

249-17R

ADRIAN McCONNAY, :
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 PETITIONER, :
 :
 V. : COMMISSIONER OF EDUCATION
 :
 BOARD OF EDUCATION OF THE : DECISION
 TOWNSHIP OF PISCATAWAY, :
 MIDDLESEX COUNTY, :
 :
 _____RESPONDENT. :

SYNOPSIS

Petitioner, a tenured physical education teacher, sought an order requiring the respondent Board to reimburse him for his salary that was withheld between September 1, 2013 and March 1, 2014, a period that corresponds to the time between when a criminal indictment against petitioner was dismissed and the date upon which he was reinstated to the payroll. Petitioner contended that a tenured teacher may not be suspended without pay unless that teacher has been indicted or tenure charges have been filed against the teacher; otherwise, a tenured teacher’s suspension must be with pay. In the instant case, petitioner resigned from his position effective April 13, 2014, and the Board never filed tenure charges against him. The Board filed a motion for summary decision.

The ALJ found, *inter alia*, that: there are no material facts at issue here, and the matter is ripe for summary decision; pursuant to *N.J.S.A.* 18A:6-8.3, a tenured employee is entitled to back pay when no longer under indictment but before tenure charges are filed; accordingly, petitioner is entitled to back pay during any period that he was not under indictment and there were no tenure charges pending; the negative inferences about petitioner’s conduct do not factor into this analysis because even if he were found guilty, he would nonetheless be entitled to suspension with pay for the month of February 2014; further, because the petitioner was not seeking payment during the period that he was under indictment, inquiries into fundamental fairness are not dispositive; and petitioner’s request for reimbursement of costs associated with bringing his appeal was not considered, as the issue was raised in the original petition. The ALJ concluded that Board owes petitioner his salary for the month of February 2014. Accordingly, the ALJ granted petitioner’s motion for summary decision with respect to payment of his wages for February 2014; denied petitioner’s motion regarding his request for costs associated with this proceeding; and denied the Board’s motion for summary decision.

Upon a comprehensive review of the record and the exceptions filed by both petitioner and respondent, the Commissioner rejected the Initial Decision and remanded the matter to the OAL for determination of unresolved issues in the case. In so doing, the Commissioner specifically ordered that the ALJ determine whether petitioner is entitled to back pay from September 1, 2013 through March 1, 2014 and whether such determination should include “weighing of the equities” and consideration of “fundamental fairness.”

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.

August 21, 2017

OAL DKT. NO. EDU 05769-14
AGENCY DKT. NO. 111-5/14

ADRIAN McCONNERY, :
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 PETITIONER, :
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 V. : COMMISSIONER OF EDUCATION
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 BOARD OF EDUCATION OF THE : DECISION
 TOWNSHIP OF PISCATAWAY, :
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 :
 RESPONDENT. :

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed.¹ Exceptions filed by the petitioner and respondent – submitted in accordance with *N.J.A.C.* 1:1-18.4 – were also considered by the Commissioner. In this matter, petitioner seeks back-pay for the period between September 1, 2013 (the commencement of his suspension without pay following his indictment) and March 1, 2014 (the date of his reinstatement into the Board’s payroll following dismissal of his indictment).² As reflected in the Initial Decision, the ALJ granted petitioner’s “motion for summary decision” in part, concluding that petitioner is entitled to payment of his wages from February 4, 2014 through March 1, 2014 because his indictment was dismissed and tenure charges were not filed; and denied in part, concluding that petitioner is not entitled to the fees and costs associated with the litigation. The

¹ The Commissioner questions the completeness of the record before her as the file transmitted for her review appears deficient, as will be addressed herein.

² Petitioner’s initial petition – filed on May 2, 2014 – sought back-pay from February 4, 2014 (the date his indictment was dismissed) through to March 1, 2014. The renewed request for relief – back-pay from September 1, 2013 to March 1, 2014 – was set forth in petitioner’s proposed amended petition submitted with his motion to amend the petition. Petitioner’s motion to amend was granted by the Administrative Law Judge (ALJ) on September 4, 2014. It does not appear that petitioner formally filed an amended petition – and if he did, it is not in the record before the Commissioner. It is evident from the record, however, that the ALJ accepted the proposed amendment to the petition and the parties pursued the matter based on the same.

ALJ also denied respondent's "motion for summary decision."³ Upon a comprehensive review of the record in this matter, the Commissioner remands the matter to the OAL for determination of the unresolved issues in this case.

In the Initial Decision, the ALJ found, "[a] tenured employee [] is entitled to back pay when no longer under indictment but before tenure charges are filed . . . Mr. McConney is entitled to back pay during any period that he was not under indictment and there were no tenure charges pending." With regard to petitioner, the ALJ noted, "[t]he negative inferences about his conduct do not factor into this analysis because even if he were found guilty, he would nonetheless be entitled to suspension with pay for the month of February 2014." The ALJ further noted, "[b]ecause the Petitioner is not seeking payment during the period that he was under indictment, inquiries into fundamental fairness . . . are not dispositive." Respondent takes exception to the Initial Decision, arguing that the ALJ relied on an older version of the parties' Joint Stipulation of Facts, as the findings of facts did not recite respondent's entitlement to

³ As of the date of the Initial Decision, the record does not reflect any cross motions (or requests) for summary decision filed with the ALJ. The record reflects that on February 2, 2016, the ALJ issued a letter to the parties adjourning the hearing date and requesting dates for a briefing schedule for filing of cross motions for summary decision. Thereafter, on March 23, 2016, respondent submitted a letter brief arguing that "fundamental fairness" based on "weighing of the equities" overrides petitioner's entitlement to back-pay during his indictment, and that the petition should be dismissed with prejudice. Said submission did not request summary decision. On March 29, 2016, respondent submitted a correspondence arguing that he is entitled to back-pay for the period between February 4, 2014 and March 1, 2014 only, because he recognizes that the Appellate Division reinstated his indictment. Said correspondence did not request summary decision. Furthermore, on February 21, 2017, petitioner notified the ALJ that he was found "not guilty" on all charges and requested that this fact be added to the record. In his correspondence, petitioner also referenced "the parties' cross-motion for summary decision" under consideration by the OAL. Therefore, it appears that the submissions of March 23, 2016 and March 29, 2016 are the parties' "cross-motions" in this matter. It bears noting that a review of the record further suggests that there are no other outstanding motions, as any such filings were resolved prior to the issuance of the Initial Decision. The pertinent pleadings, documents, and orders are as follows: 1) Petitioner's motion to amend the petition, filed on June 4, 2014; ALJ's Order of September 4, 2014, granting the motion. 2) Respondent's motion to place the case on the inactive list or, alternatively, to dismiss the petition without prejudice, filed on August 20, 2014; petitioner's response thereto, filed on August 21, 2014; respondent's brief in support of adverse inference, filed on October 20, 2014; petitioner's response thereto, filed on October 28, 2014; ALJ's Order of January 5, 2015, denying motion to place matter on inactive list and the motion to dismiss, and granting respondent's request for adverse inference to be drawn from petitioner's invocation of his privilege against self-incrimination. 3) Respondent's motion for summary decision, filed on July 29, 2015; respondent's supplementary submission in support of its motion, filed on August 3, 2015; petitioner's letter brief in response to respondent's motion, filed on August 13, 2015; ALJ's Order of August 20, 2015, denying respondent's motion for summary decision.

adverse inference regarding petitioner's conduct. Respondent further argues that the ALJ failed to consider "fundamental fairness" in awarding petitioner back-pay. Petitioner also filed exceptions, arguing that the ALJ failed to address the entirety of petitioner's claim for back-pay, *i.e.*, September 1, 2013 through March 1, 2014.⁴ Petitioner submits that he is entitled to back-pay for the entire period between September 1, 2013 and March 1, 2014. The Commissioner agrees that the ALJ failed to incorporate the revised Joint Stipulation of Facts in the Initial Decision. The Commissioner further agrees that the ALJ failed to adjudicate petitioner's claim in its entirety. The remainder of the exceptions relate to the merits of the unresolved issues in this case; and therefore, the Commissioner will not consider them.

Accordingly, the Initial Decision is rejected; and the matter is remanded to the OAL for proper adjudication of the remaining issues in this case. Specifically, the ALJ must determine whether petitioner is entitled to back-pay from September 1, 2013 through to March 1, 2014, and whether such determination should include "weighing of the equities" and consideration of "fundamental fairness."

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: August 21, 2017

Date of Mailing: August 22, 2017

⁴ Petitioner states in his exceptions that he was granted leave to amend the petition to extend the scope of his claim for back-pay from September 1, 2013 to April 13, 2014; however, neither the initial petition nor the proposed amended petition seek back-pay until April 13, 2014. The claim for back-pay ends on March 1, 2014 in both instances.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDU 05769-14

AGENCY REF.NO. 111-5/14

ADRIAN McCONNEY,

Petitioner,

v.

TOWNSHIP OF PISCATAWAY

BOARD OF EDUCATION,

MIDDLESEX COUNTY,

Respondent.

Steven J. Kafowitz, Esq., for petitioner (Caruso Smith Picini, PC, attorneys)

David B. Rubin, Esq., for respondent (David B. Rubin, PC, attorneys)

Record Closed: March 31, 2017

Decided: July 6, 2017

BEFORE **LELAND S. McGEE**, ALJ:

STATEMENT OF FACTS

Adrian McConney (“Petitioner” or “Mr. McConney”), and Respondent, Piscataway Township Board of Education (“Respondent” or “Board”) (collectively referred to as “the

Parties”), in the above-captioned matter, stipulated to the following Statement of Facts in lieu of proceeding with a hearing, and as such I **FIND** the following to be the **FACTS OF THE CASE**:

1. Mr. McConney, whose home address is XXX Balch Avenue, Piscataway Township, New Jersey, was employed by the Board as a tenured physical education teacher at Piscataway High School (“School”).
2. The Board is a public entity, located at 1515 Stelton Road, Piscataway Township, New Jersey 08854, that provides educational and schooling services to students in the Township of Piscataway.
3. On or about August 13, 2013, Mr. McConney was indicted by the Middlesex County Grand Jury on a charge of “Official Misconduct,” in contravention of N.J.S.A. 2C:30-2. The charge and corresponding indictment was based on allegations that Mr. McConney engaged in sexual relations with an eighteen (18) year old female student who attended the School. He pled not guilty to the charge at the Superior Court of New Jersey, Middlesex County (“Court”).
4. The Board suspended Mr. McConney, who was contracted as a ten (10) month employee, without pay effective September 1, 2013, prior to the start of the 2013-14 school year.
5. Prior to the filing of the indictment, Mr. McConney had no criminal record and was never subject to disciplinary action by the Board.
6. On or about September 20, 2013, Mr. McConney filed a motion to dismiss the indictment and underlying charge of Official Misconduct with the presiding judge for the Court, the Honorable Bradley J. Ferencz, J.S.C. The motion was based on the following grounds: (1) the indictment was fatally flawed because it did not set out the “official function” allegedly breached by Mr. McConney, (2) the prosecution failed to adequately charge the jury in the indictment process, and (3) the prosecution failed to state a claim to prove that Mr. McConney committed official misconduct.

7. On or about February 4, 2014, Judge Ferencz granted Mr. McConney's motion, thereby dismissing the indictment and corresponding charge on even date, on the basis that the facts presented to the grand jury, even if accepted as true, did not constitute Official Misconduct as defined by statute.
8. The Board reinstated Mr. McConney to its payroll on March 1, 2014.
9. Mr. McConney resigned from his position with the Board effective April 13, 2014. The Board never filed tenure charges against him.
10. On or about May 2, 2014, Mr. McConney initiated the instant action by filing a Petition for Relief with the Commissioner of Education, through which he sought back pay for the period from February 4, 2014 (the date upon which the indictment was dismissed) to April 13, 2014 (the date of his resignation).
11. On or about June 4, 2014, Mr. McConney then filed a motion for leave to amend the Petition to extend the scope of his claim for back pay to the period from September 1, 2013 (the date upon which he was first removed from the Board's payroll) to April 13, 2014 (the date of his resignation). The Board did not oppose his motion and it was subsequently granted by the Honorable Leland S. McGee, A.L.J.
12. Thereafter, the Middlesex County Prosecutor's Office appealed the Court's decision to grant Mr. McConney's motion to dismiss the indictment to the Appellate Division. On February 9, 2015, the Appellate Division issued an opinion reversing Judge Ferencz's decision, thereby reinstating the indictment and underlying charge against Mr. McConney, and remanding the matter back to the Court for adjudication.
13. As of the date of this stipulation, the indictment against Mr. McConney is still pending before the Court, and no hearing dates have been scheduled in the criminal case.
14. Mr. McConney acknowledges that if the Board called him to testify as a witness in the instant action, he would decline to do so, invoking his Fifth Amendment right against self-incrimination.

15. Mr. McConney further acknowledges that he declined to respond to discovery requests from the Board's attorney inquiring about his alleged sexual activity with the student in question, also invoking his Fifth Amendment privilege against self-incrimination.

By letters dated February 21, 2017, the parties acknowledged that during the criminal proceedings against Petitioner, a jury found him “not guilty” of all charges. The record closed March 31, 2017.

Parties Arguments

Petitioner seeks payment of his salary for the month of February 2014, the period in which he was suspended without pay, was not under indictment, and tenure charges were not filed against him. Petitioner also seeks reimbursement for the fees and costs associated with generating, filing, and pursuing this relief. This request was not a prayer for relief in his original petition.

Respondent argues that an indictment was pending against Petitioner after it was dismissed, so a weighing of fundamental fairness is required to determine if the Petitioner is entitled to back pay. Respondent argues that the weight is against Petitioner because the assertion of his Fifth Amendment rights allows Respondent to make inferences about discovery. Respondent also argued that Petitioner's acquittal would not entitle him to back pay because his conduct was morally reprehensible, even though the student was eighteen. Finally, Respondent seems to argue that the court should treat the tenure charges as having been filed because the Petitioner, if the charges had been filed, would not have prevailed. The implication is that the intention of Petitioner's swift submission of his resignation was to prevent the Board from filing, and certifying tenure charges.

LEGAL DISCUSSION

New Jersey Statutes (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 or 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. (Emphasis added) (LexisNexis, Lexis Advance through New Jersey 217th Second Annual Session, L. 2017, c. 87, and J.R. 4).

“Thus, 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.” Slater v. Board of Educ. of Ramapo-Indian Hills Regional High School Dist., 237 N.J. Super. 424, 426 (App. Div. 1989). In Slater, a custodian was arrested for distributing marijuana to an undercover police officer. Id. He was suspended without pay, pled guilty, and his position was forfeited by the conviction. Id. at 267. No tenure charges were filed against him. Id. The court held that his suspension without pay was valid only from the point of his indictment forward. Therefore, the custodian was entitled to back pay up to the date of his indictment, despite his arrest and subsequent conviction. Id.

A tenured employee is also entitled to back pay when no longer under indictment but before tenure charges are filed. In re Morton, EDU 0253-97, Initial Decision, (June 11, 1999), adopted Comm’r (July 30, 1999) <http://njlaw.rutgers.edu/collections/oal/>. In re Morton, held that a teacher who was in possession of cocaine was entitled to pay between the date of his conviction and the certification of his tenure charges because a forfeiture order was not entered.

Slater and In re Morton are particularly relevant here because they show that even if McConney was convicted, he would still be entitled to back pay for the time he

was not under indictment until tenure charges were certified. Mr. McConney is entitled to back pay during any period that he was not under indictment and there were no tenure charges pending. The negative inferences about his conduct do not factor into this analysis, because even if he were found guilty, he would nonetheless be entitled to suspension with pay for the month of February 2014.

Respondent points to Lopez v Bridgeton Board of Education, and Beatty v Newton Board of Education to assert that “an employee is not automatically entitled to back pay upon dismissal of an indictment...”. (Resp’t Br. 4.) These cases are distinguishable because they both pertain to when a petitioner is entitled to back pay *during* the period of indictment, not *before* it. Lopez v Bridgeton Board of Education, EDU 6786-02, Initial Decision (October 3, 2003), modified, Commissioner, (November 6, 2003), reversed, State Board (November 3, 2004), <http://njlaw.rutgers.edu/collections/oal/> (police officer was arrested on charges of child endangerment and was indicted; after being found not guilty, the State Board awarded pay for the entire period of his suspension); Beatty v Newton Board of Education, 1991 S.L.D. 1001 (“Fundamental fairness dictates that petitioner be granted back pay for the period of his unpaid suspension given that a trial by jury yielded a verdict of not guilty on the indictment which provided the basis for the suspension without pay...”)

There is no disagreement between Lopez and Slater because they pertain to different periods in the process. Because the Petitioner is not seeking payment during the period that he was under indictment, inquiries into fundamental fairness, as per Lopez, are not dispositive. Furthermore, any argument based upon the indictment pending during the month of February is unnecessary. The appeal of Judge Ferencz’s dismissal of the indictment was not filed until at least four months after the indictment was dismissed, and the indictment was not reinstated until a year later.

Following the enactment of N.J.S.A. 18A:6-8.3, in Beatty v. Newton Board of Education, 1991 S.L.D. 1001, the Commissioner considered whether a suspended teacher should receive back pay following his acquittal of criminal charges. Beatty was

suspended without pay following his indictment on charges of sexual misconduct against several minor females, including his stepdaughter. After the jury returned a verdict of not guilty, completely acquitting him of all charges, he requested reinstatement and back pay. The board rejected his demand for back pay pursuant to N.J.S.A. 18A:6-8.3 and brought tenure charges. Agreeing with the board's contention that this was a case of first impression, the Commissioner held "[n]otwithstanding the absence of specific statutory language, ... in weighing the equities of this matter, fundamental fairness dictates that petitioner be granted back pay for the period of his unpaid suspension given that a trial by jury yielded a verdict of not guilty on the indictment which provided the basis for the suspension without pay under N.J.S.A. 18A:6-8.3." Id. at 1008-09. He explained:

At the present time, petitioner has not been found guilty of any wrongdoing and the indictment upon which the suspension is based has been disposed of in his favor, therefore, it is concluded that as a matter of equity, back pay is warranted under the circumstances, ... The fact that tenure charges are pending against petitioner and he has been lawfully suspended without pay under the provisions of N.J.S.A. 18A:6-10 does not alter the equities of the matter. If petitioner is found guilty of the tenure charges, an appropriate penalty shall be fashioned by the Commissioner, which could include but is not limited to reduction in salary or dismissal.

[Id. at 1009-10.]

The question of whether an employee should receive back pay following acquittal of criminal charges was also considered in Griffin v. Paterson Board of Education, 93 N.J.A.R.2d (EDU) 882. Griffin, a custodian was arrested and charged with various sexual offenses by two young female students of the school to which he was assigned. Following his indictment on charges of sexual assault and endangering the welfare of a child, the Board suspended him without pay. After a jury trial, he was acquitted of most counts of the indictment and the remaining counts were dismissed. He requested reinstatement with back pay and reimbursement of counsel fees. In concluding that

Griffin was entitled to back pay, ALJ Diana Sukovich stated the facts of the case were “strikingly similar” to those of Beatty, supra. Id. at 886. She also noted the fact that the board did not issue tenure charges against him bolstered his claim for back pay, although this distinction was not determinative. Ibid. The Commissioner adopted ALJ Sukovich’s decision for the reasons outlined in her decision.

Unlike, Beatty, where tenure charges were pending and Griffin, where tenure charges were not filed, in Camden Board of Education v. Hovington (Hovington II), EDU 6675-97, Initial Decision (January 29, 1998), <<http://njlaw.rutgers.edu/collections/oal/>>, adopted, Commissioner (March 30, 1998)⁵, the question as to whether an employee was entitled to back pay following acquittal of criminal charges was considered after the employee had been found guilty of tenure charges, which related to the same misconduct for which he was indicted.

In the prior tenure proceeding, Camden Board of Education v. Hovington (Hovington I), EDU 4318-95, Initial decision, (October 2, 1996), adopted, Commissioner (November 18, 1996), 97 N.J.A.R.2d (EDU) 168, remanded, State Board (April 2, 1997), 97 N.J.A.R.2d (EDU) 419, Initial Decision adopted on remand, Commissioner (August 5, 1997), <http://www.state.nj.us/education/legal/index.html>, Hovington, a teacher and track coach was indicted on charges of sexual misconduct with a female student whom he had coached. After a series of three criminal trials, he was acquitted of the charges. The board then filed tenure charges related to the same alleged sexual misconduct. ALJ Jeff Masin determined that Hovington had violated his tenure by engaging in sexual misconduct with the same student who was the alleged victim of the matters for which the indictment had been returned, as well as a second student who was not an alleged victim of the offenses charged in the indictment.

⁵ This decision is not reported. The parties apparently settled their dispute prior to the Commissioner’s issuance of a final decision and the Commissioner wrote in his final decision that he “finds no need to reach the substantive merits of respondent’s claims. Accordingly, the order of the ALJ is entered as the final decision in this matter for the reasons expressed herein.” Hovington, supra, Comm’r Decision.

In Hovington II, supra, Hovington subsequently sought to recover the pay withheld from him during the pendency of the indictment. In deciding the matter, ALJ Masin reviewed the Romanowski, Beatty and Griffin decisions. He noted at the time of the Romanowski case there was no authority for a suspension upon indictment except where written charges had been brought against the tenured employee before the Commissioner and he explained Beatty and Griffin, relied upon equity as the basis for recovery. Thus, he held the determination of whether Hovington could recover the pay for the period he was suspended while under indictment required an examination of the facts relevant to his case to determine whether equities lie with him. In concluding they did not, he explained:

In neither Beatty nor Griffin did the respective Boards of Education pursue tenure charges to completion prior to the determination of the claim for pay withheld during the suspension imposed during the pendency of the criminal indictments, each of which had resulted in an acquittal. Thus, in judging the equities of the claimants in each of those cases, the Commissioner was presented with an employee who had never been proven to have engaged in inappropriate conduct, either to the satisfaction of the criminal proof standard of beyond a reasonable doubt or to the civil/administrative standard of preponderance of the evidence. Beatty and Griffin thus were apparently innocent persons, who had suffered a loss of pay while successfully defending themselves against what, at the time of the Commissioner's decision on the back-pay claims, were presumptively unsupported and unproven allegations. Here, Mr. Hovington stands in an entirely different position. While the ultimate outcome of the criminal proceedings was an acquittal, and the charges were thus not proven beyond a reasonable doubt, they were amply proven in the tenure hearing, and in fact, a new allegation, never part of the criminal process, was also proven. Therefore, Hovington's position as a supplicant seeking equity from the Commissioner is far different than the presumptively innocent claimants in Beatty and Griffin. "Fundamental fairness," the touchstone of the commissioner's reasoning in Beatty, hardly demands that this Board be required to pay this petitioner for six years in which he did not work for the Board, when in fact he was guilty of serious tenure violations committed before his suspension. If anything, "fundamental

fairness" to the citizens and taxpayers of the City of Camden demands that he not be paid where he so flagrantly violated his trust as a professional educator.

[Hovington II, supra, Initial Decision.]

In Lacey Township Board of Education v. Yatauro, EDU 793-99, Initial Decision (July 12, 1999), modified, Commissioner (October 13, 1999), <<http://njlaw.rutgers.edu/collections/oal/>>, ALJ Jeff Masin reiterated his Hovington II analysis. Yatauro was a band director and music instructor that was suspended without pay following his indictment for criminal charges related to an inappropriate sexual relationship with a student. He was eventually acquitted of the criminal charges after a jury trial. After his acquittal, the board-certified tenure charges against him and he was subsequently stripped of his tenure when it was determined in the tenure proceeding that the inappropriate sexual relationship had transpired. He sought to recover the salary withheld from him, while he was under indictment.

Yatauro's attorney rejected the Hovington II analysis and argued that since N.J.S.A. 18A:6-8.3 is unclear on its face as to an employee's right to recover pay withheld following acquittal of criminal charges in an indictment, the common-law determination announced in Romanowski was still the guidepost. As for the Beatty and Griffin cases, he argued, even if the right to repayment is equitable, in Beatty the Commissioner did not wait for the determination of a tenure case, but decided the back-pay issue prior to such determination, when only the favorable resolution of the criminal matter was before him. He averred:

The equities that the Beatty case reviewed was limited to the fundamental fairness of not paying Beatty for the period of his suspension by reason of indictment when a jury of his peers had acquitted Beatty, in essence, finding that the indictment was without adequate factual basis. In making this determination of fundamental fairness, Beatty did not consider the merits of the tenure charges. By deciding the motion for backpay while the tenure case remained pending,

the Commissioner implicitly recognized that the merits of the tenure charges would be relevant to the determination of the 120-day suspension pending tenure hearing under N.J.S.A. 18A:6-14, not the indefinite suspension pending indictment under N.J.S.A. 18A:6-8.3.

[Yatauro, supra, Initial Decision.]

In rejecting the attorney's argument, ALJ Masin explained:

It is true that the Legislature did not directly address the *Romanowski* ruling, which was rendered in a case in which there appears not to have been a tenure charge pending when the court wrote its decision. Since that time, no appellate court has addressed the issue and the Commissioner has only addressed it in the context of matters in which the administrative proceeding had either not been completed, or had never even been invoked against the employee. In the absence of Legislative direction, in *Beatty* the Commissioner saw fit to consider fundamental fairness and equity as the basis for deciding the claim. In *Hovington II* and here in *Yatauro*, the decision as to whether the now-former employee should recover the pay withheld from him during the pendency of the indictment is made in a markedly different factual setting than existed in *Romanowski*, *Beatty*, or *Griffin*. The application of equity principles to decide this issue is in keeping with the Commissioner's view of the law expressed in *Beatty*, and in the absence of express Legislative direction, affords a reasonable means of considering all of the material information now available to decide if an employee who did not work for the Board while suspended and was ultimately determined guilty of serious tenure charges which mirror the criminal charges should nevertheless be allowed to collect this withheld pay.

[Ibid.]

Based upon considerations of fundamental fairness and equity, ALJ Masin concluded that where a tenured employee seeks to recover salary which was withheld after an indictment from which the employee has obtained a favorable disposition, but where the employee has subsequently been proven in a tenure proceeding to have

committed the same misconduct which was the essential subject of the criminal charges, the employee may not recover salary withheld during the pendency of the indictment. Therefore, he denied Yatauro's claim for back pay.

An employee's entitlement to back pay during a period of suspension was considered in Lopez v. Bridgeton Board of Education, EDU 6786-02, Initial Decision (October 3, 2003), modified, Commissioner, (November 6, 2003), reversed, State Board (November 3, 2004), <<http://njlaw.rutgers.edu/collections/oal/>>. Lopez, a campus police officer employed by the board was arrested on charges of child endangerment. Following his arrest, he was suspended without pay and was subsequently indicted. The charges were based upon an accusation made by Lopez's daughter, who was a student at the middle school where he was employed. Lopez contended the charges were the result of an on-going custody dispute between him and his former wife. After considering the nature of the indictment and the evidence offered by the State, the court found that the indictment was unsupported by credible evidence and had been improperly obtained. The court dismissed the indictment in its entirety and Lopez was reinstated to his former position. After the board denied his request for back pay and emoluments, he filed an appeal with the Commissioner.

ALJ Miller granted Lopez's request for back pay and emoluments for the entire period of his unpaid suspension. In his decision, ALJ Miller explained:

I **FIND** that petitioner, a school employee, was involved in an unfortunate contentious family matter. An immediate suspension appeared to be justified given the nature of the allegations and pending charges. However, as of October 12, 2001, petitioner was totally exonerated of the charge. There has been no evidence offered by the district that petitioner should have remained suspended, even in the absence of criminal charges. The record is barren of any evidence that petitioner acted wrongfully or was a risk to students. In essence, petitioner did nothing wrong if measured by a criminal or civil standard. The allegation of any wrongdoing was dismissed as baseless. In fact, petitioner asserts that "Mr. Lopez was arrested because of

an overzealous prosecutor who pursued a cause of action on untrue assertions in the face of evidence that contradicted the compliant by an adolescent seeking to shed the parental yoke of her father in favor of a permissive lifestyle with her mother who never enjoyed the custody the child.” (Petitioner’s brief at page 10). Apparently, the criminal trial Judge agreed. In the spectrum of possible outcomes, a pretrial dismissal of an indictment is about the best possible vindication. In view of the aforementioned, the district reinstated petitioner but refused to do so with back pay and other benefits. Had petitioner been culpable in a civil sense, applied for Pretrial Intervention, accepted a plea agreement or presented some other concern to the district, then withholding back pay would be plausible. However, none of the aforementioned occurred.

Therefore, I **CONCLUDE** that petitioner must be awarded all of his back pay, vacation time, benefits, pension credit and any other benefits from the first day of such suspension. Griffin, supra., N.J.S.A. 18A:6-8.3; N.J.S.A. 18A:6-14. To suspend a school employee, without pay, because they were silent on the issue of involved in a contentious family matter resulting in criminal charges is reasonable. However, if they are fully exonerated, as in this case, it is unreasonable to not fully reinstate the teacher with all rights and emoluments. The districts failure to do so does not comport with “fundamental fairness” as expressed in *Griffin, Beatty, supra.* This type of action could have a chilling effect upon school board employees involved in difficult family matters. It may impact or deter necessary child discipline for fear losing one’s wages and benefits. Mere “trumped up charges” and the fear of the related consequences, including a suspension with no right to recover back pay, could negatively impact important family matters and decisions. The threat of filing charges could disrupt the process of resolving family matters. The present matter is a clear indication of just how family matters can carelessly spiral out of control and spill over in a way that seriously affects the family unit’s financial well-being. I **CONCLUDE** that withholding back pay and benefits, under the circumstances presented in this case, is simply not justified.

[Lopez, supra, Initial Decision.]

Upon review, the Commissioner modified ALJ Miller's decision and directed that Lopez be awarded back pay and emoluments only for the period of his unpaid suspension prior to his indictment. Noting that N.J.S.A. 18A:6-8.3 is silent on the issue of back pay subsequent to the disposition of a criminal indictment, the Commissioner cited Busler v. East Orange Board of Education, EDU 3916-00, where the Commissioner declared and the State Board affirmed there was no basis under education law to award back pay regardless of the disposition of the criminal indictment. The Commissioner rejected Lopez's argument that Busler was not relevant since Busler availed himself of the pretrial intervention program as a way of avoiding the prosecution for which he was indicted. He held the holding in Busler was not so limited. Lopez, supra, Comm'r Decision.

On appeal, the State Board reversed the Commissioner's decision and held Lopez was entitled to back pay and emoluments for the entire period of his unpaid suspension. The Board explained:

Contrary to the Commissioner's determination, Busler does not stand for the general proposition that an employee suspended without pay following an indictment is precluded from receiving back pay after an acquittal or dismissal of the criminal charges. Nor did the State Board intend such a result in its decision in that case. Rather, as previously indicated, the denial of Busler's claim was predicated in part on the fact that the criminal charges filed against him had been dismissed only after he had successfully completed a pretrial intervention program ("PTI"). Under those circumstances, the State Board agreed with the Commissioner that Busler, an assistant principal, had not demonstrated his entitlement to back pay on fundamental fairness grounds for the period of his unpaid suspension following his indictment.

[Lopez, supra, State Board Decision.]

Citing In re Pawlak, No. A-3298-87 (App. Div. July 7, 1989), the Board explained the completion of a PTI program "signifies nothing concerning the truth of the charges; it

is indicative only of the fact that the prosecutor's office thought he was a good candidate for rehabilitation or diversion from the criminal process.” Ibid.

Then, reiterating the Commissioner's reasoning in Beatty, supra, the Board agreed with ALJ Miller's conclusion that fundamental fairness dictates that Lopez be awarded back pay and emoluments. It explained the indictment against Lopez was dismissed in its entirety by the judge who found that the prosecutor had misled the grand jury as to the actual offense charged and had improperly obtained an indictment without offering sufficient proofs of the alleged offense. Under these circumstances, the Board determined fundamental fairness dictates that the petitioner be awarded his back pay and emoluments. Ibid.

In the present case, Respondent asserts that there has been no complete and final exoneration from wrongdoing. It argues petitioner was charged with having sexual relations with a student enrolled at the high school where he taught. The indictment, however, was dismissed because there was a legal question as to whether his actions were a violation of the statute because the student was eighteen years old. Further, it asserts that even though a jury found Petitioner “not guilty” after a criminal trial, that verdict does not mean that Petitioner is “innocent.” As such, Respondent asserts, the equities do not weigh in his favor and its original discovery requests were propounded to determine whether he committed the act of having sex with a student.

In opposing Respondent's motion, Petitioner primarily argues that the charge against him was dismissed because he committed no crime and thus he was exonerated. He avers a tenured teacher may not be suspended without pay unless that teacher has been indicted or tenure charges have been preferred against the teacher and certified to the Board of Education. In all other circumstances, a tenured teacher's suspension must be with pay. Accordingly, he contends the truth of the charges underlying the indictment filed against him was not relevant to his request for back-pay.

Respondent also argues that Petitioner's prompt resignation precluded the bringing of tenure charges and had they been brought, he would have been found guilty with the lower burden of proof. (Resp't Br. 6). This argument has no relevance to the narrow case at hand because no tenure charges were filed. Even if they were, the suspension of pay would not be valid until they were filed and certified by the Commissioner. In re Morton, EDU 0253-97. Even if, in the remote chance, this court was to treat the tenure charges as having been filed, until those charges were certified, he would still be entitled to his salary for the month of February, 2014.

Finally, Petitioner's Motion seeks costs associated with the filing which was not included in his original Petition of Appeal. In discussing amendments to pleadings, the Uniform Administrative Procedure Rules ("UAPR") states "[u]nless precluded by law or constitutional principle, pleadings may be freely amended when, in the judge's discretion, an amendment would be in the interest of efficiency, expediency and the avoidance of over-technical pleading requirements and would not create undue prejudice." N.J. Admin. Code. § 1:1-6.2(a). In addition, discussing jurisdiction, the UAPR provides that

"When the Office of Administrative Law acquires jurisdiction over a matter that arises from a State agency's rejection of a party's application, and at the hearing the party offers proofs that were not previously considered by the agency, *the judge may either allow the party to amend the application to add new contentions, claims or defenses* or, if considerations of expediency and efficiency so require, the judge shall order the matter returned to the State agency. . ."

N.J. Admin. Code § 1:1-3.2 (emphasis added).

The UAPR further provides that

"[t]he Office of Administrative Law shall acquire jurisdiction over a matter only after it has been determined to be a contested case by an agency head and has been filed with the Office of Administrative Law or as otherwise authorized

by law except as provided by N.J.A.C. 1:1-17. *The Office of Administrative Law shall not receive, hear or consider any pleadings, motion papers, or documents of any kind relating to any matter until it has acquired jurisdiction over that matter, except as provided by N.J.A.C. 1:1-17.*"

N.J. Admin. Code. § 1:1-6.2(a) (emphasis added).

Petitioner's request for costs sought in his motion is, in effect, an attempt to include a pleading that is outside of the "contested case" as determined by the agency head, and is not cognizable in the context of this proceeding.

CONCLUSION

For the foregoing reasons, I **CONCLUDE** that Petitioner's Motion for Summary Decision should be **GRANTED** with respect to payment of his wages for the month of February 2014, and **DENIED** with respect to his request for costs associated with this proceeding. I further **CONCLUDE** that Respondent's Motion for Summary Decision should be **DENIED**.

ORDER

For the foregoing reasons, it is hereby **ORDERED** that Petitioner's Motion for Summary Decision with respect to payment of his wages for the month of February 2014 is hereby **GRANTED**.

It is further **ORDERED** that Petitioner's Motion for Summary Decision regarding his request for costs associated with this proceeding is hereby **DENIED**.

It is further **ORDERED** that Respondent's Motion for Summary Decision is **DENIED**.


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.

July 6, 2017

DATE



LELAND S. McGEE, ALJ

Date Received at Agency: July 6, 2017

Date Mailed to Parties:
LSM/lr _____