

TELFORD BERKEBILE,
PETITIONER, :

V. :
BOARD OF EDUCATION OF THE BOROUGH :
OF SOUTH RIVER, MIDDLESEX COUNTY, :
RESPONDENT. :

NICHOLAS BYCZKOWSKI,
PETITIONER, :

V. :
BOARD OF EDUCATION OF THE BOROUGH :
OF SOUTH RIVER, MIDDLESEX COUNTY, :
RESPONDENT. :

JOHN GOLDSBOROUGH,
PETITIONER, :

V. :
BOARD OF EDUCATION OF THE BOROUGH :
OF SOUTH RIVER, MIDDLESEX COUNTY, :
RESPONDENT. :

COMMISSIONER OF EDUCATION

DECISION

PETER KRZYKOWSKI,
PETITIONER, :

V. :
BOARD OF EDUCATION OF THE BOROUGH :
OF SOUTH RIVER, MIDDLESEX COUNTY, :
RESPONDENT. :

ARLENE NOVAK,
PETITIONER, :

V. :
BOARD OF EDUCATION OF THE BOROUGH :
OF SOUTH RIVER, MIDDLESEX COUNTY, :
RESPONDENT. :

ROBERT PETCHEL,
PETITIONER, :

V. :
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JOSEPH PRATO,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE BOROUGH	:	
OF SOUTH RIVER, MIDDLESEX COUNTY,	:	
RESPONDENT.	:	
	:	
MELVIN ROSSI,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	
BOARD OF EDUCATION OF THE BOROUGH	:	
OF SOUTH RIVER, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	
FREDERICK SCHAUM,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE BOROUGH	:	
OF SOUTH RIVER, MIDDLESEX COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioners, nine nontenured custodians, contended the Board improperly suspended them without pay. Petitioners argued that the Board had no legal authority to refuse to pay them during the pendency of investigations and complaints into possible criminal activity (falsifying vouchers for overtime and weekend duty). Board refused to reinstate them or pay back compensation even though charges were ultimately dismissed.

ALJ found that summary judgment was warranted pursuant to *N.J.S.A. 18A:6-14*. ALJ found that petitioners were not illegally suspended, but the Board acted illegally when it refused to pay petitioners during the period of suspension as no indictment was pending against them. ALJ directed the Board to restore petitioners to the positions they would have had had it not acted improperly by making their otherwise lawful suspensions payless. Petitioners had a duty to mitigate their damages during the suspensions by making reasonable efforts to secure employment during the suspension, but the burden to establish that petitioners did not put forth reasonable efforts to mitigate while suspended under suspicion of illegal conduct lies with the respondent. ALJ determined petitioners need not account for the monies received from unemployment compensation as they can deal with the Department of Labor on their own concerning repayment of such benefits.

Commissioner concurred with the ALJ that the issuance of summary judgment was warranted. Commissioner found that interest was not warranted in that petitioners provided no basis for concluding that the Board acted in bad faith. Commissioner concurred that the Board failed to meet the burden necessary to fully litigate the issue of mitigation. Commissioner modified the ALJ's recommendation regarding unemployment benefits, concluding that the amount of back pay owed by the Board should be offset by unemployment benefits already paid to petitioners, as well as the amount of any actual earnings received.

JULY 28, 1997
OAL DKT. NOS. EDU 10768-96 through 10776-96 (CONSOLIDATED CASES)
AGENCY DKT. NOS. 527-11/96 through 535-11/96

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The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. The Board’s exceptions and the petitioners’ joint reply thereto, filed through one attorney, were timely filed in accordance with *N.J.A.C.* 1:1-18.4.

The Board excepts to the Administrative Law Judge’s (ALJ) contention that the Middlesex County Prosecutor’s Office and the South River Municipal Prosecutor declined to prosecute any charges against petitioners and explains the procedural history of the instant matter at length. (Board’s Exceptions at pp. 1-3)

The Board then avers that summary judgment was inappropriate herein due to the unresolved issue regarding mitigation of damages, noting that discovery would have provided the Board with the opportunity to learn exactly what petitioners did to mitigate their damages. Additionally, the Board excepts to the lack of a determination in the initial decision requiring each petitioner to provide an affidavit as to what, if anything, each of them did to mitigate the damages. In citing *West Orange Supplemental Instructors Assoc. et al. v. Board of Education of West Orange Twp.*, 92 *N.J.A.R.* 2d 287 (EDU) 1991, on remand, 94 *N.J.A.R.* 2d 337 (EDU) 1993, the

Board avers that petitioners were required to use reasonable diligence and to exercise ordinary care to mitigate any damages which they may have sustained. (Board's Exceptions at pp. 4-6)

Additionally, the Board excepts to the ALJ's directive regarding the unemployment benefits which have been paid to the petitioners. Citing *Willis v. Dyer*, 63 *N.J. Super.* 152, 163-164 (App. Div. 1978), the Board contends that legal authority supports a finding that back salary be reduced by unemployment benefits received by an employee. (Board's Exceptions at p. 7)

In reply, petitioners first contend that they were improperly served with the Board's exceptions in that only one of the nine petitioners was served. (Petitioners' Exceptions at p. 1) Next, while concurring with the ALJ's determination that their suspension without pay was not allowable under *N.J.S.A.* 18A:6-14, petitioners except to the ALJ's calculation of damages, urging the Commissioner to award them interest on their back pay in that the Board acted in bad faith when it suspended them without pay in direct contravention of statute. (Petitioners' Exceptions at pp. 2-5) They further contend that the question of mitigation of damages should not have been considered by the ALJ in that the Board failed in its pleadings to raise it as an affirmative defense. In support of this proposition, the Board cites *Winans-Carter Corporation v. Jay & Benisch*, 107 *N.J. Super.* 268 (App. Div. 1969). (Petitioners' Exceptions at p. 5) Lastly, petitioners argue that the Board failed to sustain its burden of proof on the mitigation issue in the instant matter. (*Id.* at pp. 5-6)

Initially, the Commissioner notes that exceptions were served upon the attorney that collectively represented the petitioners in the filing of exceptions, so that no harm was incurred. Thus, the Commissioner will not reject the Board's exceptions on this basis alone.

Upon review of the substantive issues raised, the Commissioner affirms the initial decision, finding that the issuance of summary judgment was warranted in the present matter pursuant to *N.J.S.A.* 18A:6-14. In so ruling, the Commissioner is satisfied that the ALJ fully and fairly considered the procedural history of this matter and the Board's arguments concerning the appropriateness of issuing summary decision herein. With regard to the arguments raised in petitioners' exceptions seeking interest, the Commissioner finds that interest is not warranted in that petitioners have provided no basis for concluding that the Board acted in bad faith or in deliberate violation of law as required by *N.J.A.C.* 6:24-1.16.

In addressing the exception arguments regarding mitigation, the Commissioner concurs that the Board failed to meet the burden necessary to fully litigate this issue herein. While

the Board correctly asserts that *West Orange, supra*, requires that petitioners use reasonable diligence and exercise ordinary care to mitigate any damages which they may have sustained, it is well-settled in law that failure to mitigate is an affirmative defense and the burden to demonstrate such failure rests with the employer. See *Zielenski v. Board of Education of the Town of Guttenberg, Hudson County*, 1981 S.L.D. 759; *Goodman v. London Metals Exchange, Inc.* 86 N.J. 19 (1981). It is not enough for an employer to merely raise lack of mitigation as an issue. As stated in *Cartin v. Continental Homes of New Hampshire*, “Such burden [of failure to mitigate] is not met by merely arguing the possibility and, absent concrete evidence, the issue is merely speculative.” 360 A. 2d. 96, 134 Vt. 362 (1976). (*Zielenski* at 764) Rather, as stated by the Supreme Court in *Goodman, supra*,

Mitigation*** is an affirmative defense and the burden of proving the appropriateness of its application rests on the wrongdoer, in this case the employer ***[who] may establish a prima facie case by first showing that comparable employment opportunities were available and, ***that there were other suitable [available] jobs***.
(at 40-41)

In the instant matter, the Board raised the question of failure to mitigate in its answering papers in opposition to petitioners’ Motion for Summary Decision but did not provide supporting affidavits, as required under *N.J.A.C. 1:1-12.4(a)*, in order to defeat a motion for summary judgment, to meet its burden under the *Goodman* case, bringing forth facts serving to demonstrate that comparable job opportunities were available to petitioners in similar types of employment, with reasonable and diligent efforts.* Thus, the Board cannot now complain that it was denied its opportunity to pursue this issue.

Finally, the Commissioner modifies the recommendation of the ALJ regarding unemployment benefits, concluding that the amount of back pay owed by the Board should be offset by unemployment benefits which have already been paid to petitioners, as well as by the amount of any actual earnings received. The Commissioner favors such approach as efficient and consistent with the approach set forth in *Willis v. Dyer, supra*, wherein the Appellate Division held that unemployment benefits received by plaintiff should be deducted by the township from the back pay due him. See also *Labor and Industry Dept. v. Smalls*, 153 N.J. Super. 411 (App. Div. 1977).

* Given this finding, the Commissioner finds it unnecessary to reach to the question as to whether affirmative defense of failure to mitigate must be raised in the initial pleadings.

Accordingly, for the reasons expressed therein and as further explicated above, the initial decision is affirmed with modification, and summary judgment is entered in favor of petitioners.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JULY 28, 1997