

WOODBINE EDUCATION ASSOCIATION :  
AND PAULA HARRIS, :  
 :  
 PETITIONERS, :  
V. : COMMISSIONER OF EDUCATION  
 :  
BOARD OF EDUCATION OF THE : DECISION  
BOROUGH OF WOODBINE, CAPE MAY :  
COUNTY, :  
 :  
RESPONDENT. :

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SYNOPSIS

Petitioner, certificated school nurse with 32 years of service to the District, alleged the Board improperly subjected her to a RIF while retaining less senior individuals to perform her duties. Petitioner contended she was given a choice between a low-paying part-time job without benefits and premature retirement with benefits. (Initially, the Board attempted to subcontract or privatize her school nursing services notwithstanding the fact that under the Education Laws, a duly certified school nurse must perform certain services.)

The ALJ concluded that the Board did violate petitioner's tenure and seniority rights when it failed to assign petitioner to teach its health curriculum when it reduced her school nurse assignment from full-time to part-time of 19-3/4 hours per week. The ALJ found that petitioner, who possessed an educational services certificate with its school nurse endorsement and an instructional certificate with its teacher of health education endorsement, was appropriately certificated to perform all the duties of a school nurse and to instruct pupils in health education. Moreover, the ALJ found that the Board, in its determination to impose a RIF to petitioner's nursing duties, failed to recognize her seniority with respect to her teaching of its health curriculum and assigned less senior teaching staff members to perform those duties. The ALJ ordered petitioner reinstated to her proper school nurse teaching position on a full-time basis and ordered the Board to provide petitioner with mitigated compensation, retroactive to September 1, 1998.

The Commissioner concurred with the ALJ's conclusion that respondent violated petitioner's tenure and seniority rights when it failed to assign her to teach the health classes in dispute herein and adopted the ALJ's order that petitioner be reinstated to her school nurse position on a full-time basis with mitigated compensation. The Commissioner determined that pursuant to *Ellicott*, petitioner was entitled to tenure protection in all assignments within her tenurable position of school nurse, the job description for which, in the instant matter, included health instruction both prior to and subsequent to the Board's RIF affecting petitioner's school nurse position. Pursuant to *N.J.A.C. 6:11-11.7*, the school nurse endorsement authorizes service as a school nurse *and* teaching in health-related areas. Thus, during the time period at issue, petitioner's teaching of health was authorized by her school nurse endorsement. Because a school nurse is not required to possess *both* an instructional certificate with an authorization to teach health *and* an educational services certificate with a school nurse endorsement, petitioner's possession of such an instructional certificate was immaterial to determining the present matter. The Commissioner noted that petitioner taught health pursuant to her school nurse endorsement, not her instructional certificate; hence, petitioner's tenure and seniority rights accrued under a school nurse position, and not under the separately tenurable position of teacher. The Commissioner, however, upon examination of the record, observed that the school nurse job description as revised and approved by the Board revealed that the teaching of health was in fact not eliminated from the school nurse position. Thus, the Board's argument that it abolished petitioner's school nurse position, which included both school nurse and health teaching responsibilities, and created two separate and distinct positions, one for school nurse and one for teaching health, was not supported by the record. Therefore, under the facts herein, assigning the teaching of health to teaching staff members who possessed less seniority than petitioner was deemed to be violative of her tenure and seniority rights. Since an individual holding only a county substitute certificate was in a school nurse position for two years, the Commissioner directed the county superintendent to determine the District's compliance with the mandates of *N.J.A.C. 6:11-4*.

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The record and Initial Decision issued by the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon careful and independent review of the record and factual circumstances presented in the instant matter, the Commissioner concurs with and adopts the Administrative Law Judge's (ALJ) conclusion, for the reasons set forth below, that respondent violated petitioner's tenure and seniority rights when it failed to assign her to teach the health classes in dispute herein.

As held by the State Board of Education in *Elissa A. Kish v. Board of Education of the Borough of Elmwood Park, Bergen County*, 92 N.J.A.R.2d (EDU) 367:

[T]enure is achieved within a "position," *Howley v. Bd. of Ed. of Ewing Township*, decided by the Commissioner of Education, 1982 S.L.D. 1328, *aff'd* by the State Board of Education, 1983 S.L.D. 1554, and tenure protection as against nontenured individuals following a reduction in force extends only to assignments *within that tenured position* for which the individual is qualified by virtue of his or her certification. *Kaprow v. Board of Education of the Township of Berkeley*, decided by the State Board of Education, January 9, 1991, slip op. at 9, *aff'd* [255 N.J. Super. 76 (App. Div. 1992), *aff'd*, 131 N.J. 572, 583 (1993)]. See *Bednar v. Westwood Bd. of Ed.*, 221 N.J. Super. 239 (App. Div. 1987), *certif. den.*, 110

*N.J. 512 (1988); Capodilupo v. West Orange Bd. of Ed.*, 218 *N.J. Super.* 510 (App. Div. 1987), *certif. den.*, 109 *N.J. 514* [1987]; *Herbert v. Board of Education of the Township of Middletown*, decided by the State Board of education, August 1, 1990, *aff'd*, Docket #A – 318-90T1 (App. Div. 1991). Such protection does *not* extend to assignments within the purview of separately tenurable positions in which the staff member has not achieved tenure pursuant to *N.J.S.A. 18A:28-5* or *N.J.S.A. 18A:28-6*. (emphasis in text)

As to the issue of positions involving educational services certificates, the State Board held in *Ellicott v. Board of Education of the Township of Frankford, Sussex County*, 1990 *S.L.D.* 1714, 1718, *aff'd* 251 *N.J. Super.* 342 (App. Div. 1991) that:

With the exception of school nurse, assignments within the purview of the educational services certificate are not enumerated in *N.J.S.A. 18A:28-5* as separately tenurable positions. Under regulations promulgated by the State Board, moreover, teaching staff members holding an educational services certificate *are authorized and qualified for service in any assignment under that certificate for which they possess the appropriate endorsement.* (citation omitted) Consequently, we conclude that, with the exception of school nurses, who are separately tenured by statute, staff members serving under educational services certificates achieve tenure in “educational services” and *are entitled to tenure protection in all assignments within that tenurable position for which the endorsements on their certificates qualify them.*\*\*\* (emphasis supplied)

See also *Harriet Wallen v. Board of Education of the Rancocas Valley Regional High School District, Burlington County*, 93 *N.J.A.R.2d* (EDU) 301.

Applying the legal holdings set forth above to the facts of the instant matter, petitioner acquired tenure in the position of school nurse, having served for 32 years under her educational services certificate in the position of school nurse, a separate and distinct position from that of teacher. *N.J.S.A. 18A: 28-5*. Consequently, she is entitled to tenure protection in all assignments within the position of school nurse for which the endorsement on her educational services certificate qualifies her.

Pursuant to *N.J.A.C.* 6:11-11.7, the school nurse endorsement authorizes service as a school nurse and teaching in health-related areas. Thus, during the time period at issue herein, petitioner's teaching of health was authorized by her school nurse endorsement. Because a school nurse is not required to possess both an instructional certificate with an authorization to teach health *and* an educational services certificate with a school nurse endorsement, petitioner's possession of such an instructional certificate is immaterial to determining the present matter. The facts of this case reveal that petitioner taught health pursuant to her school nurse endorsement, not her instructional certificate. Moreover, the circumstances herein are unlike those found in *Dennery v. Bd. Of. Ed. of Passaic County Regional High School District*, 131 *N.J.* 626 (1993), wherein it was determined that a board of education acted properly in requiring dual certification to qualify for a single educational position. No such requirement was imposed herein. Thus, as stated above, petitioner's tenure and seniority rights herein accrued under a school nurse position, and not that of the separately tenurable position of teacher.

It is the Board's contention that, upon abolishment of petitioner's school nurse position:

The positions of School Nurse and the Teaching of Health were separated into two separate and distinct positions. The part-time school nurse was obligated to follow the job description as set forth in Bates Nos. 100042, 100043, 100044 and 100061. The health instruction was primarily provided by other certified personnel.<sup>1</sup> Health education does not have to be provided by a person that is holding a School Nurse certificate. (Respondent's Brief at 5)

*See* also Initial Decision at 21. However, upon examination of the record, the Commissioner

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<sup>1</sup> Upon review of the record, it is noted that the copy of the instructional certificate found at Bates No. 100072 for Kimbra (Osborn) Goodwin, one of the teachers assigned to teach health after the abolishment of petitioner's school nurse position, has the endorsement of "Teacher of Physical Education." Pursuant to *N.J.A.C.* 6:11-6.2(a)17, such an endorsement authorizes the holder to teach physical education, not health and physical education.

observes that the school nurse job description, as revised and approved by the Woodbine Board on June 29, 1998 (Bates Nos. 100042-44, in particular 100043, paragraph 11) and the superintendent's June 29, 1998 memorandum to petitioner regarding the newly created school nurse position (Bates Nos. 10061-100062, in particular paragraph m), both reveal that the teaching of health was in fact *not* eliminated from the school nurse position.<sup>2</sup> Thus, the Board's argument that it abolished petitioner's school nurse position, which included both school nurse and health teaching responsibilities, and created two separate and distinct positions, one for school nurse and one for teaching health, is not supported by the record.

Consequently, the Commissioner finds and determines that, pursuant to *Ellicott, supra*, petitioner is entitled to tenure protection in *all assignments within her tenurable position of school nurse*, the endorsement and the job description for which, in the instant matter, included health instruction both prior *and* subsequent to the Board's RIF affecting petitioner's school nurse position. Therefore, under the facts of this matter, assigning the teaching of health to teaching staff members who possess less seniority is deemed to be violative of petitioner's tenure and seniority rights.

Further, the Commissioner is constrained to qualify the statement on page 46 of the Initial Decision in which the ALJ agrees with petitioner that "\*\*\*when a board of education initiates a RIF, it is obligated to aggregate the duties of the part-time position in order to provide full-time employment to the teaching staff member subjected to the RIF. *Brueck, supra., Kojak, supra., McGlynn, supra., Laufenberg, supra.*" As to this, the Commissioner notes that each of the cases cited involved the rights of tenured staff to positions or assignments held by nontenured

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<sup>2</sup> The June 29, 1998 school nurse job description, Bates No. 100043, paragraph 11, states that the school nurse "[t]eaches assigned health classes." The superintendent's June 29, 1998 letter to petitioner (Bates No. 100062, paragraph m), states that the school nurse will "additionally, when so assigned, provide instruction to students within the limitations of the school nurse endorsement\*\*\*."

teaching staff members. The Commissioner also wishes to stress that where there does exist an obligation to aggregate assignments, such obligation is a general principle of law, *not* an absolute one. *See, e.g., Taxman v. Piscataway Township Board of Education*, 93 N.J.A.R.2d (EDU) 189, a case involving a tenured teacher's claim to the assignments/classes of three part-time teachers. In *Taxman*, the Commissioner addressed the issue of a board's duty to attempt to aggregate assignments for a tenured staff member who is subject to a RIF, stating that:

\*\*\*Likewise the Board knew or should have known that if it was shown that petitioner was qualified to teach the positions, she would be entitled to them *unless the Board could demonstrate a compelling educational reason to defeat her tenure rights. See [Capodilupo, supra, Bednar, supra ]*. Moreover, while the law may still be "evolving" in the sense that there is no clear-cut formula to define when *a tenured teacher's claim may be defeated because of the disruptive impact the accommodation of those rights may cause on the scheduling of courses or assignment of teachers to given classes*, the law is not in the least new or unsettled that a tenured teacher has employment rights which must be given the utmost deference except when it can be demonstrated that the board would have to stand on its head to honor those rights. (citations omitted) (emphasis supplied) (*Taxman* at 195)

Finally, the Commissioner will address petitioner's allegations regarding a school nurse position being filled since 1998 with an individual who possesses only a county substitute certificate. Upon review of the record in the instant matter, the Commissioner agrees with petitioner's argument that *Pennsville, supra*, is applicable herein. In *Pennsville*, an individual with a county substitute certificate was employed by the board of education, ostensibly as a library aide, upon the retirement of its educational media specialist. However, the individual was found in fact *not to be substituting* for any teaching staff member. The Commissioner held that, "Contrary to the Board's urging, persons who hold substitute certificates *are* to be employed only in the manner prescribed by *N.J.A.C. 6:11-4.5*."\*\*\*" (emphasis in text) *Pennsville, supra*, at 38. This admonition applies equally in instances such as herein, where a county substitute certificate is issued, pursuant to *N.J.A.C. 6:11-4.5(h)*, to a holder of a valid New Jersey registered

nurse license to *substitute* for a school nurse. As indicated in *N.J.A.C. 6:11-4.5(c)*, county substitute certificates are intended only for persons *temporarily performing the duties of a fully certificated and regularly employed teaching staff member*. The county superintendent is, therefore, directed to determine whether or not all staff assigned to teach health since September 1998 in the Woodbine School District possessed appropriate instructional endorsements for teaching that subject.

Accordingly, for the reasons set forth above, the Commissioner adopts the ALJ's order that petitioner be reinstated to her school nurse position on a full-time basis and that she be provided all salary, emoluments and benefits to which she is entitled, less mitigation, to make her whole, including all proper pension credit, retroactive to September 1, 1998. The Commissioner also adopts the ALJ's denial of pre- and post-judgment interest, finding that, pursuant to *N.J.A.C. 6A:3-1.17*, no basis has been established to warrant the former and a request for the latter is prematurely made. Finally, because of the concerns stated above with respect to the employment of an individual for two school years in a school nurse position who holds only a county certificate, the county superintendent is to determine forthwith if the District is complying with the mandates of *N.J.A.C. 6:11-4*.

IT IS SO ORDERED.<sup>3</sup>

COMMISSIONER OF EDUCATION

Date of Decision: August 18, 2000

Date of Mailing: August 28, 2000

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<sup>3</sup> This decision, as the Commissioner's final determination, 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. 6A:4-1.1 et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.