

#159-11 (OAL Decision: Not yet available online)

IN THE MATTER OF THE TENURE :
HEARING OF LOUIS MELILLO, : COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY : DECISION
OF ELIZABETH, UNION COUNTY :

SYNOPSIS

In 2004, the School District of the City of Elizabeth brought tenure charges of conduct unbecoming against respondent – a tenured custodian – and sought respondent’s dismissal from employment. Respondent denied all charges, contending that the students who made the allegations of unbecoming conduct had fabricated their stories in a scheme to get him fired because he had caught them derelict in their work duties, had sent them home for not doing their work, and had their pay reduced. Following dismissal of criminal charges filed against respondent in the same matter, a hearing was held at the OAL; subsequently, all tenure charges against respondent were also dismissed. The Commissioner’s final decision, issued in November 2010, remanded the case back to the OAL for proceedings to resolve the parties’ disputes concerning back pay and emoluments.

The ALJ found that: tenured school employees who have been exonerated of tenure charges are entitled to be reinstated with back pay and emoluments, but have a duty to mitigate damages by seeking similar employment; any award of back pay may be reduced for failure to mitigate; respondent was under a duty to mitigate and seek suitable employment; respondent was employed from August 2004 to July 2005 in construction work; respondent did not seek further employment after being laid off from his construction job in July 2005, and continued on suspension with pay even after the Commissioner’s final decision in November 2010 dismissing all tenure charges; however, the Board overlooked the fact that mitigation is an affirmative defense, and therefore the Board had the burden of proof. The ALJ concluded that respondent is entitled to full back pay and emoluments, minus what he earned while working in construction, and ordered that the Board: 1) pay the net amount of \$16,781.14 as reimbursement of wrongfully withheld wages; 2) award respondent all increments to which he would have been entitled; 3) credit respondent for the sick days he has earned since his suspension; and 4) award respondent with vacation days he has accrued, beginning with August 2004.

The Assistant Commissioner, to whom this matter has been delegated pursuant to *N.J.S.A.* 18A:4-34, concurred with the ALJ that the Board failed to meet its burden of establishing that respondent’s back pay should be subject to mitigation, and with the ALJ’s determinations with respect to earned sick time and reimbursement for pay respondent was entitled to for the period during which he was inappropriately suspended. Additionally, the Assistant Commissioner found, *inter alia*, that: respondent is entitled to a credit for the vacation time he accrued but did not use prior to his suspension, not a monetary reimbursement; and respondent should have returned to work immediately following the dismissal of tenure charges in November 2010 and is consequently not entitled to any additional sick or incremental pay beyond November 30, 2010. The respondent shall be awarded back pay and increments due totaling \$52,411.64, and shall be credited with 96 sick days through November 30, 2010 and 15 vacation days earned but not used prior to his suspension. No additional vacation time is warranted since respondent is being paid for the entire amount of time he was wrongfully suspended.

<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>

April 25, 2011

OAL DKT. NO. EDU 12620-10
(EDU 11502-04 ON REMAND)
AGENCY DKT NO. 363-10/04

IN THE MATTER OF THE TENURE :
HEARING OF LOUIS MELILLO, : COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY : DECISION
OF ELIZABETH, UNION COUNTY :

The record of this matter and the Initial Decision of the Office of Administrative Law – as well as the respective exceptions filed pursuant to *N.J.A.C.* 1:1-18.4 by the respondent and the Board of Education (Board), and the respondent’s reply thereto – have been reviewed by the Assistant Commissioner, to whom this matter has been delegated pursuant to *N.J.S.A.* 18A:4-34. On November 4, 2010, the Commissioner remanded this matter to OAL to fully resolve the parties’ disputes concerning back pay and emoluments.¹

The Board submitted exceptions arguing that the ALJ inappropriately found that the respondent’s back pay should not be subject to mitigation. The Board contends that the ALJ erroneously found that the Board failed to present prima facie evidence that there were other comparable employment opportunities available to the respondent. The Board argues that the ALJ’s finding with respect to mitigation was ludicrous because it was the respondent’s obligation to put forth a good faith effort to mitigate the damages. In its exceptions, the Board points out that the respondent testified that he did not make any attempts to work during his suspension.

¹ In the November 4, 2010 decision, the Commissioner dismissed the tenure charges against the respondent.

The Board also takes exception to the ALJ's specific findings regarding respondent's increments and accrued vacation time. The Board contends that the ALJ wrongfully awarded the restoration of an increment from August 1, 2004 - June 30, 2005 even though an increment was not withheld during that period. Finally, the Board argues that respondent should not be reimbursed for his accrued vacation days, but rather he should be credited with those days.

The respondent submitted exceptions generally supporting the ALJ's findings with respect to the back pay and emoluments. In his exceptions, the respondent additionally argues that in light of the delay occasioned by waiting for the remand decision, the respondent should receive an additional 14 sick days and 2 personal days which accrue as sick days for the 2010-2011 school year. In reply to the Board's exceptions, the respondent contends that the ALJ properly found that it is the Board who has the burden of establishing the failure to mitigate, and that no such evidence was presented by the Board in this case. Again, in reply the respondent reiterated his position with respect to back pay and emoluments previously stated in his exceptions.²

Upon review of the record on remand, the Assistant Commissioner concurs with the ALJ for the reasons stated in the Initial Decision that the Board failed to meet its burden of establishing that the respondent's back pay should be subject to mitigation. The Assistant Commissioner further agrees with the ALJ's determination with respect to respondent's earned sick time, and the reimbursement for pay that he is entitled to for the period during which respondent was inappropriately suspended.

² The remaining arguments made by the respondent in reply are beyond the scope of remand, and are more directed at the Board's counsel and the number of delays that have occurred in this case. It should be noted that both parties have used their respective exceptions as a method to complain about the manner in which this case has been litigated.

In the Initial Decision the ALJ found that the respondent's increment for 2004 – 2005 should be restored. Based on the record on remand, it does not appear that the respondent's increment was withheld prior to July 1, 2005; therefore, no increment shall be restored for that time period. The ALJ also awarded respondent with the vacation time he accrued beginning August 2004. Since the respondent is being paid for the entire amount of time he was wrongfully suspended, no additional vacation time is warranted. It is also not clear from the Initial Decision whether the ALJ's recommendation was meant to be a credit for vacation time or if it was meant to be a reimbursement for that accrued time.³ The Assistant Commissioner finds that respondent is entitled to a credit for the vacation time he accrued but did not use prior to his suspension, not a monetary reimbursement.

Finally, the Assistant Commissioner finds that the respondent should have returned to work immediately following the November 4, 2010 final decision dismissing the tenure charges.⁴ *See, N.J.S.A. 18A:6-14.* Moreover, the Assistant Commissioner cannot even fathom why respondent has not returned to work, especially considering the amount of time that it has taken for the tenure proceedings to culminate. The portion of the November 4, 2010 decision that remanded this case to the OAL was strictly limited to the parties' disputes concerning back pay and emoluments, and should not have delayed respondent's return to work. As a result, the Assistant Commissioner finds that the respondent is not entitled to any additional sick or incremental pay beyond November 30, 2010.⁵

³ It is clear from the respective exceptions that the parties each interpreted the ALJ's finding differently.

⁴ According to the record on remand the respondent has not yet returned to work; however, the record is devoid of any justification for such.

⁵ On remand it appears that the Board provided the ALJ with all of the relevant back pay and emolument calculations up until November 30, 2010 with the expectation that the respondent would be back at work by that date.

Accordingly, the respondent shall be awarded \$16,781.14, which amounts to his salary for the period when he was improperly suspended, reduced by the amount he earned while working in construction during that time period. The respondent shall also be awarded the increments he would have received between July 1, 2005 and November 30, 2010, which amounts to a reimbursement of \$35,630.50.⁶ As a result, the respondent shall receive a total of \$52,411.64 in monetary reimbursements. Finally, the respondent shall be credited with the 96 sick days that he accrued during the suspension up until November 30, 2010, and the 15 vacation days that he had accrued but had not used prior to the suspension.

IT IS SO ORDERED.⁷

ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: April 25, 2011

Date of Mailing: April 25, 2011

⁶ These calculations were provided by the Board on remand, and the respondent agreed they were accurate for purposes of the remand.

⁷ Pursuant to *P.L. 2008, c. 36 (N.J.S.A. 18A:6-9.1)*, Commissioner decisions are appealable to the Superior Court, Appellate Division.