

EDU # 7871-94
C # 149-97
SB # 41-97

IN THE MATTER OF THE TENURE :
HEARING OF ROBERT R. VITACCO, :
SCHOOL DISTRICT OF THE : STATE BOARD OF EDUCATION
BOROUGH OF LINCOLN PARK, : DECISION
MORRIS COUNTY. :

Decided by the Commissioner of Education, March 24, 1997

For the Petitioner-Respondent, Lindabury, McCormick & Estabrook
(Anthony P. Sciarrillo, Esq.)

For the Respondent-Appellant, Klausner & Hunter (David L. Rosenberg, Esq., of
Counsel)

Robert R. Vitacco (hereinafter "respondent" or "Vitacco") was employed as Superintendent of Schools by the Board of Education of the Borough of Lincoln Park (hereinafter "Board") since 1975, inclusive of calendar years 1991 and 1992, achieving tenure in the position. On January 22, 1992, the respondent and the Board entered into a written termination agreement ("Agreement"), in which Vitacco agreed "to resign his position as Superintendent of Schools to take effect September 30, 1995." Paragraphs Seven and Eight of the Agreement also set forth terms under which the respondent was to receive an additional \$15,000 in compensation for his service as a consultant with respect to labor negotiations.

However, on June 20, 1994, the Board certified tenure charges against Vitacco seeking his removal as Superintendent. The Board alleged that Vitacco and the

district's business administrator, Leonard Marano ("Marano"), had engaged in criminal conduct that constituted unbecoming conduct within the meaning of N.J.S.A. 18A:6-10. The alleged criminal conduct included tax evasion, misappropriation of public funds, misuse of vacation days, destruction of public records and financial mismanagement.

On August 16, 1994, the Commissioner of Education transmitted the matter to the Office of Administrative Law ("OAL") for a hearing.

On March 21, 1995, six months prior to the date designated by the Agreement as respondent's resignation date, Vitacco and Marano were both indicted under a 12-count federal indictment for various criminal offenses, including criminal conspiracy, embezzlement and attempt to evade taxes by underreporting income for five separate years.

On March 24, 1995, the respondent filed a motion seeking dismissal of the tenure charges. Respondent contended that the charges were moot since the Board had accepted his resignation and he had indicated his willingness to surrender his teaching certificates. During this period, from September 1, 1994 through September 30, 1995, the respondent was on a paid leave of absence pursuant to the termination agreement with the Board, following which his formal resignation would take effect.

On November 2, 1995, the respondent pleaded guilty before U.S. District Court Judge Harold Ackerman to two counts of tax evasion for filing false tax returns for 1991 and 1992 and for underreporting his income by \$16,520.45 in 1991 and by \$29,054.04 in 1992. The respondent's unreported income included vacation reimbursement, a monthly car allowance and payment he had received as a consultant in labor

negotiations.

On December 12, 1995, the Board filed a motion seeking a declaration that respondent could be removed from his position by operation of law, based on the forfeiture statute, N.J.S.A. 2C:51-2, as amended on September 12, 1995. With the consent of the parties, the Administrative Law Judge (“ALJ”) deferred ruling on the Board’s motion until completion of the criminal proceedings.

On June 18, 1996, the respondent was sentenced to ten months’ imprisonment on each criminal count, to be served concurrently, and fines totaling \$15,000. As part of his plea agreement, Vitacco agreed that under federal sentencing guidelines, a two-level enhancement for abuse of a position of trust was appropriate. Judge Ackerman specifically addressed the higher level of penalty, explaining that it was necessary not only to penalize “these individuals for their own conduct but to also send a message to those who have privileged positions as public servants and the penalty one pays for abusing that trust they have been given by the public.” Transcript of June 18, 1996, Vitacco’s Sentencing Hearing, at 26. Judge Ackerman stressed that a superintendent’s position is such that his responsibility is increased proportionately.

The pre-sentencing report was also considered during the sentencing hearing. That report provides specific accounts by various school employees that confirm the continuous nature of the respondent’s actions and the adverse effect of his actions on their employment.

On August 29, 1996, oral argument was held before the ALJ with respect to the respondent’s motion to dismiss the tenure charges. On February 6, 1997, the ALJ recommended granting summary judgment on the Board’s motion and denying the

respondent's motion to dismiss the tenure charges. Based on the seriousness of the respondent's criminal actions, as well as his continued claims for salary reimbursement during the first 120 days of his suspension and an outstanding claim for benefits, the ALJ concluded that the respondent's resignation would not render the tenure charges moot. With respect to the jurisdictional question, the ALJ found that the Commissioner did have jurisdiction and that, pursuant to N.J.S.A. 2C:51-2, the respondent's actions warranted the forfeiture of his position in the district as of November 2, 1995, the date on which he had entered his guilty plea.

On March 24, 1997, the Commissioner rejected the ALJ's recommendation, concluding that he did not have subject matter jurisdiction to render a determination on forfeiture under N.J.S.A. 2C:51-2. Nonetheless, the Commissioner agreed with the ALJ that the tenure charges in this matter were not moot since the respondent had retained his teaching certificates and had an outstanding claim for benefits arising out of his employment. The Commissioner also concluded that the conduct which gave rise to the respondent's federal conviction amply established the Board's charges of unbecoming conduct and that, as a result, an evidentiary hearing was not necessary.¹

The respondent filed the instant appeal to the State Board from the Commissioner's ruling with regard to the tenure charges. The Board filed a

¹ N.J.S.A. 18A:6-10 provides in pertinent part:

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...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....

cross-appeal from the Commissioner's determination that he lacked subject matter jurisdiction under the forfeiture statute.

In its cross-appeal, the Board requested guidance on the application of N.J.S.A. 2C:51-2(a)(1). Specifically, the Board sought a declaration that this agency has the authority to file an application for forfeiture in state court pursuant to N.J.S.A. 2C:51-2(g) as a "public entity having authority to remove the person convicted from his public office, position or employment."

We reject the Board's contention. Quite simply, the terms of the statutes show that N.J.S.A. 2C:51-2(g) is not applicable to this case. Nor does any other provision provide the authority in this matter for either the Commissioner or the Board to seek a forfeiture from our state courts under these circumstances.

N.J.S.A. 2C:51-2(a) provides that:

a. A person holding any public office, position, or employment, elective or appointive, under the government of this State or any agency or political subdivision thereof, who is convicted of an offense shall forfeit such office or position if:

(1) He is convicted under the laws of this State of an offense involving dishonesty or of a crime of the third degree or above or under the laws of another state or of the United States of an offense or a crime which, if committed in this State, would be such an offense or crime;

(2) He is convicted of an offense involving or touching such office, position or employment.

N.J.S.A. 2C:51-2(b) further provides that a Court of this State shall enter an Order of Forfeiture of Public Office by a person holding such public office:

(1) Immediately upon a finding of guilt by the trier of fact or a plea of guilt entered in any court of this State unless the court, for good cause shown, orders a stay of such forfeiture

pending a hearing on the merits at the time of sentencing; or

(2) upon application of the County Prosecutor or the Attorney General, when the forfeiture is based upon a conviction of an offense under the laws of another State or of the United States. An order of forfeiture pursuant to this paragraph shall be deemed to have taken effect on the date the person was found guilty by the trier of fact or pled guilty to the offense.

N.J.S.A. 2C:51-2(d) emphasizes that:

In addition to the punishment prescribed for the offense, and the forfeiture set forth in subsection a. of N.J.S.A. 2C:51-2, any person convicted of any offense involving or touching on his public office, position or employment shall be forever disqualified from holding any office or position of honor, trust or profit under this State of any its administrative or political subdivisions.

N.J.S.A. 2C:51-2(g), in pertinent part, also states that:

in any case in which the issue of forfeiture is not raised in a court of this State at the time of a finding of guilt, entry of guilty plea or sentencing, a forfeiture of public office, position or employment required by this section may be ordered by a court of this State upon application of the county prosecutor or the Attorney General or upon application of the public officer or public entity having authority to remove the person convicted from his public office, position or employment. The fact that a court has declined to order forfeiture shall not preclude the public officer or public entity having authority to remove the person convicted from seeking to remove or suspend the person from his office, position or employment on the ground that the conduct giving rise to the conviction demonstrates that the person is unfit to hold the office, position or employment.

As detailed above, the respondent pleaded guilty to federal tax evasion in U.S. District Court. Consequently, his conviction was for an offense under the laws of the United States, rather than those of the State of New Jersey. Hence, a forfeiture may be sought and declared in New Jersey State court only after the procedures specified in

N.J.S.A. 2C:51-2(b)(2) have been followed. As set forth above, a court of this State can declare forfeiture under these circumstances only upon application of the County Prosecutor or the Attorney General.

This result is not altered by the fact that the Commissioner may have the jurisdiction to seek a forfeiture under N.J.S.A. 2C:51-2(g) in a case where sentencing was in state court and the issue was not raised in that court at the time of sentencing. As previously stated, the guilty plea in this case was in federal court under the laws of the United States. Because the plea was not entered in a “court of this State,” N.J.S.A. 2C:51-2(g) does not apply here.

As the Commissioner found, the language of the statute as amended in September 1995 is clear and unambiguous. Hence, we need look no further than the words of the statute. Nonetheless, we stress that state courts and federal courts constitute separate judicial systems based on distinctly derived jurisdictional authority. The statutory framework involved here reflects that distinction.

In short, the statute unquestionably confers the authority on either the County Prosecutor or the Attorney General in these circumstances to seek a forfeiture in state court. Nothing extends that authority to the Commissioner of Education or to district boards of education where the plea was entered in federal district court under the laws of the United States. The fact that the Attorney General did not exercise that authority in this case cannot alter the terms of the statute. Consequently, we affirm the Commissioner’s determination that he lacked the jurisdiction to declare a forfeiture or to authorize the district board to seek such a declaration in this instance.

We further agree with the Commissioner that the tenure charges in this case are

not moot. We also concur that the conduct established in this matter by the respondent's guilty plea warrants the conclusion that respondent was guilty of unbecoming conduct. We further concur with the Commissioner that this conduct warrants the dismissal of the respondent from his tenured employment.

As the Commissioner stressed, the respondent has a claim for benefits arising out of his employment in the school district. More significantly, his voluntary resignation would not preclude him from employment in the public schools of New Jersey or in those of other states. This result is unconscionable given the seriousness of the federal charges to which respondent pleaded guilty and the nexus of those charges to his position in the school district. In this respect, we emphasize that, as described above, the respondent's plea agreement included a stipulation which provided for a two-level enhancement to his penalty since his conduct clearly reflected an abuse of the position of trust which he had held with the district.

Accordingly, for the reasons expressed herein, as well as those articulated by the Commissioner, we affirm the Commissioner's determination in this matter.

Attorney exceptions are noted.

April 5, 2000

Date of mailing _____