

281-01

ROBERT BUSLER, :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE CITY OF : DECISION

EAST ORANGE, ESSEX COUNTY, :

RESPONDENT. :

SYNOPSIS

Petitioner, former assistant principal with 25 years experience in the District’s employ, sought back pay, attorney fees and service credit for the period of suspension in 1997 when criminal indictment was filed against him and later dismissed after pre-trial intervention (PTI) was completed by petitioner. Petitioner had been charged with sexually assaulting and recklessly endangering the welfare of a child.

The ALJ noted that indemnification for the costs of defending against the charges for which petitioner was indicted, pursuant to *N.J.S.A.* 18A:16-6 and 16-6.1, require 1) that the charges arose out of the course of his employment and 2) that the charges resulted in a final disposition in favor of petitioner. In this matter, the ALJ determined that petitioner’s participation in PTI was not tantamount to an acquittal; the component factors of the PTI program imply guilt with amenability to rehabilitation, not innocence. Therefore, the ALJ concluded that petitioner’s participation in the PTI program was not a final disposition in his favor under the provisions of the indemnification statutes. The ALJ further found that the charges did not arise out of or in the course of his employment. Moreover, there was no statutory or equitable basis on which to award back pay and service credit.

The Commissioner adopted the findings and determination in the Initial Decision as his own with clarification. The Commissioner agreed with the ALJ that it is well-established that the Courts, in interpreting *N.J.S.A.* 18A:16-6.1, have held that successful completion of PTI leading to dismissal of charges is not a dismissal or favorable determination of a criminal proceeding entitling the employee to reimbursement. Thus, the Commissioner found it unnecessary to reach to the ALJ’s discussion as to whether petitioner’s criminal charges arose out of and during the course of his employment. As to petitioner’s claim for back pay, benefits and restoration of service credit for the period of his suspension, the Commissioner concurred with the ALJ that *N.J.S.A.* 18A:6-8.3 makes no provision for back pay, regardless of the disposition of the criminal indictment and there is no basis under education laws here to award such relief. As to petitioner’s reliance on the concepts of fundamental fairness and estoppel as justification for his recovery, the Commissioner found no merit to petitioner’s contention that he properly and reasonably relied on a District administrator as having the authority to grant him the relief he sought thereby rendering the representations of this individual binding on the Board. The Commissioner noted that it is well-established that representations of an individual board member or administrator are insufficient to bind a board to a particular course of action. (*Dorrington*) Petition was dismissed.

AUGUST 30, 2001

<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>

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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 were filed in accordance with the provisions of *N.J.A.C.* 1:1-18.4 and were fully considered by the Commissioner in reaching his determination here.

Petitioner’s exceptions 1) object to the omission of what he avers are certain relevant facts in points 7, 8 and 9 of the Administrative Law Judge’s (ALJ) Factual Findings¹; 2) claim the cases cited by the ALJ on pages 6-7 of the Initial Decision are factually irrelevant as they are distinguishable from the within matter because in none of these cited cases “was a petitioner actually issued a check for the *full disputed amount* let alone actually receiving and depositing said check***,” as was the circumstance here (emphasis in text) (Petitioner’s exceptions at 2); and 3) contest the ALJ’s determination that the Board was not bound, by the doctrine of agency by estoppel, to honor Dr. King’s representations that petitioner would be reimbursed for counsel fees and back pay if the charges against him were dismissed, irrespective

¹ It is noted that all of the ALJ’s Factual Findings are derived, point by point, from the petitioner’s Petition of Appeal, with points 8 and 9 being a verbatim presentation from that document.

of any conditions accompanying such dismissal. Here, petitioner argues that his undisputed hearing testimony established that Dr. King, who was Assistant Superintendent of Personnel and his long-standing supervisor, was aware of the charges against him and served as his conduit to the personnel committee throughout the pendency of the matter. He professes that Dr. King's authority to speak for the Board was evidenced by the fact that it was he who informed petitioner of his suspension and authorized the issuance of checks to petitioner, which were subsequently issued. As such, he argues, contrary to the conclusion of the ALJ, it was entirely reasonable for petitioner to rely on the representations which had been made to him by this individual.

In reply, the Board advances that although petitioner claims to have placed a great deal of reliance on representations, supposedly made by Dr. King, that he would be reimbursed back pay and legal fees if the charges against him were dismissed, irrespective of any conditions on such dismissal, there is no independent corroboration of such a "sweeping representation" in the record. (Board's Reply Exceptions at 1) Indeed, it argues, the statement, in and of itself, is illogical. Even assuming, *arguendo*, that Dr. King may have been of the impression that petitioner's successful completion of pretrial intervention (PTI) would entitle him to the compensation he claims, this administrator's suppositions are not the issue here. The focus of attention in this matter is whether petitioner is legally entitled to the relief he seeks. Pursuant to applicable statutes and relevant case law, PTI is not a successful disposition of criminal charges which would operate to trigger the monetary protections claimed by petitioner.

Upon careful and independent review of the record, which it is noted did not contain transcripts of the hearing conducted at the OAL, the Commissioner, finding petitioner's exceptions without merit, is in accord with the ALJ's conclusion that petitioner is neither entitled

to indemnification for attorney fees and expenses nor back pay and pension credit for the period he was suspended subsequent to his indictment.

Initially, the Commissioner notes that petitioner seeks reimbursement for legal fees and expenses accrued in defending against his prior criminal action pursuant to *N.J.S.A.* 18A:16-6 and *N.J.S.A.* 18A:16-6.1 which must be read *in pari materia* and, in pertinent part, specify:

N.J.S.A. 18A:16-6: **Indemnity of officers and employees against civil actions**

Whenever any civil action has been or shall be brought against any person holding any office, position or employment under the jurisdiction of any board of education, ****for any act or omission arising out of and in the course of the performance of the duties of such office, position, employment ****, the board shall defray all costs of defending such action, including reasonable counsel fees and expenses, together with costs of appeal, if any, and shall save harmless and protect such person from any financial loss resulting therefrom***. (emphasis supplied)

N.J.S.A. 18A:16-6.1 **Indemnity of officers and employees in certain criminal actions**

Should any criminal action be instituted against any such person *for any such act or omission and should such proceeding be dismissed or result in a final disposition in favor of such person*, the board of education shall reimburse him for the cost of defending such proceeding, including reasonable counsel fees and expenses of the original hearing or trial and all appeals. (emphasis supplied)

Thus, an employee is entitled to reimbursement for the cost of attorney's fees and expenses upon the satisfaction of a two-pronged analysis: 1) whether the charged offense arose out of and during the course of the employee's performance of his duties and responsibilities; *and* 2) whether the underlying criminal action is dismissed or resulted in a final disposition in favor of the employee. As was recognized by the ALJ, it is well-established that the Courts, in interpreting *N.J.S.A.* 18A:16-6.1, have held that an employee's successful completion of PTI

leading to dismissal of the charges against him is *not* a dismissal or favorable determination of a criminal proceeding, within the intentment of this statute, entitling the employee to reimbursement. See *Cressinger, supra; Thadeus Pawlak v. Board of Education of the Borough of Hopatcong*, (App. Div. A-5083-87T2, July 12, 1989). Given that petitioner's application here clearly fails to satisfy this requisite statutory condition, the Commissioner finds it unnecessary to reach to the ALJ's discussion on page 7 of the Initial Decision as to whether petitioner's criminal charges arose out of and during the course of his employment.²

With respect to petitioner's claim for back pay, benefits and restoration of service credit for the period of his suspension, pursuant to *N.J.S.A. 18A:6-8.3*, from January 23, 1997 to November 30, 1997, the Commissioner finds and concludes, as did the ALJ, that this statute makes no provision for back pay, regardless of the disposition of the criminal indictment, and that there is no basis under education laws here to award such relief.

Finally, turning to petitioner's contention of entitlement to his requested reliefs pursuant to the concepts of fundamental fairness and estoppel, the Commissioner is in full agreement with the ALJ that reliance on either of these doctrines is misplaced in this matter. First, as to fundamental fairness, as was pointed out by the ALJ, each of the cases relied on by petitioner "for the general proposition that a 'fully vindicated employee must be made whole,'" (Initial Decision at 6, footnote 2) are inapposite to the within matter, as in those cases each of the petitioners was *acquitted* of the charges for which he was suspended while here the charges were dismissed subsequent to completion of PTI, which is not tantamount to an acquittal or vindication. The Commissioner similarly finds no merit in petitioner's contention that he properly and reasonably relied on a District administrator as having the authority to grant him the

² See, however, *Bower v. Board of Education of the City of East Orange*, 149 N.J. 416 (1997).

relief he sought, thereby rendering the representations of this individual as binding on the Board. It is by now well-established that the representations of an individual board member or administrator are insufficient to bind a board to a particular course of action. See *Cheryl Dorrington v. North Bergen Board of Education*, 1982 S.L.D. 247; see, also, *Kevin Griffin v. Board of Education of the City of Paterson*, 93 N.J.A.R. 2d (EDU) 882 (1993). Rather, the Commissioner concludes that here, as in *Dorrington*:

An examination of the [full] record reveals that the Board committed itself not at all to petitioner, but that petitioner mistakenly relied on the opinions and assurances of [a Board administrator] in concluding that a commitment had been made. Such reliance was misplaced, since opinions and assurances cannot stand in the stead of deliberate Board action.

Dorrington 1982 S.L.D. at 256, quoting *Anna Brennan v. Board of Education of the City of Pleasantville*, 1977 S.L.D. 1059.

As found by the ALJ, it is inconceivable that petitioner, as a professional educator and administrator with 25 years experience in the District's employ, would be unaware of this "hierarchical nature of public education." Initial Decision at 9.³

Accordingly, the Initial Decision of the OAL is affirmed for the reasons stated therein as clarified above and the instant Petition of Appeal is dismissed.

IT IS SO ORDERED.⁴

COMMISSIONER OF EDUCATION

Date of Decision: AUGUST 30, 2001

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³ Petitioner's contention that issuance of checks for the monies he sought at the direction of Dr. King evidences the reasonableness of his reliance on this individual's representations is misplaced. This argument is specifically belied by the fact that payment on such checks was almost immediately stopped, in obvious recognition that the administrator had exceeded his authority in directing their issuance.

⁴ This decision, as the Commissioner's final determination 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:2-1.1 et seq.* Commissioner decisions are deemed filed three days after the date of mailing to the parties.