

DOLORES SANCHEZ, :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE CITY OF : DECISION

CAMDEN, CAMDEN COUNTY, :

RESPONDENT. :

SYNOPSIS

Petitioner, tenured principal who was transferred to acting vice principal position without loss of salary and benefits, alleged her tenure rights were violated in contravention of *N.J.S.A.* 18A:28-1 to 14 and sought emergent relief. Respondent Board, an *Abbott* district whose School Management Team (SMT) is designated to participate in the selection of a school’s principal, contended it was not obligated to immediately appoint a tenured principal whose school has been closed mid-year to another principal title, at a time when the Board was in the process of reorganizing. The Board claimed that petitioner must apply for any open principal positions, be interviewed and recommended by the SMT of the particular school in order to be considered for appointment to a principal position by the Board. Petitioner argued that she should not be required to apply for a position that she was entitled to by virtue of her tenure and seniority rights and that SMT regulations cannot defeat the tenure laws.

The ALJ determined that the Board acted properly. The ALJ found that to move petitioner mid-year into a principal’s slot, the Board would have to displace someone else and create new dislocations in a school year where there were already other disruptions. Thus, the disruption caused in the District would outweigh the harm to petitioner given that she suffered no seniority or salary loss. The ALJ denied petitioner’s application for emergent relief.

Upon a thorough review of this matter, the Commissioner found that petitioner met the four-pronged standard necessary for granting emergent relief. Moreover, in the absence of Legislative action establishing separate tenure laws applicable to the *Abbott* school districts or express statutory authority applying the procedures embodied in *N.J.A.C.* 6A:24-2.2(c)(2) to tenured individuals in *Abbott* school districts, the statutory tenure rights set forth at *N.J.S.A.* 18A:28-1 *et seq.* are controlling in this matter and cannot be “trumped” by regulations, not even *Abbott* regulations. The Commissioner granted petitioner’s motion for emergent relief and directed the Board to assign petitioner immediately to either one of the District’s vacant principal positions or to any of the District’s other principal positions to which petitioner is entitled by virtue of her tenure and seniority. Since there were no outstanding issues requiring plenary hearing, this determination constituted the Commissioner’s final decision.

<p>This synopsis is not part of the Commissioner’s decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.</p>

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The record of this emergent matter, including the audiotape of the hearing conducted at the Office of Administrative Law on January 17, 2003 and the Order of the Administrative Law Judge (ALJ), have been reviewed. Petitioner filed exceptions to the ALJ's Order on February 7, 2003 and the Board filed a reply on February 14, 2003. The exceptions and reply thereto were considered in reaching this determination.¹

Petitioner's exceptions essentially recast and reiterate arguments advanced before the ALJ, again contending, *inter alia*, that, absent tenure charges or a lawful reduction in force, there is nothing in the *Abbott* regulations and there are no exceptions or extenuating circumstances which can legitimately defeat an employee's tenure rights. (Petitioner's Exceptions at 1) Petitioner further argues that she has met all of the criteria for emergent relief in that the facts in this matter are not in dispute and the legal right underlying her claim is well-

¹Although *N.J.A.C.* 1:1-12.6 does not provide for the filing of exceptions or reply exceptions to an Emergent Relief Order by an ALJ, these submissions reach to the merits of the matter which forms the underlying basis of this application for emergent relief. Accordingly, notwithstanding that neither party requested permission to file exceptions, under the particular circumstances of the instant matter, these submissions have been considered in making this determination.

settled. (*Id.* at 2) Thus, petitioner asserts that she has demonstrated the likelihood of prevailing on the merits of this matter. (*Ibid.*)

Petitioner likewise claims that she can never be made whole because the harm to her reputation and professional standing in the District and the community can never be remedied, nor can such damage to her reputation be adequately addressed by the award of monetary damages. (*Ibid.*) Petitioner further asserts that, in balancing the equities and interests of the parties, any administrative inconvenience to the Board is far outweighed by the harm caused to her by forcing her to work in a position in derogation of her tenure rights. (*Ibid.*) Finally, petitioner submits that, although New Jersey School law requires that the decision to transfer an employee be made by a majority vote of the Board membership, the decision to transfer petitioner was made solely by the superintendent. (*Ibid.*)

In its response, the Board points out that it is an *Abbott* District² and that *Abbott* regulations at *N.J.A.C.* 6A:24-2.2(c)(2) require that the School Management Team (SMT)³ interview and select candidates for a specific principal position and the superintendent may only recommend to the Board a candidate who has been recommended by the SMT. (Board's Reply at 1-2) The Board suggests that it is premature for petitioner to claim that she will suffer irreparable damage by her loss of right to function as a principal because there are three vacant principal positions in the District which have been posted, and that petitioner has submitted her application for at least one of them. (*Id.* at 2) The Board further posits that petitioner has not suffered irreparable harm in that she has not suffered any loss of seniority or salary. (*Id.* at 3)

² Pursuant to *N.J.S.A.* 18A:7F-3, an "Abbott district" means one of the 28 urban districts in district factor groups A and B specifically identified in the appendix to *Raymond Abbott, et al. v Fred G. Burke, et al.*, decided by the New Jersey Supreme Court on June 5, 1990 (119 *N.J.* 287, 394)***."

³ Pursuant to *N.J.A.C.* 6A:24-2.1(a) and (d), "[t]he purpose of the SMT is to ensure participation of staff, parents and the community in the school level decision making and to develop a culture of cooperation, accountability and commitment, all with a focus on improving student achievement," and "***shall include the building principal, teachers, school-level support staff, parents and community members. The SMT may include students."

Moreover, the Board avers, petitioner failed to present any evidence of any stigma or damage to her reputation at hearing, so there was no basis for the ALJ to conclude that petitioner suffered irreparable damage that could not be remedied by the award of monetary damages if such injury was established at some future date. (*Ibid.*)

With respect to evaluating the relative hardship to the parties, the Board avers that the disruption caused in the District if it were required to place petitioner in a principal's position mid-year outweighs the harm to petitioner, given that she suffers no seniority or salary loss. (*Id.* at 4) Citing the ALJ's Order, the Board also argues that petitioner has failed to demonstrate a likelihood of success on the merits, stating that the law is not settled with respect to "whether an Abbott district must immediately appoint a tenured principal whose school has been closed mid-year to another principal title, at a time when the district is in the midst of reorganizing." (*Id.* at 5, citing Order at 3) The Board claims that petitioner has also failed to establish that all material facts are undisputed and it specifically objects to petitioner's assertion that it is uncontested that eight nontenured individuals are currently serving in principal positions. (*Id.* at 6) Thus, the Board reasons, an evidentiary hearing in this matter is required. (*Ibid.*)

The Board concludes that "[i]n emergency circumstances, the temporary assignment of a principal to an 'Acting Vice-Principal' position that fills an unexpected mid-year vacancy, while complying with *Abbott* regulations for the appointments of permanent principals, is in the best interests of the students and an appropriate balancing of tenure and *Abbott* requirements." (*Ibid.*) Accordingly, the Board asserts, the ALJ correctly denied petitioner's application for emergent relief because the legal right to petitioner's claim is not well-settled; any claimed harm is not irreparable; and the balance of the equities weigh in favor of the students. (*Ibid.*)

In accordance with State Board regulations found at *N.J.A.C.* 6A:3-1.6, the standard for granting emergent relief is established by *Crowe v. DeGioia*, 90 *N.J.* 126 (1982). Emergent relief is considered an extraordinary remedy and may be granted only where necessary to prevent irreparable harm, where the legal right underlying petitioner's claim is settled, where there is a likelihood of success on the merits and where the relative hardship to the moving party favors granting such relief. *Crowe* at 132-134. Upon a thorough review of this matter, the Commissioner finds that petitioner meets the four-pronged standard necessary for granting emergent relief.

Specifically, the Commissioner agrees with petitioner that, if her application for emergent relief is not granted, she will suffer irreparable harm to her reputation by the District's decision to assign her, a tenured principal who has served in that position for nine years, to the position of Acting Vice Principal.⁴ Moreover, the illegal transfer and the consequent defacto demotion to the separate and subordinate position of Acting Vice Principal can never be adequately addressed over time, nor can monetary damages ameliorate the blemish on her professional standing among her peers and her reputation in the school district and in the community.

Further, the Commissioner finds that the material facts are not in dispute; the legal right underlying petitioner's tenure claim is well-settled; and there is no disagreement between the parties that petitioner is entitled to be placed in an assignment within her tenured position, principal, commensurate with her tenure and seniority rights. As noted by the ALJ, "The parties agree that petitioner is entitled to placement in a principal's title ahead of non-tenured, or tenured personnel with less seniority, *Capodilupo v. West Orange Twp. Ed. Bd.*, 218 *N.J. Super.* 520 (App. Div. 1987); *Bednar v. Westwood Bd. Of Ed.*, 221 *N.J. Super.* 239 (App. Div. 1987)."

⁴ Although the Board argued at hearing that the Vice Principal assignment was a temporary situation, the Board was unable to provide the ALJ with any definitive timeframe beyond indicating that it might be able to assign petitioner to a principal position by the beginning of the next school year.

(Initial Decision at 2-3) The difficulty is, the Board claims, that, as an *Abbott* school district, it is restricted from placing petitioner in a principal's position without the recommendation of the SMT by regulations implementing the Supreme Court's Decision in *Abbott v. Burke*, specifically *N.J.A.C. 6A:24-2.2(c)(2)*, which states that, after having had specific training in these areas, each SMT of a Whole School Reform school shall be authorized to:

Make recommendations for the appointment of a building principal, of teaching staff members, and of instructional aides for early childhood programs providing not less than three candidates to the Chief School Administrator, who may select one of the three candidates for recommendation to the board pursuant to *N.J.S.A. 18A:27-4.1* The Chief School Administrator may request additional candidates from the SMT. *The Chief School Administrator shall not recommend to the board any such candidates for appointment unless the SMT has recommended that candidate to the Chief School Administrator.* (emphasis added)

The disputed issues, therefore, are the intent of the language in the regulation cited above and whether this regulation can take precedent over statutory tenure rights set forth at *N.J.S.A. 18A:28-1 et seq.* In assessing the intent of *N.J.A.C. 6A:24-2.2(c)(2)*, *N.J.A.C. 6A:24-1.4(b)*, which defines the responsibilities of an *Abbott* school district with respect to transfer or removal of a principal, is instructive in determining the intended role of the SMT in personnel decisions.⁵ *N.J.A.C. 6A:24-1.4(b)* states that:

The Chief School Administrator shall ensure that each school is led by an effective principal. Where a principal is not effective, the Chief School Administrator, in consultation with the SMT and the SRI⁶ team, shall recommend to the board the transfer or removal of that principal. The Chief School Administrator shall be guided by the Standards for School Leaders, developed by the Interstate School Leaders Licensure Consortium, or any successor document, in assessing principal effectiveness.

⁵In reviewing the public comments in the New Jersey Register with respect to the proposed code, *N.J.A.C. 6A:24-2.2(c)(2)*, there are no comments directly addressing the intent of this regulation with respect to the SMT's authority in personnel matters involving tenured personnel.

⁶ SRI refers to the School Review and Improvement Team, a team comprised by Department of Education staff assigned by the Commissioner to work with *Abbott* schools in supplementing the Court's decision. See *N.J.A.C. 6A:24-1.2*.

On July 3, 2000, the *New Jersey Register* published the following comment from representatives of the New Jersey Education Association and the New Jersey Principals and Supervisors Association on the proposed code at *N.J.A.C. 6A:24-1.4(b)*, along with the Department of Education's response:

COMMENT: The commenters asked whether explicit statutory authority is needed in order to allow the Chief School Administrator to consult with the SMT and SRI teams about recommendations to transfer or remove a principal pursuant to proposed *N.J.A.C. 6A:24-1.4*. The commenters inquired further as to the liability of the members of the SMT for an adverse decision recommended after consultation with the SMT.

RESPONSE: Explicit statutory authority is not needed. The purpose of the SMT, pursuant to *N.J.A.C. 6A:24-2.1*, is to ensure the participation of staff, parents and the community in the school level decision making process and to develop a culture of cooperation, accountability and commitment while focusing on improving student achievement. SMT's do not approve or reject transfers as they are only involved in an *advisory* capacity. SMT's may also opt out of the decision making process. The Chief School Administrator makes the final decision and the schools are accountable for the results. (emphasis added) 32 *N.J.R. 2471*

Accordingly, the Department's view of the SMT's role in personnel decisions regarding existing District employees is clearly that of an advisory body.

Moreover, as the State Board noted in *Arlene Miller v. Leo F. Klagholz, Commissioner, Department of Education and Board of Education of the Township of New Hanover, Burlington County*, decided by the State Board, May 3, 2000, "It is axiomatic that, as creatures of the Legislature, both this agency and district boards of education must act within the authority delegated to them by that body. *E.g., In re Jamesburg High School Closing*, 83 *N.J.* 540, 549 (1980); *Remedial Educ. & Diagnostic Servs. v. Essex Cty. Educ. Servs. Comm.*, 191 *N.J. Super.* 524, 527 (App. Div. 1983)." (Slip Op. at 4) Accordingly, regulations promulgated by the State Board of Education, such as *N.J.A.C. 6A:24-2.2(c)(2)* at issue herein, cannot require procedures that contravene the Legislative scheme. In the absence of Legislative

action establishing separate tenure laws applicable to the *Abbott* school districts or express statutory authority applying the procedures embodied in *N.J.A.C. 6A:24-2.2(c)(2)* to tenured individuals in *Abbott* school districts, the statutory tenure rights set forth at *N.J.S.A. 18A:28-1 et seq.* are controlling in this matter and cannot be “trumped” by regulations, not even *Abbott* regulations. *N.J.A.C. 6A:24-2.2(c)(2)* can only be read, therefore, to apply to vacant positions to which there is no tenure or seniority entitlement, and *cannot be read* to require a tenured principal to submit an application and interview for a vacant principal position that she is entitled to by virtue of her tenure and seniority rights.

Finally, upon balancing the hardships to both parties, the equity clearly favors a grant of the relief requested. The nature of the harm that petitioner will continue to suffer absent immediate relief far outweighs that which the Board may experience as a result of being required to return petitioner to a principal position within the school district.

Accordingly, petitioner’s motion for emergent relief is **GRANTED** and the Board is directed, *upon receipt of this decision*, to assign petitioner immediately to either: 1) one of the District’s vacant principal positions; or 2) to any of the District’s other principal positions to which petitioner is entitled by virtue of her tenure and seniority.

Given this conclusion, there are no outstanding issues requiring plenary hearing. This determination, therefore, constitutes the Commissioner’s final decision in this matter.

IT IS SO ORDERED.⁷

COMMISSIONER OF EDUCATION

Date of Decision: March 6, 2003

Date of Mailing: March 12, 2003

⁷ 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:2-1.1 et seq.*