

C # 332-99L
SB# 45-99

IN THE MATTER OF THE TENURE :
HEARING OF DANIEL McHARRIS, : STATE BOARD OF EDUCATION
SCHOOL DISTRICT OF THE : DECISION
TOWNSHIP OF NORTH BRUNSWICK, :
MIDDLESEX COUNTY. :

Decided by the Commissioner of Education, October 21, 1999

Decision on motion by the Commissioner of Education, November 18, 1999

For the Petitioner-Appellant, Borrus, Goldin, Foley, Vignuolo, Hyman, Stahl &
Clarkin (Anthony B. Vignuolo, Esq., of Counsel)

For the Respondent-Respondent, Wilbert & Montenegro (Ben Montenegro,
Esq., of Counsel)

On or about August 16, 1999, Daniel McHarris (hereinafter "respondent"), a tenured teaching staff member employed by the Board of Education of the Township of North Brunswick (hereinafter "Board"), was arrested and charged with criminal sexual contact involving two female students and official misconduct. Shortly thereafter, the Board filed tenure charges of unbecoming conduct against the respondent, which were mailed to him on August 24, 1999. The Assistant Superintendent/Board Secretary advised the respondent in a letter accompanying the charges that he had 15 days from receipt of those charges to submit a written response to the Board.

In a second letter dated August 24, 1999, the Superintendent of Schools notified the respondent that the Board would be meeting on September 7 to consider suspending him without pay “based upon the fact that you have been charged with indictable criminal offenses which may result in the forfeiture of your public office.” The Superintendent requested that the respondent advise the Board if he wished to have that matter discussed in an open session.

By letter dated August 25, 1999, the counsel for the Board sent a copy of the tenure charges to Gidian R. Mellk, Esq., then the counsel for the respondent, and requested that Ms. Mellk advise “as to your client’s position on filing a response to the enclosed initial charge.” In a response dated August 25, Ms. Mellk advised the counsel for the Board that she had received a copy of the tenure charges and that the respondent “will not be responding to the Board’s charges, without prejudice, as provided for in Ott v. Hamilton Township Board of Education, 160 N.J. Super. 333 (App. Div. 1978), cert. den. 78 N.J. 336 (1978).”

By letter dated August 26, counsel for the Board notified Ms. Mellk that the tenure charges would be considered by the Board on September 7. He further indicated that “[b]ased upon your letter of August 25, 1999 it is our understanding that no response will be received from Mr. McHarris and the Board will proceed based upon the record before it at that time.”

By letter dated August 31, 1999, Ben Montenegro, Esq., the current counsel for the respondent, notified the counsel for the Board that he had been retained to represent the respondent in this matter. In response to the Superintendent’s letter of August 24, Mr. Montenegro stated that any action by the Board on September 7 to

suspend the respondent without pay would violate N.J.S.A. 18A:6-8.3, which provides that a board employee suspended other than by reason of indictment or certification of tenure charges is entitled to full pay during the period of such suspension. In that regard, Mr. Montenegro pointed out that the respondent had not been indicted and that tenure charges had not yet been certified against him.

At a special meeting held on September 7, 1999, the Board voted to certify the tenure charges to the Commissioner of Education and to suspend the respondent without pay. Those charges were transmitted to the Commissioner on September 20 and received by the Commissioner on September 21.

On or about September 29, 1999, the respondent filed a motion with the Commissioner to dismiss the tenure charges for procedural defects or, in the alternative, to stay the tenure proceedings. The respondent argued that the Board had not provided him with 15 days to submit a written response to the charges as required by N.J.S.A. 18A:6-16, alleging that Mr. Montenegro had advised the counsel for the Board on September 2, 1999 that he would not waive his right to respond during the 15-day period. The respondent further alleged that the Superintendent had failed to submit the charges to the Board under oath as required by N.J.A.C. 6:24-5.1(b) and that the Board had failed to determine by a majority vote of its full membership whether there was probable cause to credit the evidence in support of the charges as required by N.J.S.A. 18A:6-11.

In the event that the tenure charges were not dismissed for the reasons set forth above, the respondent requested that his "right to respond to the charges and statement

of evidence pursuant to N.J.S.A. 18A:6-1 be stayed pending completion of the criminal case” pursuant to Ott, supra.

In briefs filed in response to the respondent’s motion, the Board argued that the respondent had waived his right to respond to the tenure charges and had not rescinded that waiver. The counsel for the Board averred in a certification that Mr. Montenegro had “never provided me with any written statement from Mr. McHarris regarding...his rescission of his earlier waiver. He further failed to advise that it was his intention to file any document with the Board in opposition to the Charges to be considered on September 7, 1999.” The Board “requested that the applications of the Respondent, except his request for a stay of the proceeding pending the outcome of the criminal charges against him, be denied in their entirety.”

In a letter decision dated October 21, 1999, the Commissioner granted the respondent’s motion and dismissed the tenure charges without prejudice. Stressing that the Board’s failure to provide respondent with 15 days to respond to the tenure charges was a fatal defect requiring dismissal of the charges, the Commissioner found that:

[t]he record evidences, and the Board does not dispute, that on or before August 31, 1999, the law firm of Wilbert & Montenegro was officially substituted as respondent’s counsel in this matter and, no later than September 2, 1999, the Board’s attorney was advised of this substitution, advised that respondent’s new counsel would not waive respondent’s right to respond to the charges, and further advised that if the Board moved forward on this matter on September 7, 1999, prior to expiration of the response period, it would be in contravention of respondent’s rights. Having been clearly placed on notice, well in advance of the Board’s scheduled meeting, that respondent intended to exercise his right to respond to the charges, the Board was

obligated to postpone consideration of the tenure charges to a date subsequent to the expiration of the response period.

Commissioner's Decision, slip op. at 2.

The Commissioner added that the respondent was entitled to his full salary until such time as he was indicted or tenure charges were properly certified against him.

On November 1, the Board filed the instant appeal to the State Board.

In light of the Commissioner's decision to dismiss the tenure charges, the Board served the respondent with a second set of charges, and on November 17, 1999, after giving the respondent 15 days to respond, the Board certified those charges to the Commissioner and once again suspended the respondent without pay.

On November 18, 1999, the Commissioner denied the Board's motion for a stay of his decision of October 21. On November 30, the Board filed a motion for a stay of the Commissioner's decision with the State Board.

After a careful review of the record, we reverse the Commissioner's determination to dismiss the August 1999 tenure charges, but, as more fully detailed herein, we restrain the Board from completing certification of those charges pending disposition of the criminal charges filed against the respondent.

In Ott, supra, a tenured teacher was arrested and charged with possession of marijuana and hashish. The district board thereupon filed tenure charges of unbecoming conduct against the teacher, who sought a court order restraining the board from acting to certify the charges to the Commissioner while the criminal charges were still pending. A trial judge granted the teacher's request, and the Appellate Division affirmed the imposition of such a restraint. Noting the teacher's dilemma in having to choose between filing a sworn statement which might be used to incriminate

him in connection with the pending criminal charges and jeopardizing his tenured position by failing to file such a statement, the Court found that there was:

a sufficient showing of inequity and unfairness if the disciplinary proceeding is permitted to continue, because of the potential prejudice to plaintiff from the dilemma of foregoing his defense therein or risking self-incrimination. Thus the relief granted by the court by way of restraint is warranted within its equitable powers. Such relief is appropriate not because of the violation of any constitutional or fundamental rights but simply as an equitable solution to an intolerable situation.

Nevertheless, it does not follow that such a reasonable resolution of plaintiff's dilemma should result in an order that he be paid his salary during the period of suspension.

Under N.J.S.A. 18A:6-14, the board may suspend an employee with or without pay upon certification of a charge to the Commissioner. And such suspension, whether with or without pay, continues for a maximum of 120 days to permit a determination by the Commissioner. If the latter delays his decision beyond the period of 120 days, the employee is to be paid his salary thereafter, until disposition of the charge.

Significantly, the provision for reinstatement of salary after 120 days excludes in the time computation "all delays which are granted at the request of such person."

In view of this expression of legislative intent and the application of basic equitable principles, we conclude that plaintiff's application for the restraint of the disciplinary process for his own purposes and protection bars him from entitlement to the continued receipt of his salary in the meantime. Since his action has produced the delay the board should not be compelled to continue to pay his salary while unemployed. A contrary conclusion would reward him with receipt of salary without service during the pendency of the criminal charge and the potential extensive delay in its disposition. In the absence of such criminal involvement, on the other hand, the board could suspend his salary for 120 days within which the Commissioner would be able to dispose of the charge. Plaintiff should not be in a better position because the infraction involves a crime than that

which would obtain if the charge were non-criminal. Since the delay is brought about by him and his interest, the board should not be burdened with interim salary payments. Of course, in the ultimate, if plaintiff is cleared of the disciplinary charges, he will be entitled to reinstatement with full back salary.

Ott, supra, at 341-42.

In the matter now before us, the respondent asserted his rights under Ott on August 25, 1999 when Ms. Mellk, his counsel at that time, indicated that the respondent would “not be responding to the Board’s charges, without prejudice, as provided for in Ott...” Although Ms. Mellk did not explicitly request that the Board restrain from transmitting the tenure charges to the Commissioner pending disposition of the criminal charges, it is evident from her letter—and particularly from her citation to Ott—that she was asserting such a right on respondent’s behalf. There is nothing in the subsequent correspondence from Mr. Montenegro, who replaced Ms. Mellk as the respondent’s counsel, that would evince a waiver of that judicially-created right. We therefore restrain the Board from transmitting the tenure charges to the Commissioner for further action until such time as the criminal proceedings against the respondent are concluded.¹

In so doing, we reject the respondent’s contention that the Board failed to comply with the requirements of N.J.A.C. 6:24-5.1(a)1, which provides that tenure charges and the supporting statement of evidence must be executed under oath by the individual instituting the charges. When the Superintendent of Schools instituted the charges which are now before us, he included a sworn statement. We reject the respondent’s contention that the inclusion of a single sworn statement for both the charges and the statement of evidence requires dismissal of the charges. Nor do we find any merit in

¹ We note that the record before us does not indicate the current status of the criminal charges.

the respondent's argument that the charges were rendered fatally defective by virtue of the fact that the statement was notarized by the Assistant Superintendent/Board Secretary. Accordingly, we reject the respondent's contention that the charges were invalid.²

As a further consequence of the respondent's assertion of his rights under Ott, the Board did not act improperly when it suspended him without pay pending disposition of the criminal charges. As the Court explained in Ott, supra, at 342, "plaintiff's application for the restraint of the disciplinary process for his own purposes and protection bars him from entitlement to the continued receipt of his salary in the meantime. Since his action has produced the delay the board should not be compelled to continue to pay his salary while unemployed." The Tenure Employees Hearing Law, N.J.S.A. 18A:6-10 et seq., provides that a district board may suspend a staff member with or without pay "[u]pon certification of any charge to the commissioner...." N.J.S.A. 18A:6-14 (emphasis added). In Ott, certification of the tenure charges was not completed since the district board had not yet transmitted those charges to the Commissioner when the trial judge restrained the board from so acting. Nonetheless, in upholding that restraint, the Appellate Division firmly held that the staff member could be suspended without pay pursuant to N.J.S.A. 18A:6-14 during the pendency of the criminal charges.

In the instant matter, the Board took formal action to certify the tenure charges on September 7, 1999 and to suspend the respondent without pay. It subsequently

² Given our determination that the Board should not have completed certification of the tenure charges once the respondent asserted his rights under Ott, we need not address the respondent's allegations that the Board failed give him 15 days to respond to the charges or that the Board, in certifying the charges,

transmitted those charges to the Commissioner. In view of the respondent's assertion of his Ott rights, the Board should have restrained from completing certification of the charges. However, it is also clear from Ott that, during the period of such restraint, the respondent could properly have been suspended without pay. He would, of course, be entitled to "reinstatement with full back salary" if he ultimately is cleared of the tenure charges. Ott, supra, at 342.

We therefore reverse the Commissioner's decision to dismiss the August 1999 tenure charges, but restrain the Board from completing certification of those charges until the criminal proceedings against respondent have been concluded. Given the respondent's assertion of his Ott rights, we also uphold his suspension without pay as of September 7, 1999. We stress in that regard that the Board must provide the respondent with the opportunity to respond to the tenure charges following the conclusion of the criminal proceedings. After consideration of the respondent's response, the Board may then determine to complete certification of the charges by transmitting them to the Commissioner.

In view of our determination, we need not address the Board's motion for a stay of the Commissioner's decision.

Attorney exceptions are noted.

April 5, 2000

Date of mailing _____

had failed to make a determination as to whether the evidence was sufficient to find that there was probable cause to credit the charges.