

353-98R
(107-97)

DIANE SWAIM AND MIDDLETOWN	:	
TOWNSHIP EDUCATION ASSOCIATION,	:	
	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE	:	DECISION ON REMAND
TOWNSHIP OF MIDDLETOWN,	:	
MONMOUTH COUNTY,	:	
	:	
RESPONDENT.	:	<u>SYNOPSIS</u>
_____	:	
	:	

Petitioning Education Association and its president asserted that the Board's action granting early tenure to two principals was arbitrary and capricious. In the 1997 Initial Decision, the ALJ dismissed the petition as moot. The Commissioner, however, determined to remand the matter to OAL to determine whether the Board acted within its authority in creating, and then rescinding, a policy to confer tenure upon all principals who had maintained continuous employment in the position of principal in the District for 24 months. Thus, the Commissioner reversed the finding that the matter was moot because the individuals in question achieved tenure, finding that issues existed of public importance which are capable of repetition while evading review. On remand, the ALJ determined that a board has the authority to shorten the period of time required for the acquisition of tenure if done for the general category of all such employees, regardless of how limited that category may be; that a board could rescind such a policy if the new requirement is uniform for all employees of the category; and that no notice of such a resolution is required if performed at a regularly scheduled meeting pursuant to the OPMA. The Commissioner determined that the ALJ did not render either factual findings or credibility assessments as to the seminal issue in this matter, *i.e.*, the intent of the Board in undertaking its actions and whether, in light of the circumstances existing in this matter, its actions exceeded the scope of its authority. Thus, the Commissioner again remanded the matter to OAL for supplementation of the record and further findings sufficient to address these concerns.

On second remand, the ALJ concluded that the Board acted within its authority in creating and then rescinding a resolution to confer early tenure. Its actions were not arbitrary, capricious or unreasonable. Citing the Supreme Court decision in *Rall*, the ALJ determined that a board has the power to pass such a resolution if it applies to the whole category of employees, regardless of the number of individuals within that job category. Moreover, just as in *Rall*, the resolution remains valid until the board adopts another rule of general application. As to notice of the resolution, no notice of such resolution is required.

The Commissioner adopted the findings and determination in the Initial Decision as his own. The Commissioner concluded that the Board's action to establish a shorter period for the grant of tenure for its principals, and its subsequent action to change the tenure qualifying period back to the presumptive three-year statutory period, grandfathering the principals lawfully tenured by its prior resolution, was within its discretionary authority. (*N.J.S.A. 18A:28-5; Rall*) The Commissioner further concurred with the ALJ that petitioners failed to produce sufficient evidence to substantiate their allegation that the Board acted in bad faith.

JANUARY 26, 2001

OAL DKT. NOS. EDU 2267-97, EDU 10691-95 (ON REMAND) AND EDU 6705-98 (ON
REMAND)
AGENCY DKT. NO. 393-10/95

DIANE SWAIM AND MIDDLETOWN :
TOWNSHIP EDUCATION :
ASSOCIATION, :

PETITIONERS, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE : DECISION ON REMAND
TOWNSHIP OF MIDDLETOWN, :
MONMOUTH COUNTY, :

RESPONDENT. :

The record of this matter and the Initial Decision on Remand of the Office of Administrative Law have been reviewed. Petitioners' exceptions and the Board's reply thereto, filed in accordance with *N.J.A.C.* 1:1-18.4, were duly considered by the Commissioner in making his determination herein.

Petitioners except to the Initial Decision of the Administrative Law Judge (ALJ), stating that the facts as found by the ALJ do not support her conclusion. Rather, petitioners posit that the ALJ's findings are supportive of their claim that the Board's actions were arbitrary, capricious and in bad faith because the ALJ acknowledged that the Board's intent was to confer tenure on two individual principals whom it wanted to retain, but felt it had nothing more to offer to encourage them to stay with the District. This, petitioners assert, confirms that the Board misused its authority by granting tenure before the expiration of the statutory probationary period

to two individuals as a personal benefit. (Petitioners' Exceptions at 6-7) Citing *Pickering v. Bd. of Ed. of the Borough of North Plainfield*, 1987 S.L.D. 1393, 1402, remanded on other grounds by the Commissioner, 1987 S.L.D. 1408, petitioners argue that the grant of early tenure to an individual as a personal benefit is unlawful and that:

The fact that these two individuals comprised the entire class of eligible employees at that particular moment does not change the fact that the Board's "intent", evident on the record and as found by the ALJ, was to benefit these individuals, as further confirmed by the subsequent resolution, barely three weeks later, rescinding the first resolution yet permitting the two individuals to be "grandfathered" in. (Petitioners' Exceptions at 7)

Petitioners support the gravamen of their argument that the Board exercised its authority in an arbitrary and capricious manner in order to confer the benefits of early tenure on two specific individuals, "and not to an open-ended class of current and future principals," (*ibid.*) by citing to Board Member Scaduto's testimony:

...I do like the opportunity to evaluate someone as long as I possibly could before I put them in a position where I may not have that flexibility. *However, taking administration's recommendations into consideration and my own personal experience in dealing with Mr. Feuer and Mrs. Martinez, I see no reason why, at this time, I could not, in all conscience, vote for an early tenure of these two individuals.* P-11; see also P-6 (emphasis in text) (*Id.* at 7-8)

Moreover, petitioners aver that the inappropriateness of the tenure resolution is underscored by the fact that Board President Stokes expressly advised Board members that he had been informed that the tenure resolution would not create a precedent, which petitioners interpret as meaning that it would never be applied to anyone other than Dr. Feuer and Dr. Martinez. (*ibid.*) Further, petitioners submit, the "immediate preparation" of the rescinding resolution, which grandfathered Dr. Feuer and Dr. Martinez, confirms that the Board's intent was

never to change the statutory tenure period “for *all* principals *present and future*.” (emphasis in text) (*Id.* at 9) Citing *Roberts v. Bd. of Ed. of Hudson County Area Vocational-Technical School District*, 1984 S.L.D. 999, 1003, *aff’d* State Board 1984 S.L.D. 1026, where “the board resolution was invalidated because ‘the resolution made it perfectly clear that the grant of tenure *was to individuals and the rescission resolution confirmed that such was the intent of the Board,*’” (emphasis in text), petitioners assert that the Board in this instance similarly acted in bad faith. Petitioners charge that, by shortening the tenure period for two individual principals and then “immediately” rescinding the resolution so that it would not apply to any new principal selected as a result of interviews for an existing vacancy that were proceeding, the Board confirmed that its intent, like that in *Roberts*, was the grant of early tenure to two individuals. (Petitioners’ Exceptions at 9)

Petitioners further object to the ALJ’s failure to make specific findings of fact as required by the Administrative Procedures Act (APA), *N.J.S.A. 52:14B-1 et seq.*, and in light of the Commissioner’s remand, which expressly directed the ALJ to make such factual findings. Petitioners argue that the requirements of the APA, as interpreted by the Courts, dictate that an initial decision must include findings of fact, conclusions of law and a sufficient explanation of how those findings of fact and conclusions of law led to that decision, such as would permit meaningful appellate review of that decision. (*Id.* at 11) Petitioners posit that the Initial Decision contains no mention of any pertinent facts in response to the Commissioner’s remand other than two newly added paragraphs on page eight, which are notable in their failure to refer to specific facts underlying the findings. Petitioners urge that, to rectify this error, the Commissioner should exercise his authority to “modify” the Initial Decision by making the

factual findings overlooked by the ALJ. (Petitioners' Exceptions at 12) In this regard, petitioners set forth a detailed recitation of proposed findings of fact which they aver should be made by the Commissioner, and which lead to the inevitable conclusion that the Board's actions in the within matter should be invalidated as unlawful. (*Id.* at 13-20)

In reply, the Board submitted a two-page letter stating that it will rely on its trial memorandum of June 20, 1996, a letter submitted to the ALJ on October 3, 1997 and its June 10, 1998 letter to the Commissioner in lieu of a more formal response to petitioners' exceptions. In its two-page letter, the Board posits that it should come as no surprise that the ALJ's decision is so similar to her original decision in view of the limited record petitioners presented at trial, much of which, it argues, was "incompetent" evidence. The Board objects to petitioners' suggestion that the Commissioner make independent findings of fact, stating that the Board objected to the tapes and transcripts provided by petitioners at hearing as failing to satisfy the Residuum Rule. The Board also argues that any deficiencies in the findings of facts are the result of the inadequate record presented in petitioners' case at the hearing. (Board's Reply Exceptions at 2)

Upon careful and independent review of the record in this matter, which includes a transcript of the hearing below¹ and the Initial Decision on Remand, the Commissioner determines that the findings of fact by the ALJ in her decision on remand are sufficient so as to fairly resolve this matter. In so finding, the Commissioner rejects petitioners' argument that the Initial Decision does not satisfy the Commissioner's remand.

¹ It is noted that the record contains a transcript of the June 10, 1996 hearing.

Initially, the Commissioner agrees with the ALJ's analysis and conclusions rejecting petitioners' claim of a violation of the Open Public Meetings Act.²

Further, the Commissioner notes that the governing statute, *N.J.S.A. 18A:28-5*, provides boards of education with the authority to shorten the time period for the acquisition of tenure if it applies to an entire category of its employees, regardless of the number of employees in that category, and permits boards to subsequently act to fix a different tenure qualifying period or restore the statutory qualification period. *See Rall v. Board of Ed. of the City of Bayonne*, 54 *N.J.* 373, 377 (1969).

In this instance, the Board adopted a resolution on July 25, 1995, establishing a two-year qualifying period for its principals, stating that:

BE IT RESOLVED by the Board of Education of the Township of Middletown that in accordance with the provisions of *N.J.S.A. 18A:28-5*, the time period within which *any* Principal of Schools in the Middletown Township School District may attain tenure is hereby fixed at 24 months of full-time service as Principal in the School District; and WHEREAS, the Board of Education of the Township of Middletown, in accordance with the provisions of *N.J.S.A. 18A:28-5*, hereby fixes the time period of 24 months of full-time service within which *any* principal of schools in the district may attain tenure as principal; and WHEREAS, Alan M. Feuer is presently employed as Principal of Schools at Middletown High School North within the School District and has been so employed since July 1, 1993, which is in excess of these 24 months; and WHEREAS, Antonia Martinez is presently employed as Principal of Schools at Middletown Village School within the District and has been so employed since February 19, 1993, which is in excess of 24 months;

² The Commissioner notes that petitioners did not object to the ALJ's findings and conclusions in their exceptions to the Initial Decision, stating:

This and the immediately preceding fact are not intended to question the Board's compliance with the requirements of the Open Public Meetings Act, despite the emphasis placed on analysis under that statute by the Initial Decision. Instead, these facts show that the resolutions at issue were handled in a manner contrary to usual practice as an indication that the Board's intent was in bad faith, arbitrary or capricious. (Petitioner's Exceptions, Footnote 6)

THEREFORE, BE IT RESOLVED by the Board of Education of the Township of Middletown that Alan M. Feuer and Antonia Martinez by virtue of the aforementioned Resolution have acquired tenure in the School District of the Township of Middletown as principals of schools and they shall continue to serve as Principals of Schools within the District with all rights and benefits accorded to tenured employees. (emphasis added) (Exhibit P-3)

Accordingly, notwithstanding the fact that there were only two principals who qualified for the grant of tenure under the 24-month provision, as named in the resolution, the Commissioner concludes that the July 25 resolution complies with *N.J.S.A. 18A:28-5* and *Rall, supra*, since the resolution specifically provides for tenure to an entire category of teaching staff members, *i.e.*, to *any* principals who *may attain* 24 months of full-time service in the District.

Although petitioners vigorously advance the argument that the Board's "immediate" reinstatement of the three-year statutory period for the acquisition of tenure for its future principals, with a grandfather clause for the two newly tenured principals, less than a month later, demonstrates that the Board acted in bad faith, the Commissioner notes that neither *N.J.S.A. 18A:28-5* nor *Rall, supra*, establishes, or even suggests, a minimum acceptable time frame wherein a board may subsequently act to fix a different qualifying period or restore the statutory period for general application to the category of employees affected by an earlier resolution. Thus, mere proximity of the effectuating resolutions in situations of this type cannot, in itself, serve to establish bad faith on the part of a board.

In the instant matter, in its rescinding resolution of August 22, 1995, the Board states that it "is now of the opinion that the reduced period of tenure is no longer in the best interests of the District***." (Exhibit P-8) The Commissioner concurs with the ALJ that petitioners have failed to produce sufficient evidence to substantiate their allegation that the

Board acted in bad faith in reaching this determination. In particular, the Commissioner notes that the Board was acting on the recommendation of the District's administration, who explained that the July 25 resolution granting early tenure was applied to a class whose then-current members had been employed in the District and had been observed for a period of time, as contrasted to the situation with newly hired principals whom the Board would not have had the same opportunity to observe. (*Tr.* at 80)

Accordingly, the Commissioner concludes that the Board's action to establish a shorter period for the grant of tenure for its principals, and its subsequent action to change the tenure qualifying period back to the three-year statutory period, grandfathering the principals lawfully tenured by its prior resolution, constituted a reasonable exercise of its discretionary authority consistent with *N.J.S.A.* 18A:28-5 and *Rall, supra*. The Initial Decision is, therefore, affirmed.

IT IS SO ORDERED.³

COMMISSIONER OF EDUCATION

Date of Decision: January 26, 2001

Date of Mailing: January 26, 2001

³ This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.