
Fattori v. Trenton State Prison
Cite as 13 *N.J.A.R.* 606

MICHAEL FATTORI,
Appellant,
v.
TRENTON STATE PRISON,
Respondent.

Initial Decision: March 6, 1987
Final Agency Decision: April 22, 1987
Approved for Publication: June 12, 1990

SYNOPSIS

Appellant was removed from his position as a correction officer after he was found guilty of violating *N.J.S.A. 2C:28-6(2)* in connection with an incident involving injuries to inmates. He appealed and the matter was transmitted to the Office of Administrative Law for a hearing.

The administrative law judge assigned to the case concluded that the crime for which appellant was convicted was an offense involving appellant's position and, consequently, his employment was forfeited pursuant to *N.J.S.A. 2C:51-2*. The judge held that appellant was not entitled to a hearing on the factual issue of whether the offense touched his employment. The facts of the case were adjudicated in appellant's trial. Only the legal question of forfeiture remained. The judge noted that the forfeiture statute was self-executing and, therefore, appellant's position was terminated when he was convicted. Since there was no issue of material fact, the judge granted respondent's motion for summary decision.

Upon review, this initial decision was adopted by the Merit System Board. The termination of appellant by the appointing authority was affirmed.

Charles P. Allen, Jr., Esq., for the appellant (Dietrich, Allen, & St. John, attorneys)

Jeffrey A. Bartolino, Deputy Attorney General, for the respondent (W. Cary Edwards, Attorney General of New Jersey, attorney)

CARNES, ALJ:

PROCEDURAL HISTORY

The appellant, Michael Fattori, was terminated from the position of Correction Officer Recruit with the Trenton State Prison on charges: (1) tampering with or fabricating physical evidence, and (2) conduct unbecoming an employee in the public service.

On May 15, 1986, a Preliminary Notice of Disciplinary Action was sent to appellant by certified mail, charging him with the above stated charges. Following a departmental hearing on June 9, 1986, the respondent issued a Final Notice of Disciplinary Action, which was mailed by certified mail to the appellant on July 16, 1986, and which sustained all charges. A Report of Separation or Transfer (CS-22) was completed by the respondent on August 8, 1986.

On August 26, 1986, the appellant filed an appeal of that decision which was timely received by the Civil Service Commission (now Merit System Board)* on August 28, 1986. The Commission directed that a hearing be held and the matter was transmitted to the Office of Administrative Law for determination as a contested case, pursuant to *N.J.S.A. 52:14B-1 et seq.* and *N.J.S.A. 52:14F-1 et seq.*

On January 22, 1987, the attorney for the respondent filed a Notice of Motion for a Summary Decision, together with supporting affidavits, exhibits and a letter brief which was served upon counsel for the appellant by regular mail. The Notice of Motion for a Summary Decision was received by the Office of Administrative Law on January 27, 1987. The appellant's counsel did not serve responsive papers within 10 days, and as such the record closed on February 7, 1987.

THE FACTS

On May 15, 1984 and May 16, 1984, inmates who were transferred from Southern State Correctional Facility to Trenton State Prison were physically abused and sustained bodily injuries. As a result of this incident, on August 28, 1984, a State Grand Jury issued a 24 count indictment, State Grand Jury Indictment Number SGJ121-84-6. The appellant, Michael Fattori, was indicted on two counts of this indictment: count one, conspiracy of the second degree; and count five, official misconduct, second degree. The appellant entered a plea of not guilty to the charges on September 28, 1984.

**P.L.* 1986, c.112, effective September 25, 1986.

During trial in September 1985, the appellant retracted his plea of not guilty of count one and entered a plea of guilty to a lesser included offense of count one. On March 7, 1986, the appellant was adjudged guilty in the Superior Court of New Jersey, Mercer County, Law Division-Criminal of the fourth degree offense of tampering with or fabricating physical evidence in violation of *N.J.S.A.* 2C:28-6(2), and was sentenced to serve a two year probationary term conditioned upon the appellant's performing 250 hours of community service, and count five was dismissed.

APPLICABLE LAW

N.J.S.A. 2C:51-2, Forfeiture of public office, provides in pertinent part:

- a. A person holding any public office, position or employment, elective or appointive, under the government of this State or any agency or political subdivision thereof, who is convicted of an offense shall forfeit such office or position if:
.....
 - (2) He is convicted of an offense involving or touching such office, position or employment;
.....
- b. The forfeiture set forth in subsection a. shall take effect:
 - (1) Upon finding of guilt by the trier of fact or a plea of guilty, if the court so orders; or
 - (2) Upon sentencing, unless the court for good cause shown, orders a stay of such forfeiture.

DISCUSSION

The issues to be resolved in this case are: (1) is there no genuine issue as to any material fact; (2) does the conviction involve or touch upon the appellant's employment; and (3) is the forfeiture statute self-executing. As the facts are all taken from official records, there does not appear to be any genuine issue as to any material fact and as such the respondent's motion for summary decision may be considered. *N.J.A.C.* 1:1-13.2.

With regard to the second issue, the indictment reveals that the charges against appellant involve the infliction of bodily harm upon inmates being transferred from the Southern State Correctional Facility to Trenton State Prison on May 15, 1984, and the agreement among the officers involved to provide false information and reports to Department of Corrections officials investigating the incident. Ap-

pellant pleaded guilty to *N.J.S.A.* 2C:28-6, which states in pertinent part as follows:

A person commits a crime of the fourth degree if, believing that an official proceeding or investigation is pending or about to be instituted, he:

.....

- (2) Makes, devises, prepares, presents, offers or uses any article, object, record, document or other thing of physical substance knowing it to be false and with purpose to mislead a public servant who is engaged in such proceeding or investigation.

In *In the Matter of Edward Scott*, (N.J. App. Div., December 18, 1986, A-87-85T1)(unreported)) the court held that a person is not entitled to a hearing for a resolution of the factual question of whether the offense of which the person was convicted touched upon or involved his employment. The court stated that

... Assuming that the statute is criminal in nature, the disability attaches only upon conviction of an offense. Therefore, the forfeiture statute is directed at those persons who are "no longer presumed innocent."

Appellant relies on principles of statutory construction to argue that the phrase, "convicted of an offense involving or touching said ... employment" should be construed to mean that he has a right to a hearing on the issue of whether his assault so touched or involved his employment. This argument is specious. Simply stated, there are no exceptions to the automatic forfeiture of public employment under this statute. More importantly, the facts concerning the assault were fully and fairly adjudicated and are no longer in dispute. Thus, whether such facts indicate an offense that involved or touched appellant's employment is a purely legal question. [*Id.* at 11.]

Since the facts in this case, as in the *Scott* case, were fully and fairly adjudicated before the Superior Court, all that remains is the purely legal question as to whether or not the offense touched appellant's employment.

With regard to the third issue, the commentary to the forfeiture statute provides:

... This section mandates forfeiture of any public office, position or employment, state or municipal upon conviction for any offense involving dishonesty or a crime involving moral turpitude. Conviction of lesser offenses, *i.e.*, disorderly persons offenses, would result in forfeiture only if the offense involves or touches the public position.

[II Final Report of the New Jersey Criminal Law Revision Commission, Commentary, *N.J.S.A.* 2C:51-2 at 361 (1971)] [*Scott* at 6.]

This statute has been applied to corrections officers who pled guilty to disorderly persons offenses arising out of a jail incident in which a prisoner was injured. *State v. Pitman*, 201 N.J. Super. 21 (App. Div. 1985). The forfeiture statute has consistently been held constitutional and self-executing. *Id.* at 25; *State v. Musto*, 187 N.J. Super. 264, 305 (Law Div. 1982), aff'd 188 N.J. Super. 106 (App. Div. 1983); *State v. Heitzman*, 209 N.J. Super. 617, 624 (App. Div. 1986); and *In the Matter of Edward Scott*. In *Scott* the court stated “[i]ndeed, to the extent that it is self-executing, discretionary enforcement is inappropriate.”

The court in the *Scott* case also addressed the issue as to whether or not a Civil Service hearing was required pursuant to N.J.A.C. 4:1-16.10 before an employee could be removed pursuant to N.J.S.A. 2C:51-2. The court concluded that the employee was not being removed pursuant to the Civil Service Regulations so those provisions are inapplicable. The court concluded that entitlement to

... public employment is subject to the restriction imposed by the forfeiture statute that once having been convicted of such an offense, such employment is terminated. If the municipal court judge as part of the sentencing process had invoked the automatic forfeiture provisions under Title 2C, appellant's due process argument would lose all semblance of merit. The forfeiture statute is much in the nature of a penalty for an adjudication of guilt on offense or crime. We have no hesitancy in concluding that appellant's due process rights were fully protected by the underlying hearings on the assault conviction and that no further hearing was required. [*Id.* at 10.]

Based on the above, I **CONCLUDE** that there is no genuine issue as to any material fact. I further **CONCLUDE** that the appellant was convicted of an offense involving or touching upon his office, position or employment. I further **CONCLUDE** that N.J.S.A. 2C:51-2 is self-executing. Finally, I **CONCLUDE** that since the appellant was convicted of an offense involving or touching upon his employment, his employment is terminated pursuant to N.J.S.A. 2C:51-2. As such, the respondent's institution of disciplinary action below was unnecessary.¹

¹By operation of law, the appellant's position was terminated on March 7, 1986. The first Preliminary Notice of Disciplinary Action was not prepared until April 16, 1986 and was amended on May 9, 1986. As the appellant was already removed from the public service prior to the preparation of a Preliminary Notice of Disciplinary Action, such action could not be maintained for lack of jurisdiction. (How could the agency fire someone who no longer works for them?) In any event, N.J.S.A. 2C:51-2 is self-executing, and therefore disciplinary actions for removal are unnecessary.

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It is **ORDERED** that respondent's motion for a summary decision is granted and that the appellant's employment was terminated upon sentencing on March 7, 1986. It is further **ORDERED** that the appellant's appeal is hereby **DISMISSED**.

This recommended decision may be affirmed, modified or rejected by the **MERIT SYSTEM BOARD**, which by law is empowered to make a final decision in this matter.

FINAL DECISION BY THE MERIT SYSTEM BOARD:

The appeal of Michael J. Fattori, Correction Officer Recruit, Trenton State Prison, State Department of Corrections, removal effective May 22, 1984, on charges, was heard by Administrative Law Judge Steven Carnes, who rendered his initial decision on March 6, 1987. Exceptions were filed on behalf of the appellant. Cross exceptions were filed on behalf of the appointing authority.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Merit System Board at its meeting on April 22, 1987, accepted and adopted the Findings and Conclusion as contained in the administrative law judge's initial decision.

ORDER

The Merit System Board finds that the action of the appointing authority in removing appellant was justified. The Board therefore affirms that action and dismisses the appeal of Michael J. Fattori.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.

You must check the New Jersey Citation Tracker in the companion looseleaf volume to determine the history of this case in the New Jersey courts.