

DIANE SWAIM AND MIDDLETOWN :  
 TOWNSHIP EDUCATION :  
 ASSOCIATION, :

PETITIONERS, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE : DECISION ON REMAND  
 TOWNSHIP OF MIDDLETOWN, :  
 MONMOUTH COUNTY, :

RESPONDENT. :

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SYNOPSIS

Petitioning Education Association and its president asserted that the Board’s action granting early tenure to two principals was arbitrary and capricious.

In 1997 initial decision, ALJ dismissed petition as moot. Commissioner, however, determined to remand the matter to OAL to determine whether the Board acted within its authority in creating, and then rescinding, a policy to confer tenure upon all principals who had maintained continuous employment in the position of principal in the District for 24 months. Thus, Commissioner reversed the finding that the instant matter was moot because the individuals in question achieved tenure, finding that herein exist issues of public importance which are capable of repetition while evading review.

On remand, ALJ determined that a board has the authority to shorten the period of time required for the acquisition of tenure if done for the general category of all such employees, regardless of how limited that category may be; that a board could rescind such a policy if the new requirement is uniform for all employees of the category; and that no notice of such a resolution is required if performed at a regularly scheduled meeting pursuant to the OPMA.

Commissioner determined that the ALJ did not render either factual findings or credibility assessments as to the seminal issue in this matter, *i.e.*, the intent of the Board in undertaking its actions and whether, in light of the circumstances existing in this matter, its actions were arbitrary, capricious or unreasonable. Thus, the Commissioner remanded this matter to the OAL for supplementation of the record and further findings sufficient to address these concerns.

AUGUST 10, 1998

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The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. Petitioners' exceptions and the Board's reply thereto, filed in accordance with *N.J.A.C.* 1:1-18.4, were duly considered by the Commissioner in making his determination within.

Petitioners vigorously except to the Administrative Law Judge's (ALJ) focus in her initial decision, observing that they do not dispute a board's "statutory authority to shorten the period of time for the acquisition of tenure for a general category of employees, [or its] statutory authority to uniformly rescind such a requirement for the same general category.\*\*\*" (Petitioner's Exceptions at p. 3). Rather, petitioners aver that the gravamen of their complaint, that this Board exercised its authority "in an arbitrary, capricious or bad faith manner in order to confer benefits on specific individual\*\*\*" is left unaddressed by the ALJ's decision. (*Id.*)

Petitioners further object to the ALJ's failure to make specific findings of fact as required by the Administrative Procedures Act, *N.J.S.A.* 52:14B-1 *et seq.*, arguing that the

requirements of this Act, as interpreted by case law, (citations omitted) dictate that an initial decision “include findings of fact, conclusions of law and a sufficient explanation of how those findings of fact and conclusions of law led to that decision, such as would permit meaningful appellate review of that decision.” (*Id.* at p. 4) They posit that the ALJ’s failure to comply with these requirements is, in and of itself, fatal error. (*Id.*) Petitioners urge that, to rectify this error, the Commissioner “exercise his authority to ‘modify’ the initial decision by making the factual findings overlooked by the ALJ,” rather than remanding this already protracted matter to the OAL. (*Id.* at p. 5) In this regard, petitioners set forth a detailed recitation of proposed findings of fact which they aver should be made by the Commissioner, and which lead to the inevitable conclusion that the Board’s actions in the within matter should be invalidated as unlawful. (*Id.* at p. 18)

In response, the Board posits that its action of July 1995, shortening the period for acquisition of tenure “[for] all persons within the category of principals,” was accomplished in accordance with statute and applicable case law (*Rall, supra*), and it avers that petitioners have advanced no “competent evidence” which establishes that such action was “impermissible.” (Board’s Reply Exceptions at pp. 2-3) As such, it argues, petitioners have failed to satisfy their burden of clearly demonstrating wrongful conduct on the part of the Board which would overcome the presumption of correctness attaching to Board action. (*Id.* at p. 7)

Upon careful and independent review of the record in this matter, which included a transcript of the hearing below,<sup>1</sup> the Commissioner finds merit in petitioners’ exception argument that the seminal issue in the within matter has been left unaddressed and unresolved by the ALJ in her initial decision and he, therefore, determines that this matter must be remanded to the OAL for further proceedings. As persuasively argued by petitioners, the Commissioner concludes that

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<sup>1</sup> It is noted that the within record contains a transcript of the June 10, 1996 hearing.

the occurrences which exist in this matter as addressed by the ALJ's initial decision are largely undisputed. Rather, what is germane and controverted herein is the intent of the Board in undertaking such actions and whether, under the existing circumstances, the Board's conduct in light of its intent exceeded a reasonable exercise of its discretionary authority calling for an invalidation of its action. In that the ALJ rendered neither factual findings nor credibility assessments in this regard, the Commissioner is compelled to return this matter to the OAL for such findings so as to fairly resolve this issue.<sup>2</sup>

Accordingly, this matter is remanded to the OAL for supplementation of the record and further findings sufficient to address the concerns expressed herein.<sup>3</sup>

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

AUGUST 10, 1998

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<sup>2</sup> The Commissioner's determination herein does not reach to the ALJ's discussion with respect to petitioners' asserted Open Public Meetings Act violation charge in that petitioners' exception submission indicates that, as such issue was not mentioned in the Commissioner's previous remand of this matter, they specifically did not pursue it on remand. The Commissioner herein clarifies that his prior remand did not intend preclusion of pursuit of this claim and, to the extent petitioners wish to supplement the record as to this issue, on remand, for consideration, such supplementation is permissible.

<sup>3</sup> This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A. 18A:6-27 et seq.* and *N.J.A.C. 6:2-1.1 et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.