

#296-12 (OAL Decision: Not yet available online)

MARC ZYDIAK, :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

BOARD OF TRUSTEES OF THE : DECISION

PLEASANTECH ACADEMY CHARTER :
SCHOOL AND KATHY McDAVID, :
CHIEF SCHOOL ADMINISTRATOR, :

RESPONDENTS. :

SYNOPSIS

Petitioner – who was tenured as a director/supervisor at respondent charter school – contended that the decision of the school’s Board of Trustees to eliminate his position as Administrative Assistant to the Chief School Administrator was a violation of his tenure and seniority rights. Petitioner held seven different positions with respondent between September 2005 and June 30, 2011, when the school abolished his final position of Administrative Assistant to the Chief School Administrator. Petitioner also served as supervisor of special education from May 2010 to March 2011. Petitioner claimed that in addition to the supervisory positions he held during his employment, he also regularly served as a substitute principal, and he claimed tenure rights as a principal. Respondent Board asserted that petitioner’s position was abolished for financial reasons, that petitioner had never been employed as a principal, and that he was not qualified for re-employment in the position of supervisor of special education.

The ALJ found, *inter alia*, that: petitioner was tenured under his administrative certificate as a supervisor and director; although petitioner was entitled to tenure credit while he was acting as principal during vacancies, his service in this capacity fell well short of the attainment of tenure rights as a principal; petitioner served as supervisor of special education from May 2010 until March 2011, and was qualified as a supervisor in that capacity; respondent advertised internally that it was hiring a supervisor almost immediately after terminating petitioner, but failed to offer petitioner re-employment as a supervisor or director; a non-tenured staff member was assigned and compensated to fill the position of supervisor of curriculum, a position that petitioner previously held; petitioner was a tenured supervisor/director, and was therefore entitled to assert tenure rights over a non-tenured staff member working in a title for which petitioner is qualified; petitioner was purposefully excluded from notification regarding the supervisory position that was internally advertised in July 2011; and, pursuant to *N.J.S.A. 18A:28-12*, respondent’s assignment of a non-tenured staff member to perform the duties and functions of a curriculum supervisor circumvented and violated petitioner’s tenure rights. Accordingly, the ALJ ordered that petitioner be reinstated as a supervisor/director with respondent charter school, together with retroactive salary, benefits and emoluments.

Upon comprehensive review, the Commissioner concurred with the ALJ’s findings and conclusions, and adopted the Initial Decision as the final decision in this matter. In so deciding, the Commissioner noted that in light of the fact that the respondent charter school is no longer operating, the Board cannot reinstate the petitioner; however, the Board remains obligated to provide the petitioner with retroactive salary, benefits and emoluments as ordered by the ALJ.

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.

July 30, 2012

OAL DKT. NO. EDU 09501-11
AGENCY DKT. NO. 216-8/11

MARC ZYDIAK, :
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 V. : COMMISSIONER OF EDUCATION
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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 the exceptions filed pursuant to *N.J.A.C. 1:1-18.4* by the PleasanTech Academy Board of Trustees (Board).

In this case, the petitioner, Marc Zydiak, challenged the Board's decision to terminate his employment and abolish his supervisor position in 2011. The Administrative Law Judge (ALJ) found that the petitioner did not accrue tenure rights as a principal; however the petitioner was tenured as a director/supervisor and as a result the petitioner was entitled to a supervisor position. Additionally, the ALJ found that the petitioner was entitled to retroactive salary, benefits and emoluments.

The Board did not file exceptions challenging the ALJ's determinations with respect to the petitioner's tenure as a supervisor and his entitlement to a position. Instead the Board took exception to the ALJ's conclusion that the Board's job offer to the petitioner following the hearing was part of ongoing settlement discussions, and that the petitioner's refusal to except the offer does not constitute abandonment. The Board maintains that after the hearing

it offered the petitioner the position of Supervisor of Curriculum and Instruction, and since the petitioner turned down that offer he had effectively abandoned his tenure and seniority rights. The Board also takes exception to the ALJ's determination that the petitioner is entitled to full retroactive salary, benefits and emoluments. The Board contends that the petitioner has been employed by the Atlantic County Institute of Technology since his separation, and – as a result – his retroactive salary, benefits and emoluments should be subject to mitigation.

Upon a comprehensive review of the record in this matter,¹ the Commissioner concurs with the ALJ, for the reasons discussed on page 13 – 19 of the Initial Decision, that the petitioner does not have tenure as a principal. The Commissioner is also in accord with the ALJ's determination that the petitioner obtained tenure as a supervisor. Although the Board contends that it terminated petitioner's employment because it eliminated the petitioner's position, the evidence revealed that – following petitioner's termination – a non-tenured teacher had been assigned the duties of supervisor of curriculum, which was a position formerly held by the petitioner. Further, the Board posted other supervisory positions following petitioner's termination that the petitioner was also entitled to based upon his tenure as a supervisor.² Therefore, when the Board terminated the petitioner's employment, it circumvented and violated petitioner's tenure rights.³

¹ The record did not include transcripts from the hearing conducted at the OAL on November 18, 2011, December 6, 2011, January 18, 2012, January 31, 2012 and February 23, 2012.

² It is not clear from the record whether the Board ever actually filled any additional supervisor positions.

³ The majority of the evidence in connection with the Board's decisions regarding petitioner's termination was witness testimony or the certification of Kathy McDavid who was not able to testify because of illness. The ALJ found that the Board's only witness Verna Forman was less than credible concerning her recollection of why petitioner was terminated and why he was not rehired. It should be noted that in the absence of the hearing transcripts, it is difficult to discern the Board's decision making process with respect to the petitioner's employment and its plan for other supervisor positions at the charter school.

With respect to the abandonment argument advanced in the Board's exceptions, the Commissioner is not persuaded by the Board's contention that the petitioner abandoned his position because he failed to accept his position back under the circumstances conveyed by the Board. The Board made the same abandonment argument before the ALJ in its post hearing submission. The ALJ found that the April 23, 2012 letter from the Board offering the petitioner the position of Supervisor of Curriculum and Instruction was a part of settlement discussions and was not offered into evidence during the hearing, and as a result he found that the documents had no evidential bearing on the case. Notably, the April 23, 2012 offer letter was provided to the petitioner well after the final hearing date of February 23, 2012, and a mere three days before the Board submitted its post hearing submission. Additionally, it is not clear from the record whether there were conditions related to the offer or how the issue of retroactive salary and benefits would be resolved. As a result, the Commissioner finds no reason to disturb the ALJ's determination with respect to the Board's abandonment claim.

In its exceptions, the Board also argues for the first time, that the recommended award of retroactive salary, benefits and emoluments should be subject to mitigation. It is well established that mitigation is an affirmative defense and the initial burden of proving the appropriateness of its application rests with the employer. *Goodman v. London Metals Exchange, Inc.*, 86 N.J. 19, 32 (1981). There is nothing in the record to suggest that the Board presented any evidence of petitioner's employment or even remotely mentioned mitigation below. Certainly, the affirmative defense of mitigation cannot be brought for the first time after the record has closed.

Moreover, the Board simply attached to its exceptions an excerpt from the Atlantic County Institute of Technology's website that lists the petitioner in the science

department. First, *N.J.A.C. 1:1-18.3* provides that evidence not presented at the hearing shall not be submitted as part of the exceptions or referenced in the exceptions. Furthermore even if it were to be considered, a print-out attached to the Board's exceptions does not prove that the petitioner is employed nor does it provide the requisite details surrounding the employment that are essential for a mitigation analysis, i.e. if and when he actually started. As such, without any admissible evidence supporting mitigation or the introduction of the defense at the OAL, the Commissioner finds that the Board failed to prove that the retroactive salary, benefits and emoluments should be subject to mitigation.

Accordingly, for the reasons expressed therein, the Initial Decision is adopted as the final decision in this matter.⁴

IT IS SO ORDERED.⁵

ACTING COMMISSIONER OF EDUCATION

Date of Decision: July 30, 2012

Date of Mailing: July 31, 2012

⁴ In light of the fact that PleasanTech Academy Charter School is no longer operating, the Board cannot reinstate the petitioner; however, the Board shall remain obligated to provide the petitioner with retroactive salary, benefits and emoluments.

⁵ Pursuant to *P.L. 2008, c. 36 (N.J.S.A. 18A:6-9.1)*, Commissioner decisions are appealable to the Superior Court, Appellate Division.