

EDU # 5150-95 and 11726-95 (consolidated)
C # 173-00
SB # 36-00

HELEN CHELOC, :
 :
 PETITIONER-APPELLANT, : STATE BOARD OF EDUCATION
 :
 V. :
 : DECISION
 BOARD OF EDUCATION OF THE CITY OF :
 ELIZABETH, UNION COUNTY, :
 :
 RESPONDENT-RESPONDENT. :
 _____ :

Decided by the Commissioner of Education, June 12, 2000

For the Petitioner-Appellant, Feintuch, Porwich & Feintuch (Philip Feintuch, Esq., of Counsel)

For the Respondent-Respondent, Murraray, Murray & Corrigan (David F. Corrigan, Esq., of Counsel)

Helen Cheloc (hereinafter "petitioner") had been employed as "Assistant Board Secretary/Director of Administration" by the Board of Education of the City of Elizabeth (hereinafter "Board") since 1985. As set forth in the job description adopted by the Board, exhibit P-1, in evidence, the basic functions of the position included acting as a general aide to the Secretary/School Business Administrator and supervising the operation of the district's Division of Administration. The specific responsibilities included supervising the district's purchasing, payroll, accounting and workers' compensation departments, contract administration, timely submission of required financial reports, assisting the Board Secretary/Business Administrator in the

preparation of the annual budget, and maintaining the Board's petty cash accounts. The job description did not include a certification requirement, and the petitioner did not possess certification at the time she was hired.¹

On December 21, 1994, the Board determined not to award the petitioner a salary increase for the 1994-95 school year, despite a favorable recommendation from the Acting Superintendent.² The petitioner filed a petition with the Commissioner of Education, alleging that the Board's action was arbitrary and capricious. The petitioner claimed that, based on past practice, she was entitled to the same benefits as supervisors and administrators who were party to a collective bargaining agreement.

On July 12, 1995, the Board created the position of comptroller and assigned the fiscal supervisory duties performed by the petitioner to that position. The job description adopted by the Board for the new position, exhibits P-30 and R-1, in evidence, required possession of a Bachelor's Degree and a certificate as a Registered Municipal Accountant or Certified Public Accountant, which were not required to be held by the Assistant Board Secretary/Director of Administration. The basic functions of the position, as set forth in the job description, included managing and controlling the financial resources of the district and supervising and managing the operation of the district's Division of Budgeting and Accounting. The specific duties included assisting

¹ The petitioner subsequently acquired certification as a school business administrator in 1989. Tr. 2/7/97, at 20.

² In a memo dated December 7, 1994 to the Acting Superintendent of Schools, Linda King, the Board Secretary/School Business Administrator, related that a salary guide had been established by the Board in January 1992 for business office directors for the term of July 1, 1990 through June 30, 1994. She added that the Board had previously agreed to consider salary increases for these employees at the conclusion of negotiations with the Elizabeth Administrative Supervisory Council. Accordingly, she recommended that the salary for these employees, including the petitioner, be increased by \$3,535 in both 1994-95 and 1995-96 and by \$3,703 in 1996-97. Exhibit P-5, in evidence.

the Secretary/School Business Administrator in all district financial matters, supervising the district's accounting and payroll units, supervising accounts payable and purchasing, timely submission of all required financial reports, supervising and maintaining financial records, controlling the income and disbursement of monies, assisting the Secretary/School Business Administrator in the preparation of the district's annual budget, evaluating accounting personnel, and supervising the district's debt management.

The petitioner retained her title as Director of Administration, her salary level and her responsibility over the district's workers' compensation department. A new job description adopted by the Board, exhibit P-2, in evidence, made the Director of Administration directly responsible to the comptroller. The basic functions of the position included acting as a general aide to the comptroller and supervising the operation of the Division of Administration.

The petitioner thereupon filed a second petition with the Commissioner challenging the Board's action and seeking reinstatement to her former position as Assistant Board Secretary/Director of Administration. The petitioner contended that the Board's actions were arbitrary, capricious and unreasonable and in violation of her tenure rights. She also claimed that such actions violated the Conscientious Employee Protection Act ("CEPA"), N.J.S.A. 34:19-1 et seq., charging that they had been taken in retaliation for her objections to allegedly improper budget-related actions taken by the Board in 1994. Those petitions were consolidated in the Office of Administrative Law.

On April 24, 2000, an Administrative Law Judge ("ALJ") concluded that the Board's action denying the petitioner a salary increase for the 1994-95 school year was

arbitrary and capricious. The ALJ found that Linda King, the Board Secretary/School Business Administrator, “did not provide Cheloc with any written evaluations, negative or positive, and always recommended her for a salary increase. In fact, King was Cheloc’s supervisor and she recommended to the superintendent that Cheloc receive the salary increase. However, the Board chose to reject King’s recommendation and withhold Cheloc’s increase.” Initial Decision, slip op. at 9. The ALJ concluded that the Board had failed to give the petitioner sufficient notice that her work was deficient or to afford her the opportunity to take corrective action, and had failed to articulate the criteria used to reject the recommendation of her supervisor.

The ALJ, however, recommended upholding the Board’s action reassigning the petitioner’s fiscal supervisory functions to the newly-created comptroller position. The ALJ concluded that the Board had reasonable grounds to establish the comptroller position with fiscal supervisory duties formerly assigned to the petitioner. In so doing, the ALJ concluded that the petitioner had not demonstrated that the Board had taken such action in bad faith, finding that the petitioner had failed to prove that there was a connection between her objections to allegedly improper budget-related actions by the Board and the Board’s decision to assign her fiscal responsibilities to the newly-created comptroller position. The ALJ did not consider the petitioner’s CEPA claim, observing that such claims are beyond the jurisdiction of the Commissioner of Education.

On June 12, 2000, the Commissioner adopted in part and modified in part the ALJ’s recommended decision. Initially, the Commissioner determined to consider the petitioner’s CEPA claim within the context of her general assertion that the Board’s actions were taken in bad faith. The Commissioner found that the petitioner had failed

to demonstrate that the Board's decisions to deny her salary increases for 1994-95 and 1995-96 had been made for retaliatory reasons. In so doing, the Commissioner found that the petitioner was not a teaching staff member subject to payment on a salary guide, pointing out that the job description for Assistant Board Secretary/Director of Administration did not require certification and that the petitioner had not possessed a certificate when she was employed by the Board in 1985. The Commissioner rejected the petitioner's contention that the Board's decisions were made for retaliatory purposes, finding that "the Board contends, and the record substantiates, that petitioner failed to adapt to its site-based management plan, and was too rigid in carrying out her duties...." Commissioner's Decision, slip op. at 20.

Turning to the issue of the Board's reorganization of its business office in 1995, the Commissioner was unable to find on the record before him that the Board's effective abolishment of the petitioner's position, its creation of the comptroller position or its hiring of a properly credentialed individual to fill the new position were arbitrary and capricious. Nor could the Commissioner conclude on the basis of that record that the Board's actions were retaliatory or otherwise carried out in bad faith. Assuming for the purpose of his discussion that the petitioner was tenured in her position as Assistant Board Secretary/Director of Administration,³ the Commissioner agreed with the ALJ that the record supported the conclusion that the Board had abolished the petitioner's position and created the comptroller position to provide greater assurance of fiscal responsibility. Additionally, like the ALJ, the Commissioner found that the record was

³ The Commissioner noted that although the Board had contended in its post-hearing submission to the ALJ that the petitioner had not acquired tenure rights in her prior position, it had not objected to the ALJ's finding that the petitioner had achieved tenure pursuant to N.J.S.A. 18A:17-2.

insufficient to establish a connection between the petitioner's stated concerns about the Board's fiscal practices and the subsequent reorganization. The Commissioner therefore dismissed the petition.

The petitioner filed the instant appeal to the State Board.

On January 16, 2002, the Legal Committee issued a report in this matter in which it recommended that the State Board affirm the Commissioner's determination to dismiss the petition, but that it do so on the basis of a different analysis. The Legal Committee concluded that the petitioner did not achieve tenure as an Assistant Board Secretary and, as a result, that she had no entitlement by virtue of tenure to claim reinstatement as Assistant Board Secretary/Director of Administration. The Committee further concluded that the petitioner did not have a claim with respect to the Board's determination not to provide her with salary increases and that the petitioner had not demonstrated that the Board's action in creating the position of comptroller and assigning the fiscal supervisory duties she had performed to the comptroller was arbitrary and capricious, retaliatory or otherwise carried out in bad faith. The petitioner filed exceptions to that report.

After reviewing the exceptions,⁴ the Legal Committee finds it necessary to issue a revised report. As in our first report, we conclude that the petitioner did not achieve tenure as an Assistant Board Secretary and, consequently, that she had no entitlement by virtue of tenure to reinstatement as Assistant Board Secretary/Director of Administration. However, we also conclude that the petitioner has demonstrated that

⁴ We have limited our consideration of the petitioner's exceptions to those arguments based on the record on appeal in this case and have not considered any of the documents appended to those exceptions that were not included in the record on appeal. N.J.A.C. 6A:4-1.8(a). See 6A:4-1.9(b) (supplementation of the record on appeal).

the Board's determination not to grant her a salary increase for the 1994-95 school year was arbitrary and capricious.

Initially, as we did in our first report, we find for the reasons that follow that the petitioner was not tenured as an Assistant Board Secretary. Tenure is a statutory right, and N.J.S.A. 18A:17-2(a) defines with specificity the conditions under which an individual may achieve tenure as a board secretary, assistant secretary or business manager. See Spiewak v. Rutherford Bd. of Ed., 90 N.J. 63, 72 (1982). In order to obtain tenure, the precise statutory conditions must be met. Zimmerman v. Bd. of Educ. of Newark, 38 N.J. 65, 72 (1962), certif. denied, 371 U.S. 956, 83 S.Ct. 508, 9 L.Ed.2d 502 (1963). The burden of proving the right of tenure is on the staff member, and that right must be clearly proved. Canfield v. Bd. of Ed. of Pine Hill Borough, 51 N.J. 400 (1968).

Pursuant to N.J.S.A. 18A:17-2(a), a board secretary or assistant board secretary who has "devoted his full time to the duties of his office and has or shall have served therein for three consecutive calendar years" shall hold such office or position under tenure. N.J.S.A. 18A:17-13, in turn, authorizes a district board of education to appoint an assistant board secretary, who may be chosen from among its members. Under the statute, an assistant board secretary assists a board secretary who has been appointed pursuant to N.J.S.A. 18A:17-5, acts in place of such secretary during his or her absence or incapacity, and performs such other duties as the board may from time to time prescribe. There is no dispute that the petitioner performed such functions for some portion of her time for more than three years. However, it is evident from the record that

given her responsibilities as Director of Administration, she did not devote her full time during that period to service as Assistant Board Secretary.

As previously indicated, the petitioner had been employed as Assistant Board Secretary/Director of Administration from 1985 until 1995. After the Board reassigned her fiscal supervisory functions to the newly-created comptroller position in 1995, she retained the title of Director of Administration with the responsibilities attendant thereto. A comparison of the job description for Assistant Board Secretary/Director of Administration with the job description subsequently adopted by the Board for Director of Administration confirms that the petitioner continued to be responsible for supervising the operation of the Division of Administration. The specific functions retained by the petitioner included contract administration, maintenance of petty cash accounts, and evaluation and in-service training of all personnel assigned to the Division of Administration. In addition, the record indicates that the petitioner continued to administer and supervise the district's workers' compensation program.

Given these circumstances, we find that the petitioner did not devote her full time to her responsibilities as Assistant Board Secretary. Consequently, she did not satisfy the precise statutory conditions for the achievement of tenure as an assistant board secretary pursuant to N.J.S.A. 18A:17-2(a). In this respect, we reject the petitioner's argument that her status as a full-time employee of the Board satisfied the statutory requirement of N.J.S.A. 18A:17-2(a). We find that the words of the statute are clear: in order to achieve tenure as an assistant board secretary, an individual must devote his full time to the duties of that office. "Past practices" cannot alter the meaning of the statutory language.

Since the petitioner did not achieve tenure as an Assistant Board Secretary, the elimination of her duties as Assistant Board Secretary did not trigger any tenure rights, and she had no entitlement by virtue of tenure to claim reinstatement as Assistant Board Secretary/Director of Administration.

We turn now to the petitioner's contention that the Board had improperly denied her salary increases for the 1994-95 and 1995-96 school years. As we indicated in our first report, such action did not constitute a reduction in compensation. See Williams v. Plainfield Bd. of Ed., decided by the State Board of Education, 1980 S.L.D. 1552, aff'd, 176 N.J. Super. 154 (App. Div. 1980), certif. denied, 87 N.J. 306 (1981) (tenure rights do not include future salary expectations). In any event, because the petitioner did not achieve tenure as a result of her service as Assistant Board Secretary, she cannot claim that the Board's action was prohibited by N.J.S.A. 18A:17-2, which provides protection to board secretaries and assistant board secretaries who are tenured in their positions.

Nonetheless, it is also well established that district boards may not act in a manner which is arbitrary or capricious, without a reasonable basis or induced by improper motives. Kopera v. West Orange Bd. of Ed., 60 N.J. Super. 288, 294 (App. Div. 1960). For the reasons that follow, we conclude that the Board's action in denying the petitioner a salary increase for 1994-95 was arbitrary and capricious.

There is nothing in the record of this case to show that the Board had anything before it when it acted on December 21, 1994 to deny the petitioner a salary increase other than the Acting Superintendent's recommendation that the petitioner receive an increase in the amount of \$3,535 for the 1994-95 school year. The record substantiates that the petitioner had, in fact, been recommended for an increase by Linda King, the

Board Secretary/School Business Administrator, who had been the petitioner's supervisor since 1989. Tr. 2/10/99, at 61-62. Specifically, in a memo to the Acting Superintendent of Schools dated December 7, 1994, King recommended that the Board increase the salary for all business office directors in the district, including the petitioner, by \$3,535 for 1994-95. Exhibit P-5, in evidence.⁵ The record shows that the Acting Superintendent approved King's request on December 12, 1994, id., and recommended to the Board that the petitioner be awarded an increase, along with the other business directors. As set forth above, the Board rejected the Acting Superintendent's recommendation with regard to the petitioner and denied her any increase.

The record does not include any indication of the basis upon which the Board determined to reject the Acting Superintendent's recommendation. In point of fact, the only document in the record to reveal any dissatisfaction with the petitioner's work is an evaluation prepared by King in June 1995, six months after the Board's action. Similarly, the only testimony in these proceedings critical of the petitioner's performance came from King. Such after-the-fact evidence cannot alter the fact that there is nothing in the record before us to show that the Board had any information upon which to conclude that the petitioner's performance was not satisfactory when it acted on December 21, 1994. We reiterate in that regard that King had recommended to the Acting Superintendent that the petitioner receive a salary increase for 1994-95.⁶ We

⁵ The petitioner testified that King had informed the business directors at a meeting held on December 4 or 5, 1994, "that there was nothing wrong with our job performance and everyone will be recommended for the salary increase...." Tr. 2/6/97, at 32.

⁶ King testified that she did not recommend to the Board that the petitioner be denied a salary increase or otherwise have any discussions with the Board concerning the petitioner's increase. Tr. 2/10/99, at 58, 61, 70.

note, in addition, that the petitioner was the only business office director in the district who did not receive an increase. Tr. 2/10/99, at 37.

Under these circumstances, we conclude that the Board's action in denying the petitioner a salary increase for the 1994-95 school year was arbitrary and capricious. See Meli v. Board of Education of the Burlington County Vocational-Technical Schools, Docket #A-5820-85T7 (App. Div. 1987) (Court held that district board's action in withholding teacher's salary increments was arbitrary and capricious where the Superintendent's recommendation to deny the increment merely cited "attendance" without more and the record showed that the teacher's attendance had improved from the previous year.) We therefore direct the Board to compensate the petitioner for her wages lost as a result of such action.⁷

The petitioner also challenges the Board's action in July 1995 to deny her a salary increase for the 1995-96 school year. As previously set forth herein, and in contrast to the Board's action in December 1994, Linda King had prepared an evaluation in June 1995 which was critical of the petitioner's performance. In that evaluation, King rated the petitioner as "Needs Improvement" in 14 categories and "Average" in the remaining six. Under these circumstances, we agree with the Commissioner that the petitioner has not demonstrated that the Board acted arbitrarily or capriciously when it denied her a salary increase for the 1995-96 school year.

⁷ In response to exceptions filed by the Board to the revised Legal Committee Report, we clarify that the petitioner is entitled to a salary increase in the amount of \$3,535 for the 1994-95 school year, which was the amount recommended by the Acting Superintendent. Since the remedy sought by the petitioner was limited to the payment of that increase, the effect that such an increase might have had on subsequent years was not litigated in these proceedings and was not before us on appeal.

With regard to the petitioner's request in her exceptions for counsel fees, it is well established that we do not have the authority to award such fees. Balsley v. North Hunderdon Bd. of Educ., 117 N.J. 434, 442-43 (1990) (the absence of express statutory authority is fatal to a claim for counsel fees).

We also concur with the Commissioner that the petitioner has not demonstrated on this record that the Board's action in creating the position of comptroller and assigning the fiscal supervisory duties the petitioner had performed to the comptroller was arbitrary and capricious, retaliatory or otherwise carried out in bad faith.

Accordingly, for the reasons expressed herein, we affirm in part and reverse in part the decision of the Commissioner.⁸

Orlando Edreira and Edward Taylor abstained.

Attorney exceptions are noted.

July 2, 2002

Date of mailing _____

⁸ We deny the Board's request for leave to file a reply to the petitioner's exceptions to the revised Legal Committee Report as not necessary for a fair determination of this matter. See N.J.A.C. 6A:4-1.17(a). We also deny the petitioner's request dated June 25, 2002 for leave "to amend to its exceptions concerning tenure the following case: DORIS A. WALSH, PETITIONER, V. BOROUGH OF LAUREL SPRINGS BOARD OF EDUCATION, RESPONDENT."