

#357-16 (OAL Decision: Not yet available online)

CLARA BRITO HERRERA,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE	:	DECISION
TOWNSHIP OF WEST NEW YORK,	:	
HUDSON COUNTY AND	:	
MONICA M. TONE, INTERIM EXECUTIVE	:	
COUNTY SUPERINTENDENT FOR	:	
HUDSON COUNTY,	:	
	:	
RESPONDENTS.	:	

SYNOPSIS

Petitioner – formerly employed by the respondent school district under tenure as an Assistant Superintendent – asserted that her tenure rights were violated when her employment contract as Superintendent of the district was not approved by the Interim Executive County Superintendent (ECS) because the salary therein was in excess of the established “maximum salary amount” of \$177,500 for the position of superintendent in the West New York school district. Petitioner’s salary in her former tenured position as Assistant Superintendent had been \$190,587, and the employment contract as superintendent included the same salary. The parties filed opposing motions for summary decision.

The ALJ found, *inter alia*, that: there are no material facts at issue herein, and the matter is ripe for summary decision; the regulations governing employment contracts for superintendents, *N.J.A.C. 6A:23A-3.1(a)(1)*, state that the ECS shall review and approve a superintendent’s new employment contract, including contracts that replace expired contracts for existing tenured and non-tenured employees; pursuant to *N.J.A.C. 6A:23A-3.1(e)(2)*, no contract for a superintendent shall include an annual salary in excess of the maximum salary amount plus additional district salary increments and/or a high school salary increment, if applicable; petitioner’s argument that the reduction of her salary to the maximum allowed superintendent salary in the West New York School District violated the tenure rights that she had accrued as an Assistant Superintendent is without merit, as the Board did not reduce her compensation as an Assistant Superintendent; rather, petitioner’s compensation was reduced because she took the job as Superintendent, the salary for which is governed by standards that include the maximum salary cap; petitioner’s tenure rights accrued as Assistant Superintendent remain intact, but do not extend to her position as Superintendent; if petitioner were to return to the position of Assistant Superintendent, she would be entitled to all tenure rights attendant to that position. The ALJ concluded that there was no violation of petitioner’s tenure rights and, accordingly, granted the respondents’ motion for summary decision.

Upon review, the Commissioner concurred with the ALJ’s findings and conclusions. Accordingly, the recommended decision of the OAL was adopted as the final decision in this matter for the reasons set forth therein. 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.

October 14, 2016

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This dispute concerns whether petitioner’s tenure rights as an Assistant Superintendent were violated when she accepted a position as the Superintendent of Schools, with a salary subject to a cap under the Fiscal Accountability regulations, *N.J.A.C. 6A:23A*, which was lower than petitioner’s salary in her tenured position. The Administrative Law Judge (ALJ) determined that petitioner’s tenure rights were not violated as the regulatory salary cap for superintendents did not affect petitioner’s tenure as Assistant Superintendent.

The record of this matter, along with the Initial Decision of the Office of Administrative Law (OAL), have been reviewed. Additionally, petitioner’s exceptions and respondents’ replies thereto – submitted in accordance with *N.J.A.C. 1:1-18.4* – were also considered by the Commissioner¹. While reflecting her obvious disagreement with the findings and conclusions contained within the Initial Decision, petitioner’s exceptions are unpersuasive,

¹ This matter has been delegated to the undersigned Assistant Commissioner, pursuant to *N.J.S.A. 18A:4-34*.

and substantially recast and reiterate the arguments made below. Upon a comprehensive review of the record, the Commissioner is in accord with the ALJ's determinations.

Petitioner takes exception to the ALJ's decision that petitioner's tenure rights were not violated when her compensation as Superintendent was "reduced" to \$177,500 in accordance with the regulatory salary cap. Petitioner argues that she is entitled to her Assistant Superintendent salary of \$190,587 in her new position, and that respondents violated her tenure rights under *N.J.S.A.* 18A:6-10 and 28-5 by approving an employment contract with a lower salary. The ALJ concluded that *N.J.A.C.* 6A:23A-3.1(e)(2) does not affect petitioner's tenure as Assistant Superintendent, and the regulation is consistent with the Legislature's intent to curb excessive superintendent salaries. Petitioner contends that the ALJ erred in his conclusion because: his reliance on *N.J.S.A.* 18A:28-5(c) was misplaced; he erroneously interpreted *N.J.S.A.* 18A:17-20.4; and he failed to consider the last sentence of *N.J.A.C.* 6A:23A-3.1(e)(2). The Commissioner disagrees.

As a preliminary matter, the ALJ is correct in determining that tenure rights accrued in one supervisory or administrative position are not transferable to another, and therefore, petitioner cannot assert her tenure rights as Assistant Superintendent in her current position as Superintendent. *See N.J.S.A.* 18A:28-5(c). Petitioner argues that *N.J.S.A.* 18A:28-5(c) typically arises in the context of a reduction in force, and is intended to prevent tenured employees from asserting claim to another position in which they have not served. The context in which transferability of tenure has been addressed in other cases does not negate the plain language of *N.J.S.A.* 18A:28-5(c) ("tenure in any of the administrative or supervisory positions enumerated herein . . . shall not extend to any other administrative or supervisory position") or its applicability to this matter. By attempting to transfer her tenure rights to her non-tenurable

Superintendent position, petitioner seeks to extend her accrued tenure from one position to another in direct contravention of *N.J.S.A.* 18A:28-5(c).

The Superintendent position is separate and apart from petitioner's previous position of Assistant Superintendent, and she does not have tenure as Superintendent.² When lifetime tenure for superintendents was abolished, those who had accrued tenure in the position prior to the effective date of the amendments were protected through inclusion of *N.J.S.A.* 18A:17-20.4, which provides in pertinent part: "[n]othing in this section or in this act shall affect any tenure rights which shall have already accrued to any superintendent prior to the effective date. . . ." Consequently, superintendents such as Raymond J. Brosel, Jr., and Dr. Thomas N. Turner³ – who had accrued tenure rights prior to August 24, 1991⁴ – were grandfathered; anyone hired after that time, such as petitioner in this matter, no longer accrued tenure in the superintendent position. Therefore, petitioner – who does not have tenure in the non-tenurable Superintendent position – cannot impose her tenure rights from her service as Assistant Superintendent.

N.J.S.A. 18A:17-20.4 also provides that "[a] superintendent of schools promoted from within a district shall retain all tenure rights in any position which was previously held by the superintendent in the district." Petitioner has misapplied this provision to argue that all her rights as a tenured Assistant Superintendent, including the salary commensurate with the position, will follow her to the Superintendent's position, and her compensation cannot be reduced to comply with the regulatory salary cap of *N.J.A.C.* 6A:23A-3.1(e)(2). The purpose of

² Pursuant to *N.J.S.A.* 18A:17-20 *et seq.*, as amended on August 24, 1991, superintendents no longer acquire tenure in the position. Petitioner was appointed as Superintendent, effective July 1, 2015.

³ Petitioner used Brosel and Turner as examples of superintendents with lifetime tenure whose salaries were not capped pursuant to *N.J.A.C.* 6A:23A-3.1(e)(2).

⁴ Brosel was appointed as superintendent as 1986 and Turner became superintendent in his present district in 1987.

N.J.S.A. 18A:17-20.4 is to ensure that a tenured district employee *retains* or maintains her rights to the position in which she has accrued tenure once she is appointed as superintendent, since lifetime tenure can no longer be accrued as a superintendent. In other words, if petitioner returned to her position as Assistant Superintendent in the District, she would receive the benefits of accrued tenure in that position. Petitioner, however, has conflated retention of tenure rights in a particular position with transfer or extension of said tenure rights to the Superintendent position, and seeks to *transfer* her right to the Assistant Superintendent salary to her compensation as Superintendent, where such right clearly does not exist. See *N.J.S.A.* 18A:28-5(c) and *N.J.A.C.* 6A:23A-3.1(e)(2). If we were to adopt petitioner's interpretation of "retain" and apply her reasoning that employees "retain all tenure rights" in the superintendent position, then it would mean that *all* rights – including an employee's lifetime tenure in another position – would carry over to their position as superintendent, which is illogical and inconsistent with *N.J.S.A.* 18A:17-20 *et seq.* This notion that *N.J.S.A.* 18A:28-5(c) does not apply in this matter and that a tenured district employee's rights in a particular position can be transferred to the superintendent position is also inconsistent with *N.J.A.C.* 6A:23A-3.1(e)(2), which specifically places a cap on superintendents' salaries, and would defeat the purpose of the Fiscal Accountability regulations if employees tenured in other positions were ultimately allowed to disregard the regulatory salary cap and extend their tenure rights.

Petitioner proffers that the final sentence of *N.J.A.C.* 6A:23A-3.1(e)(2) – "[t]his paragraph shall be construed consistent with any tenure rights acquired pursuant to *N.J.S.A.* 18A:6-10 *et seq.*" – means that her tenured Assistant Superintendent salary must be maintained even when she is employed as Superintendent. However, the last sentence applies to the compensation of tenured superintendents pursuant to *N.J.S.A.* 18A:17-20.4, which petitioner

is not, and she simply cannot extend her tenure as Assistant Superintendent to the Superintendent position. *See N.J.S.A. 18A:28-5(c)* and *N.J.S.A. 18A:17-20 et seq.* In compliance with *N.J.S.A. 18A:17-20.4*, *N.J.A.C. 6A:23A-3.1(e)(2)* protects the tenure rights of superintendents who have lifetime tenure in their position, such as Raymond J. Brosel, Jr. and Dr. Thomas N. Turner. The subject provision of *N.J.A.C. 6A:23A-3.1(e)(2)* is not intended to extend tenure rights accrued in other positions, nor can it be applied to contractual tenure. *See New Jersey Association of School Administrators v. Cerf*, 428 *N.J. Super.* 588 (App. Div. 2012) (upholding the cap on superintendent salaries pursuant to the Fiscal Accountability regulations); *Bacher v. Bd. of Educ. of the Twp. Of Mansfield*, Commissioner Decision No. 84-12, decided March 5, 2012, *aff'd*, Dkt. No. A-3743-11T2 (App. Div. 2013) (finding reduction of petitioner's salary to comply with the regulatory cap was proper and it did not violate petitioner's contractual tenure rights); *Seitz v. Bd. of Educ. of the Twp. of Parsippany-Troy Hills and Serafino*, Commissioner Decision No. 258-13, decided July 15, 2013 (affirming the ALJ's conclusion that the board's reduction of petitioner's salary in accordance with the Fiscal Accountability regulations was proper and the board was entitled to reimbursement from petitioner for the amount overpaid). Since petitioner is not a lifetime tenured superintendent she is not entitled to compensation exceeding the salary cap.

Application of the regulatory salary cap in this case does not violate petitioner's tenure rights as her salary was not reduced during her time as Assistant Superintendent and was appropriately reduced once she accepted the position as Superintendent. *See New Jersey Association of School Administrators v. Schundler*, 211 *N.J.* 535 (2012) (holding that the Legislature had the authority to modify terms and conditions for future contracts without violating tenure laws when it directed the Commissioner to issue regulations consistent with the

enabling statutes and the Legislature's goal, and finding that tenure rights were not violated when sick leave was capped pursuant to the Fiscal Accountability regulations).

Petitioner also argues that the ALJ erred when he did not consider evidence of the two lifetime tenured superintendents, Brosel and Turner, whose salaries are higher than the cap. Petitioner maintains that this evidence demonstrates that the Executive County Superintendent (ECS) failed to properly construe the final sentence of *N.J.A.C. 6A:23A-3.1(e)(2)* in this matter. In reply, the respondents note that the two superintendents acquired lifetime tenure in their superintendent positions before tenure for superintendents was abolished, and therefore, petitioner's status as a tenured Assistant Superintendent is not analogous to the two superintendents' lifetime tenure rights in their position and has no bearing on the issue at hand. The Commissioner agrees. However, to the extent such evidence is to be considered, it only supports the narrow application of the last sentence of *N.J.A.C. 6A:23A-3.1(e)(2)*, as discussed above. Petitioner does not have tenure as a superintendent, and therefore, the regulatory salary cap was properly applied to her without violating her tenure rights as an Assistant Superintendent.

Accordingly, the recommended decision of the OAL is adopted as a final decision in this matter for the reasons set forth therein, and the petition is dismissed.

IT IS SO ORDERED.⁵

ASSISTANT COMMISSIONER

Date of Decision: October 14, 2016

Date of Mailing: October 17, 2016

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.