



NEW JERSEY LAW REVISION COMMISSION

Final Report to Clarify N.J.S. 18A:6-14 Regarding Pending Tenure Charges and Back Pay

July 30, 2020

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Please consult the New Jersey statutes in order to determine the law of the State.

Please send comments concerning this Report or direct any related inquiries, to:

Arshiya M. Fyazi, Counsel
New Jersey Law Revision Commission
153 Halsey Street, 7th Fl., Box 47016
Newark, New Jersey 07102
973-648-4575
(Fax) 973-648-3123
Email: amf@njlrc.org
Web site: <http://www.njlrc.org>

Executive Summary

In *Pugliese v. State-Operated School District of City of Newark*, the New Jersey Superior Court, Appellate Division, was asked to construe N.J.S. 18A:6-14 and determine what impact an appellate remand has on a suspended educator's entitlement to back pay while the remand was pending.¹ The plain language of N.J.S. 18A:6-14 does not address the situation in which the Appellate Division vacates and remands an arbitrator's determination without dismissing the charges.²

The Appellate Division ascertained that the Legislature's intent in enacting N.J.S. 18A:6-14 was to alleviate economic hardship endured by teachers suspended without pay pending outcome of their certified charges.³ The Court also noted that vacating an order is "akin to an order granting a new trial."⁴ Consequently, the Court determined that the tenured teachers were statutorily entitled to back pay from 121st day of suspension without pay **until date of arbitrator's final decision** on remand.⁵

Relevant Statute

N.J.S. 18A:6-14 provides:

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.** Should the charge be dismissed at any stage of the process, the person shall be reinstated immediately with full pay from the first day of such suspension. **Should the charge be dismissed at any stage of the process and the suspension be continued during an appeal therefrom, then the full pay or salary of such person shall continue until the determination of the appeal.** However, the board of education shall deduct from said full pay or salary any sums received by such employee or officers by way of pay or salary from any substituted employment assumed during such period of suspension. Should the charge be sustained on the original hearing or an appeal therefrom, and should such person appeal from the same, then the suspension may be continued unless and until such

¹ *Pugliese v. State-Operated Sch. Dist. of City of Newark*, 454 N.J. Super. 495 (App. Div. 2018).

² *Id.* at 506.

³ *Id.*

⁴ *Id.* at 507.

⁵ *Id.* (Emphasis added).

determination is reversed, in which event he [or she] shall be reinstated immediately with full pay as of the time of such suspension. [Emphasis added].

Background⁶

Felicia Pugliese and Edgard Chavez were tenured teachers employed by the State Operated School District of the City Newark (District).⁷ Both educators were the subject of tenure charges filed by the principals of their respective schools.⁸ Effective September 12, 2012, the District certified the tenure charges and suspended both teachers without pay.⁹ On February 6, and February 15, 2013, the arbitrator issued a decision sustaining the tenure charges against Chavez and Pugliese¹⁰ In addition, the arbitrator terminated the employment of both teachers.¹¹ The Chancery Division confirmed these determinations on September 16, 2013.¹²

The Appellate Division vacated the arbitrator's award and remanded both matters to the Commissioner.¹³ Included in its decision were specific instructions to the Commissioner to "either decide certain legal defenses or delegate their determination to the arbitrators with instructions as to the proper legal standard to [be] utilize[d]."¹⁴

In 2015, while awaiting the decision on their arbitration on remand, the appellants filed a petition with the Commissioner for back pay commencing from the 121st day of their suspension until the second arbitration decisions were rendered on remand.¹⁵ The Commissioner transferred these matters to an Administrative Law Judge (ALJ).¹⁶

The ALJ in the Pugliese matter decided that she should receive back pay from the 121st day of her suspension.¹⁷ The ALJ noted that the 2015 determination of the Appellate Division "wiped clean" the arbitration award sustaining the tenure charge, thus she had to be tried anew under the legal standards set forth by the Commissioner of Education.¹⁸

The ALJ in the Chavez matter reached a contrary conclusion, determining that the Appellate Division did not dismiss the underlying tenure charges against Chavez, but remanded the matter to be reconsidered by an arbitrator under the legal standards set forth by the

⁶ See Fig.1.

⁷ *Pugliese*, 454 N.J. Super. at 500.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at 500-501.

¹⁶ *Id.* at 501.

¹⁷ *Id.*

¹⁸ *Id.*

Commissioner.¹⁹ Further, the ALJ stated that, “by reversing and remanding the matter, our decision could not reasonably be characterized as a reversal within the meaning of N.J.S. 18A:6-14... [thus] Chavez [...] is not entitled to the restoration of his pay....”²⁰

Both decisions were reviewed by the Commissioner on appeal.²¹ The Commissioner adopted the ALJ’s finding in Chavez and ultimately held that neither educator was entitled to the restoration of pay pursuant to N.J.S. 18A:6-14.²² The Commissioner noted that “reversal and remand of the proceeding did not re-trigger the 120-day rule because there is no mechanism for such contained within N.J.S. 18A:6-14.”²³ Both parties appealed the Commissioner’s decision.²⁴

Analysis

The plain language of N.J.S. 18A:6-14 addresses three circumstances that lead to the payment of compensation after a teacher has been suspended.²⁵ For a teacher who is suspended without pay, the statute provides that compensation is to resume after 120 days if: (1) the determination of the charge by the arbitrator is not made within that time; (2) the charges against the teacher are dismissed; or, (3) the charges are initially sustained but reversed on appeal.²⁶ The statute, however, does not address what occurs when the Appellate Division vacates and remands an arbitrator’s determination without dismissing the charges.²⁷ The *Pugliese* Court found no clarification in the statute’s legislative history.²⁸

On a prior occasion, the Appellate Division had the opportunity to address the Legislature’s intent in enacting N.J.S. 18A:6-14.²⁹ The Court concluded that the purpose of 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.”³⁰ The Court continued that, “in many instances because of the volume of matters awaiting [a] hearing, a prompt disposition of the charges is not feasible....”³¹ For 44 years, the interpretation of the Court remained unaddressed by the Legislature. Thus, the Court invoked the canon of “legislative acquiescence” in affirming its earlier interpretation of the Legislature’s intent in enacting this statute.³²

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.* at 501-502.

²⁴ *Id.* at 503.

²⁵ *Id.* at 506.

²⁶ *Id.* See N.J.S. 18A:6-14.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.* at 505 citing *In re Grossman*, 127 N.J. Super. 13, 35-36 (App. Div. 1974).

³⁰ *Id.*

³¹ *Id.*

³² *Id.* at 506.

The Appellate Division “summarized the impact of an order vacating and remanding an initial decisions [made by trial court or agencies] by analogizing it to the grant of a motion for a new trial.”³³ The Court said that its 2015 decision to reverse and remand the arbitrator’s decisions meant that no final decision had been rendered as to the educator’s tenure charges, and that Chavez and Pugliese were entitled to back pay from the 121st day of their suspension until the arbitrators reached their decision on remand from which the appellants did not appeal.³⁴

Outreach

In connection with this Report, Staff sought comments from knowledgeable individuals and organizations, including: the Attorney General of New Jersey; the New Jersey Education Association; the New Jersey Department of Education; the Employment Section of New Jersey State Bar Association; the New Jersey State Board of Education; the New Jersey School Board Association; Newark Teachers Union Local 481; and, the attorneys of record in *Pugliese v. State-Operated School District of City of Newark*.

- *In Support of the Modification*

The New Jersey Education Association (NJEA) and Newark Teachers Union Local 481 had no objection to the proposed modification. They indicated that it will be “in the interest of all parties and consistent with the legislative intent that the holding of *Pugliese* be incorporated into the statutory language.”³⁵

The New Jersey School Boards Association (NJSBA) supported the change to refine the statutory language to encompass remands. This commenter said that doing so will “provide greater certainty for boards of education and help reduce costs of tenure proceeding.”³⁶ The organization’s representative further stated that the proposed modification will reduce litigation and that “decisions will be rendered more expeditiously.”³⁷

- *Objection to Modification*

The New Jersey Department of Education – Office of Controversies and Disputes (NJDOE) advised the Commission that it was not “necessary to modify the language contained in

³³ *Id.* at 507 citing *In re Assignment for Old Colony Coal Co.*, 49 N.J. Super. 117, 123 (App. Div. 1958).

³⁴ *Id.* at 507 and 508.

³⁵ Letter from Richard A. Friedman, Esq., New Jersey Education Association network attorney at Zazzali, Fagella, Nowak, Kleinbaum & Friedman to Arshiya M. Fyazi, Counsel, New Jersey Law Revision Commission *2 (Apr. 13, 2020) (on file with the NJLRC). *See also* e-mail from Eugene G. Liss, General Counsel to the Newark Teachers Union Local 481, to Arshiya M. Fyazi, Counsel, New Jersey Law Revision Commission (Apr. 14, 2002) (on file with the NJLRC) concurring with Mr. Friedman’s letter mentioned above.

³⁶ E-mail from John J. Burns, Counsel, New Jersey School Boards Association to Arshiya M. Fyazi, Counsel, New Jersey Law Revision Commission (June 1, 2020) (on file with NJLRC).

³⁷ *Id.*

N.J.S. 18A:6-14.”³⁸ This stakeholder suggested that the procedural history of *Pugliese* is not typical to most tenure proceedings.³⁹ The tenure charges brought against the teachers were for general inefficient teaching that predated the enactment of the Teacher Effectiveness and Accountability for the Children of New Jersey Act, N.J.S. 18A:6-117 et al., (“TEACHNJ”).⁴⁰ The remand in *Pugliese* occurred due to the differing procedural standards applied by the arbitrators in assessing teacher’s poor performances.⁴¹ Since the implementation of TEACHNJ, tenure charges against the teachers are guided by the new standards established by N.J.S. 18A:6-117 et al.⁴²

The NJDOE also indicated that tenure charges that result in the removal of an employee are usually upheld on appeal and the arbitration awards that are vacated normally involve cases in which the employee is suspended or the charges are not sustained.⁴³ In such instances, “disputes arising under the 120-day rule are not triggered if the Appellate Division vacates the arbitrator’s awards because the employee would be getting paid during the pendency of the appeal.”⁴⁴

This explanatory information was helpful in providing background and context, since the statute does not presently address a subset of circumstances that may occur – even if not frequently – the proposed modifications may be appropriate in the interest of addressing the full range of possible circumstances. It does not appear that the proposed changes would have any detrimental impact in what have been described as the more common circumstances.

Although TEACHNJ sets forth procedures for addressing a teacher’s tenure charges and establishes a timeframe within which an arbitrator must complete a tenure hearing, it does not address the effect of a vacatur and/or remand of an arbitrator’s decision by a reviewing Court. Thus, the proposed statutory modifications are not inconsistent with TEACHNJ.

Conclusion

The current tenure employee statute, at N.J.S. 18A:6-14, does not address the payment of compensation after a teacher has been suspended if the Appellate Division vacates and remands an arbitrator’s determination without dismissing the underlying charges. The language in the Appendix is proposed to address those circumstances.

³⁸ Letter from Jennifer Killough-Herrera, Director of Office of Controversies and Disputes for the NJ Dept. of Ed., to Arshiya M. Fyazi, Counsel, New Jersey Law Revision Commission (June 1, 2020) (on file with NJLRC).

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Pugliese*, 454 N.J. Super. at 500.

⁴² Letter from Jennifer Killough-Herrera, Director of Office of Controversies and Disputes for the NJ Dept. of Ed., to Arshiya M. Fyazi, Counsel, New Jersey Law Revision Commission (June 1, 2020) (on file with NJLRC).

⁴³ *Id.*

⁴⁴ *Id.*

Appendix

The proposed modifications to **N.J.S. 18A:6-14, Suspension upon certification of charge; compensation; reinstatement**, (shown with ~~strike~~through, and underlining), follow:

a. Upon certification of any charge to the commissioner, the board may suspend the person against whom such charge is made, with or without pay.

b. Compensation shall be paid as follows after an initial suspension of the person without pay:

(1) ~~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.~~ or if the determination of the arbitrator is reversed and remanded, then the full salary of such person shall be paid beginning on the one hundred twenty-first day after certification until the post-remand determination is made. For purposes of this subsection, calculation of the 120-day time period shall not include any delays which are granted at the request of such person.

(2) Should the charge be dismissed at any stage of the process, the person shall be reinstated immediately with full pay from the first day of such suspension.

(3) Should the charge be dismissed at any stage of the process and the suspension be continued during an appeal therefrom, then the full pay or salary of such person shall continue until the determination of the appeal.

c. Should the charge be sustained on the original hearing or an appeal therefrom, and should such person appeal from the same, then the suspension may be continued unless and until such determination is reversed, in which event ~~he [or she]~~ the person shall be reinstated immediately with full pay as of the time of such suspension.

d. For purposes of this section, However, the board of education shall deduct from said full pay or salary any sums received by such employee or officers by way of pay or salary from any substituted employment assumed during such period of suspension.

Comments

Except for the addition of the language in subsection b., the proposed modifications to the statute are not substantive in nature but involve reordering subsections c. and d. and adding subsections in the interest of clarity.

The underlined modification contained in subsection b. is based upon the language utilized by the Court in *Pugliese v. State-Operated School District of City of Newark*, 454 N.J. Super 495 (App. Div. 2018).

Pugliese v. State- Operated School District of City of Newark 454 N.J. Super 495 (2018)

Timeline - Fig.1



