

**New Jersey Commissioner of Education
Final Decision**

Jeffrey Klein,

Petitioner,

v.

Board of Education of the Passaic County
Technical Institute, Passaic County,

Respondent.

Michelle Owens,

Petitioner,

v.

Board of Education of the Passaic County
Technical Institute, Passaic County,

Respondent.

Synopsis

Petitioner appealed a suspension without pay imposed by the respondent Board. Petitioner was charged with the disorderly persons offense of possession of hashish and was suspended by the Board with pay. Following petitioner's receipt of a six-month conditional discharge, the Board changed the suspension to one without pay.

The ALJ found, *inter alia*, that: no genuine issues of material facts existed, and the matter was ripe for summary decision; *N.J.S.A.* 18A:6-8.3 provides that tenured employees may be suspended without pay only if they are indicted or if tenure charges have been certified against them; and petitioner had not been indicted and the Board had not certified tenure charges against him. The ALJ concluded that the suspension without pay was in contravention of *N.J.S.A.* 18A:6-8.3. Accordingly, the ALJ granted petitioner's motion for summary decision and ordered the Board to reinstate petitioner's suspension with pay.

Upon review of the record in this matter, the Commissioner concurred with the ALJ's findings and conclusion. The Initial Decision was adopted as the final decision in this matter.

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.

March 17, 2020

New Jersey Commissioner of Education

Decision

Jeffrey Klein,

Petitioner,

v.

Board of Education of the Passaic County
Technical Institute, Passaic County,

Respondent.

Michelle Owens,

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v.

Board of Education of the Passaic County
Technical Institute, Passaic County,

Respondent.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties did not file exceptions.

In February 2019, petitioner Klein,¹ a special education teacher, was charged with the disorderly persons offense of possession of hashish and suspended with pay by the Board. In May 2019, after Klein received a six-month conditional discharge that did not require

¹ Petitioner Klein's matter was previously consolidated by the OAL with a similar matter involving Michelle Owens. On September 26, 2019, Owens withdrew her petition.

him to plead guilty, the Board changed his suspension to one without pay. The ALJ found that under *N.J.S.A.* 18A:6-8.3, a tenured employee may be suspended without pay only if the employee was indicted or if tenure charges were certified against him. Neither of those circumstances were present here, so the ALJ found that the suspension without pay was improper.

Upon review, the Commissioner concurs with the ALJ's conclusion that, in the absence of tenure charges or an indictment, the Board was not permitted to suspend Klein without pay. Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter for the reasons expressed therein. The Board is directed to reinstate Klein's suspension with pay, retroactive to May 2, 2019.

IT IS SO ORDERED.²

COMMISSIONER OF EDUCATION

Date of Decision: March 17, 2020
Date of Mailing: March 17, 2020

² 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).



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

JEFFREY KLEIN,

Petitioner,

v.

**BOARD OF EDUCATION OF THE
PASSAIC COUNTY TECHNICAL
INSTITUTE, PASSAIC COUNTY,**

Respondent.

OAL DKT. NO EDU 08805-19

AGENCY DKT. NO. 101-5/19

CONSOLIDATED

MICHELLE OWENS,

Petitioner,

v.

**BOARD OF EDUCATION OF THE
PASSAIC COUNTY TECHNICAL
INSTITUTE, PASSAIC COUNTY,**

Respondent.

OAL DKT. NO. EDU 10789-19

AGENCY DKT. NO. 149-6/19

Ronald J. Ricci, Esq., for Petitioners (Ricci & Fava, LLC, attorneys)

Albert C. Buglione, Esq., for Respondent (Buglione, Hutton & Deyoe,
LLC, attorneys)

Record Closed: January 29, 2020

Decided: February 21, 2020

BEFORE JULIO C. MOREJON, ALJ:

STATEMENT OF THE CASE

Petitioners, Jeffrey Klein (Klein), and Michelle Owens, allege that respondent, Board of Education of the Passaic County Technical Institute, (PCTI), decision to suspend them without pay is in violation of their respective tenure rights under N.J.S.A. 18A:6-8.3.

PROCEDURAL HISTORY

Klein filed his Verified Petition (Petition) with the Commissioner of the New Jersey Department of Education (Commissioner), on May 10, 2019, contesting PCTI's decision to suspend him without pay on May 2, 2019. Owens filed her Petition with the Commissioner on June 21, 2019, contesting PCTI's decision to suspend her without pay on June 14, 2019. PCTI filed an Answer to Klein's Petition with the Commissioner on June 17, 2019, and PCTI filed an Answer to Owens' Petition with the Commissioner on June 24, 2019.

The two matters were transferred to the Office of Administrative Law (OAL), as a contested cases under N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13, as follows: Klein's matter was filed on June 27, 2019, and Owens' matter was filed on August 7, 2019. Thereafter, on September 17, 2019, an Order of Consolidation was entered.

On August 23, 2019, Klein filed a motion for summary decision. On October 3, 2019, PCTI filed its opposition to Klein's motion for summary decision, and on October 9, 2019, Klein filed a reply to PCTI's opposition.

On September 19, 2019, Owens' filed her motion for summary decision, and on September 26, 2019, Owens withdrew her Petition pursuant to an agreement with PCTI and her motion for summary decision was withdrawn.

On January 29, 2020, oral argument was held, at which time the record closed.

DISCUSION

The following facts are undisputed, and I **FIND** them to be **FACTS** of this case:

Klein was hired by PCTI as a special education teacher in 2007 and received tenure in 2011. On February 9, 2019, Klein was charged with possession of hashish under 5 grams. This was in violation of N.J.S.A. 2C:35-10a (4), a disorderly persons offense. As a result of the charge and arrest, PCTI suspended Klein with pay on February 11, 2019.

On April 29, 2019, Klein appeared in municipal court on the disorderly persons offense and received a six-months conditional discharge under. N.J.S.A. 2C:36A-1 On May 2, 2019, the Board changed the suspension from with pay to without pay, as a result of Klein entering into conditional discharge. Klein has not been indicted nor has he been notified of tenure charges against him.

The conditional discharge concluded on October 31, 2019, at which time the original charge of N.J.S.A. 2C:35-10a (4), would be dismissed, provided Klein complied with the terms of his conditional discharge.³ As part of his conditional discharge, Klein was not required to enter a guilty plea, but did have to pay mandatory fines and assessments.

Klein seeks relief pursuant to N.J.A.C. 1:1-12.5, which provides that summary decision should be rendered “if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law.” Our regulation mirrors R. 4:46-2(c) which provides that “the judgment or order sought shall

³ During oral argument on January 29, 2020, counsel for Klein represented that Klein had complied with the terms of his conditional discharge and the underlying misdemeanor charge was dismissed.

be rendered if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law.”

A determination whether a genuine issue of material fact exists that precludes summary judgment requires the judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party. Our courts have held that the "judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995), citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). When the evidence "is so one-sided that one party must prevail as a matter of law," the trial court should not hesitate to grant summary judgment. Anderson, 477 U.S. at 252. Conversely, it is critical that a favorable ruling on a summary judgment motion not "shut a deserving litigant from his [or her] trial." Judson v. Peoples Bank and Trust Co. of Westfield, 17 N.J. 67, 77 (1954).

No genuine issues of material fact exist in this case. For the reasons set forth in greater detail below, Klein is entitled to summary decision ordering his suspension be with pay and awarding back pay. As the underlying facts are not in dispute in this matter, the fundamental issue to be decided is whether Klein's suspension without pay is proper, and whether he is entitled to backpay.

The relevant statute, N.J.S.A. 18A:6-8.3, provides:

Any employee or officer of a board of education in this State who is suspended from his employment, office or position, other than by reason of indictment, pending any investigation, hearing or trial any appeal therefrom, shall receive his full pay or salary during such period of suspension, except that in the event of charges against such employee or officer brought before the board of education or

the Commissioner of Education pursuant to law, such suspension may be with or without pay or salary as provided in Chapter 6 of which this section is a supplement . . . “

[N.J.S.A. 18A:6-8.3].

Klein moves for summary decision claiming that he should be placed on suspension with pay and additionally, that he is entitled to back pay for the period he has been suspended without pay. In support of his argument, he relies on a variety of cases; the most decisive is the seminal case of Slater v. Bd. of Educ. of Ramapo-Indian Hills Reg. High Sch. Dist., 237 N.J. Super. 424 (App. Div. 1989). In Slater, a tenured school employee was arrested for the sale of marijuana. He was immediately suspended without pay. Months later, he was indicted and convicted, which led to his forfeiture of employment. The court held that “a tenured employee may be suspended without pay only if indicted or if tenure charges have been preferred and certified to the Commissioner of Education. In all other circumstances, a suspension must be with pay.” Id. at 246. Further, since the employee was not indicted at the time of suspension, nor were tenure charges certified against him, the suspension should have been with pay up until he was indicted. Accordingly, the court remanded for entry of an order requiring backpay to the date of indictment.

PCTI contends that Klein behaved inappropriately and that his possession of hashish in addition to improperly securing his illicit drugs amounts to conduct unbecoming of a teacher.⁴ However, the appropriateness of Klein’s conduct is not the dispositive issue. In fact, it is well settled law that a tenured school employee may be suspended without pay only if indicted or if tenure charges were certified [emphasis supplied], neither scenario which exists herein. Furthermore, PCTI relies on In the Matter of Tenure Charges of Brenda Bruni (No. 207-9/17) (February 9, 2018), where a “teacher *inter alia* had drug charges that were dismissed, and a two-month suspension without pay was imposed” to support the assertion that withholding Klein’s salary is proper during this probationary period.⁵ The Bruni decision is distinguishable herein as

⁴ PCTI refers to an alleged incident where a fourteen-year-old classmate of Klein’s daughter received a marijuana edible and began vomiting.

⁵ PTCI, Br. at 5

Bruni was suspended with pay for several months pending investigation. Before her penalty of suspension without pay was levied, tenure charges were brought against her [emphasis supplied].

In the present matter, Klein is a tenured employee. He has not been indicted and tenure charges have not been certified against him. While he was arrested and charged with a misdemeanor drug offense, he entered a conditional discharge term that did not require him to plead guilty. Conditional discharge in misdemeanor drug offenses is set forth in N.J.S.A. 2C:36A-1, which states in pertinent part:

Whenever any person who has not previously been convicted of any offense under section 20 of P.L.1970, c.226 (C.24:21-20), or a disorderly persons or petty disorderly persons offense defined in chapter 35 or 36 of this title and who has not previously participated in a program of supervisory treatment . . . or conditional dismissal . . . or a Veterans Diversion Program . . . is charged with or convicted of any disorderly persons offense or petty disorderly persons offense under chapter 35 or 36 of this title, the court upon notice to the prosecutor and subject to subsection c. of this section, may on motion of the defendant or the court:

- (1) Suspend further proceedings and with the consent of the person after reference to the State Bureau of Identification criminal history record information files, place him under supervisory treatment upon such reasonable terms and conditions as it may require; or
- (2) After a plea of guilty or finding of guilty, and without entering a judgment of conviction, and with the consent of the person after proper reference to the State Bureau of Identification criminal history record information files, place him on supervisory treatment upon reasonable terms and conditions as it may require, or as otherwise provided by law.

A guilty plea is not required under N.J.S.A. 2C:36A-1, in every case, and it was not required of Klein when he entered into his conditional discharge for a six-month term. In addition, PCTI has not certified tenure charges against Klein for his conduct.

As such, I **CONCLUDE** that Klein's initial suspension with pay was appropriate under N.J.S.A. 18A:6-8.3 and should not have been converted to a suspension without pay.

In addition, I **CONCLUDE** that since Klein was neither indicted nor facing tenure charges, he is entitled to backpay commencing May 2, 2019 when his penalty was modified to suspension without pay. I/M/O Tenure Hearing of Robert G. Morton, EDU 0253-97, Initial Decision (06/11/99), adopted, Comm'r (07/30/99) <<http://lawlibrary.rutgers.edu/oal/search.html>>. In Morton, a tenured teacher was indicted on numerous drug offenses, to which he pled guilty and was sentenced to probation. Thereafter, Morton was suspended without pay for one month before tenure charges were certified against him. He was eventually granted backpay for the time between his conviction and the certification of his tenure charges.

Also, in Adrian McConney v. Twp of Piscataway Bd. of Educ. Middlesex Cty, EDU 0576 (2017), McConney was a tenured teacher who was indicted on "official misconduct" charges. He was subsequently suspended without pay. The indictment was eventually dismissed and McConney was placed on payroll a month after. The court in McConney grants him backpay for the month between the dismissal of his indictment and his reinstatement on payroll.

Accordingly, Klein's motion for summary decision is **GRANTED** and PCTI's opposition to said motion is **DENIED**.

ORDER

It is hereby **ORDERED** that Klein's motion for summary decision that PCTI's decision to suspend him without pay since May 2, 2019, is in contravention of N.J.S.A. 18A:6-8.3, is **GRANTED**.

It is hereby further **ORDERED** that since Klein was neither indicted nor facing tenure charges, he is entitled to backpay commencing May 2, 2019, when PCTI modified Klein's suspension from with pay to a suspension without pay, and it is hereby

further **ORDERED** that PCTI is to reinstate Klein's suspension with pay retroactive to May 2, 2019.

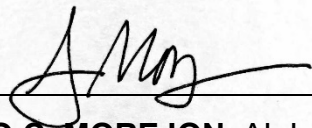
I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

February 21, 2020

DATE



JULIO C. MOREJON, ALJ

Date Received at Agency:

February 21, 2020

Date Mailed to Parties:

February 21, 2020

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