

New Jersey Commissioner of Education
Final Decision

Michael Smurro,

Petitioner,

v.

Board of Education of the Township of
Neptune, Monmouth County,

Respondent.

Synopsis

This matter stems from tenure charges of unbecoming conduct that were brought against petitioner by the Board following a single incident that occurred off school grounds at a restaurant in April 2021. Pursuant to *N.J.S.A. 18A:6-16*, tenure charges against petitioner were assigned to an arbitrator, who found that petitioner was guilty of one charge of unbecoming conduct which did not warrant his removal; rather, the arbitrator imposed a penalty of suspension without pay for six months. Petitioner, a tenured Vice Principal in the Neptune School District, sought an order finding that his motion to dismiss in lieu of an answer to the charges did not constitute a “delay” that would otherwise toll a 120-day unpaid suspension period under *N.J.S.A. 18A:6-14*. The respondent Board opposed the petitioner’s motion, contending that petitioner had caused the delay.

The ALJ found, *inter alia*, that: there are no material facts at issue here, and the matter is ripe for summary decision; it is evident from the plain language of 6A:3-5.3(a)1 that a motion to dismiss in lieu of an answer is expressly permitted as a response by an individual against whom tenure charges are certified; therefore, a filing specifically set forth in the regulations governing this process does not constitute a delay of the proceedings before the arbitrator. Accordingly, the ALJ granted summary decision in favor of petitioner and denied the respondent Board’s motion for summary decision. Further, the ALJ ordered the Board to reimburse petitioner for the full amount of time he was suspended without pay beyond the six-month period that the arbitrator imposed.

Upon review, the Commissioner agreed with the ALJ that petitioner’s motion to dismiss the tenure charges filed against him was not a delay requested by petitioner within the meaning of *N.J.S.A. 18A:6-14*. Accordingly, the Commissioner adopted the Initial Decision of the OAL as the final decision in this matter, granted petitioner’s motion for summary decision and denied the Board’s motion for summary decision. The Board was ordered to reimburse petitioner for the full amount of his salary for thirty-one days, the amount of time he was suspended without pay beyond the six-month period of suspension imposed by the arbitrator.

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.

335-22
OAL Dkt. No. 00198-22
Agency Dkt. No. 218-11/21

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Neptune, Monmouth County,

Respondent.


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

Upon review, the Commissioner agrees with the Administrative Law Judge that petitioner's motion to dismiss the tenure charges filed against him was not a delay requested by petitioner within the meaning of *N.J.S.A. 18A:6-14*.

Accordingly, the Initial Decision is adopted as the final decision in this matter. Petitioner's motion for summary decision is granted and respondent's motion for summary decision is denied. The Board is ordered to reimburse petitioner for the full amount of his salary for thirty-one days, the amount of time he was suspended without pay beyond the six-

month period of suspension imposed by the arbitrator.

IT IS SO ORDERED.¹


ANGELINA ALLEN McMILLAN, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: December 14, 2022

Date of Mailing: December 14, 2022

¹ This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A. 18A:6-9.1*. Under *N.J.Ct.R. 2:4-1(b)*, a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
CROSS-MOTIONS FOR
SUMMARY DECISION

OAL DKT. NO. EDU 00198-22

AGENCY DKT. NO. 218-11/21

MICHAEL SMURRO,

Petitioner,

v.

**TOWNSHIP OF NEPTUNE BOARD OF
EDUCATION, MONMOUTH COUNTY,**

Respondent.

Andrew L. Schwartz, Esq., for petitioner (Schwartz Law Group, LLC, attorneys)

Stephen J. Edelstein, Esq., for respondent (Weiner Law Group, attorneys)

BEFORE **JACOB S. GERTSMAN, ALJ** t/a:

Record Closed: September 28, 2022

Decided: November 17, 2022

STATEMENT OF THE CASE

Petitioner seeks an order finding that his motion to dismiss in lieu of an answer did not constitute a “delay” that would otherwise toll the 120-day unpaid suspension period under N.J.S.A. 18A:6-14. Respondent opposes the petition contending that petitioner caused the delay.

PROCEDURAL HISTORY

The petition was filed on November 23, 2021, and the matter was transmitted to the Office of Administrative Law (OAL), where it was filed on January 6, 2022, as a contested case and assigned to the undersigned. N.J.S.A. 52:14B-1 to N.J.S.A. 52:14B-15; N.J.S.A. 52:14F-1 to N.J.S.A. 52:14F-13. Petitioner filed a motion for summary decision on February 16, 2022, and the initial telephone prehearing conference was held on the March 8, 2022. During the prehearing conference, respondent notified the undersigned that they would be filing a cross-motion for summary decision, and a briefing schedule was established. Respondent’s cross-motion was filed on March 25, 2022, petitioner’s reply brief was filed on April 5, 2022, and the joint stipulation of facts was filed on April 7, 2022. Oral argument was held on May 16, 2022.

On July 25, 2022, petitioner submitted a letter to the undersigned advising of “certain actions the District appears poised to take at its next meeting of Wednesday, July 27, 2022.” The record was reopened, and a telephone status conference was held on July 27, 2022, where the parties agreed to submit a supplemental joint stipulation of facts. Following the submission of the stipulation on August 19, 2022, a telephone status conference was held to discuss outstanding issues with the submission. The revised and executed supplemental joint stipulation was submitted on September 28, 2022, and the record once again closed.

FACTUAL DISCUSSION AND FINDINGS

JOINT STIPULATION OF FACTS¹

The following Joint Stipulation of Facts was duly submitted by the parties and are hereby **FOUND** as **FACT**:

1. Pursuant to N.J.S.A. 18A:6-10 et seq., the District served tenure charges upon petitioner Smurro on May 26, 2021 (the “tenure charge matter”). (Exhibit 1, at ¶4; Exhibit 2, at ¶4.)
2. Petitioner filed his Answer with the Board on June 10, 2021. (Exhibit 1, at ¶5; Exhibit 2, at ¶5.)
3. The Board, by way of a special meeting held on June 28, 2021, voted to certify tenure charges against Smurro to the Commissioner of Education (“Commissioner”). (Exhibit 1, at ¶6; Exhibit 2, at ¶6.)
4. Pursuant to N.J.S.A. 18A:6-14, at the special meeting of June 28, 2021, the Board also voted to suspend Smurro without pay for 120 days or until final determination of the tenure charges, effective June 29, 2021. (Exhibit 1, at ¶7; Exhibit 2, at ¶7.)
5. The District filed its certified tenure charges with the Commissioner on June 29, 2021 (“Commissioner’s Receipt of Certified Charges”). (Exhibit 4.)
6. Petitioner was receiving his full salary as well as his concomitant medical benefits from the District up until it suspended him without pay. (Exhibit 1, at ¶8; Exhibit 2, at ¶8.)

¹ ¶1 through ¶25 were submitted by the parties on March 24, 2022. ¶26 through ¶35 were submitted on September 28, 2022. The Joint Stipulations were modified by the undersigned for stylistic purposes.

7. Despite voting to suspend Smurro's pay effective June 29, 2021, the District actually began Smurro's unpaid suspension on July 16, 2021. (Exhibit 1, at ¶9; Exhibit 2, at ¶9.)
8. On July 14, 2021, Smurro filed a motion to dismiss the tenure charges in lieu of an answer pursuant to N.J.A.C. 6A:3-5.3(a)(1). (Exhibit 1, at ¶12; Exhibit 2, at ¶12.)
9. On July 19, 2021, the Commissioner of Education assigned an arbitrator to the tenure charges pursuant to N.J.S.A. 18A:6-16. (Exhibit 1, at ¶13; Exhibit 2, at ¶13.)
10. By letter dated July 19, 2021, the arbitrator assigned to the matter asked counsel to the District how long it needed to respond to the motion to dismiss, to which the District requested two weeks. (Initial Motion Timeline Email; Exhibit 5.)
11. On August 2, 2021, the District sought, and the arbitrator granted, a request for a seven-day extension of time to respond to Smurro's motion to dismiss. (Exhibit 1, at ¶15; Exhibit 2, at ¶15.) (Extension Request Email; Exhibit 6.)
12. The District submitted its opposition to the motion to dismiss on August 9, 2021. (Exhibit 1, at ¶16; Exhibit 2, at ¶16.)
13. Petitioner submitted his reply brief on August 16, 2021. (Exhibit 1, at ¶17; Exhibit 2, at ¶17.)
14. The arbitrator assigned to the tenure charges issued her Decision denying the motion on October 17, 2021, and ordered that the tenure charges proceed to a hearing. (Exhibit 1, at ¶18; Exhibit 2, at ¶18.) (Decision on Motion; Exhibit 7.)

15. On October 28, 2021, counsel for petitioner Smurro sent the District a letter inquiring about the resumption of petitioner's salary. (Exhibit 1 at ¶¶18; Exhibit 2, at ¶¶24.) (Letter re Resumption of Salary; Exhibit 8.)
16. On November 2, 2021, the District sent a letter indicating that the District would not consider resuming the payment of Smurro's salary before February 14, 2022, because it contended that petitioner's motion to dismiss operated as a request for a delay of the proceedings. (November 2, 2021, District Letter; Exhibit 9.)
17. The District's November 2 letter asserted that the time period between Smurro's filing of the motion to dismiss on July 14, 2021, and the arbitrator's determination of that motion on October 17, 2021, should not count for purposes of the 120-day period under N.J.S.A. 18A:6-14. (Exhibit 9.)
18. Petitioner responded to the District's November 2 letter that same day contending that the District violated N.J.S.A. 18A:6-14 and that the arbitrator appointed to preside over the underlying tenure matter had the authority to order the resumption of petitioner's salary. (Petitioner's November 2, 2021, Reply Letter; Exhibit 10.)
19. The District then responded on November 4, 2021, contending that based upon N.J.S.A. 18A:6-9 only the Commissioner of Education had jurisdiction to decide issues under N.J.S.A. 18A:6-14. (November 4, 2021, District Letter; Exhibit 11.)
20. After further letters on this issue, along with oral arguments before the arbitrator, the arbitrator on November 11, 2021, signed an order determining "that she lacks jurisdiction over the issue of the resumption of [petitioner's] salary pursuant to N.J.S.A. 18A:6-14[.]" (Executed Order - Resumption of Salary; Exhibit 12.)

21. The arbitrator's November 11, 2021, order was "without prejudice to [petitioner's] right to file a Petition of Appeal before the Commissioner of Education seeking an order requiring that the District reinstate Mr. Smurro to the payroll pursuant to N.J.S.A. 18A:6-14." (Exhibit 12.)
22. Also on November 11, 2021, the arbitrator sent her first request to the Commissioner of Education, Office of Disputes and Controversies, for an extension of time regarding the forty-five-day period from which to hold the hearing after the assignment of the arbitrator pursuant to N.J.S.A. 18A:6-17.1(b)(1). (Exhibit 1, at ¶34; Exhibit 2 at ¶34.)
23. Thereafter, on November 16, 2021, Office of Disputes and Controversies granted the arbitrator's request for an extension to hold the hearing beyond forty-five days from the arbitrator's assignment. (Exhibit 1 at ¶37; Exhibit 2, at ¶37.) (Email re Extension of forty-five-day timeline; Exhibit 13.)
24. By way of email dated, February 11, 2021, the District confirmed that petitioner would be reinstated to the payroll effective February 14, 2022. (Email Confirming Resumption of Pay Feb. 14, 2022; Exhibit 14.)
25. One hundred and twenty-one days following the receipt of the certified tenure charges by the Commissioner, which occurred June 29, 2021, is October 28, 2021. (Commissioner's Receipt of Certified Charges; Exhibit 4.)
26. The merits of the tenure charge matter were decided by Decision of Arbitrator Deinhardt dated July 11, 2022 (the "Decision").
27. That Decision imposed a six-month unpaid suspension on petitioner Smurro.

28. During the pendency of the tenure charge matter, the District suspended petitioner Smurro without pay for a total of 213 days, from July 16, 2021, until February 14, 2022.
29. Of those 213 days, ninety-five days were during the pendency of a motion to dismiss filed in lieu of an answer, from July 14, 2021, until it was decided on October 17, 2021.
30. Among the original issues before this tribunal is whether the filing of a motion to dismiss in lieu of an answer pursuant to N.J.A.C. 6A:3-5.3(1)(1) operates to toll the 120-day time period for which a district filing tenure charges is permitted to suspend an employee without pay pursuant to N.J.S.A. 18A:6-14.
31. Petitioner Smurro takes the position that the filing of a motion to dismiss in lieu of an answer pursuant to N.J.A.C. 6A:3-5.3(1)(1) does not operate to toll the 120-day unpaid suspension time period set forth by N.J.S.A. 18A:6-14.
32. Respondent District takes the position that the time during which a motion to dismiss in lieu of an answer pursuant to N.J.A.C. 6A:3-5.3(1)(1) is pending does operate to toll 120-day unpaid suspension time period set forth by N.J.S.A. 18A:6-14.
33. Despite the District's resumption of petitioner Smurro's regular salary effective February 14, 2022, he remained suspended with pay until August 15, 2022, when the District ended his suspension and provided him with an assignment.
34. If this tribunal determines that petitioner Smurro's legal position is correct, given that the arbitrator imposed a six-month unpaid suspension and he was suspended without pay for a total of 213 days during the pendency of the tenure charge matter, this tribunal should order that the District is

required to reimburse petitioner Smurro for the full amount of time he was suspended without pay beyond the six-month period² the arbitrator imposed, his full salary for thirty-one days, or the difference between 213 days and 182 days.

35. If this tribunal determines that respondent District's legal position is correct, meaning that the time during the pendency of petitioner's motion to dismiss pursuant to N.J.A.C. 6A:3-5.3(1)(1) did not count as part of the 120-day unpaid suspension time period set forth by N.J.S.A.18A:6-14 and the additional unpaid suspension of petitioner beyond 120 days was due to petitioner's strategic choice and cannot count against the District, then this tribunal should order that petitioner is required to serve an additional sixty-four days of unpaid suspension to the District, representing the difference between 182 days and 118 days³, to satisfy the requirements of the arbitrator's six-month unpaid suspension penalty.

LEGAL ANALYSIS AND CONCLUSION

Summary Decision Standard

Summary decision may be granted "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." N.J.A.C. 1:1-12.5(b).

The standard for granting summary judgment (decision) is found in Brill v. Guardian Life Insurance Company of America, 142 N.J. 520 (1995):

a determination whether there exists a "genuine issue" of material fact that precludes summary judgment requires the

² For purposes of this matter, the parties agree that six-months is 182 days.

³ One hundred and eighteen days represents the difference between the 213 days that petitioner has been on unpaid suspension with the ninety-five days that the District claims should not count as part of that unpaid suspension because they were during the pendency of the motion to dismiss.

motion 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. 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, 142 N.J. at 540 (quoting Anderson v. Liberty Lobby, 477 U.S. 242 (1986).]

In addressing whether the Brill standard has been met in this case, further guidance is found in R. 4:46-2(c):

An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact.

Accordingly, the undisputed facts and the arguments of both parties will be evaluated utilizing the Brill standard.

N.J.S.A. 18A:6-14 provides in pertinent part that

Upon certification of any charge to the commissioner, the board may suspend the person against whom such charge is made, with or without pay, but, if the determination of the charge by the arbitrator is not made within 120 calendar days after certification of the charges, excluding all delays which are granted at the request of such person, then the full salary (except for said 120 days) of such person shall be paid beginning on the one hundred twenty-first day until such determination is made (emphasis added)

The Legislature’s intent in enacting the statute was “to alleviate ‘the economic hardship endured by teachers . . . suspended without pay pending the outcome of charges filed against them and certified for [a] hearing. . . .’” Pugliese v. State-Operated Sch. Dist. of City of Newark, 454 N.J. Super. 495, 505 (App. Div. 2018) (quoting In re Grossman, 127 N.J. Super. 13, 35-36 (App. Div. 1974)).

The issue before this tribunal is whether petitioner's filing of a motion to dismiss in lieu of an answer otherwise constitute a delay that would toll the 120-day unpaid suspension period under N.J.S.A. 18A:6-14.⁴

N.J.A.C. 6A:3-5.3(a) provides

Except as specified in N.J.A.C. 6A:3–5.1(c)(5), an individual against whom tenure charges are certified shall have 15 days from the date such charges are filed with the Commissioner to file a written response to the charges. Except as to time for filing, the answer shall conform to the requirements of N.J.A.C. 6A:3–1.5(a) through (d).

1. Consistent with N.J.A.C. 6A:3–1.5(g), nothing in this subsection precludes the filing of a motion to dismiss in lieu of an answer to the charges, provided the motion is filed within the time allotted for the filing of an answer. Briefing on the motions shall be in the manner and within the time fixed by the Commissioner, or by the arbitrator if the motion is to be briefed following transmittal to an arbitrator.

Petitioner argues that N.J.S.A. 18A:6-10 et seq. “has numerous references to the timelines and how to request an extension of time. However, not once in the statute is there any reference, or suggestion, that a motion to dismiss in lieu of an answer constitutes such a request. The specific section that discusses extensions of time N.J.S.A. 18A:6-17.4 provides only that the ‘commissioner shall have the authority to extend the timelines in the tenure charge process upon a showing of exceptional circumstances.’ However, this section makes no mention of the filing of a Motion to Dismiss constituting a request for an extension.” (Petitioner motion at 11.) Respondent contends that the Board did not cause the delay and “[t]he one and only reason that the

⁴ The petition additionally sought an order that “the arbitrator appointed to the underlying tenure proceeding had the authority to make that determination and order the respondent-District to resume petitioner’s salary on the 121st day following the certification of the tenure charges—October 28, 2021.” (Petitioner motion at 17.) The Commissioner has transmitted this matter to the OAL which maintains jurisdiction pursuant to N.J.A.C. 1:1-3.1 and 3.2. This tribunal takes no position on the merits of petitioner’s argument, as it is purely a question of law that should be addressed by the Appellate Division. (See Wending v. New Jersey Racing Comm’n, 279 N.J. Super 477, 484). Accordingly, I **CONCLUDE** that the OAL is not the proper forum for consideration of this issue.

arbitration of this case was delayed for just over three months is because Mr. Smurro's counsel chose to file an ill-fated Motion to Dismiss." (Respondent motion at 4.)

The parties agree that if petitioner prevails, respondent will reimburse petitioner for the full amount of time he was suspended without pay beyond the six-month period the arbitrator imposed, his full salary for thirty-one days, or the difference between 213 days and 182 days. If respondent prevails, petitioner is required to serve an additional sixty-four days of unpaid suspension to the District, representing the difference between 182 days and 118 days, to satisfy the requirements of the arbitrator's six-month unpaid suspension penalty. (Joint Stipulation at ¶¶ 34, 35)

First and foremost a court's analysis begins with the plain language of a statute. State v. Smith, 197 N.J. 325, 332 (2009) (citing State v. Brannon, 178 N.J. 500, 505-06 (2004)). The language of statute should be given its ordinary meaning and used to determine intent of the legislature; the courts cannot arbitrarily expand the scope of a statute beyond plainly expressed legislative intent. DiProspero v. Penn, 183 N.J. 477, 492 (2005); Smith, 197 N.J. at 332 (it is not the function of the court to rewrite a plainly written enactment of the Legislature or presume that the Legislature intended something other than that expressed by way of the plain language).

The language of both N.J.S.A. 18A:6-14 and N.J.A.C. 6A:3-5.3(a) is clear and unambiguous. The individual against whom the charges have been certified must file a written response within fifteen days of the charges being filed and N.J.A.C. 6A:3-5.3(a)1 provides that "nothing in this subsection precludes the filing of a motion to dismiss in lieu of an answer to the charges, provided the motion is filed within the time allotted for the filing of an answer." Put simply, it is evident from the plain language of 6A:3-5.3(a)1 that a motion to dismiss in lieu of an answer is expressly permitted as a response by an individual against whom tenure charges are certified. Therefore, it stands to reason that a filing specifically set forth in the regulations governing this process does not constitute a delay of the proceedings before the arbitrator.

Based upon the foregoing, I **CONCLUDE** that petitioner's motion to dismiss in lieu of an answer was not a delay requested by petitioner as set forth in N.J.S.A. 18A:6-14.

ORDER

I **ORDER** that petitioner's motion for summary decision be and hereby is **GRANTED** and respondent's motion for summary decision be and hereby is **DENIED**. I **FURTHER ORDER** that respondent shall reimburse petitioner for the full amount of time he was suspended without pay beyond the six-month period the arbitrator imposed, his full salary for thirty-one days, or the difference between 213 days and 182 days.

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.

November 17, 2022

DATE



JACOB S. GERTSMAN, ALJ t/a

Date Received at Agency:

Date Mailed to Parties:

JSG/jm