

#174-05 (OAL Decision not yet available)

RALPH McCULLOUGH, :  
 :  
 PETITIONER, :  
 :  
 V. : COMMISSIONER OF EDUCATION  
 :  
 BOARD OF EDUCATION OF THE CITY : DECISION  
 OF TRENTON, MERCER COUNTY, :  
 :  
 RESPONDENT. :  
 \_\_\_\_\_ :

SYNOPSIS

Petitioner filed a Verified Petition seeking an order directing the respondent Board to pay him back-pay for the period from July 1999 through January 2002, based on petitioner's wrongful suspension without pay during this period. Petitioner claimed the Board owed him \$62,599, plus interest, as well as out-of-pocket costs relating to medical and dental insurance, prescriptions, and medical payments, totaling an additional \$1,987.86.

The ALJ found that the petitioner's unemployment compensation during the period of his wrongful suspension, \$6,725, mitigates against his claim for back-pay; and that the Board must reimburse this amount to the unemployment system. Furthermore, the ALJ found that all of petitioner's earnings in 2000 and 2001, totaling \$30,959, should be treated as mitigation income. The ALJ found credible the petitioner's claim that shift differentials must be applied in the calculation of his back-pay.

The Commissioner adopted the Initial Decision of the OAL with modification. The Commissioner found the Initial Decision to be replete with mathematical inaccuracies and inconsistencies, and set forth clarification of the instant record to show a remaining unpaid back-pay balance of \$2,639.55. Furthermore, the Commissioner found no evidence in the record showing that the criteria for the award of pre and/or post-judgment interest pursuant to *N.J.A.C. 6A:3-1.17* have been satisfied. The Commissioner ordered the Board to remit to the petitioner the sum of \$2,639.55, minus required employment deductions, in satisfaction of the back-pay award due him as a result of petitioner's improper termination. A copy of the decision will be forwarded to the Department of Labor so as to facilitate prompt reimbursement of offset unemployment benefits by the Board.

<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>
---

OAL DKT. NO. EDU 6164-03  
AGENCY DKT. NO. 154-5/03

RALPH McCULLOUGH,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE CITY	:	DECISION
OF TRENTON, MERCER COUNTY,	:	
	:	
RESPONDENT.	:	
_____	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner's exceptions and the Board's reply thereto, filed in accordance with *N.J.A.C.* 1:1-18.4, were fully considered by the Commissioner in reaching his determination herein.

Petitioner's exceptions object, *inter alia*, to the Administrative Law Judge's (ALJ) interlocutory Letter Order determination of July 22, 2004 in this matter, which concluded that principles of mitigation were applicable to any back-pay award received by petitioner. Citing *Goodman v. London Metals Exchange, Inc.*, 86 *N.J.* 19 (1981), he again maintains, as he did below, that because mitigation was not raised as an affirmative defense by the Board, who bears the burden of proof on this issue, or in any way addressed in any of the previous proceedings in this matter, it must be deemed waived. (Petitioner's Exceptions at pp. 1-4) Petitioner, additionally, claims entitlement to an award of interest on the monies owed him by the Board due to the protracted period of time the Board took to compensate him. (*Id.* at 4)

Upon his full and independent review, the Commissioner determines to adopt the Initial Decision and the ALJ's July 22, 2004 Letter Order, as modified below. Initially, the Commissioner observes that it appears that petitioner harbors a misapprehension as to how principles of mitigation affect this matter. In this regard, it is noted that petitioner claims entitlement to back-pay pursuant to *N.J.S.A.* 18A:6-30, which specifies:

Any person holding office, position or employment in the public school system of the state, who shall be illegally dismissed or suspended therefrom shall be entitled to compensation for the period covered by the illegal dismissal or suspension\*\*\*.

The court in *Mullen v. Board of Education of Jefferson Township*, 81 *N.J. Super.* 151 (App. Div. 1963), in reviewing *N.J.S.A.* 18:5-49.1, the precursor to this statutory provision, found that "the Legislature must be taken as having meant that all claims made by illegally dismissed persons under [this statute] be subject to the common law rule of mitigation of damages, in light of the plain meaning carried by the word 'compensation'," such being the case because damages under this statute have been determined to be "compensatory" in nature, and, thus, an individual should not be awarded more damages than actually sustained. (at 159.) Therefore, under common law principles, petitioner here was under a duty to mitigate his damages during the period of his improper termination by making reasonable efforts to secure alternative employment, notwithstanding that he was improperly terminated from his position. See *Zielenski v. Board of Education of the Town of Guttenberg, Hudson County*, 1981 *S.L.D.* 759; *White v. Township of North Bergen*, 77 *N.J.* 538 (1978); *Miele v. McGuire*, 31 *N.J.* 339 (1960). This obligation is not predicated on any action on the part of the Board or any other individual or entity involved in adjudication of the case in chief. The record here reflects that, upon receipt of petitioner's demand for back-pay, the Board requested that he

submit evidence of any and all monies he received from unemployment compensation and alternative employment during the period at issue. Such information was subsequently provided and this amount is appropriately offset from petitioner's monetary award, thereby according him the full measure of his *actual* damages. To find otherwise would violate public policy as petitioner would be provided compensation in excess of his economic loss at public expense. However, while it is without question that the amount of petitioner's award here must be reduced by his actual earnings during the time of his removal, *Goodman, supra.*, at 36, it is, similarly, well settled that a charge of *failure to mitigate* is an affirmative defense and the burden to demonstrate that petitioner did not put forth reasonable efforts to secure employment during the period of his improper termination rests with the employer. With respect to such a contention, the Supreme Court in *Goodman, supra*, stated:

The employer may establish a prima facie case [in this regard] by first showing that comparable employment opportunities were available and, if the lower sights doctrine is applicable, that there were other suitable jobs. The burden of going forward would then shift to the employee who may introduce evidence that comparable employment did not exist, that reasonable and diligent efforts on his part had not been successful, or that the circumstances did not justify acceptance of a dissimilar job. Whether the individual sought a job or not would be irrelevant in the absence of the existence of a position. \*\*\*So, if the proofs show that jobs were not available, if the complainant had unsuccessfully expended reasonable efforts and lowered his sights, if appropriate, no reduction in the back-pay award would be warranted. The ultimate burden of persuasion rests on the employer. (at 41)

Under the facts in this matter, the Board did not plead, nor was it required to plead, failure to mitigate as such a contention was not at issue herein.

Turning to calculation of damages actually due petitioner in this matter, the Commissioner finds that clarification is necessary here as the Initial Decision is replete with mathematical inaccuracies and inconsistencies. The instant record establishes the following:

The contracted salary for petitioner's position during the time of his improper termination was:

1999-2000 school year - \$22,698  
2000/2001 school year - \$24,100  
July 1, 2001 – January 15, 2002 - \$15,801.92<sup>1</sup>  
For a total of \$62,599.92

From this amount should be deducted \$30,680.58<sup>2</sup> for actual wages earned by petitioner during this period and \$6,725 in unemployment compensation he received,<sup>3</sup> leaving a balance of \$25,194.34. The Board previously issued a check to petitioner in the amount of \$22,554.79, **leaving a remaining unpaid back-pay balance of \$2,639.55, minus required employment deductions.**

Additionally, petitioner was entitled to a refund, in the amount of \$1,987.86 for certain out-of-pocket costs incurred (\$1,537.80 medical and dental insurance, \$393.06 for prescriptions and \$57.00 for medical payments). The Board has previously tendered a check to petitioner in full satisfaction of his \$1,987.86 out-of-pocket costs.

Finally, the Commissioner finds that the instant record provides no showing that the criteria for the award of pre and/or post-judgment interest pursuant to *N.J.A.C.* 6A:3-1.17 have been satisfied, in that there has been no showing of bad faith as a result of the Board's denial of petitioner's claims or a deliberate violation of a statute or a rule. Rather, the denial of the full extent of the back-pay award on the part of the Board was predicated at this juncture upon a dispute over what the precise amount of the award should have been.

Accordingly, the Initial Decision of the OAL and the ALJ's July 22, 2004 Interlocutory Order are adopted, as modified herein. The Board is hereby ordered to remit to

---

<sup>1</sup> The Commissioner concurs with the ALJ's determination that petitioner's claim of shift differentials is appropriately included here.

<sup>2</sup> It is noted that the record contains W-2's for wages earned by petitioner during the period at issue in the amounts of \$6,313.44, \$12,461.58, \$1,191, \$1,000, \$2,446.44, \$316.68, \$2,732.74, \$184.61 and \$4,034.09 which totals \$30,680.58 rather than the Initial Decision figure of \$30,959 or the Board's May 19, 2004 Motion for Summary Decision figure of \$30,950.58.

<sup>3</sup> Although the Board is entitled to offset petitioner's monetary award by the unemployment compensation he received, the Board is reminded of its obligation, pursuant to *N.J.S.A.* 43:21-5(b), to transmit to the Department of Labor monies offset for reimbursement for unemployment compensation.

petitioner the sum of \$2,639.55, minus required employment deductions, in satisfaction of the back-pay award due him as a result of petitioner's improper termination during the period at issue here. A copy of this decision will be forwarded to the Department of Labor so as to facilitate prompt reimbursement of offset unemployment benefits by the Board.

IT IS SO ORDERED.<sup>4</sup>

COMMISSIONER OF EDUCATION

Date of Decision: May 11, 2005

Date of Mailing: May 12, 2005

---

<sup>4</sup> This decision 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.*