

TRACY SUMMERS,	:	
	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE	:	DECISION
CITY OF UNION, HUDSON COUNTY,	:	
	:	
RESPONDENT	:	

SYNOPSIS

Petitioner, tenured teaching staff member, sought reinstatement to her position and back pay, alleging Board violated *N.J.S.A. 18A:28-5*, in refusing to allow her to rescind her retirement when she was denied acceptance into the Early Retirement Incentive Program.

Having considered the written communication between the parties, the ALJ concluded that petitioner did not resign or retire. ALJ concluded that petitioner's acceptance into the Early Retirement Incentive Program was a condition precedent to the operation of a valid resignation/retirement. Thus, because petitioner failed to qualify for that program, the ALJ concluded that no resignation/retirement occurred. ALJ concluded petitioner was entitled to reinstatement, back pay and benefits less mitigation from wages earned.

Commissioner concurred with the ALJ's analysis and determination that petitioner's acceptance into the Early Retirement Incentive Program was a condition precedent to her resignation/retirement from her tenured position and, because she failed to qualify for such program, no resignation/retirement occurred. Commissioner directed Board to reinstate petitioner to her position and to promptly compensate her for lost salary and emoluments owed for the period of her improper termination. The Board, however, was entitled to reduce this amount to the extent of unemployment benefits petitioner received during this period. Commissioner noted that it is well-settled in law that the burden to establish that petitioner did not put forth reasonable efforts to mitigate her damages during this period lies with the Board and the Board failed to satisfy its required burden of proof.

AUGUST 7, 1997

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The record of this matter and the initial decision of the Office of Administrative Law (OAL)¹ have been reviewed. By letter dated May 19, 1997, counsel for the respondent Board requested and was granted a 10-day extension of the period within which to submit exceptions in this matter to allow him to procure and submit hearing transcripts. The Board's exceptions and petitioner's reply thereto were timely filed in accordance with the established schedule.

The Board initially excepts to the Administrative Law Judge's (ALJ) conclusion that petitioner's acceptance into the Early Retirement Incentive Program was a condition precedent to her retirement. Rather, it maintains that petitioner's letter of retirement submitted to the District, along with consideration of selected portions of petitioner's hearing testimony which it presents, clearly evidences that her actual intent was to unconditionally resign from the District because of her dissatisfaction with her teaching assignments and to, additionally, take advantage

of the early retirement program, if possible. (Board's Exceptions at p. 3) The Board argues that, in reaching her erroneous conclusion here, the ALJ "exalt[ed] the unexpressed, potential subjective intent of Petitioner***" (*id.* at p. 4), and incorrectly accepted petitioner's testimony as credible while ignoring the credible testimony of its witness in this regard.

The Board next contends that even assuming, *arguendo*, that petitioner's retirement letter to the District was ambiguous, the ALJ erred in not applying requisite contract law principles which dictate that any ambiguity is to be construed against the drafter of the document, citing *Mautz v. J.P. Patti Co. et al.*, 298 N.J. Super. 13, 19 (App. Div. 1997); *Leonard & Butler, P.C. v. Evan M. Harris*, 279 N.J. Super. 659 (App. Div. 1995); *Michele Matthews, Inc. v. Kroll & Tract*, 275 N.J. Super. 101 (App. Div. 1994); and *In the Matter of the Estate of Alton Glenn Miller*, 90 N.J. 210 (1982) as its authority for this proposition. (Board's Exceptions at pp. 6-7)

The Board further argues that petitioner should be estopped from claiming anything other than a retirement status by virtue of the fact that she accepted and cashed a check for \$5,536, representing payment for accumulated sick leave entitlement, a retirement benefit under the parties' collective bargaining agreement.

Finally, the Board urges that if ordinary contract principles are to be dispositive in this matter as espoused by the ALJ, in the event that it is ultimately determined that petitioner should be reinstated to her position, the public interest requires that such reinstatement should be without back pay due to petitioner's failure to mitigate damages. (Board's Exceptions at p. 9) It cites hearing testimony of petitioner which it asserts establishes that petitioner never completed

¹ It has been brought to the Commissioner's attention that in the last sentence of page 5 of the Initial Decision the reference to "PERS" should be corrected to read "TPAF."

any application to teach during this period or earned any money but, rather “merely collected unemployment benefits and retirement benefits.” (Board’s Exceptions at p. 12)

In reply, petitioner posits that the Board’s argument with respect to petitioner’s intent to retire unconditionally is belied by the resolution that the Board expressly adopted (Exhibit J-4), accepting Summers’ retirement under the Early Retirement Incentive Program. She argues that “[g]iven the clarity of the Board’s action, it is completely disingenuous for the Board to claim now that the petitioner’s request was not conditioned on entry into the Early Retirement Incentive Program; [t]he Board knew it, approved it and may not now assert a contrary position.” (Petitioner’s Reply at pp. 1-2) Further, she asserts that acceptance of the Board’s contention that ambiguity in petitioner’s initial letter should, pursuant to contract law, be construed against her and in favor of the Board would entail adoption of an extremely limited view of contract law and a total ignoring of the subsequent Board actions establishing that petitioner’s intent to retire was conditional.

With respect to petitioner’s acceptance of a check from the Board in September 1995, petitioner asserts that there is no reasonable basis on which to conclude that her acceptance of such check “constitutes the acceptance of retirement benefits so as to justify a forcible separation from employment.” (Petitioner’s Reply at p. 8) She posits that upon her restoration to employment, the sick leave bank should be restored by a set-off from her back pay damage award.

Lastly, petitioner asserts that although the Board argues the issue of mitigation, it has not met its burden of establishing a failure to mitigate. Citing *West Orange Supplemental Instructors Association v. West Orange Board of Education*, 92 N.J.A.R. 2d (EDU) 287 (Comm. Ed.), aff’d in part, reversed in part, 301, 302 (State Board of Education) as authority, petitioner

maintains that “***[t]he Board bears the burden of proving the existence of comparable jobs that Summers could have taken.” (Petitioner’s Reply at p. 9) In order to meet this burden, petitioner states that the Board would need to show the existence of positions for Speech and Drama Teachers “that would be available to a 50+ year old teacher with 21 years of experience that were not remote to the petitioner.” (*Id.*) In that the Board failed to present any evidence on this issue, petitioner argues that it cannot now argue a failure to mitigate damages. Moreover, petitioner asserts that the record substantiates that she not only sought teaching positions during this period but also sought employment in the theater arts and, as such, has met her duty to mitigate damages. (*Id.*) Petitioner argues that the only mitigation applicable in the within matter would be unemployment compensation, which she contends would only arise if the Board reimburses the unemployment benefits. (*Id.*)

Upon a full review of the record in this matter, which included transcripts of the two days of hearings at the OAL,² the Commissioner agrees with the ALJ’s analysis and conclusion that petitioner’s acceptance into the Early Retirement Incentive Program was a condition precedent to her resignation/retirement from her tenured position and, because she failed to qualify for such program, no resignation/retirement occurred. As such, the action of the Board in refusing to continue the petitioner’s employment was improper and she must, therefore, be immediately be reinstated to her position.

Notwithstanding the Board’s protestations that petitioner’s communication indicating her intent to retire was “ambiguous” and that it understood such to represent her unconditional intent to leave the District, its subsequent actions in this matter strongly belie such a contention. In this regard, the Commissioner notes that the minutes of the Board’s April 28, 1994

meeting (Exhibit J-3) indicate that it acted on that date to accept what appears to be the unconditional retirement of certain individuals. (See Meeting Minutes at pp. 3 and 5.) Petitioner's retirement, on the other hand, was specifically considered and approved under the "Early Retirement Incentive Program - window of opportunity extension" (*Id.* at p. 7) Moreover, the Board's awareness with respect to the specifics surrounding petitioner's retirement was further confirmed in its April 29, 1994 letter to her which stated in pertinent part

Receipt is acknowledged of your communication whereby you are retiring from your position at Union Hill High School. Please be advised that at the regular meeting of the Union City Board of Education held on April 28, 1994, your retirement was accepted under the Early Retirement Incentive Program-Delayed Retirement Provision, effective July 1, 1995.

As such, the Commissioner finds it amply established, through the Board's own actions, that it understood and accepted that there was a "condition" to petitioner's notice to retire, thereby effectively preserving to her the right to rescind such retirement if the operative condition did not come to pass. (See *Cutler et al. v. Board of Education Parsippany-Troy Hills*, N.J. Superior Court, Appellate Division, A-1464-90T3 (January 27, 1992)). This position is further buttressed, again through the Board's own actions, by events which transpired at its June 13, 1995 meeting. Although, admittedly, taking no action on petitioner's proffered rescission of her retirement/resignation at this meeting, the Board did, however, act to approve petitioner's participation in a Computer Camp later that summer which petitioner, uncontrovertedly asserts she did, in fact, attend and for which she was compensated. The Commissioner concludes that this action, along with those previously noted, are totally inconsistent with the Board's contention

² It is noted that hearings in this matter were conducted on December 19 and 23, 1996.

that it considered petitioner terminated from its employ as of June 30, 1995³. With respect to the Board's expressed disagreement with the credence given to testimony of the witnesses, the Commissioner finds no cause, based upon the full record before him, to call into question the credibility determinations made by the ALJ herein.

Turning to the issue of how principles of mitigation affect this matter, the Commissioner observes that, *N.J.S.A.* 18A:6-30 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***.

Under the provisions of this statute, the within Board is required to reinstate the petitioner to her position and restore the back pay and emoluments which she would have received had the Board not acted improperly in discontinuing her employment. Case law in this area, however, has consistently held that, under common law principles, petitioner was under a duty to mitigate her damages during this period by making reasonable efforts to secure alternative employment, notwithstanding that she was improperly terminated from her 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); *Mullen v. Board of Education of Jefferson Township*, 81 *N.J. Super.* 151 (App Div. 1963); *Miele v. McGuire*, 31 *N.J.* 339 (1960). The Commissioner observes that petitioner contends that she has met her burden in that she made a diligent search for employment, filling out applications and going on auditions for theater jobs in New York. (Tr. I, 155-22 to 156-15) She, additionally, testified that there were no openings in most of the

³ The Commissioner observes that he is unpersuaded, given the circumstances existing in this matter, that petitioner's acceptance of a check from the Board in September 1995, can serve to effectively constitute her concession to "retirement" status and, thereby, serve as justification for her forced separation from employment. Such amount must, however, be set off against her ultimate damage award herein.

schools. (Tr. I, 158-7) The Commissioner further observes it is also well-settled in law that the burden to establish that petitioner did not put forth reasonable efforts to mitigate her damages during this period lies with the Board. (See *Goodman v. London Metals Exchange, Inc.*, 86 N.J. 19 (1981); *West Orange, supra*, *Zielenski, supra*.) To sustain its burden, the Board would be required, by the preponderance of the credible evidence, to establish that during the relevant period comparable employment opportunities were available to petitioner and she failed to take advantage of those opportunities. (*Goodman*; *West Orange*) In the within matter, although the Board charges that petitioner's damage award must be reduced due to her failure to expend reasonable efforts to mitigate her damages, it failed to satisfy its required burden of proof in support of this assertion. Merely arguing the possibility of a lack of reasonable mitigation, absent concrete evidence, renders the issue purely speculative. As such, there is no basis upon which the Commissioner can award the Board's requested relief in this regard.⁴

Accordingly, the initial decision of the OAL is adopted as the final decision in this matter for the reasons articulated therein. The Board is hereby directed to reinstate petitioner to her position and to promptly compensate her for lost salary and emoluments owed for the period of her improper termination. The Board, however, is entitled to reduce this amount to the extent of unemployment benefits petitioner received during this period.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

AUGUST 7, 1997

⁴ Although the unemployment benefits received by petitioner are to be deducted by the Board from the back pay due petitioner, and this will serve to "mitigate" her award, it is noted that such benefits are recoverable from the Board by the State. *Willis v. Dyer*, 163 N.J. Super. 152 (App. Div. 1978).