

#308-15 (OAL Decision: Not yet available online)

KIMBERLYNN JURKOWSKI, :  
 :  
 PETITIONER, :  
 :  
 V. : COMMISSIONER OF EDUCATION  
 :  
 BOARD OF EDUCATION OF THE : DECISION  
 CITY OF ATLANTIC CITY, ATLANTIC :  
 COUNTY, AND DONNA HAYE, :  
 SUPERINTENDENT, :  
 :  
 RESPONDENTS. :  
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SYNOPSIS

Petitioner – formerly employed as a School Library Media Specialist – challenged the Board’s decision terminating her employment because she entered into a Pretrial Intervention (PTI) program, a condition of which was that she forfeit her current employment. On October 23, 2013, petitioner was found guilty by a jury of theft by deception and falsifying or tampering with records; however, the trial judge did not enter a judgment of conviction, but instead – in December 2013, post-trial – granted the petitioner’s request for PTI. The respondent Board notified petitioner – by letter dated October 30, 2013 – that her conviction qualified as an automatic job forfeiture pursuant to *N.J.S.A. 2C:51-5*, and did not file tenure charges based on the jury verdict and the forfeiture statute. The petitioner asserted that she was already terminated before she entered into PTI, and therefore had no “current employment” to forfeit; she sought to be rehired to her former position. The Board filed a motion for summary decision.

The ALJ found, *inter alia*, that: although the Board’s conclusion that petitioner had been convicted after her trial was technically incorrect because the trial judge did not perfect the jury verdict pursuant to *R. 3:21-5(b)*, the respondent Board clearly anticipated that the trial judge was going to enter a judgment of conviction, and equated the jury verdict as the legal equivalent to a judgment of conviction and forfeiture, negating the need for tenure charges; since petitioner had not been terminated by either statutory forfeiture or statutory tenure proceedings, she was technically and legally still employed by the Board on December 6, 2013, when she entered into PTI; and therefore all the terms of the PTI Order were applicable and petitioner agreed to forfeit her employment with the Board, which she remained entitled to on December 6, 2013. The ALJ concluded that petitioner, pursuant to the PTI Order, was terminated from her employment with the Board effective on December 6, 2013, obviating the requirement for tenure charges or hearings. Accordingly, the ALJ granted the Board’s motion for summary decision.

Upon comprehensive review, the Commissioner adopted the Initial Decision of the OAL as the final decision in this matter, and dismissed the petition.

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.
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September 28, 2015

OAL DKT. NO. EDU 13701-14  
AGENCY DKT. NO. 252-9/14

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The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed, as have the exceptions filed pursuant to *N.J.A.C. 1:1-18.4* by the petitioner, Kimberlynn Jurkowski, and the Atlantic City Board of Education’s (Board) reply thereto. The petitioner, a tenured School Library Media Specialist, is challenging the decision of the Board terminating her employment because she entered into Pretrial Intervention (PTI) where a condition of PTI was that she forfeit her current employment.

In her exceptions, petitioner argues that the Initial Decision should be rejected because the matter should not have been decided on summary decision as there are material facts in dispute. The petitioner maintains that at the time she entered into the PTI program, she had already been terminated from her position with the Board and as a result she had no “current employment.” The petitioner further asserts that the PTI Order does not reference the Atlantic City Board of Education but simply states “current employment” and the sentencing Judge never questioned the petitioner to ascertain that she understood each condition of PTI. If a condition of the PTI was to forfeit her right to appeal the termination of her employment with the Board or the forfeiture of her employment with the Board, the petitioner stresses that she would not have entered into the PTI Order. Therefore, the petitioner contends that a hearing must be held to ascertain the intent of the parties who entered into the PTI Order.

The petitioner also argues that to the extent there was ambiguity or uncertainty as to what the petitioner was agreeing to as a condition of PTI, all inferences should be resolved in her favor as the non-moving party. Instead the ALJ wrongfully stated that he addressed the motion solely on the legal side to avoid a trial by affidavit. Finally, the petitioner points out that the Board failed to respond to interrogatories served on the Board in April 2015. As a result, the petitioner maintains that based upon these facts it cannot be determined that petitioner agreed to forfeit her employment with the Board, and her petition seeking reimbursement and back pay should be granted. In the alternative, the petitioner argues that fundamental fairness suggests that she should be given an opportunity to withdraw her consent to the terms of PTI.

In reply, the Board contends that the ALJ properly granted summary decision to the Board based on the application of the relevant law to the material facts necessary for his determination. Although the petitioner may have raised contested factual issues, those facts were not material. The Board stresses that the petitioner's intention or understanding regarding her entry into the PTI program is irrelevant because she voluntarily forfeited her position with the Board and her claim that she agreed to give up a position she thought she did not have is disingenuous. The ALJ found that the Board could not have legally terminated the petitioner on October 30, 2013, and as a result she was employed by the Board when she entered into the PTI Order in December 2013. Therefore, when she agreed to "forfeit her current employment" as a condition of PTI, she forfeited her employment with the Board. Finally, the Board claims that it is of no matter that the discovery responses were not produced because the ALJ's decision was based solely on the undisputed material facts.

The resolution of this case turns on the impact of the Board's October 30, 2013 letter terminating the petitioner's employment and whether the petitioner was employed by the Board when she was admitted into PTI. Upon review, the Commissioner concurs with the ALJ's determination – for the reasons stated in the Initial Decision – that the Board properly terminated the petitioner's employment as a result of the condition of PTI requiring her to forfeit her "current employment." Although the timing of

the events in this case has resulted in a convoluted scenario, the Commissioner is also in accord with the ALJ's determination that the material facts are not in dispute.

On October 23, 2013, an Atlantic City jury found the petitioner guilty of third degree theft by deception and fourth degree falsifying or tampering with records.<sup>1</sup> For unknown reasons, the jury verdict was not recorded by the presiding judge. It is undisputed that – had the verdict been recorded – the petitioner would have been required to automatically forfeit her employment with the Board pursuant to *N.J.S.A. 2C:51-2*.<sup>2</sup> Based on the jury verdict alone, by letter dated October 30, 2013, the Board wrongfully informed the petitioner that her employment was terminated effective October 23, 2013.

On December 6, 2013, a PTI Order was entered granting the petitioner admission into the PTI program – despite the jury verdict – with one of the conditions being that she forfeit her “current employment.” In light of the fact that the Board wrongfully issued the petitioner a termination letter on October 30, 2013, the Commissioner finds that when the petitioner entered into the PTI program in December, 2013, she was then currently employed by the Board. The Commissioner is not persuaded that the exceptions submitted by the petitioner dictate a different result, as the arguments advanced by the petitioner in her exceptions were considered and fully addressed by the ALJ in the Initial Decision. Further, the petitioner's contention that the forfeiture of her “current employment” did not include her employment with the Atlantic City Board of Education is not supported by the record.<sup>3</sup>

It is important to recognize that the Commissioner only has jurisdiction to determine whether the petitioner was lawfully terminated by the Board. The bizarre circumstances surrounding the

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<sup>1</sup> The complete procedural history related to the petitioner's arrest and the actions taken by the Board are outlined in the Initial Decision and will not be repeated here.

<sup>2</sup> Under *N.J.S.A. 2C:51-2(a)(1)*, forfeiture of public employment is mandatory for a conviction of crime of the third degree or higher.

<sup>3</sup> Despite the fact that petitioner contends she believed she was already terminated by the Board when she agreed to forfeit her current employment as a condition of PTI, a review of the parties' submissions indicates that the parties agree that the Board did not properly terminate the petitioner effective October 23, 2013, because a judgment of conviction was not entered against the petitioner.

jury verdict and petitioner's subsequent entry into PTI, coupled with the Board's erroneous termination letter, have complicated this matter. Nonetheless, the resolution of the case before the Commissioner is dictated by the fact that the petitioner agreed to forfeit her "current employment" as a condition of PTI, and her current employment at the time of the entry of the PTI Order in December 2013 was with the Board.<sup>4</sup> Therefore, the petitioner's employment with the Board was terminated after the PTI Order was entered. To the extent that the parties involved with the PTI Order – including the Atlantic City Prosecutor's Office and the Superior Court Judge – may have had different intentions concerning the terms and conditions of PTI, that analysis is beyond the scope of the Commissioner's jurisdiction. Further, if the petitioner wishes to withdraw her consent to the terms of PTI at this juncture, those efforts must be commenced in Superior Court – to the extent authorized by law – as the Commissioner does not have jurisdiction over the PTI program.

Accordingly, the Initial Decision is adopted as the final decision in this matter and the petition of appeal is dismissed.

IT IS SO ORDERED.<sup>5</sup>

COMMISSIONER OF EDUCATION

Date of Decision: September 28, 2015

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<sup>4</sup> It should be noted that the petitioner has pointed to no other employment that the PTI could have been conditioned upon and the petitioner did not file a petition of appeal after the Board issued the October 30, 2013 letter but instead filed a petition in November 2014 when the Board refused to reinstate her following her completion of PTI.

<sup>5</sup> This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L. 2008, c. 36*. (*N.J.S.A. 18A:6-9.1*).