

JERRY NESTER, :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE : DECISION

TOWNSHIP OF OLD BRIDGE, :

MIDDLESEX COUNTY, :

RESPONDENT. :

SYNOPSIS

Petitioning teacher, whose supervisory position was abolished, sought reinstatement to other supervisory position of Department Supervisor/Athletic Director, held by staff member with allegedly less seniority than petitioner.

ALJ found that pursuant to *N.J.S.A.* 18A:28-5, each administrative or supervisory position is to be treated separately for tenure and seniority purposes. Thus, petitioner did not have tenure in the separate supervisory position of Department Supervisor/Athletic Director. Moreover, the ALJ found that although the other individual (Ms. Ryan) was in the same situation as petitioner, when their seniority was calculated by including their length of service in “all categories in which he or she previously held employment” after obtaining tenure in a supervisory position and including the “full recognition of the previous years of service within the district” after tenure was obtained in the supervisory category, Ms. Ryan had greater seniority than petitioner and, therefore, greater seniority entitlement to the position in question. Petition was dismissed.

Commissioner found that petitioner had acquired tenure as a supervisor, as had Ms. Ryan. However, the Commissioner further found that neither petitioner nor Ms. Ryan maintained a seniority claim to the position in question, in that said position was a new one, and not merely a new title affixed to an existing position. Accordingly, the Board was free to exercise its discretion in selecting a person to fill the position. Commissioner concurred with the ALJ that absent a showing by petitioner that the Board’s actions in selecting Ms. Ryan over petitioner were arbitrary, capricious, or unreasonable, the Board’s decision was presumed valid and would not be disturbed. Commissioner further noted that the decision in *Nelson* and the resultant statutory amendment to *N.J.S.A.* 18A:28-5 clarifying the separately tenurable nature of the positions enumerated therein, did not apply to the facts in this matter, inasmuch as the positions which petitioner and Ms. Ryan held in the past, and the position to which they both laid claim herein were in the same separately tenurable category of supervisor. Commissioner dismissed petition.

SEPTEMBER 8, 1997

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The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. The Board submitted exceptions in support of the initial decision of the ALJ, which submission is merely a verbatim reiteration of its arguments raised at the OAL and, therefore, will not be summarized herein.

Upon careful and independent review of the record in this matter, which included a transcript of the proceedings conducted on May 5, 1997 at the OAL, the Commissioner determines that petitioner is not entitled to reinstatement in the position of Department Supervisor/Athletic Director, for the reasons set forth herein.

Initially, the Commissioner finds that petitioner has acquired tenure as a supervisor, pursuant to *N.J.S.A.* 18A:28-5 and 18A:28-6, by virtue of his employment as an Athletic Director, from 1985 to 1994, and as the Administrator of Athletics and Intramurals, from 1994 to 1996. Despite the parties' apparent dispute about the certification requirement for the position of Athletic Director, the job description for that position, on its face, required a "Master's Degree with Supervisor's Certificate." (Exhibit J-1, attachment A) Additionally, the

parties have stipulated that the Administrator of Athletics and Intramurals position required that the holder of the position maintain a valid administrative certificate with supervisory endorsement. (Initial Decision at p. 2) In spite of the Board's characterization of these positions as "clerical in nature," (Board's Exceptions at p. 4), petitioner was required to interview applicants for coaching positions, to recommend coaches for new hires, to supervise coaches and to evaluate coaches at the end of the year. (Initial Decision at p. 3) Moreover, coaches are certificated teachers, (*N.J.A.C. 6:29-3.3 et seq.*) notwithstanding that their depth of participation in the District's educational program varies from that of classroom teachers. This conclusion is buttressed by the legislative history of the statute requiring that athletic directors hold endorsements as supervisors. The Legislature therein affirmed that

Athletics have become an increasingly significant component of the educational program in every school in the State. With the expanding emphasis on athletics has come a multidimensional expansion in the supervisory responsibilities and duties of athletic directors. These supervisory responsibilities include recruiting, selecting and evaluating coaches and trainers, ordering equipment, maintaining inventories, establishing crowd control and safety, reviewing eligibility, providing transportation and scheduling comprehensive physical examinations. (*P.L. 1991, c. 17, Senate Education Committee Statement to Senate, No. 2343, April 26, 1990*)

The Commissioner additionally finds that Ms. Ryan, too, has acquired tenure as a supervisor. Here, the record indicates that, although Ms. Ryan was appointed to the position of Department Chairperson of Physical Education in 1974, the job description for Department Chairpersons did not, until September 11, 1979, require that the holder possess a supervisor's endorsement. (Exhibit J-1, attachment C; Transcript at p. 72) Ms. Ryan's tenure as a supervisor, therefore, could not begin to accrue before September 11, 1979. (*N.J.S.A. 18A:28-4*) Initially, she served as Department Chairperson until June of 1982, thereby satisfying the time requirement set forth in *N.J.S.A. 18A:28-6* for obtaining tenure pursuant to a transfer or

promotion. Thus, her tenure accrued because she was employed for the requisite time period as a Department Chairperson *and* because, as of 1979, she was required to hold, and did in fact possess, an administrative certificate with a supervisory endorsement. Moreover, the record clearly supports the conclusion that the functions of the Department Chairperson after September 11, 1979 were supervisory in nature.¹

With respect to the determination of tenure rights, the Commissioner clarifies that neither petitioner's nor Ms. Ryan's membership in a particular bargaining unit is dispositive:

***Tenure is created by statute, and the Tenure Act, *N.J.S.A. 18A:28-1 et seq.*, defines with specificity the conditions under which teaching staff members are entitled to the security of tenure. *Spiewak v. Rutherford Bd. of Ed.*, 90 *N.J.* 63, 72 (1982). Tenure supersedes any contractual terms, and whether a teaching staff member is entitled to the protection of tenure never depends on the contractual agreement between the staff member and the employing board. *Id.*, at 72, 77. Rather, 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). *John Zachau v. Burlington County Vocational and Technical Schools, Burlington County*, decision by State Board of Education September 4, 1996, rejecting petitioner's claim that the particular bargaining unit in which he was represented was material to the determination of his statutory tenure rights. Slip Opinion at p. 4.

The Commissioner next finds that, having acquired tenure as a supervisor, petitioner accumulated just under nine years of seniority as an Athletic Director, and just under two years of seniority as the Administrator of Athletics and Intramurals (*N.J.A.C. 6:3-5.1(l)10i*) as of July 1996, when the new position of Department Supervisor/Athletic Director was created. Likewise, as a tenured supervisor, Ms. Ryan had accumulated over 16 years of seniority in the title of Department Chairperson of Physical Education (*N.J.A.C. 6:3-5.1(l)10i*) as of July 1996.²

¹ The Commissioner does not herein make a determination with respect to the nature of Ms. Ryan's job functions as Department Chairperson prior to September 11, 1979, since that period of time cannot, in any event, count toward her acquisition of tenure as supervisor, in that she was not properly certified. (*N.J.S.A. 18A:28-4*)

² The Commissioner notes that this calculation covers the time period of September 1979 through July 1996, less the four-month period Ms. Ryan was on maternity leave.

Further, notwithstanding the Board's assertions that the functions of the new position are "substantially similar" to those of the Department Chairperson of Physical Education (Board's Exceptions at pp. 11-15), the Commissioner finds that the record supports the conclusion that the position of Department Supervisor/Athletic Director is a new position, not merely a new title affixed to an existing position, which represents a fairly balanced blend of the job duties formerly performed by the Department Chairperson of Physical Education *and* the Athletic Director. (Initial Decision at p. 5; Transcript at p. 77) Accordingly, neither petitioner nor Ms. Ryan maintained a seniority claim with respect to the new position, and the Board was, therefore, free to exercise its discretion in selecting the person to fill the position. As the ALJ properly noted, absent a showing by petitioner that the Board's actions in selecting Ms. Ryan over petitioner were arbitrary, capricious, or unreasonable, the Board's decision is presumed valid, and will not be disturbed.

Finally, the Commissioner notes that the decision in *Nelson, supra*, and the resultant statutory amendment to *N.J.S.A. 18A:28-5* clarifying the separately tenurable nature of the positions enumerated therein, do not apply to the facts in this matter, inasmuch as the positions which petitioner and Ms. Ryan held in the past, and the position to which they both lay claim now, are in the same separately tenurable category of supervisor.³ The Commissioner, therefore, does not reach to the ALJ's discussion in this regard.

Accordingly, the Commissioner determines to affirm the conclusion of the ALJ, for the reasons expressed herein. The Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.

³ The Commissioner herein notes that the job description for the position of Administrator of Athletics and Intramural, facially indicates that the holder is required to maintain "A Principal's Certificate." (Exhibit J-1, attachment B) However, inasmuch as the parties have stipulated that the position required a supervisor's endorsement, the Commissioner accepts that stipulation as determinative in this matter.

COMMISSIONER OF EDUCATION

SEPTEMBER 8, 1997