

EDU #6786-02
C # 621-03
SB # 46-03

JOSEPH LOPEZ, :
 :
 PETITIONER-APPELLANT, : STATE BOARD OF EDUCATION
 :
 V. : DECISION
 :
 BOARD OF EDUCATION OF THE CITY :
 OF BRIDGETON, CUMBERLAND COUNTY, :
 :
 RESPONDENT-RESPONDENT. :
 _____ :

Decided by the Commissioner of Education, November 6, 2003

For the Petitioner-Appellant, D'Arrigo & D'Arrigo, P.C. (Cris D'Arrigo, Esq.,
of Counsel)

For the Respondent-Respondent, Casarow, Kienzle & Raczenbek (A. Paul
Kienzle, Jr., Esq., of Counsel)

Joseph Lopez (hereinafter "petitioner"), who was employed by the Board of Education of the City of Bridgeton (hereinafter "Board") as a campus police officer, was suspended without pay by the Board on November 15, 2000 after he was arrested on charges of child endangerment. The charges stemmed from an on-going custody dispute between the petitioner and his former wife, and the accusation was made by the petitioner's daughter, a middle school student. The petitioner was indicted on or about January 10, 2001 by the Cumberland County Grand Jury on a charge of 2nd degree child endangerment. However, in a decision dated October 12, 2001, the Hon. John Tomasello, J.S.C., Gloucester County Superior Court, dismissed the indictment in its

entirety, and the Board reinstated the petitioner to his former position. After the Board denied his request for back pay and emoluments, the petitioner filed a petition of appeal with the Commissioner of Education.

In a decision issued on October 3, 2003, an administrative law judge ("ALJ") recommended awarding the petitioner back pay and emoluments for the entire period of his unpaid suspension. The ALJ 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 [sic] by an adolescent seeking to shed the parental yoke of her father in favor of a permissive lifestyle wit [sic] her mother who never enjoyed the custody the [sic] 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. [Citations omitted.] To suspend a school employee, without pay, because they were 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 [sic] failure to do so does not comport with "fundamental fairness"....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.

Initial Decision, slip op. at 8-9.

On November 6, 2003, the Commissioner modified the ALJ's conclusion, directing that the petitioner be awarded his back pay and emoluments only for the period of his unpaid suspension prior to his indictment. Emphasizing that N.J.S.A. 18A:6-8.3¹ is silent on the issue of back pay subsequent to the disposition of a criminal indictment, the Commissioner, citing Busler v. Board of Education of the City of East Orange, decided by the Commissioner of Education, August 30, 2001, aff'd, State Board of Education, February 6, 2002, concluded that there was no basis under the education laws to award back pay under that statute, regardless of the disposition of a criminal indictment. The Commissioner rejected the petitioner's argument that Busler was distinguishable since the staff member in that case had been accepted into a pretrial intervention program, finding that the holding in Busler was not so limited.

¹ N.J.S.A. 18A:6-8.3 provides that:

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.

However, observing that the Board had suspended the petitioner without pay in November 2000, prior to his indictment in January 2001, which is contrary to the language of N.J.S.A. 18A:6-8.3, the Commissioner directed the Board to compensate the petitioner for his back pay and emoluments due from the date he was suspended without pay in November 2000 until his indictment in January 2001.

The petitioner filed the instant appeal to the State Board, contending that the Commissioner erred in failing to award him back pay for the period of his unpaid suspension following his indictment.²

After a thorough review of the record, we reverse the decision of the Commissioner to deny the petitioner back pay for the period following his indictment. While it is true that N.J.S.A. 18A:6-8.3 is silent as to whether an employee is entitled to back pay after disposition of criminal charges, we agree with the ALJ that the petitioner is entitled to back pay and emoluments for the entire period of his unpaid suspension.

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

² We note that the Board did not file a response to the petitioner's brief in support of his appeal.

principal, had not demonstrated his entitlement to back pay on fundamental fairness grounds for the period of his unpaid suspension following his indictment.

Although the Commissioner in Busler, supra, slip op. at 15, stated that N.J.S.A. 18A:6-8.3 “makes no provision for back pay, regardless of the disposition of the criminal indictment, and that there is no basis under education laws here to award such relief,” he went on to address Busler’s argument that he was entitled to relief under fundamental fairness principles and estoppel, rejecting both arguments on the basis of the particular facts of the case. In rejecting Busler’s fundamental fairness argument, the Commissioner found that the cases Busler had cited for the proposition that a vindicated employee must be made whole were “inapposite to the within matter, as in those cases each of the petitioners was acquitted of the charges for which he was suspended while here the charges were dismissed subsequent to completion of PTI, which is not tantamount to an acquittal or vindication.” Id. (emphasis in original).

In the matter now before us, we agree with the ALJ’s conclusion that fundamental fairness dictates that the petitioner be awarded back pay and emoluments. Any administrative agency in determining how best to effectuate public policy is limited by applying principles of fundamental fairness. State, Dept. of Envir. Protection v. Stavola, 103 N.J. 425, 436 n.2 (1986). Fundamental fairness is appropriately applied “where not to do so will subject the defendant to oppression, harassment, or egregious deprivation.” Doe v. Poritz, 142 N.J. 1, 108 (1995), quoting State v. Yoskowitz, 116 N.J. 679, 712 (1989) (Garibaldi, J., concurring and dissenting). The Court observed that there was one common denominator in all cases in which fundamental fairness was applied: “a determination that someone was being subjected to potentially unfair

treatment and there was no explicit statutory or constitutional protection to be invoked.”
Id. at 109.

It is undisputed that, in contrast to the situation in Busler, in which the criminal charges were dismissed only after the petitioner had completed a pretrial intervention program, the petitioner in this matter was totally exonerated of the charges filed against him. Completion of a PTI program is not regarded as a favorable termination of a criminal proceeding. Cressinger v. Bd. of Ed. City of Newark, 256 N.J. Super. 155 (App. Div. 1992) (completion of a pretrial intervention program did not entitle the plaintiff to reimbursement of counsel fees under N.J.S.A. 18A:16-6.1). See also In the Matter of the Revocation of the Teaching Certificate of Thadeus Pawlak, Docket #A-3298-87T7 (App. Div. 1989) (respondent’s 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”). The Court in Pawlak observed that previous decisions had determined that acceptance into a PTI program did not constitute a favorable termination of a criminal proceeding to support a claim for malicious prosecution; was an indecisive termination of a criminal proceeding; and was not a favorable disposition entitling a police officer to reimbursement for legal expenses.

As pointed out by the ALJ and the petitioner in the matter now before us, the Commissioner had concluded in Griffin v. Board of Education of the City of Paterson, 93 N.J.A.R.2d (EDU) 882 and Beatty v. Board of Education of the Township of Newton, 1991 S.L.D. 1001, that, notwithstanding the silence of N.J.S.A. 18A:6-8.3 regarding an employee’s entitlement to back pay following dismissal of an indictment, fundamental

fairness dictated that the employees in those cases were entitled to back pay and emoluments since they were fully exonerated of the charges. We reiterate the Commissioner's reasoning in Beatty, supra, at 1009-10:

Notwithstanding the absence of specific statutory language, the Commissioner believes that 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 his suspension without pay under N.J.S.A. 18A:6-8.3. 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, less mitigation for monies earned during the period of his lawful suspension without pay....

Similarly, in this case, the indictment against the petitioner was dismissed in its entirety by Judge Tomasello, 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, fundamental fairness dictates that the petitioner be awarded his back pay and emoluments.

This result finds support in N.J.S.A. 18A:6-14, which governs the procedures to be followed following certification of tenure charges. That statute provides that a tenured teaching staff member suspended without pay following certification of tenure charges is entitled to full pay from the first day of the suspension if the charges are ultimately dismissed. It would defy reason to conclude that a staff member is entitled to back pay for the period of his unpaid suspension when he is exonerated of tenure

charges but would have no such entitlement following the dismissal of a criminal indictment.

Therefore, for the reasons stated herein, we reverse the decision of the Commissioner to deny the petitioner back pay for the period of his suspension following his indictment, and we direct the Board to compensate the petitioner for his back pay and emoluments, less mitigation, for the entire period of his unpaid suspension. To the extent that the State Board's decision in Busler can be read to foreclose an award of back pay in all instances following the imposition of an unpaid suspension pursuant to N.J.S.A. 18A:6-8.3, we clarify that decision as explained herein.

Finally, we deny the petitioner's request for counsel fees and costs. It is well established that we do not have the authority to award such fees and costs. Balsley v. North Hunderdon Bd. of Educ., 117 N.J. 434, 442-43 (1990) (the absence of express statutory authority is fatal to a claim for counsel fees). We also deny the petitioner's request for interest. Post-judgment interest, which is only applicable when the party responsible for payment of a judgment has failed to satisfy the claim within 60 days of its award, N.J.A.C. 6A:3-1.17(c)2, is premature in this instance. In addition, the petitioner has failed to demonstrate that the Board denied his claim in bad faith or in deliberate violation of a statute or rule so as to entitle him to an award of prejudgment interest. N.J.A.C. 6A:3-1.17(c)1.

Attorney exceptions are noted.

November 3, 2004

Date of mailing _____