

#25-16 (OAL Decision: Not yet available online>

BRIDGEWATER-RARITAN EDUCATION :
ASSOCIATION, ON BEHALF OF
TAMARA MANZUR, :

COMMISSIONER OF EDUCATION

PETITIONER, :

DECISION

V. :

BOARD OF EDUCATION OF THE :
BRIDGEWATER-RARITAN SCHOOL :
DISTRICT, SOMERSET COUNTY, :

RESPONDENT. :

SYNOPSIS

Petitioner Bridgewater-Raritan Education Association asserted that Tamara Manzur – formerly employed as a teacher by the respondent Board – had attained tenure in her position, and was improperly terminated from employment at the end of the 2010-2011 school year, in violation of her tenure rights. The Board contended that Ms. Manzur never attained tenure, because her service during the 2007-2008 school year was as a replacement for a teacher who was out on an extended maternity leave and, as such, did not qualify as creditable time toward the attainment of tenure. The within dispute was remanded from the New Jersey Supreme Court (Court) for a determination as to whether Tamara Manzur had sufficient prior notice that the Board designated her as a replacement teacher under *N.J.S.A. 18A:16-1.1* for the 2007-08 school year. The parties agreed that if it is found that Ms. Manzur is entitled to receive tenure credit for the 2007-2008 school year, she would have obtained tenure in the district prior to her non-renewal in June 2011.

The ALJ found, *inter alia*, that: Ms. Manzur was hired by the Board for the 2006-2007 school year as a temporary employee to replace a full-time teacher who was on maternity leave; she continued to teach in the district full-time for the 2007-2008, 2008-2009, 2009-2010, and 2010-2011 school years; in April 2011, Ms. Manzur was notified by letter that her contract would not be renewed for the 2011-2012 school year; the dispute herein is whether Ms. Manzur – at the time she was told her contract for 2011-2012 was not renewed – was a non-tenured teacher and therefore subject to non-renewal at the discretion of the Board, or a tenured teacher who could not be so summarily removed from her position; the Supreme Court (Court), in *Bridgewater-Raritan Educ. Assoc. v. Board of Educ. of the Bridgewater-Raritan School District, Somerset County*, 221. N.J. 349, 361 (2015), concluded that if the respondent Board could not demonstrate that it had provided Ms. Manzur with notice that her 2007-2008 service was still in a replacement, non-tenure accruing role, it could not deny her credit for that year’s service toward the attainment of tenure status; the Court construed *N.J.S.A. 18A:16-1.1* to require a board of education to make an employee aware that he or she is being employed as a “replacement” and therefore would not have the normal expectation that his or her time in service would count toward the acquisition of tenure; in this case, Ms. Manzur did not receive sufficient notice that she was designated as a replacement teacher; and therefore her service during the 2007-2009 school year does count toward the accrual of tenure. Accordingly, the ALJ concluded that Ms. Manzur was tenured at the time of her unlawful non-renewal in June 2011, and is entitled to \$127,586.67 in back pay.

Upon comprehensive review, the Commissioner concurred with the findings and conclusions of the ALJ, and adopted the Initial Decision as the final decision, with modification to the amount due to Ms. Manzur to include back pay for the period between January 2016 and the date upon which the Board offers to return her to employment with the Board. In so doing, the Commissioner noted that, based on the Court’s decision in *Bridgewater-Raritan, supra*, it would behoove all boards of education intending to designate an individual as a replacement employee to provide written notice of such designation prior to the commencement of work in the replacement position.

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.

OAL DKT. NO. EDU 7117-15
(ON REMAND NO. EDU 6095-11)
AGENCY DKT. NO. 125-5/11

BRIDGEWATER-RARITAN EDUCATION	:	
ASSOCIATION, ON BEHALF OF	:	
TAMARA MANZUR,	:	COMMISSIONER OF EDUCATION
	:	
PETITIONER,	:	DECISION
	:	
V.	:	
	:	
BOARD OF EDUCATION OF THE	:	
BRIDGEWATER-RARITAN SCHOOL	:	
DISTRICT, SOMERSET COUNTY,	:	
	:	
RESPONDENT.	:	

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 Bridgewater-Raritan Board of Education (Board) and the Bridgewater-Raritan Education Association’s (Association) reply thereto.¹

This tenure dispute was remanded from the New Jersey Supreme Court for a determination as to whether Tamara Manzur had notice that the Board designated her as a replacement teacher under *N.J.S.A. 18A:16-1.1* for the 2007-08 school year. The Court further directed that, “Manzur is entitled to receive [tenure] credit for the school year in question if she succeeds in her claim that no notice or other source of information of her replacement status was provided to her regarding her service for the 2007-08 school year.” It is undisputed that if it is

¹ The Board also submitted a reply to the petitioner’s reply exceptions. *N.J.A.C. 1:1-18.4* makes no provision for replies to reply exceptions; therefore, the Board’s submission was not considered.

determined that Ms. Manzur is entitled to receive tenure credit for the 2007-08 school year, she would have obtained tenure in the district when she was non-renewed in June 2011.²

Following a hearing at the OAL, the Administrative Law Judge (ALJ) determined that Ms. Manzur did not receive sufficient notice that she was designated as a replacement teacher and therefore her service during the 2007-08 school year counted toward the accrual of tenure. As a result, Ms. Manzur was a tenured employee at the time of her unlawful non-renewal in June 2011, and she is entitled to \$127,586.67 in back pay.

In its exceptions the Board argues that the ALJ erred because he imposed a heavier burden on the Board than was required by the Supreme Court when he concluded that verbal notice from a principal is insufficient to satisfy the rudiments of notice required by the Court. The Board contends that under the Supreme Court's holding, verbal notice from a school administrator regarding a teacher's status as a leave replacement is plainly sufficient to preclude tenure accrual under *N.J.S.A. 18A:16-1.1*. The ALJ improperly discounted the verbal notice provided by Principal Diskin and minimized it to the point where he disqualified it as *per se* insufficient, suggesting a fundamental misapprehension of the significance of the role of a school principal.

The Board also maintains that the ALJ erred in finding that Principal Diskin did not give Ms. Mazur notice that her service with the District could continue in 2007-08 as a replacement teacher. Contrary to the ALJ's credibility findings, the indicia of credibility regarding Principal Diskin's and Ms. Manzur's respective testimony weigh in favor of Principal Diskin. The relevant testimony indicated that Principal Diskin provided specific notice

² The parties agree that Ms. Manzur was informed that she was designated as a replacement teacher for the 2006-07 school year and that she was not entitled to accrue tenure. Ms. Manzur continued to teach in the District during the 2007-08, 2008-09, 2009-10 and 2010-2011. The Board agrees that Ms. Manzur was a permanent employee during the 2008-09, 2009-10 and 2010-2011 school years.

regarding Ms. Manzur's continued status as a leave replacement teacher for the 2007-08 school year during their conversations in the Spring of 2007. In fact, Principal Diskin's testimony did not waver even when the ALJ engaged in protracted direct questioning of Principal Diskin.

Further, the ALJ erred by failing to address the inconsistencies between Ms. Manzur's testimony and her prior sworn statements, while discounting Principal Diskin's clean and consistent testimony. The Board urges that Ms. Manzur's claims regarding the lack of conversations regarding her potential return for the 2007-08 school year belie common sense. Due to the uncertainty regarding Ms. Manzur's continued employment, common sense suggests that she would have inquired as to her status for the upcoming year. By March of 2007, Principal Diskin knew that Ms. Fischer – the employee who Ms. Manzur replaced during the 2006-07 school year – would be extending her leave of absence for another year. Thus Principal Diskin's testimony was rational while Ms. Manzur's was not, and the ALJ was mistaken in discrediting Principal Diskin's version of events. The Board also stresses that Principal Diskin's testimony was consistent with two sworn statements that he signed in August 2015 in response to the petitioner's discovery request.

Assuming, arguendo, that the ALJ's determination that Ms. Manzur did not receive sufficient notice is adopted, the Board claims that Initial Decision must be modified because any entitlement to pay back should have been substantially reduced. In calculating the back pay, the ALJ improperly assumed that Ms. Manzur would have progressed along the salary guide via increments. The Board suggests that even if Ms. Manzur was not terminated, she would not have advanced along the salary guide until at least the 2011-12 school year because she was not recommended for increment advancement in her 2010-11 annual evaluation. The Board also reiterated the arguments made below as to why Ms. Manzur's award of back pay

should be reduced for certain periods of time due to her failure to mitigate her damages by exercising reasonable diligence and ordinary care in seeking alternate employment.

In reply, the petitioner asserts that the Board's contention that the ALJ erred in questioning whether the notice requirement instituted by the Supreme Court can be satisfied by a principal's verbal remarks is of no moment to the outcome of Ms. Manzur's claim. Although the ALJ acknowledged a potential concern with that type of notice, he thoroughly examined the evidence and found that Ms. Manzur had not been given notice of her replacement status prior to the 2007-08 school year. The ALJ specifically found that no conversation regarding replacement status ever occurred between Principal Diskin and Ms. Manzur prior to the commencement of the 2007-08 school year.

The petitioner also maintains that the ALJ's finding that Principal Diskin did not give Ms. Manzur notice that she was a replacement teacher for 2007-08 was based on a thorough credibility analysis and must be adopted because his credibility determination was not arbitrary, capricious or unreasonable. As a fact-finder, the ALJ was able to observe Principal Diskin's demeanor on the witness stand, and the manner in which he responded to questions and prompting from the Board's counsel, which was only one of many factors upon which the ALJ based his credibility determination. The petitioner reiterated how Ms. Manzur testified credibly that she was not notified of her replacement status for the 2007-08 school year and that her testimony was consistent with the certifications she has made since the beginning of this case. The petitioner also provided a response to each argument advanced by the Board, emphasizing why the ALJ's credibility determinations were not arbitrary capricious or unreasonable.

The petitioner also contends that the ALJ's ruling on back pay correctly applied the facts in this matter to the law and Ms. Manzur's entitlement to back pay is fully supported by

the record. The petitioner claims that the Board's exceptions concerning the amount of back pay owed to Ms. Manzur present the same legally and factually flawed arguments that were rejected below. Therefore the petitioner requests that Ms. Manzur be awarded the back pay determined by the ALJ in the Initial Decision with two modifications. The petitioner claims that the Board should be required to reimburse the Department of Labor for the unemployment benefits that Ms. Manzur received during the period in question. Additionally the petitioner asserts that the Board should be required to pay the difference between Ms. Manzur's current rate of pay and what she would be earning in the Bridgewater-Raritan School District until it is practicable that she return to work at the Bridgewater-Raritan School District in the beginning of the 2016-17 school year.

Upon a comprehensive review of the record in this matter, the Commissioner concurs with the ALJ – for the reasons thoroughly set forth in the Initial Decision – that Ms. Manzur did not receive sufficient notice that she was being designated as a replacement teacher for the 2007-08 school year.

Pursuant to *N.J.S.A.* 18A:16-1.1, a board of education may designate a person to act in the place of an employee during the employee's absence, disability, or disqualification, but the designated replacement shall not acquire tenure during that temporary service. The Supreme Court found that the term designate in *N.J.S.A.* 18A:16-1.1, "incorporates an obligation that the employer give notice to the employee receiving the specialized designation that takes the employee off the normal service road toward tenure. We construe *N.J.S.A.* 18A:16-1.1 to require a board of education to make an employee aware that he or she is being employed as a 'replacement.'" *Bridgewater-Raritan Educ. Assoc. v. Board of Educ. of the Bridgewater-Raritan School District, Somerset County*, 221 N.J. 349, 361 (2015).

In light of the fact that there is no documentation stating that Ms. Manzur was designated as a replacement teacher prior to the commencement of the 2007-08 school year, the testimony of the relevant witnesses becomes paramount. The ALJ evaluated the testimony of Ms. Manzur and Principal Diskin, their prior statements and the documentary materials, and found that the greater weight of the credible evidence is that Mr. Diskin did not specifically tell Ms. Manzur during the Spring of 2007 that she was being offered the opportunity to accept a position as a replacement for Ms. Fisher, who would be remaining on maternity leave. The ALJ had the opportunity to assess the credibility of the various witnesses who appeared before him and made findings of fact based upon their testimony. In this regard, the clear and unequivocal standard governing the Commissioner's review is:

The agency head may not reject or modify any findings of fact as to issues of credibility of lay witness testimony unless it is first determined from a review of the record that the findings are arbitrary, capricious or unreasonable or are not supported by sufficient, competent, and credible evidence in the record. [*N.J.S.A. 52:14B-10(c)*].

The Commissioner finds no basis in the record to reject either the ALJ's recitations of testimony or his determinations of witness credibility.³ Therefore, the ALJ's determination that Ms. Manzur did not receive sufficient notice that she was being designated as a replacement teacher for the 2007-08 school year is fully supported by the record.

Additionally, despite the Board's assertion in its exceptions, the ALJ did not rule that a verbal notice from a principal is insufficient as a matter of law. In the Initial Decision, the ALJ expressly stated that because it was already determined that Principal Diskin did not give

³ The record did not contain a transcript from the hearing conducted at the OAL on September 17, 2015. The Board submitted a recording of the hearing along with the exceptions it filed. However, it should be noted that audio recordings of the hearings at OAL are only reviewed in connection with Orders on Emergent Relief. If a party intends to reference witness testimony in its exceptions, the actual transcripts must be provided.

Ms. Manzur adequate notice, it was not necessary to reach a determination on that issue. The Commissioner agrees that it is not necessary to explore the extent of notice that was envisioned by the Supreme Court in light of the fact that Ms. Manzur did not receive any notice that she was being designated as a replacement teacher for the 2007-08 school year.⁴

The Commissioner is also in accord with the ALJ's conclusion – for the reasons set forth in the Initial Decision – that Ms. Manzur did not fail to mitigate her damages so as to warrant the reduction of back pay. The objections raised in the exceptions filed by the Board generally reiterate the arguments previously made before the ALJ, which were clearly taken into account by him in determining the amount of back pay owed to Ms. Manzur. The Board attempts to argue that Ms. Manzur's back pay should be reduced for the failure to mitigate her damages, notwithstanding the fact that Ms. Manzur applied for at least 90 teaching jobs following her nonrenewal. The Board has not established that Ms. Manzur failed to make “a reasonable and diligent effort to obtain other employment.” *See, Bonnie Goodman v. London Metals Exchange, Inc., et al.*, 86 N.J. 19, 36 (1981). Therefore, the amount of back pay that Ms. Manzur is entitled to receive shall not be reduced.

Ms. Manzur was hired as a teacher at Cedar Hill Preparatory School at a lesser salary than she would have made at Bridgeton-Raritan for the 2014-15 and 2015-16 school years. It is undisputed that Ms. Manzur was out on maternity leave from September 2015 through December 2015 and she is not entitled to any back pay for that period. Further, in the Initial Decision, the ALJ appropriately determined the amount of compensation Ms. Manzur was entitled to receive for the 2014-15 school year, which was the difference in compensation between Ms. Manzur's rate of pay at Cedar Hill and what she would be earning in the

⁴ Based on the Supreme Court's decision in *Bridgewater-Raritan, supra*, it would behoove all boards of education intending to designate an individual as a replacement employee to provide written notice of such designation prior to the commencement of work in the replacement position.

Bridgewater-Raritan School District. Under *N.J.S.A.* 18A:6-30, an employee entitled to back pay after an improper dismissal is entitled to compensation for the period covered by the illegal suspension. Thus, in addition to the \$127,586.67 in back pay recommended by the ALJ, the Board shall also reimburse Ms. Manzer for any additional back pay that she is entitled to receive between January 2016 and the date upon which the Board offers to return her to employment with the Board.⁵ Despite the petitioner's request, Ms. Manzur is not entitled to compensation from January 2016 through June 2016. Accordingly, the Initial Decision is adopted as the final decision in this matter, as modified above.⁶

IT IS SO ORDERED.⁷

COMMISSIONER OF EDUCATION

Date of Decision: January 22, 2016

Date of Mailing: January 22, 2016

⁵ The amount of compensation that Ms. Manzur is entitled to receive for this period shall also be the difference between her pay rate at Cedar Hill and what she would be earning in the Bridgewater-Raritan School District consistent with the ALJ's calculation of back pay for prior years outlined in the Initial Decision.

⁶ The District is responsible for reimbursing the unemployment benefits to the Department of Labor, and a copy of this decision will be forwarded to that Department.

⁷ 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).