

#143-13R (OAL Decision: Not yet available online)

CHRISTINA SILVEIRA FRANCISCO, :
PETITIONER, :
V. : COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE : DECISION
CITY OF ELIZABETH, UNION COUNTY, :
RESPONDENT. :
_____ :

SYNOPSIS

The petitioner in this case on remand – who contended that she had been employed by the respondent Board as a vice principal or principal for four years prior to a reduction-in-force (RIF) at the end of the 2009-2010 school year – filed an appeal asserting that she had attained tenure in the position of vice principal. Petitioner claimed that the vice principals who lost their positions due to the RIF in June 2010 were reinstated in March 2011, but petitioner was not offered a vice principal position and remains a class room teacher. The Board contended that petitioner never achieved tenure as a vice principal. The case was initially heard in the Office of Administrative Law in April 2012. The ALJ issued an Initial Decision on July 31, 2012 in which he determined that petitioner’s Standard Certificate – Principal was *ultra vires*, as it was issued by the Department of Education in August 2010 with a retroactive date of September 2009 and therefore petitioner had not yet attained tenure as a vice principal or principal at the time of the RIF. The Commissioner issued a final decision on September 14, 2012 in which he determined that petitioner’s Standard Certificate – Principal was effective as of September 2009, and the matter was remanded to the OAL for a determination of the petitioner’s tenure and seniority rights.

On remand, the ALJ found, *inter alia*, that: the parties stipulated that, with the ten months from September 2009 to June 2010 counting toward her tenure calculation, petitioner would have had enough service to attain tenure as of June 2010; the parties further stipulated that, had petitioner been tenured as of June 2010, she would have been returned to the classroom at a vice principal’s salary and then returned to a vice principal position between March and June 2011 when other vice principals were returned to that position; petitioner performed the duties of an interim principal from September 2009 through June 2010; in light of the September 2009 effective date of petitioner’s standard certificate as a principal, and pursuant to *N.J.S.A. 18A:28-6(a)(3)*, petitioner achieved tenure as a vice principal in November 2009; accordingly, petitioner should have been treated no differently than the other tenured vice principals at the time of the RIF at the end of the 2009-2010 school year. The ALJ concluded that the school district must pay the petitioner the difference between her teacher’s salary and her vice principal’s salary retroactive to June 2010, and must reinstate petitioner to the position of vice principal immediately with seniority from June 2010.

Upon review on remand, the Commissioner concurred with the ALJ that, by the time respondent removed petitioner from the position of principal in June 2010, she had earned tenure as a vice principal as she had satisfied the requirements – set forth at *N.J.S.A. 18A:28-6(c)* – for acquiring tenure after a promotion. Accordingly, the Commissioner ordered that petitioner be reinstated to the position of vice principal and be paid the difference between her teacher’s salary and her vice principal salary, retroactive to June 2010; further, petitioner’s tenure and seniority as a vice principal shall date from January 2010.

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.

April 17, 2013

OAL DKT. NO. EDU 12576-12
(EDU 9192-11 ON REMAND)
AGENCY DKT. NO. 192-7/11

CHRISTINA SILVEIRA FRANCISCO, :
PETITIONER, : COMMISSIONER OF EDUCATION
V. : DECISION
BOARD OF EDUCATION OF THE CITY :
OF ELIZABETH, UNION COUNTY, :
RESPONDENT. :
_____ :

This controversy was first addressed by the Commissioner following receipt of a July 31, 2012 Initial Decision in which the Office of Administrative Law (OAL) determined that petitioner had not achieved tenure as a school administrator in respondent’s district. On September 14, 2012, after full review of the record, the Commissioner rejected the Initial Decision and remanded the controversy to the OAL “for a determination of the petitioner’s tenure and seniority rights in the District based upon the fact that she received a valid Standard Certificate – Principal on August 11, 2010, with a September 2009 effective date.” *Christina Silveira Francisco v. Board of Education of the City of Elizabeth, Union County*, Commissioner Decision No. 371-12 (September 14, 2012), at 4 (emphasis added).¹

In the Initial Decision on remand the Administrative Law Judge (ALJ) has determined that petitioner did earn tenure as a vice principal in respondent’s district. Upon review of the history of petitioner’s service in respondent’s district, the Commissioner concurs.

¹ In the first Initial Decision, the ALJ had declined to use the back date on petitioner’s standard administrative certificate/principal endorsement in calculating petitioner’s service toward tenure.

Set forth in the Initial Decision on Remand are those uncontested factual findings from the prior Initial Decision which the Administrative Law Judge deemed germane to the instant controversy, as well as two additional uncontested findings: “(1) in June 2010, the Board abolished all vice principal positions for economic reasons as part of a Reduction In Force (RIF); and (2) between March and June 2011, the vice principals who had lost their positions of vice principal were reinstated to the position of vice principal.” (Initial Decision on Remand at 4) Further, the ALJ has advised that the parties stipulated to the following proposition:

If the ten months from September 2009 to June 2010 during which Francisco performed in the position of interim principal were to count toward tenure as a vice principal, she would indeed have had enough service to attain tenure as of June 2010; If she had attained tenure at that time, she would have been returned to the classroom at a vice principal’s salary (pro-rated to ten months) as were other vice principals and then returned to a vice principal position sometime between March and June 2011 when the vice principals were returned to that position.

(Ibid.)

A distillation of the material facts reveals the following. Petitioner was a tenured teacher in respondent’s district when, on February 8, 2006, she earned a certificate of eligibility/principal endorsement entitling her to seek employment as a principal, vice principal, director, supervisor, and/or assistant superintendent for curriculum and instruction. At the beginning of the next school year (2006-2007), respondent appointed petitioner to the position of interim vice-principal at Alexander Hamilton School, and three months later the appointment became permanent.

On July 1, 2007 petitioner was reappointed to the vice-principal position at Alexander Hamilton School for the 2007-2008 school year, and two months after that, on September 10, 2007, she was transferred to the position of assistant house director (equivalent to

vice principal) at Jefferson High School. While in that position, she first received (on January 9, 2008) a provisional certificate/principal endorsement, backdated to November 2007.²

Petitioner was reappointed to Assistant House Director Jefferson High School on July 1, 2008 and served in that position for the school year. On June 16, 2009 she was appointed as interim house director of Jefferson High School, and two weeks later, on July 1, 2009 the position became permanent. At this point, petitioner had served 19 ½ months as a vice principal under her provisional certificate and one half of a month as a principal.

While she was serving as principal of Jefferson High School her provisional certificate/principal endorsement expired – on July 2, 2009. Nonetheless, she continued to be employed as principal. Her standard certificate/principal endorsement was issued to her in August 2010 but was backdated to September 2009. In light of the foregoing, and discounting July and August of 2009 during which time petitioner had been working without certification, petitioner had served over 19 months as a vice principal and ten months as a principal by the time respondent returned her to a teaching position as the result of a RIF in June 2010.

Thus, as the ALJ explained, by the time respondent removed petitioner from the position of principal, she had earned tenure as a vice principal. More specifically, petitioner had satisfied the requirements – set forth in *N.J.S.A. 18A:28-6(c)* – for acquiring tenure after a promotion. *N.J.S.A. 18A:28-6(c)* provides, in pertinent part, that:

any such teaching staff member under tenure or eligible to obtain tenure under this chapter who is transferred or promoted with his consent to another position covered by this chapter. . . shall . . . obtain tenure in the new position . . . after:
. . . .

² It was at this point that her service in the district could be counted toward tenure since, prior to that date, she had held only a certificate of eligibility. See, e.g. *Clanton v. State-Operated Sch. Dist. of the City of Newark*, OAL Dkt. No EDU 07092-06, Agency Dkt. No. 172-5/06, Initial Decision (February 2, 2007), *aff'd* Commissioner's Decision No. 98-07, March 12, 2007 (time served as vice principal with a **certificate of eligibility** does not count toward **tenure** because nothing in the statute or case law . . . supports this position).

- (c) employment . . . within a period of any three consecutive academic years, for the equivalent of more than two academic years

Within the period of the academic years 2007-2008, 2008-2009 and 2009-2010, petitioner had been employed under her principal endorsement for more than the equivalent of two academic years. In fact, she had been employed under her principal endorsement for more than two calendar years – during that period of three consecutive academic years.

Equally important to understanding this controversy is the last paragraph of *N.J.S.A.* 18A:28-6, which instructs that a period of employment in a new position counts toward tenure in a prior position. Thus, the ten-plus months in which petitioner served as Jefferson High School's principal – a promotion from the position of vice principal – must be included in determining petitioner's tenure rights in the position which she held prior to the principalship, *i.e.* the position of vice principal.

Accordingly, petitioner was tenured in the position of vice principal in June 2010 when a reduction in force (RIF) caused respondent to eliminate its vice principal positions. When she was assigned to a teaching position she should have been treated just as the other vice principals had been; they were returned to the classroom at a vice principal's salary, pro-rated to ten months. And when respondent restored the vice principal positions to its district, petitioner should have been appointed to one of said positions.

Respondent's exceptions to the Initial Decision are numerous but without merit. The Commissioner observes at the outset that respondent's suggestion – that those findings of fact which were set forth in the July 31, 2012 Initial Decision, but not in the January 23, 2013 Initial Decision, are still in effect – is belied by the Commissioner's unambiguous rejection of the July 2012 Initial Decision. *See, Christina Silvierra Francisco v. Board of Education of the*

City of Elizabeth, Union County, Commissioner's Decision No. 371-12, decided September 14, 2012, at 4.

Second, the ALJ's determination –in his decision on remand –that *Francey v. Bd. of Educ. of City of Salem*, 286 N.J. Super. 354 (App. Div. 1996) and *Lobello v. Bd. of Educ. Warren Hills Reg. Sch. Dist.*, Commissioner's Decision No. 161-11, decided April 27, 2011, are inapposite to the present case is correct – for precisely the reasons set forth on page 6 of that decision. In *Francey* and *Lobello* the petitioners received new credentials after the date they were RIF'd. In the present case, petitioner had already served for over 19 months under a valid provisional administrative certificate/principal endorsement before the RIF, and was ultimately issued a standard administrative certificate with the same endorsement, *i.e.* principal.

Third, the Commissioner already explained in his September 14, 2012 decision that a challenge to an agency's action or inaction, including the backdating of instructional or administrative certificates must be brought in Superior Court. There having been no such challenge, the Commissioner will not regard the backdating of petitioner's administrative certificate as an *ultra vires* act.³ Accordingly, the September 2009 effective date on petitioner's standard administrative certificate/principal endorsement will stand.

Finally, the Commissioner rejects respondent's 'equitable' arguments. Respondent knew that the State Board of Examiners had been issuing backdated certificates and that, in fact, petitioner had been issued such a backdated provisional certificate/principal endorsement on January 8, 2008, effective November 2007. Respondent apparently had no problem utilizing petitioner's services as a vice principal and principal for almost four years, and must be deemed to have known that much of that service had been pursuant to appropriate

³ Similarly, the parties in this action are a petitioning employee and a respondent employer. If respondent wishes to challenge the validity of the State Board of Examiner's (SBE) issuance of petitioner's standard administrative certificate/principal endorsement, it must bring that action in the correct forum and join the SBE as a party.

credentials. Thus, respondent was on notice that petitioner was well on her way to tenure in its district as an administrator. Under those circumstances, it is disingenuous to suggest that respondent was blindsided by the issuance of petitioner's standard certificate.

Further, only two months after the RIF and petitioner's reassignment to a teaching position, she produced her standard certificate/principal endorsement – with the effective date of September 2009. Thus, only two months after the RIF, respondent had notice that petitioner had met the requirements for tenure as a vice principal in its district. At that point it would hardly have been an impossible administrative burden for the district to have amended petitioner's salary and made plans for her to be reappointed to a vice principal position once said positions were restored in respondent's schools.

Accordingly, the petition is granted. Petitioner shall be reinstated to the position of vice principal and shall be paid the difference between her teacher's salary and her vice principal salary retroactive to June 2010. Her tenure and seniority as a vice principal shall date back to January 2010.

IT IS SO ORDERED.⁴

COMMISSIONER OF EDUCATION

Date of Decision: April 17, 2013

Date of Mailing: April 18, 2013

⁴ This decision may be appealed to the Superior Court, Appellate Division, pursuant to *P.L. 2008, c. 36* (*N.J.S.A. 18A:6-9.1*).