

JOHN GALANTE, :
PETITIONER, :
V. : COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE : DECISION
BOROUGH OF NORTH ARLINGTON,
BERGEN COUNTY, :
RESPONDENT. :

SYNOPSIS

Petitioning teacher, a longtime head football coach, appealed the Board of Education's decision not to certify the tenure charges he filed against the high school principal, wherein he alleged that such principal had prepared a false evaluation of his performance as coach at the behest of a Board member who was also the disgruntled parent of a student on the football team.

The ALJ found that the Board failed to meet the standard for consideration of tenure charges set forth in *Manalapan-Englishtown Education Association v. Board of Education of the Manalapan-Englishtown Regional School District*, in that no support was proffered for the Board's conclusory statements that petitioner's charges were not creditable and that they did not – even if assumed true – rise to the level of warranting the principal's dismissal or reduction in salary. The ALJ found that petitioner's allegations were true and directed the Board to certify tenure charges to the Commissioner for imposition of an appropriate penalty against the charged principal.

The Commissioner adopted in part, and rejected in part, the Initial Decision of the ALJ. The Commissioner concurred that the Board failed to meet the *Manalapan* standard, but rejected the ALJ's ultimate conclusion and order, stressing that the truth of petitioner's allegations could not lawfully be adjudicated absent tenure proceedings and that the principal – who vigorously disputed petitioner's allegations – was entitled to preliminary investigation at the local level and should not be subjected to certification of tenure charges solely because the Board failed to articulate the basis for its decision not to certify such charges. The Commissioner remanded petitioner's tenure charges to the Board with the direction that it make a determination on their certification within 45 days, after investigation and deliberation as necessary to make – and be able to articulate in the event of an appeal – a proper discretionary decision as to whether probable cause exists to credit the evidence in support of the charges, and, if so, whether the charges warrant dismissal or reduction in salary.

<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>

August 21, 2008

OAL DKT. NO. EDU 11479-06
AGENCY DKT. NO. 373-10/06

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The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have exceptions filed by the respondent Board of Education (Board) to which petitioner did not reply.

In its exceptions, the Board contends that the Administrative Law Judge (ALJ) erred by failing to give appropriate consideration to the Board's resolution declining to certify the tenure charges filed by petitioner against high school principal Robert Kinloch and to the certification filed by Kinloch in response to such charges. According to the Board, the resolution memorializes the undisputed fact that it: 1) considered both petitioner's statement and Kinloch's reply disputing the charges against him, and determined based upon Kinloch's explanation – as it was entitled to do pursuant to the very case law (*Ridgefield Park, infra*) cited by petitioner – not to credit such charges; and 2) gave petitioner the benefit of assuming his factual allegations to be true, but concluded that they were insufficient to warrant Kinloch's dismissal or a reduction in his salary. Therefore, the Board asserts, it did everything required of it by

law, and, consequently, its discretionary decision – made after considering the submissions of both petitioner and Kinloch – cannot be found to have been arbitrary and unreasonable. (Board’s Exceptions at 3-7)

The Board further contends that the ALJ additionally erred by:

- 1) considering petitioner’s charges *de novo*, rather than according the Board’s decision the presumption of correctness to which it was entitled and placing upon petitioner the burden of demonstrating that the Board acted arbitrarily, unreasonably or unlawfully;
- 2) misinterpreting case law (*Sheridan, infra*) that actually supports the Board’s position, ignoring that the *Sheridan* decision stands for the proposition that discretionary Board personnel determinations cannot be upset where the Board has adhered to statutory procedural requirements;
- 3) concluding without analysis that petitioner’s allegations met the “flagrant” offense standard, apparently accepting petitioner’s (flawed) analogy to a case (*Astacio-Borja, infra*) where – unlike here – the charged party did *not* dispute the alleged conduct and the matter involved manifestation of racial discrimination rather than evaluation of teacher performance; and
- 4) making, in effect, a determination that Kinloch was guilty as charged, thereby exceeding her authority in this matter and denying Kinloch the due process to which he is entitled under the tenure laws. (Board’s Exceptions at 7-11)

Upon review, the Commissioner adopts in part, and rejects in part, the Initial Decision of the OAL.

Initially, the Commissioner concurs with the ALJ that petitioner’s appeal is not appropriately dismissed at this juncture on grounds of procedural deficiency in the tenure charges petitioner filed with the Board, since the Board accepted and acted upon

petitioner's filing and Kinloch could and did fully respond. (Initial Decision at 12) Moreover, the Commissioner concurs with the ALJ's discussion of the standard of review to be applied in this matter, to the extent that it identifies the arbitrary and capricious standard as appropriate and notes that the role of the ALJ and Commissioner is not to substitute their judgment for that of the Board. (*Id.* at 13-14)

Finally, the Commissioner concurs – as set forth more fully below – with the ALJ's determination that the Board has failed to meet the standard for consideration of tenure charges set forth in *Manalapan-Englishtown Education Association v. Board of Education of the Manalapan-Englishtown Regional School District*, 187 N.J. Super. 426 (App. Div. 1981), in that no support was proffered for the Board's conclusory statements that petitioner's charges were not creditable and that they did not – even if assumed true – rise to the level of warranting Kinloch's dismissal or reduction in salary. (Initial Decision at 15-17)

The Commissioner cannot, however, concur with the findings, conclusions and order that follow from the ALJ's determination in this regard, since – as contended by the Board – these constitute, in effect, a *de novo* determination wherein the ALJ has substituted her judgment for that of the Board and exceeded her authority by declaring petitioner's allegations to be true in fact. (Initial Decision at 12, 17-18)

As recognized by the parties, the central inquiry in this matter is whether the Board, in considering the tenure charges filed by petitioner, made the determination required of it by law – whether there was probable cause to credit the evidence in support of the charges, and, if so, whether the charges warranted Kinloch's dismissal or reduction in salary – and whether it did so properly. *Manapalan, supra*, at 429-30.

There is no dispute in this instance that the requisite determination was made by the Board; what is disputed is whether it was made *properly*. The Board argues in the affirmative, asserting that it considered petitioner's charges (Exhibit J-1) and Kinloch's reply (Exhibit J-2) and reached its stated conclusions (Exhibit J-3) based upon the two men's respective affidavits – as it was entitled to do pursuant to *Ridgefield Park Education Association v. Ridgefield Park Board of Education*, State Board of Education Decision, February 6, 1985, affirmed App. Div. December 24, 1985, No. A-2859-84T7 – with its determination entitled to a presumption of correctness pursuant to *David M. Sheridan v. Board of Education of the Borough of Pitman, Gloucester County, et al.*, Commissioner's Decision No. 476-04, decided December 1, 2004, affirmed State Board of Education, June 1, 2005.

In considering this position, the Commissioner finds the Board's reliance on *Ridgefield Park* and *Sheridan* to be misplaced. In the *Ridgefield Park* matter – while the board did, indeed, make its determination based upon affidavits – the record was clear as to precisely how and why the board reached the conclusions it did, and to the board's having acted after intense deliberations including briefing by counsel on applicable case law; in the *Sheridan* matter – while the board's action was, indeed, upheld despite a finding that it was motivated by considerations of “small-town politics” – the holding relied on the fact that boards have long been entitled in matters involving reemployment of nontenured teachers – to which, of course, the present matter bears no relation – to unfettered discretion so long as they act for reasons that are not statutorily or constitutionally prohibited.

In the present matter, though – *Sheridan* being inapplicable, and in marked contrast to *Ridgefield* – the record provides no indication whatsoever as to how and why the Board determined, based on Kinloch’s affidavit, that probable cause did not exist to credit petitioner’s allegations; nor is there any explanation – other than counsel’s argument that allegations of a badly conducted evaluation are not on the same plane as the racially abusive remarks underlying the charges in *Rosa Astacio-Borja v. Board of Education of the Passaic County Technical-Vocational High School District, Passaic County*, Commissioner’s Decision No. 148-98, decided March 30, 1998 – as to how and why the Board concluded that, even if true, petitioner’s charges did not rise to the level of warranting tenure proceedings. In this regard, the Commissioner stresses that it is by no means self-evident from review of the two affidavits – which present diametrically opposed views of the circumstances and motivations underlying the charges – why Kinloch’s view is to be credited over petitioner’s; indeed, petitioner’s statement of evidence sets forth very specific circumstances and events which – taken alone – would certainly lead a cautious person to conclude that Kinloch had acted as charged, while Kinloch’s certification avoids addressing petitioner’s specific points (other than failure to submit accident reports, and even here his “proofs” are disputed by petitioner) and is, in essence, a recitation of undisputed facts followed by a general denial that he did anything other than evaluate petitioner lawfully and in good faith consistent with petitioner’s current level of performance. The Commissioner further stresses the serious nature of petitioner’s allegation that Kinloch, in fulfilling his assigned duty as high school principal, conducted a bad faith performance evaluation at the behest of a Board member who was also a disgruntled parent; petitioner was not, as suggested by the

Board,¹ merely challenging a negative evaluation because he found it unwarranted and inconsistent with the positive ratings he had received in the past.

Thus, while the Board's actions herein are, indeed, entitled to a presumption of correctness and the Board did, in fact, make the specific determination required of it by law, the Commissioner finds that it is simply not possible to ascertain how – without inquiry or deliberation not reflected on the present record – the Board could have reasonably concluded that petitioner's charges should be halted at the local level rather than proceed to certification to the Commissioner for adjudication on the merits, and thus made a proper discretionary determination not to certify charges.

Notwithstanding this finding, however, the Commissioner cannot conclude – as did the ALJ – that petitioner's allegations are both true and sufficient to warrant Kinloch's dismissal or reduction in salary, and that the Board must, therefore, be ordered to certify charges so that the appropriate penalty may be imposed. Initially, the Board is entirely correct that the truth of petitioner's allegations absolutely cannot be adjudicated in this proceeding; the most that could result is a determination that the Board erred in finding no probable cause to credit them for purposes of certification to the Commissioner. Moreover, the Commissioner recognizes that, in this matter – in contrast to the prior matters cited by the parties and the ALJ involving a board's failure to certify tenure charges – the actual conduct alleged by petitioner, in addition to the sufficiency of such conduct to warrant tenure proceedings, is vigorously disputed by respondent; consequently, respondent is entitled to preliminary investigation at the local level as envisioned by the Tenure Employees Hearing Law, and should not be subjected to

¹ The Board argues that petitioner's stance would lead to the filing of endless tenure charges by teaching staff members whose evaluations are critical of their performance. (Post-hearing Brief at 12)

certification of tenure charges as a result of the present proceeding solely because the Board has failed to articulate the basis for its findings of insufficiency and no probable cause.

Under these circumstances, then, the Commissioner holds that the appropriate remedy in this matter is to remand petitioner's tenure charges to the Board of Education with the directive that it undertake such investigations and engage in such deliberations as are necessary for it to make a proper discretionary determination – and be able, should its determination again be challenged by petitioner, to articulate the specific bases therefor – as to whether there is probable cause to credit the evidence in support of petitioner's charges, and, if so, whether such charges warrant Kinloch's dismissal or reduction in salary.

Accordingly, for the reasons set forth above, the Initial Decision of the OAL is adopted in part and rejected in part, and the North Arlington Board of Education is directed to make the requisite determination within 45 days of the filing date of this decision pursuant to *N.J.S.A. 18A:6-13*.

IT IS SO ORDERED.²

COMMISSIONER OF EDUCATION

Date of Decision: August 21, 2008

Date of Mailing: August 21, 2008

² This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L. 2008, c. 36*.