

**NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION**

This opinion shall not "constitute precedent or be binding upon any court."
Although it is posted on the internet this opinion is binding only on the
parties in the case and its use in other cases is limited. R.1:36-3.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1032-15T3

KIMBERLYNN JURKOWSKI,

Petitioner-Appellant,

v.

BOARD OF EDUCATION OF
THE CITY OF ATLANTIC CITY,
ATLANTIC COUNTY, AND DONNA
HAYE, SUPERINTENDENT,

Respondents-Respondents.

Argued January 19, 2017 — Decided July 12, 2017

Before Judges Lihotz and Hoffman.

On appeal from the Department of Education,
Docket No. 252-9/14.

Wesley L. Fenza argued the cause for
appellant.

James J. Panzini argued the cause for
respondents Board of Education of the City of
Atlantic City, Atlantic County and Donna Haye
(Jackson Lewis P.C., attorneys; Mr. Panzini,
on the brief; Diane M. Shelley, of counsel and
on the brief).

Christopher S. Porrino, Attorney General,
attorney for respondent Department of
Education (Geoffrey N. Stark, Deputy Attorney
General, on the statement in lieu of brief).

PER CURIAM

Petitioner Kimberlynn Jurkowski appeals from the September 28, 2015 decision of the Commissioner of the Department of Education (Commissioner), adopting the order of the Office of Administrative Law (OAL) granting summary decision in favor of respondents, Board of Education of the City of Atlantic City (A.C. Board), Atlantic County, and Donna Haye, Superintendent. In her petition, Jurkowski sought reinstatement of her employment with the A.C. Board and back pay. We affirm.

We begin by summarizing the relevant facts and procedural history. According to petitioner, the A.C. Board hired her as an educational media specialist in October 2005, and she received tenure in 2008. In 2005, petitioner's son began kindergarten in the Hamilton Township School District, and in 2008, her daughter began kindergarten in the same district. Both children had difficulties in school and petitioner sought additional services for them from the Hamilton Township Board of Education (Hamilton Board).

In January 2010, petitioner reached a settlement with the Hamilton Board, which agreed to provide her son with home instruction; however, no teacher was available to provide the home instruction at that time. A month later, petitioner suggested Midge Spencer, who owned a business called Bridges Educational

Consulting Services, as a homebound instructor for her son. The Hamilton Board approved Spencer, and she began providing instruction to petitioner's son. In September 2010, the Hamilton Board also approved Spencer to provide homebound instruction to petitioner's daughter. According to petitioner, "Ms. Spencer would give me invoices to sign for her tutoring services. I often signed batches of them at a time because I did not see her every day."

At some point in 2011, Spencer stopped providing tutoring services to petitioner's children; petitioner and her children then moved to another school district. Notwithstanding this development, Spencer continued to submit invoices signed by petitioner to the Hamilton Board, fraudulently representing the hours she spent with petitioner's children. On July 25, 2012, petitioner was arrested and charged with conspiracy, N.J.S.A. 2C:5-2(a)(1); theft by deception, N.J.S.A. 2C:20-4(a); forgery, N.J.S.A. 2C:21-1(a)(2); and falsifying or tampering with records, N.J.S.A. 2C:21-4(a).

By letter, petitioner promptly informed the A.C. Board's superintendent of the criminal charges. On August 7, 2012, the superintendent suspended petitioner with pay, based upon the pending charges. In December 2012, petitioner informed the superintendent she had been indicted. Effective January 14, 2013,

the A.C. Board suspended petitioner without pay based upon her indictment.

Petitioner applied for Pretrial Intervention (PTI) in February 2013, but the prosecutor rejected her application. Petitioner proceeded to trial in October 2013. On October 23, 2013, at the end of a two-day trial, the judge dismissed two conspiracy charges and the jury returned a guilty verdict on the remaining charges, theft by deception and falsifying records. In accordance with Rule 3:21-5, the trial judge did not enter a judgment of conviction at that time.

By letter dated October 30, 2013, the superintendent advised petitioner that based upon the jury verdict, her employment with the A.C. Board was terminated, effective October 23, 2013, pursuant to N.J.S.A. 2C:51-5(a)(8).¹ On November 5, 2013, petitioner informed the New Jersey Department of Higher Education of her intentions to appeal the jury verdict as well as the termination of her employment.

On December 6, 2013, petitioner filed a motion to set aside the jury verdict. Before the trial court decided the motion, the prosecutor consented to petitioner's admission into PTI on the condition she forfeit her current employment. When asked by the

¹ N.J.S.A. 2C:51-5(a)(8) provides that a person convicted of a third-degree crime will automatically have his or her professional license suspended.

trial judge if the terms were agreeable with petitioner, petitioner's counsel stated he went over the PTI terms with his client and acknowledged "[this] matter[] involves a potential revocation of a teacher's license. She understands also that the present position, however, would be one of the conditions, I guess, in addition to the usual conditions of pre-trial intervention." The trial judge postponed sentencing pending the successful completion of PTI. The judge then stated, "[S]he will forfeit current employment only, and I understand that . . . probably is mooted because I believe she's unemployed at the present time, is that correct?" Petitioner's counsel responded,

She's at least suspended on her present employment in any way, and just so the record is clear, she agrees that that would remain and not be contested . . . because this reserves her right[,] the whole purpose to attempt to take her position later on regarding her teacher's license based on the absence of a judgment of conviction here, assuming that she does the pre-trial regiment.

Petitioner completed PTI on June 16, 2014, resulting in the dismissal of the charges against her. On June 17, 2014, plaintiff sent a letter to the superintendent seeking reinstatement of her employment and back pay, claiming this was in accordance with their discussion at a July 2012 meeting. The superintendent responded on July 16, 2014, denying petitioner's request for

reinstatement based upon her acceptance of the PTI condition requiring she forfeit her employment.

On September 12, 2014, petitioner filed a petition with the Commissioner seeking reinstatement of her employment and back pay from the A.C. Board. The Commissioner treated the petition as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13, and transferred the matter to the OAL on October 23, 2014.

Before the OAL, petitioner argued she was under the impression, when she entered PTI, the condition requiring she forfeit her current employment was moot as she was already terminated by the A.C. Board, pursuant to the superintendent's October 30, 2013 letter. However, a certification from petitioner's criminal defense attorney, H. Robert Boney, Jr., directly contradicted petitioner's claimed understanding of the PTI agreement:

I fully explained in detail to [petitioner] that by accepting the conditions to enter PTI, she was no longer entitled to reinstatement to seek her position with the Atlantic City Board of Education. Instead, she could seek employment with the Atlantic City Board of Education or any other School District but the Board of [E]ducation was not required to hire her into her prior position or any other position.

The A.C. Board filed a motion for summary decision, which an Administrative Law Judge (ALJ) granted on June 29, 2015. The ALJ

concluded, absent a judgment of conviction, the A.C. Board could not terminate plaintiff's employment without the proper tenure charges and due process protections. The ALJ found the A.C. Board incorrectly equated a jury verdict as the "legal equivalent of a judgment of conviction and forfeiture" when the superintendent sent her October 30 letter. Therefore, petitioner remained employed by the A.C. Board at the time she entered into the PTI program and agreed to forfeit her current employment.

Petitioner filed exceptions to the ALJ's decision, and the Commissioner issued a final decision dated September 28, 2015. The Commissioner accepted and adopted the ALJ's findings of fact and determination, upholding the order granting summary decision in favor of respondents. This appeal followed.

On appeal, petitioner argues that (1) she was not employed with the A.C. Board when she forfeited her current employment, (2) the A.C. Board's interpretation of the PTI agreement was contrary to her reasonable expectations, and (3) summary decision in this matter was premature.

We have carefully considered the record and conclude petitioner's arguments are entirely without merit. We affirm substantially for the reasons set forth in the final decision of the Commissioner. R. 2:11-3(e)(1)(D). We add the following comments.

It is well established that "[i]n light of the executive function of administrative agencies, judicial capacity to review administrative actions is severely limited." In re Musick, 143 N.J. 206, 216 (1996). We will intervene "only in those rare circumstances in which an agency action is clearly inconsistent with its statutory mission or other state policy." Ibid.

Our review of a final decision of an administrative agency is limited to three inquiries: (1) whether the agency's action is consistent with the applicable law; (2) whether there is substantial credible evidence in the record to support the factual findings upon which the agency acted; and (3) whether, in applying the law to the facts, "the agency clearly erred in reaching a conclusion that could not reasonably have been made on a showing of the relevant factors." Ibid. (citing Campbell v. Dep't of Civil Serv., 39 N.J. 556, 562 (1963)).

Furthermore, when reviewing an agency's factual finding, "an appellate court may not 'engage in an independent assessment of the evidence as if it were the court of first instance.'" In re Taylor, 158 N.J. 644, 656 (1999) (quoting State v. Locurto, 157 N.J. 463, 471 (1999)). The findings of fact made by an administrative agency are binding on appeal if they are supported by substantial, credible evidence. Id. at 656-57 (citing Close v. Kordulak Bros., 44 N.J. 589, 599 (1965)).

We are satisfied the record contains sufficient credible evidence to support the Commissioner's determination to adopt the summary decision of the ALJ as the final agency decision and to dismiss petitioner's appeal. The record fully supports the conclusion petitioner remained employed by the A.C. Board on the date she entered PTI as the superintendent's October 30, 2013 letter was procedurally defective.


We also reject petitioner's argument that summary decision should not have been granted prior to the completion of discovery. Petitioner simply argues there are "likely" many documents in support of her position, falling short of demonstrating with any degree of particularity the need for discovery.

Notably, the ALJ stated he addressed the motion before him solely on the legal issues. Our Supreme Court has held, "Purely legal questions . . . are questions of law particularly suited for summary judgment." Badiali v. N.J. Mfrs. Ins. Grp., 220 N.J. 544, 555 (2015). Therefore, the Commissioner correctly concluded the ALJ properly decided the summary decision motion based upon the legal questions presented.

We are satisfied that the Commission's decision was not arbitrary, capricious, or unreasonable. Any arguments not specially addressed lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.


CLERK OF THE APPELLATE DIVISION