioner of Education. In all other circumstances, a suspension must be with pay.").

Accordingly, the Initial Decision of the OAL is adopted, as modified herein, as the final decision in this matter. The Board is directed to reimburse petitioner for compensation withheld between February 4, 2014 and March 1, 2014.

IT IS SO ORDERED. [1]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: December 9, 2021
Date of Mailing: December 9, 2021

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 13422-17
ON REMAND OAL DKT. NO. EDU 05769-14
AGENCY DKT. NO. 111-5/14

ADRIAN MC CONNEY,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF PISCATAWAY, MIDDLESEX COUNTY,
Respondent.

Steven J. Kaflowitz, Esq., for petitioner (Caruso, Smith & Picini, attorneys)

David Rubin, Esq., for respondent

Record Closed: August 2, 2021 Decided: September 13, 2021

BEFORE **JEFF S. MASIN**, ALJ (Ret., on recall):

The Commissioner of Education remanded this matter to the Office of Administrative Law after a review of an Initial Decision rendered by Honorable Leland McGee, ALJ, dated July 6, 2017. The Commissioner determined that there were issues that had not been addressed in the decision and thus, further OAL proceedings were

necessary. The matter was assigned to a judge, but upon her appointment to the Superior Court the matter was transferred to this judge on August 2, 2021. The parties had cross-moved for summary decision before the previously assigned judge.

The parties produced a Joint Stipulation of Facts. These provide the background for the current dispute, which deals with whether Mr. McConney should receive back pay for the period when he was suspended from employment without pay. Based upon the Stipulated Facts, I make the following **FINDINGS** relevant to this remand.

1) McConney was employed as a tenured physical education teacher at Piscataway High School.
2) On August 13, 2013, he was indicted by the Middlesex County Grand Jury on a charge of "Official Misconduct," relating to allegations that he had engaged in sexual relations with an eighteen-year-old student who attended that school. He plead not guilty to the charge.
3) He was suspended from employment without pay, effective September 1, 2013, the start of the school year. McConney was a ten-month employee.
4) McConney filed a motion to dismiss the indictment.
5) On February 4, 2014, Honorable Bradley J. Ferencz J.S.C., granted the motion and dismissed the indictment. He concluded that even if the factual allegations stated in the indictment were true, they did not establish a basis for the charge of Official Misconduct.
6) Following Judge Ferencz's decision, the Board of Education reinstated Mr. McConney on the payroll, effective March 1, 2014.
7) McConney then resigned his position with the Board, effective April 13, 2014.
8) The Board never filed any tenure charges against McConney.
9) On May 2, 2014, McConney filed a Petition for Relief with the Commissioner of Education, seeking back pay for the period from February 4, 2014, the date of Judge Ferencz's Order dismissing the indictment, to April 13, 2014, the date of his resignation.

10) On June 4, 2014, McConney filed a motion seeking leave to amend the Petition to request back pay from September 1, 2013, the effective date of the Board's suspension of his pay, to April 13, 2014, the date of his resignation. This motion was subsequently granted by Judge McGee.

11) On February 9, 2015, the Appellate Division overturned Judge Ferencz's Order dismissing the indictment, thereby reinstating the indictment and remanded the matter to the Superior Court for disposition.

12) Following a trial, on February 21, 2017, the jury returned a verdict of "not guilty" to all charges against McConney.

13) In response to certain interrogatories and requests for admission filed by the Board in discovery in this matter, then pending before Judge McGee, Mr. McConney advised that if called to testify as a witness he would invoke his privilege against self-incrimination under the Fifth Amendment. He also declined to answer the interrogatories or the requests for admission on the same basis. In the Stipulation of Facts dated by his counsel on March 23, 2017, McConney acknowledges that in light of his invocation of the privilege, "the Board remains entitled to the adverse inference regarding his conduct that was granted to the Board in the Court's [Judge McGee's] January 5, 2015 Order."

In remanding the matter, the Commissioner noted that in his decision Judge McGee determined that as of the date of Judge Ferencz's Order dismissing the indictment, there was then neither an indictment nor a tenure charge pending against McConney and that under N.J.S.A. 18A:6-8.3, a tenured employee was entitled to back pay when no longer under indictment and before the filing of any subsequent tenure charges. Judge McGee further found that the negative inferences arising from McConney's invocation of the Fifth Amendment in this civil administrative proceeding did not factor into this analysis of his right to back pay for that period. Additionally, McConney was not seeking back pay for the period when he had been under indictment, and therefore consideration of the fundamental fairness question regarding the issuance of back pay to one who had not actually performed services was not dispositive. The

Commissioner noted that on remand, the judge was to determine whether McConney was "entitled to back pay from September 1, 2013 through March 1, 2014 and whether such determination should include 'weighing of the equities' and considerations of 'fundamental fairness.'"

The parties have filed briefs and exhibits relating to their cross-motions for summary decision. In his brief, Mr. McConney relies upon the language of N.J.S.A. 18A:6-8.3, which states

> Any 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.

In Slater v. Board of Education, 237 N.J. Super. 424 (App. Div. 1989), the court noted that

> Thus, a tenured employee may be suspended without pay only if indicted or if tenure charges have been preferred and certified to the Commissioner of Education. In all other circumstances, a suspension must be with pay.

As this language and court pronouncement only relate here to the period after the dismissal of the indictment on Judge Ferencz's order, this only speaks to McConney's right to receive back pay for the period from February 4, 2014, until his reinstatement to the payroll on March 1, 2014. However, McConney also argues that as the jury eventually returned a verdict of not guilty on the charge of Official Misconduct, the sole charge of the reinstated indictment, fundamental fairness and a weighing of the equities demand that he recover the back pay withheld during the pendency of the indictment from September 1, 2013, until its dismissal by Judge Ferencz on February 4, 2014. He cites prior administrative decisions by the Commissioner in support, Beatty v. Newton Board of Education, 1991 S.L.D. 1001; Lopez v. Bridgeton Board of Education,

http://unlawful.Rutgers,edu/collections/oal, and Griffin v. Paterson Board of Education, 93 N.J.A.R. 2d (EDU) 882.

In Beatty, the teacher was suspended without pay after an indictment. The criminal trial resulted in a jury verdict of not guilty. The Commissioner determined that "fundamental fairness" entitled Beatty to back pay for all salary lost while under indictment. Equity demanded this result as the indictment had been the sole basis for the suspension without pay. Although tenure charges had been filed and were pending, this fact "did not alter the equities in the matter." Beatty, at 1009-1010. Griffin similarly involved a suspension due to an indictment. Griffin was found not guilty after a jury trial and no tenure charges were filed. In Lopez, a trial judge dismissed an indictment for child endangerment. As the dismissal of the indictment exonerated Lopez, back pay for the period of suspension due to the pendency of the indictment was awarded.

McConney differentiates these cases from other cases in which the Commissioner determined that back pay for a period of suspension was not warranted, despite not guilty findings in a criminal case, or the entry of the teacher into a pre-trial intervention program, Camden Board of Education v. Hovington, (Hovington II) http://unlawful Rutgers.edu/collections/oal/, adopted by Comm. of Ed. (March 30, 1998)(not guilty verdict); Busler v. Board of Education of the City of East Orange, http://njlaw.Rutgers.edu/collections/oal/, adopted by Comm. of Educ. (February 6, 2002)(pre-trial intervention). In each instance, tenure charges were filed and resulted in findings of misconduct by the teacher and the loss of tenure; In the Matter of the Tenure Hearing of John Hovington, Board of Education of the City of Camden (Hovington I), (Final Commissioner's Decision on Remand from State Board of Education., August 5, 1997). He contends that the facts in this case are dissimilar to Hovington II and Busler.

As for the negative inference arising against Mr. McConney due to his invocation of his Fifth Amendment privilege, he argues that the issue before the Commissioner is simply whether, in light of the dismissal of the indictment by a jury verdict of not guilty and the absence of any tenure charge pending at the time of the suspension without pay, the

statute directs that he is entitled to receive full back pay for that period of suspension. He contends that the clear language supports his right to such back pay. This is not the forum to adjudicate his alleged culpability for unbecoming conduct. As such, any evidence that purports to address that issue is irrelevant to the present proceedings. Additionally, the negative inference alone is insufficient to prove McConney's guilt for unbecoming conduct.

In response to McConney's arguments and in support of its own motion for summary decision, the Board notes that in cases such as Griffin and Beatty, the employee had been adjudged completely innocent of any wrongdoing. As such, for the employee to have continued to suffer the loss of pay withheld due to a suspension founded upon the existence of an indictment that was later adjudged to have charged an innocent person would "shock the conscience" and thus principles of equity and fundamental fairness demanded that the lost pay be restored. In Lopez, the ALJ noted that the employee had been totally exonerated of the charge of child endangerment by the criminal court judge's dismissal of the indictment because it was unsupported by credible evidence and had been improperly obtained. The judge then added that

> [t]he record is barren of any evidence that petitioner acted wrongfully or was a risk to students. In essence, petitioner did nothing wrong if measured by a criminal or civil standard. The allegation of any wrongdoing was dismissed as baseless.

Counsel for the Board points out that these cases contrast with other cases, such as Hovington II and Lacey Township Board of Education v. Yatauro, http://unlawful Rutgers.edu/collections/oal/. Hovington had been indicted for charges relating to sexual misconduct with a student he coached. He was acquitted of the criminal charges. He sought back pay for the period of suspension without pay which had been suspended due to the pendency of the indictment. However, after the acquittal, tenure charges were filed for the same conduct that had led to the indictment and after an administrative hearing, Hovington was found to have engaged in misconduct and his tenure was removed. Hovington I. The Commissioner agreed with this judge that as

Hovington had been shown to have "so flagrantly violated his trust as a professional educator," he did not stand before the Commissioner on the same ground as had Beatty and Griffin. Hovington II. They, having been exonerated by jury verdicts, were to be presumed innocent of the charges that had been the basis for the indictment that supported the suspension of pay. Hovington could not claim to stand in the same position, as he had instead been found to have actually engaged in improper conduct, even if the proofs had not been determined to rise to the level of criminality. Yatauro also was acquitted of criminal charges arising from alleged sexual improprieties with a student. However, the Board was able to sustain tenure charges against him; charges that were not filed until after the acquittal occurred.

Counsel contends that the present case is unlike Beatty, Griffin or Lopez and is instead more akin to Hovington II and Yatauro. The reason for this distinction arises from Mr. McConney's invocation of the Fifth Amendment privilege in response to interrogatories that specifically asked

> 1. State whether you engaged in sexual relations with a student enrolled at Piscataway High School, as alleged in the criminal indictment that was the subject of this action.
> 2. If so, set forth the following information: a) student's name; b) when and where sexual relations occurred; c your understanding of the student's age at the time sexual relations occurred; d) your understanding with respect to whether sexual relations with said student were a violation of your professional responsibilities as employee of the Piscataway Township School District,

and requests for admissions that stated that while employed by the School District as physical education teacher and/or girls soccer coach at Piscataway High School,

> 1. you engaged in sexual relations with a female student enrolled in Piscataway High School.
> 2. you repeatedly engaged in sexual relations with a female student enrolled in Piscataway High School.
> 3. you engaged in sexual relations with a female student enrolled in Piscataway High School on Piscataway High School or other Piscataway School District property.

McConney's refusal to answer these very specific questions and his refusal to admit or deny the statements and his use of the privilege against self-incrimination led Judge McGee to issue his Order II, dated January 5, 2015, wherein he considered the impact of McConney's refusal to provide the requested answers as part of discovery and noted that in Mahne v. Mahne, 66 N.J. 53 (1974), the New Jersey Supreme Court had concluded that where the privilege was invoked by the plaintiff in the course of civil discovery, its "sole purpose . . . is to shield a witness against the incriminating effects of the testimony." As such, the Court "will not permit its use as a weapon to unfairly prejudice an adversary." As such, where the privilege is invoked in a civil litigation, the action may be dismissed or a lesser non-criminal sanction may be imposed. Judge McGee concluded that the Board could still proceed in the case without the answers to its interrogatories and requests for admission. However, he concluded that, in line with Mahne, the sanction "best designed to protect the pertinent public and private interests without impairing the historic designs of the privilege," Mahne, at 61, was to permit "an adverse inference to be drawn from petitioner's invocation of his privilege against self-incrimination."

Counsel for the Board asserts that while here no tenure charges were filed and there has thus been no prior determination of misconduct, unlike in both Hovington II and Yatauro, nevertheless, given the fact that McConney resigned his position "promptly after dismissal of the indictment" and given the negative inferences that arise from his refusal to answer the pointed questions and statements in discovery, the equities do not lie in McConney's favor and "fundamental fairness" does not support his receiving back pay for the period of his suspension without pay from September 1, 2013, until his reinstatement to pay status on March 1, 2014.

Discussion

A motion for summary decision is permitted by N.J.A.C. 1:1-12.5. The standard for judging such a motion is the same as for the motion for summary judgment in the

Superior Court. The New Jersey Supreme Court defined this standard in Brill v. The Guardian Life Insurance Company of America, et al., 142 N.J. 520 (1995). The Court elaborated upon the standards first established in Judson v. People's Bank and Trust Co. of Westfield, 17 N.J 67, 74-75 (1954). Under the Brill standard, a motion for summary decision may only be granted where there are no "genuine disputes" of "material fact." The determination as to whether disputes of material fact exist is made after a "discriminating search" of the record, consisting as it may of affidavits, certifications, documentary exhibits and any other evidence filed by the movant and any such evidence filed in response to the motion, with all reasonable inferences arising from the evidence being accorded to the opponent of the motion. In order to defeat the motion, the opposing party must establish the existence of "genuine" disputes of material fact. The substantive law governing a dispute determines which facts are material. Only disputes regarding "those facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." Dungee v. Northeast Foods, Inc., 940 F. Supp 682, 685 (D.N.J. 1996), quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 2511, 91 L. Ed.2d 202, 211 (1986)(Anderson).

In Judson, at 75, the Supreme Court stated that the material facts allegedly in dispute upon which the party opposing the motion relies to defeat the motion must be something more than "facts which are immaterial or of an insubstantial nature, a mere scintilla, fanciful, frivolous, gauzy or merely suspicious, . . . ,"(citations omitted). Brill focuses upon the analytical procedure for determining whether a purported dispute of material fact is "genuine" or is simply of an "insubstantial nature." Brill, at 530. Brill concludes that the same analytical process used to decide motions for a directed verdict is used to resolve summary decision motions. "The essence of the inquiry in each is the same: 'whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that a party must prevail as a matter of law.'" Id. at 536, quoting Anderson, at 477 U.S. 251-52, 106 S. Ct. 2505, 2512, 91 L. Ed 2d 214. In searching the proffered evidence to determine the motion, the judge must be guided by the applicable substantive evidentiary standard of proof, that is, the "burden of persuasion" which would apply at trial on the merits, whether that is the preponderance

of the evidence or the clear and convincing evidence standard. If a careful review under this standard establishes that no reasonable fact finder could resolve the disputed material facts in favor of the party opposing the motion, then the uncontradicted facts thus established can be examined in the light of the applicable substantive law to determine whether or not the movant is clearly entitled to judgment as a matter of law. However, where the proofs in the record are such that "reasonable minds could differ" as to the material facts, then the motion must be denied, and a full evidentiary hearing held.

Mr. McConney was indicted for Official Misconduct, and after the indictment was reinstated by the Appellate Division, he was acquitted of that criminal charge. He resigned his position with Piscataway School District shortly after he was restored to pay status following the trial judge's ruling, which the Appellate Division found, had incorrectly dismissed the indictment. The Board did not file a tenure charge, which it must be noted they could have done even before the criminal charge was initially dismissed. I **FIND** that there is no dispute as to both the dismissal of the indictment and the lack of any tenure charges.

Once the indictment was dismissed by Judge Ferencz, with no pending tenure charge, the Board reinstated his pay as of March 1, 2014. The Board still did not choose to file a tenure charge between the date of the Judge's Order and McConney's resignation, which latter action they may well not have had any advance indication was to occur when it did. Given these undisputed facts, if one looks at the wording of N.J.S.A. 18A:6-3, it is apparent that there being no tenure charge and a dismissed indictment, as of the time of McConney's resignation, it would have seemed unfair for the Board to be able to deny back pay for the period during which there was neither a tenure charge or, as Judge Ferencz's ruling held, no grounds for the indictment that had served as the basis for the suspension of pay. At that time, it might well have seemed that the equities would have been on McConney's side, that "fundamental fairness" would require that he be made whole for the pay he lost while under the cloud of what the trial judge determined was a flawed and unsustainable indictment. At that point in time, if one looked at prior cases such as Beatty, Lopez and Griffin, one might well have ruled that the Board should

pay McConney that which had been withheld. Thus, were these the only relevant material facts, summary decision in McConney's favor would seem appropriate. However, as Hovington II and Yatauro explain, while at one point in time the fact of the jury's verdict finding a lack of criminal conduct and the absence of tenure charges would favor restoration of the suspended pay, at another point in time, where tenure charges have been filed and the employee found to have engaged in misconduct arising from the same factual base as the indictment arose from, the positions of the employee and the school board vis a vis the equities can be seen to have changed. Judge McGee kindly quoted heavily from the initial decision in Hovington II, and I will not repeat much of that material here. Hovington had been acquitted in the criminal trial, but "the charges that were not proven beyond a reasonable doubt . . . were amply proven in the tenure hearing

> Therefore, Hovington's position as a supplicant seeking equity . . . is far different than the presumptively innocent claimants in Beatty and Griffin. "Fundamental fairness," the touchstone of the commissioner's reasoning in Beatty, hardly demands that this Board be required to pay this petitioner for six years in which he did not work for the Board, when in fact he was guilty of serious tenure violations committed before his suspension. If anything, "fundamental fairness" to the citizens and taxpayers of the City of Camden demands that he not be paid where he so flagrantly violated his trust as a professional educator.
>
> [Hovington II, (initial decision)]

The question presented here is whether the facts as developed for the record as it now stands present a situation akin to those cases where there is neither a criminal conviction nor a tenure finding to support a Board's opposition to paying the monies withheld, or, instead, to those cases where the evidence of a tenure violation exists to such a degree that it would be an injustice to pay an employee for time in which he did not work and where his proven conduct shows that he did in fact act in a manner that warrants sanction. Here, there is no tenure determination made subsequent to the acquittal or dismissal of criminal charges. Instead, the Board contends that as McConney chose, as was his undeniable Constitutional right, to refuse to answer specific interrogatories or reply to specific requests for admission which directly addressed the question of whether he had sexual relations with a student enrolled in the District while he was a teacher and coach

in the District, he should be seen as one who, in effect, has admitted that he did such acts and therefore, engaged in what is undeniably improper conduct for a teacher. As the Court in Mahne noted, "the sole purpose of the privilege is to shield a witness against the incriminating effects of the testimony." Mahne, at 58. Clearly, if Mr. McConney had chosen to answer the discovery, he could have denied that he had sexual relations with a student. Since he did not deny that, the only remaining alternative is that he did. And as has been noted elsewhere, even if the student was over the age of eighteen and thus an adult, that does not mean that McConney's conduct was not a serious violation of what is expected of a teacher. Thus, to the Board, McConney's guilt of a violation of his responsibilities as a teacher is sufficiently established to move the case into the class of Hovington II and Yatauro, and away from Beatty, Griffin and Lopez. As such, with regard to its own motion for summary decision, while McConney is entitled to all reasonable inferences arising from the evidence, given the negative inference against his interests to which the Board is entitled under Judge McGee's ruling, the Board has met its burden to demonstrate that no reasonable finder of fact could conclude that he is entitled to back pay for the period of the suspension while under indictment.

The standard of proof in this proceeding requires a party seeking a favorable result to prove their case by a preponderance of the credible evidence. Despite arguments to the contrary, given the Commissioner's acceptance of the Hovington II and Yatauro analyses that sufficient proof of misconduct is properly weighed in considering the equities, the negative inference arising from McConney's refusal to answer whether he had sex with a district student while a district teacher and coach is highly relevant evidence. And as the negative inference must be that he did have such relations, I **FIND** that in the context of this specific issue regarding back pay, the Board has presented sufficient evidence to support the conclusion that McConney was guilty of misconduct by a public school teacher. Given that finding, the equities come down on the side of the Board. Considerations of fundamental fairness lead to the conclusion that Mr. McConney has failed to justify why the Board should have to pay him for the period of time he was suspended without pay. While he was not found guilty of criminal conduct for having sex

with a student who was over eighteen, that same conduct, established by a preponderance of the credible evidence, violated the accepted standards for a teacher.[1]

ORDER

Mr. McConney's motion for summary decision is **DENIED** and the Board's motion seeking dismissal of the petition for relief on substantive grounds is **GRANTED**.

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.

[1]Counsel for petitioner has included as Exhibit B an arbitration decision in a tenure proceeding, In re: Lydia Wilson, Agency Dkt. No. 174-6/16 (February 1, 2017). In his brief counsel merely states that in regard to the negative inference arising from Mr. McConney's invocation of the Fifth Amendment in this administrative proceeding, that the inference is not enough to prove McConney guilty of unbecoming conduct. Without specifying what portion of the Wilson decision he believes relevant to the present matter, he merely points this judge to the "elaborate discussion on this point." It is noted that the Wilson case did not include any invocation of a privilege against self-incrimination and no negative inference issue. If counsel thought that there was some particular portion of this forty-five-page arbitration decision that should be focused upon, he should have made that clear. If instead, the point is only that in Wilson the arbitrator found that the presentation by the Board failed to present sufficient credible evidence to prove Wilson's alleged misconduct, such a general conclusion of insufficiency of evidence does not address itself to the particular nature of the present case, in which the negative inference arises directly from the refusal of McConney to answer the direct question of whether he had sexual relations with a student in the school district in which he was both a teacher and coach. His failure to deny such obviously serious conduct, which, under Mahne allows a fact finder to conclude that if he had truthfully answered the question he would have had to admit that he did engage in that conduct, constitutes sufficient evidence to determine that in a balancing of equities and a determination of fundamental fairness with respect to pay for services that were not actually rendered, the Board is entitled to prevail.

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.

September 13, 2021
DATE

JEFF S. MASIN, ALJ (Ret., on recall)

Date Received at Agency: 9/13/2021

Date Mailed to Parties: 9/13/2021

mph

EXHIBITS

For petitioner:

Exhibit A	Joint Stipulation of Facts, dated March 23, 2017
Exhibit B	Final Decision of Arbitrator in In re: Lydia Wilson, Agency Dkt. No. 174-6/16 (February 1, 2017)

For respondent:

Exhibit A	Joint Stipulation of Facts
Exhibit B	Letter dated September 11, 2014 with attached Interrogatories and Requests for Admission
Exhibit C	Letter dated September 16, 2014
Exhibit D	Order II, dated January 5, 2015, Adrian McConney v. Township of Piscataway Board of Education, Middlesex County, EDU 05769-14
Exhibit E	Decision of Appellate Division entered in State of New Jersey v. Adrian A. McConney, Docket No. A-2655-13T3, dated July 31, 2015