

#264-14 (OAL Decision: Not yet available online)

CATHERINE RUTLEDGE, :
PETITIONER, :
V. : COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE : DECISION
TOWNSHIP OF BETHLEHEM, :
HUNTERDON COUNTY, :
RESPONDENT. :

SYNOPSIS

This matter involves a dispute between petitioner and the respondent Board regarding whether petitioner has achieved tenure as an elementary school teacher in Bethlehem Township schools. Petitioner – who holds both an instructional teaching certificate with an Elementary School Teacher endorsement and an Educational Services certificate with a Student Personnel Services endorsement – was hired by the Board as a full-time elementary school guidance counselor in September, 1999. In May of 2010, petitioner was notified that she was being reduced to part-time status as a guidance counselor. In the instant appeal, she contends that she had earned tenure as an elementary teacher because she spent significant time developing and implementing a character education curriculum which she taught in a classroom setting. Petitioner argues that on the basis of this tenure claim, she was entitled to be placed in a full-time teaching position over a less senior or non-tenured elementary teacher. The Board contends that petitioner had not achieved tenure or seniority rights as a teacher, as her employment in the district has been solely as an elementary guidance counselor. Subsequent to the filing of the instant appeal, petitioner’s guidance counselor position was restored to full-time status, thereby narrowing petitioner’s requested relief to back pay.

The ALJ found, *inter alia*, that: petitioner was hired by the Board in 1999 as a guidance counselor; as part of her duties in that capacity, she implemented grade-appropriate character development programs; petitioner often prepared and submitted lesson plans outlining her character development program, but was not required to do so; the lessons presented by the petitioner were solely guidance-related, and she never taught core curriculum subjects; educational personnel are tenured under New Jersey’s Tenure Act, *N.J.S.A. 18A:28-1 to -18*; tenure is achieved in a specific position held under an appropriate certificate; petitioner in the instant matter was employed under her educational services certificate as a guidance counselor, and her tenure status in the respondent’s district is limited to same. Accordingly, the ALJ concluded that the petitioner is not a tenured teacher but rather is tenured exclusively as a guidance counselor, and ordered the petition dismissed.

Upon comprehensive review, the Commissioner concurred with the ALJ’s determination that the petitioner did not earn tenure in respondent’s district as a teacher, and was accordingly not entitled to teaching assignments during the period of the RIF, nor to any back pay. The Initial Decision was adopted as the final decision in this case, and the petition was dismissed.

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.

June 19, 2014

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Before the Commissioner is petitioner's contention that, when the hours of the guidance counselor position in which she served were reduced in 2010, she should have been given a teaching assignment to increase her working hours to full-time status. Subsequent to the institution of this controversy, the guidance counselor position in which petitioner served was restored to a full-time position, narrowing petitioner's requested relief to back pay. Upon review of the record, Initial Decision, petitioner's exceptions to same and respondent's reply to petitioner's exceptions, the Commissioner adopts the Initial Decision as the final decision in this case.

The record reveals that petitioner was hired by respondent in 1999 to fill the position of guidance counselor. At the time, she held (and still holds) an educational services certificate with a student personnel endorsement, and an instructional certificate with both elementary education and preschool education endorsements. It is undisputed that she earned tenure as a guidance counselor in respondent's district. The controversy arises from petitioner's contention that she also achieved tenure as a teacher. Petitioner has the burden of persuasion.

Tenure is achieved in a specific position and the scope of the tenured position is limited by the certificate(s) the individual must hold to satisfy the prerequisite qualifications for

employment. *See, e.g., Nelson v. Board of Education*, 148 N.J. 358, 366 (1997) (emphasis added). As support for her contention that she also achieved tenure as a teacher in respondent’s district, petitioner makes two arguments. First, petitioner notes that her first five contracts – through 2004 – expressly referred to the fact that she held an instructional certificate as well as an educational services certificate. From this, petitioner appears to reason that her position was a dual position, *i.e.*, both guidance counselor and teacher. Second, petitioner quotes language from some of her contracts, evaluations and observation reports which refer to her as a “teacher.” She urges that the cited language denotes that her position was a teaching position as well as a counseling position.

Petitioner’s first argument fails because she has misconstrued the significance of the references, in her early contracts, to her instructional certificate/endorsements. Currently, employment as a guidance counselor requires a school counselor endorsement to an educational services certificate. However, prior to 2004, *i.e.*, during the first five years of petitioner’s employment in respondent’s district, a guidance counselor was required to hold both a “Student Personnel” endorsement to an educational services certificate and an instructional certificate. As the New Jersey Register (Volume 35, Number 19, October 6, 2003) explained:

PROFESSIONAL LICENSURE AND STANDARDS

Summary

The Department of Education is proposing the repeal of [N.J.A.C. 6:11](#), Professional Licensure and Standards, and the adoption of a new chapter, [N.J.A.C. 6A:9](#), also entitled Professional Licensure and Standards. The proposed new rules represent the initial comprehensive examination of existing regulations that began several years ago. At that time, under the provisions of Executive Order No. 22(1994), the Department was directed to conduct such a review of all chapters of Title 6 to identify rules that were overly prescriptive, outdated or creating high cost and low benefit to those affected by these regulations.

. . . .

[T]he proposal to repeal [N.J.A.C. 6:11](#) and to adopt [N.J.A.C. 6A:9](#) occurs at an opportune time. Under Executive Order No. 66(1978) the current chapter is scheduled to expire ("sunset") on January 11, 2004. Concurrently, the State's commitment to student achievement through better teaching and learning has fundamentally altered the view of how teachers, school leaders and other school personnel must be prepared to fulfill their educational responsibilities. Within this new context, therefore, the proposal is a natural transition resulting from the adoption of varied regulations and amendments to an educational standards-based system to prepare school personnel in the improvement of teaching and learning.

....

With thoughtful consideration of the above mentioned expansive growth and development of licensure rules, the newly developed [N.J.A.C. 6A:9](#) incorporates the critical improvements made in the last several years. More importantly, the proposed new chapter, driven by professional standards-based reform, is structured in a coherent, practical manner. Professional educators are thereby guided by rules and grounded in such standards from service preparation to induction year support and certification to professional development to insure improved teaching and learning and, ultimately, high student achievement.

....

[N.J.A.C. 6A:9-13.8](#) School counselor

This section incorporates provisions formerly appearing at [N.J.A.C. 6:11-11.11](#). It establishes the certification for the school counselor. This section has been rewritten and reorganized for clarity and includes the following changes:

- The name of the certificate has changed from Student Personnel Services to School Counselor ([N.J.A.C. 6A:9-13.8](#));
- The functions of a school counselor have been defined ([N.J.A.C. 6A:9-13.8\(a\)](#));
- A master's degree and a supervised counseling practicum are now required ([N.J.A.C. 6A:9-13.8\(b\)](#));
- Additional study in counseling and study in statistics and research methods have been added ([N.J.A.C. 6A:9-13.8\(b\)2v](#));

- Candidates who complete a master's or higher degree from a regionally accredited college or university that meets the standards of the Council for Accreditation of Counseling and Related Education Programs may be issued standard certificates (*N.J.A.C. 6A:9-13.8(c)*);
- The requirement for a teaching certificate and classroom teaching experience has been eliminated; and
- Provisions for emergency certification have been defined (*N.J.A.C. 6A:9-13.8(d)*).
[Emphasis added.]

35 *N.J.R.* 4352(a). These changes were adopted effective January 20, 2004. 36 *N.J.R.* 469

In light of the foregoing, the allusions to petitioner’s instructional certificate in her first five contracts were simply pursuant to the requirement that she hold same in order to serve as a guidance counselor under her educational services certificate. This explanation is corroborated by the fact that after 2004, petitioner’s contracts no longer referred to her instructional certificate. Accordingly, petitioner’s instructional certificate was not the *sine qua non* for her position in respondent’s district and cannot serve as the basis for (teacher) tenure.

Petitioner’s second argument concerning documents which referred to her as a “teacher” is also unavailing. Close scrutiny of her contracts, for example, reveals the following. First, petitioner’s contracts with respondent – for the school years 1999-2000, 2000-2001, 2002-2003, and 2003-2004 – all stated that respondent engaged petitioner as a guidance counselor. (Petitioner’s Exhibits P-2A through P-2E) Second, although the text of petitioner’s boilerplate contracts for the school years 2004-2005, 2005-2006, 2006-2007 and 2009-2010¹ represented that she was engaged to “teach in the public schools,” and held “an appropriate

¹ No contracts were produced for the 2007-2008 and 2008-2009 school years.

Elementary School Teacher certificate,” (Petitioner’s Exhibits P-2F through P-2I), Dr. Nancy Lubarsky – who began employment as a principal in respondent’s district in July 2004 and served as its superintendent from July 2009 through November 2011 – testified that contracts are issued by the district’s business office, provided to the employees to sign, and then forwarded to the respondent Board to execute. The superintendent does not review them. The references to petitioner as a teacher were clerical errors made by the business office and did not correctly represent petitioner’s position in the district. (2T17 through 2T20; 2T23 through 2T4-31) Third, petitioner’s contract for the 2010-2011 school year, during which she was slated to work half-time, returned to describing her as a guidance counselor and referring to her student personnel services endorsement to her educational services certificate. (Petitioner’s Exhibit P-2J) In sum, the Commissioner is not persuaded that the contractual language upon which petitioner relies supports her contention that she held a teaching position in respondent’s district.

Similarly, examination of the evaluations and observation reports which petitioner offers as proof of her alleged status as a teacher in respondent’s district reveals that acceptance of petitioner’s thesis would require elevating form over substance. For example, five observation reports and two end-of-year evaluations (which will be referred to as Exhibits P-3A through 3G), covering school years 1999-2000 and 2000-2001 were performed by Dr. James Gamble, who hired petitioner as a guidance counselor in 1999. (2T62) At the beginning of each evaluation and observation report, petitioner’s area of expertise was identified as “Guidance.” The five observation reports memorialized petitioner’s performance in activities typical of school counselors: reviewing information about kindness with a class of first-graders, participating in a parents conference, presenting lessons on human differences to second-graders, exploring with kindergarteners ways of speaking nicely to each other, and engaging third-graders in various activities related to responsibility. The two end-of-year evaluations identified petitioner as a guidance counselor and, *inter alia*, discussed: her establishment of an effective school guidance program, her cooperation

with another guidance counselor to create a crisis management plan, her ability to handle interventions and crises, her implementation of prevention strategies by giving presentations to classes of children, her individual and group counseling work, her coordination of standardized testing, and her excellent rapport with students, staff and parents.

The two observation reports and one year-end evaluation of petitioner, performed by Donald Burkhardt in 2002, were specifically and unambiguously guidance counselor assessments. (Petitioner's Exhibits P-3H, 3I and 3J) Petitioner's Exhibit P-3L is a "Professional Performance Report" by Carolyn Smith, dated June 10, 2004, which identifies petitioner as a guidance counselor, itemizes her many activities and offers several suggestions for petitioner's professional growth.²

Lubarsky also performed end-of-year evaluations for petitioner – beginning in 2005 and ending in 2009. She testified that in the forms for the end-of-year evaluations, she erroneously referred to petitioner as a teacher. More specifically: on June 14, 2005, May 30, 2006, June 15, 2007, June 11, 2008 and June 15, 2009, Lubarsky prepared evaluations which – on the first page – referred to petitioner as a school counselor, but also – on the second page – referred to her as a teacher. (Petitioner's Exhibits P-3M through P-3Q) Lubarsky's explanation was that in a short period of time, she was required to issue many evaluations, most of which were for teachers. She worked from a template and, in petitioner's case, forgot to change the term "teacher" to "school counselor." (2T20-21) Petitioner's end-of-year evaluation in 2010 was prepared by Dr. Edward Keegan. He used a template which appeared to be composed for the evaluation of teachers, but clearly identified petitioner as a "Guidance Counselor" in the heading of the document and in the narrative portions of the last page. (Petitioner's Exhibit P-3R)

² Petitioner also refers, in her exceptions, to an undated letter from a former Bethlehem Superintendent, Mario Barbieri, in which he states that he believes that, on occasion, petitioner performed duties as a teacher. (Petitioner's Exhibit P-24) Barbieri did not testify at the hearing, admittedly never observed petitioner, and was not responsible for her supervision. The Commissioner gives no weight to P-24.

In sum, while it is true that some of petitioner's evaluators over the years used templates designed for teacher assessments, there is nothing in the content of the evaluations and observation reports that convinces the Commissioner that respondent transferred petitioner from the counseling position for which she was hired to an instructional position. The act of imparting information to students, pursuant to the character development component of her mission as a guidance counselor, did and does not transform petitioner from a guidance counselor into a classroom teacher. The fact that she was the only staff member in the room when she presented her program did not signify that the students in the room were her class. Moreover, acceptance of petitioner's thesis would logically require acceptance of the indefensible corollary that certified guidance counselors who do not also hold instructional certificates must be barred from presenting their character development or other programs to groups of students in a classroom.³

The record of this matter as a whole indicates that petitioner was hired for the position of guidance counselor, and that it was the student personnel endorsement to the educational services certificate that constituted the *sine qua non* for her position in respondent's school district. There is no indication in the record that petitioner's duties changed radically throughout the approximately twelve years of her employment prior to the RIF which reduced her hours. Thus, her visits to other teachers' classrooms to impart to groups of students the principles of good character were executed not as a duty ancillary to a new teaching position, but in the service of the various guidance programs which she instituted and/or implemented pursuant to her responsibilities as a guidance counselor – *i.e.*, her position of guidance counselor. The fact that, in the course of imparting character development guidance, she may have used some of the same techniques that

³ Petitioner also points to the fact that she sometimes covered for absent teachers. That fact does not buttress her position, as individuals with only county substitute credentials may do the same. That she was alone in the room with the children is of little significance.

teachers use is unremarkable and does not change the nature of the position she held in respondent's district.

Accordingly, the Commissioner concurs with the determination of the ALJ that petitioner did not earn tenure in respondent's district as a teacher. She was not entitled to teaching assignments during the period of the RIF, and is not due any back pay. The Initial Decision of the OAL is adopted as the final decision in this matter, and the petition is dismissed.

IT IS SO ORDERED.⁴

ACTING COMMISSIONER OF EDUCATION

Date of Decision: June 19, 2014

Date of Mailing: June 20, 2014

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*).