

OAL DKT. NO. EDU 09053-03

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AGENCY DKT. 248-7/03

MAREN BRISTOL, :  
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 PETITIONER, :  
 :  
 V. :  
 : COMMISSIONER OF EDUCATION  
 BOARD OF EDUCATION OF THE :  
 NORTHERN VALLEY REGIONAL HIGH : DECISION  
 SCHOOL DISTRICT, BERGEN COUNTY, :  
 :  
 RESPONDENT. :  
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The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. The exceptions filed by both petitioner and the Board, as well as the respective replies thereto, were submitted in accordance with *N.J.A.C.* 1:1-18.4.<sup>1</sup>

Although petitioner supports most of the Administrative Law Judge’s (ALJ) findings and conclusions, she presents the following exceptions: (1) Given the determination that the reduction in petitioner’s position was done in violation of *N.J.S.A.* 18A:28-9 and with improper motive, the back pay and benefit award ordered by the ALJ should have been accompanied by an award of pre-judgment interest as requested pursuant to *N.J.A.C.* 6A:3-1.17(c); (2) The ALJ’s finding that the duties of the “Substance Abuse Counselor” may be subcontracted to outside contractors is contrary to law; (3) The ALJ’s finding that a person, such as Dr. Vaccaro, who is not certified as a “Substance Abuse Counselor” may perform student counseling services is contrary to law; and (4) Those portions of the Initial Decision relating to

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<sup>1</sup> To the extent these submissions contain evidence which was not before the Administrative Law Judge, such evidence was not considered by the Commissioner as part of his decision herein. *N.J.A.C.* 1:1-18.4(c).

whether the Board should have been given limited access to petitioner's medical records are beyond the scope of the issues in this matter and should, therefore, be rejected as irrelevant. (Petitioner's Exceptions at 1-2)

The Board submits the following exceptions to the Initial Decision: (1) The ALJ failed to include a number of significant, undisputed facts in her summary; (2) It is unclear why, in the Initial Decision, the ALJ analyzed Dr. Vaccaro's position and determined that it was more akin to an employer/employee relationship *after* she concluded that the Board had the right to subcontract out those services; (3) The ALJ's statement on page 12 that Dr. Vaccaro does not meet the requirements to obtain an emergency certificate is unsupported by the record; (4) The ALJ improperly "bought in" to petitioner's claim that the Board should have negotiated with her attorney concerning the release of at least some of petitioner's medical records (Board's Exceptions at 8-9); (5) The Initial Decision fails to mention "the inconsistencies between [petitioner's] statements at the psychiatric evaluation in May of 2003, and what actually happened in November 2002, when she had her psychiatric episode," and also fails to note the Board's position that the need for some objective medical records was absolute (*Id.* at 9-10); (6) The ALJ's conclusion concerning the reduction in force is wrong, because the Board has "consistently asserted \*\*\* that this is a subcontracting situation, not a RIF matter" (*Id.* at 11); (7) The ALJ erred in finding that the Board acted improperly in subcontracting out counseling services to Dr. Vaccaro in this instance; (8) The Initial Decision must be rejected because it contains factual and legal errors (*i.e.*, a finding of bad faith absent having heard testimony; reliance upon *Cochran, supra*, which involved the subcontracting of child study team duties; application of tenure/seniority principles which are irrelevant to a subcontracting issue; and a finding that there was no compelling case law for the proposition that an independent medical

examination included access to a patient's medical records); and (9) The ALJ's finding that the Board should have filed tenure charges against petitioner is incorrect and must be rejected.

Upon careful and independent review of the record in this matter, the Commissioner determines to modify the Initial Decision, as set forth herein, and, in so doing, he adopts the factual summary set forth by the ALJ at pages 1-4 of the Initial Decision.

### **“Substance Awareness Coordinator”**

First, it is critical to note that the position of Substance Awareness Coordinator is authorized by statute and administrative code, and the duties for this position are set forth at *N.J.S.A.* 18A:40A-18(c) and *N.J.A.C.* 6A:9-13.2. That is, the Substance Awareness Coordinator is authorized to:

assist with the inservice training of school district staff concerning substance abuse issues and the district program to combat substance abuse; serve as an information resource for substance abuse curriculum development and instruction; assist the district in revising and implementing substance abuse policies and procedures; develop and administer intervention services in the district; provide counseling services to pupils regarding substance abuse problems; and where necessary and appropriate, cooperate with juvenile justice officials in the rendering of substance abuse treatment services. *N.J.S.A.* 18A:40A-18(c); *See also, N.J.A.C.* 6A:9-13.2(a)<sup>2</sup>

The record herein, however, reflects the consistent use of titles *other than* “Substance Awareness Coordinator” when referring to the position held by petitioner.<sup>3</sup> For this reason, the

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<sup>2</sup> Irrespective of whether a local board of education chooses to hire a Substance Awareness Coordinator, *all* local boards are statutorily obligated to offer the prevention, intervention and treatment-referral programs and services required by *N.J.S.A.* 18A:40A-1 *et seq.* Thus, while a Board may be prudent to employ a Substance Awareness Coordinator to assist it in meeting its broad statutory responsibilities, there is presently no requirement for it to do so. Consequently, the programs and services compelled by the imposition of these mandates need not, as petitioner argues, be provided exclusively by a Substance Awareness Coordinator, or, necessarily, a district employee.

<sup>3</sup> Specifically: (1) In a letter to petitioner dated December 4, 2002, the Superintendent acknowledges the caseload of students petitioner sees in her role as “Student Assistance Counselor.” (Brief on Behalf of Respondent, Certification of Jan A. Furman at Exhibit A); (2) In a memorandum dated January 17, 2003, staff were informed that Dr. Vaccaro was hired on an interim basis to serve as the “Student Assistance Counselor” for the district. (Brief in Opposition to Respondent’s Motion for Summary Judgment, Certification of Sheldon H. Pincus in Opposition to

Commissioner underscores that every position must have a position title which is recognized in the administrative code. *See, N.J.A.C. 6:11-3.3(a), now N.J.A.C. 6A:9-5.5(a); Howley and Bookholdt v. Ewing Township Board of Education, 1982 S.L.D. 1328.* A position title corresponds either to one of the enumerated endorsements (*e.g.*, the Substance Awareness Coordinator endorsement on the Educational Services Certificate) or is specifically designated within the endorsement description. In the alternative, if a district board of education determines that use of an unrecognized position title is desirable, prior to appointment of the candidate, the title must be approved by the county Superintendent who has made a determination of the appropriate certification for the position. *See, N.J.A.C. 6:11-3.3(b), now N.J.A.C. 6A:9-5.5(b); Howley, supra* at 1335. Neither “Substance Abuse Counselor,” nor “Student Assistance Counselor” is a recognized title, yet both petitioner and the Board appear to have consistently used both titles.<sup>4</sup> Notwithstanding that the record is unclear on this point, petitioner nevertheless asserts, and the Board admits, that she is a tenured teaching staff member (Petition of Appeal at 1; Board’s Answer at 1). Therefore, the following analysis presumes that petitioner has acquired tenure in her “position.”

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Cross Motion for Summary Judgment at Exhibit 3); (3) In a letter dated February 27, 2003 from the Board’s prior counsel to Mr. Pincus, counsel indicates that she obtained a description of the job duties for the “Student Assistance Counselor” to supply to Mr. Pincus and the selected psychiatrist. (Brief in Support of Motion for Summary Judgment, Certification of Sheldon H. Pincus at Exhibit K); (4) In a letter to petitioner dated April 17, 2003, the Superintendent stated that the Board will consider and act upon a recommendation to abolish “the full-time position of Student Assistance Counselor in the District and to create a 2/5ths part-time position of Student Assistance Counselor commencing with the 2003-2004 school year.” (*Id.* at Exhibit L); (5) Petitioner’s salary notices, dated April 28, 2003 and June 16, 2003, as issued by the Board, identify her position as “therapist” (*Id.* at Exhibits E and F); and (6) In her Petition of Appeal, petitioner alleges that on or about April 28, 2003, the Board adopted a resolution abolishing her full-time position as “Substance Abuse Counselor” and creating a 2/5ths part-time position of “Substance Abuse Counselor” commencing with the 2003-2004 school year. (Petition of Appeal at paragraph 4)

<sup>4</sup> There is no indication on this record whether the County Superintendent approved the use of an unrecognized title and established the appropriate certification requirements.

### **Abolishment of Petitioner's Position**

There is no dispute that, on April 28, 2003, the Board abolished petitioner's full-time "position" and assigned 3/5ths of her counseling duties to Dr. Vacarro, who did not hold an instructional, educational services or administrative certificate issued by the State Board of Examiners. In a letter to petitioner dated April 17, 2003, the Superintendent stated that the Board "will consider and act upon a recommendation to abolish the full-time position of Student Assistance Counselor in the District and to create a 2/5ths part-time position of Student Assistance Counselor commencing with the 2003-2004 school year." (Petitioner's Brief in Support of Motion for Summary Judgment, Certification of Sheldon H. Pincus at Exhibit L).

Moreover, there is no dispute that the abolishment was *not* effectuated pursuant to a reorganization or declining enrollment. Rather, as the Superintendent indicated in her letter to petitioner's counsel dated July 7, 2003:

During [Ms. Bristol's] absence, the Board of Education contracted with a private practitioner for these services. The level of satisfaction with this service provider exceeds the satisfaction level with Ms. Bristol's services. For these reasons the district has chosen to continue the students services provided by the private practitioner. (*Id.* at Exhibit Q)

Like the ALJ, the Commissioner is persuaded on this record that, notwithstanding the Board's attempts to characterize its action as a pure "subcontracting issue," the overriding impetus to abolish petitioner's full-time position and to contract with Dr. Vaccaro for 3/5ths of a "Student Assistance Counselor position" was not "genuinely for reasons of economy" as may be permitted by law, *See, e.g. Impey, supra*, but, rather, because the Superintendent was concerned about petitioner's ability to provide counseling services to the students. As the ALJ notes, "The District made it clear that the reason for this action was not economy (even though the result

might have been more economical) but rather an attempt to deal with the continuing problem of Ms. Bristol's perceived incapacity." (Initial Decision at 25)

Thus, while acknowledging that the Board's actions are entitled to a presumption of lawfulness and good faith (*See*, Initial Decision at 10), the Commissioner must nevertheless conclude, for the reasons set forth above, that the Board violated petitioner's tenure rights when it reduced her full-time position to a 2/5ths position, eliminated her benefits and transferred her counseling duties to Dr. Vacarro. Having so found, it is not necessary to reach to the issue of whether Dr. Vacarro was, in fact, an outside contractor or an (uncertified) employee of the district since, in either event, given the particular circumstances in this matter, the reduction of petitioner's full-time position and the transfer of her duties were unlawful.<sup>5</sup>

Accordingly, the Commissioner concurs that petitioner must be reinstated to her full-time "position," with back-pay and emoluments, for the reasons set forth above.<sup>6</sup> Having so determined, the Commissioner does not find it necessary to reach, or adopt, any findings and conclusions issued by the ALJ in her Initial Decision *other than* those specifically addressed in this decision.

IT IS SO ORDERED.<sup>7</sup>

COMMISSIONER OF EDUCATION

Date of Decision: August 4, 2004

Date of Mailing: August 4, 2004

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<sup>5</sup>Mindful that this matter is decided pursuant to motions for summary decision, however, the Commissioner declines to find that the Board's action was in bad faith so as to entitle petitioner to pre-judgment interest.

<sup>6</sup>Based on the outcome herein, the Commissioner does not find it necessary to address the third issue in this matter, *i.e.*, whether the reduction constitutes an abuse of discretion because the petitioner's psychiatric evaluation was negative. (Initial Decision at 5)

<sup>7</sup> This decision 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.*