

ROBERT BARRATT, :
PETITIONER, :
V. : COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE : DECISION
BOROUGH OF GLASSBORO, :
GLOUCESTER COUNTY, :
RESPONDENT. :

SYNOPSIS

Petitioner claimed tenure entitlement to the position of Athletic Director (AD). The Board had reassigned his duties as AD to another teaching staff member holding the newly created position of “Vice Principal-Student Activities/Athletics” for the 1999-2000 school year.

The ALJ determined that the Board took no official action to abolish the AD position, to articulate reasons for its action or to establish a preferred eligibility list. Thus, the ALJ concluded that when the Board summarily reassigned all of petitioner’s duties to another individual, petitioner clearly held tenure in the AD position and his tenure rights were violated. The ALJ ordered that the Board provide petitioner back pay and benefits associated with the AD position from July 1, 1999 until such time as it may abolish his position in accordance with the requirements of the statutes. (Petitioner did not seek appointment to the newly created Vice Principal position effective July 1, 1999 as he did not hold the New Jersey Administrative Certificate required.)

The Commissioner reversed the ALJ’s determination that petitioner clearly held tenure in the AD position because he served under his instructional certificate and any tenure protections flowing from petitioner’s AD assignment attached to his tenured position as teacher. (*N.J.S.A. 18A:26-2.2; Grosso; Ellicott*) The Commissioner found that the Board could assign petitioner to any instructional/teacher position within the scope of his certificate and not violate his tenure rights, so long as he did not suffer a reduction in salary. (*Carpenito*) The Commissioner found that the Initial Decision did not address the Board’s claim that the AD position was an extracurricular, stipended assignment and that the record was void of any specific information about petitioner’s actual work day or the details of his salary/compensation. No tenure protections flow from extracurricular positions. Therefore, the Commissioner remanded this matter to the OAL in order that the record may be supplemented with respect to whether or not the AD position was an extracurricular assignment or a salaried position and a determination made as to the applicability of *Connor* and/or *Reinhardt*. Accordingly, the matter was remanded for further proceedings on the issue of whether or not the Board violated petitioner’s tenure rights by its action assigning him to a position within the scope of his certification for the 1999-2000 school year.

January 11, 2001

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The record and Initial Decision issued by the Office of Administrative Law (OAL) have been reviewed. The Board's exceptions and petitioner's reply thereto were timely filed pursuant to *N.J.A.C.* 1:1-18.4.

The Board's exceptions aver that the Administrative Law Judge (ALJ) erred in interpreting the grandfather clause of *N.J.S.A.* 18A: 26-2.2 as conferring tenure rights by virtue of the statute's requirement that an athletic director (AD) possess an instructional certificate. The Board argues, *inter alia*, that prior to the enactment of this statute, many ADs were not certificated staff, thus, *N.J.S.A.* 18A:26-2.2 terminated the employment of any person so employed and allowed those already employed as ADs with instructional certificates to retain their jobs. It further argues that:

Historically, the position of AD was an extra-curricular position much like coaching in which a staff member was and is required to be a certificated teacher. [citations omitted] If the coach resigned from coaching or if another staff member was selected as coach, the former coach would return to his/her teaching position. This analogy is applicable to the case herein. No tenure rights were conferred by the grandfather clause. Mr. Barratt's tenure remains in the category of teacher. (Board's Exceptions at 3)

The Board also excepts to the ALJ's finding at page 7 of the Initial Decision that petitioner prevailed as a matter of law because the Board took no official action to abolish his AD position, to articulate the reasons for its actions or to establish a preferred eligibility list. With respect to this, it avers that the ALJ's finding ignored the fact that it took two separate votes to establish the newly combined Vice-principal/Student Activities/Athletic Director position at Glassboro High School. In support thereof, the Board submits the minutes of its meetings on March 31 and May 26, 1999¹ and argues that these actions constitute formal action abolishing the AD position as it was known before. Moreover, the Board maintains that it "was not in need of two ADs, and was fully aware that creating the newly combined position effectively eliminated the former AD position. To hold otherwise exalts form over substance which has been consistently rejected by the courts. [citations omitted]" (Board's Exceptions at 3)

The Board next reiterates its argument that it was not obligated to give reasons for not reassigning petitioner to the AD position, averring that unless there is evidence of arbitrary or capricious or unreasonable judgment, the exercise of its discretionary authority with respect to nontenured extracurricular athletic staff must be sustained. It cites in support of its position *Norcross v. Bd. of Ed. of North Hunterdon Reg'l H.S. District*, 1991 S.L.D. 1154, *aff'd* State Board 92 N.J.A.R.2d (EDU) 176 (1991), *aff'd* Appellate Division No. A-3533-91, March 30, 1993 (unpublished).

Finally, the Board avers that the ALJ's decision must be reversed because its decision in creating the newly combined position was neither arbitrary nor capricious and, as

¹ Petitioner's reply exceptions urge that the minutes of these two Board meetings not be considered by the Commissioner because they were never submitted to the ALJ or made part of the record in proceedings before the OAL, nor did the Board move or otherwise show cause why the evidentiary record should be supplemented. Petitioner further argues that the minutes do not provide reasons why the Board wanted to abolish his AD position, nor do they authorize the publication of a preferred eligibility list for that position; thus, the minutes do not satisfy the statutory requirements for abolishing a position in accordance with *N.J.S.A.* 18A:28-9 and 28-12. See Petitioner's Reply Exceptions at 7-8.

held in prior case law, it is not obligated to restructure its educational program to accommodate an individual's tenure/employment rights.

Petitioner's reply exceptions urge acceptance of the ALJ's recommended decision because he has established that he achieved tenure in the position of AD and that the elimination of his tenured position by an informal transfer of its duties to another position, rather than by a formal abolishment, denied him his due process rights to challenge the legal sufficiency of the Board's reasons, as well as his rights to be listed for reinstatement to the AD or similar position. Petitioner further argues that under the circumstances of the instant matter, the ALJ's findings and determinations are fully supported by the tenure law and cases decided thereunder. Consequently, petitioner urges that the Commissioner should affirm the ALJ's order requiring the Board to provide him back pay and benefits associated with the position of AD from July 1, 1999 until such time as the Board abolishes his position in accordance with statutory requirements.

Upon review of the record in this matter, including the parties' exceptions, the Commissioner is unable to accept the ALJ's determination that "petitioner clearly held tenure *in the position Athletic Director* in respondent's district***." (emphasis supplied) (Initial Decision at 7) With the enactment of *N.J.S.A. 18A:26-2.2*, those individuals who were employed prior to July 1, 1994 as an AD and who possessed an instructional certificate were allowed to continue in their employment as an AD. For such individuals serving as an AD in 1994 by virtue of an *instructional certificate*, tenure would be obtained in the *position of teacher*. See the State Board of Education's decisions in *Grosso v. New Providence Bd. of Ed.*, 1990 *S.L.D.* 1750 and *Ellicott v. Frankford Bd. of Ed.*, 1990 *S.L.D.* 1714, *aff'd* 251 *N.J. Super.* 342 (App. Div. 1991), wherein it was held that under the statutory scheme, particularly, *N.J.S.A. 18A:28-5*, "teacher" is a separately tenurable position, and that teaching staff members serving under instructional

certificates achieve tenure in the *position of teacher*. Furthermore, the position of athletic director is not enumerated as a separately tenurable position in *N.J.S.A.* 18A:28-5.

Similarly, for those who serve as an AD by virtue of a supervisor endorsement on an administrative certificate, tenure accrues not in the position of AD but rather, in the *position of supervisor*, which is a *separately tenurable position enumerated in N.J.S.A.* 18A:28-5. See *Connor, supra*, and *Nester v. Board of Education of the Township of Old Bridge*, decided by the Commissioner September 8, 1997, which determined that the AD petitioners were tenured in the *position of supervisor*.

Consequently, under the facts of the instant matter, any tenure protections flowing from petitioner's AD assignment attached to *his tenured position as teacher*, a status the parties do not dispute he achieved in the Glassboro district.² Therefore, the Board could assign petitioner to any instructional/teacher position within the scope of his certificate and not violate his tenure rights, *so long as he did not suffer a reduction in salary*. *Carpenito v. Board of Education of the Borough of Rumson, Monmouth County*, 96 *N.J.A.R.2d* (EDU) 958 (1996), *rev'd* State Board February 4, 1998, *rev'd* 322 *N.J. Super.* 522 (App. Div. 1999).

Petitioner, however, avers that he *did* suffer a reduction in salary and urges that the instant matter is most similar to *Connor, supra*, wherein it was determined that the board unlawfully reduced the salary of an AD by expanding the duties of his position without abolishing his position of AD before naming him director of athletics and activities. The Board, on the other hand, claims petitioner did not suffer a loss or reduction of salary because the AD

² Petitioner commenced his employment as a teacher in the Board's district in 1974. Page 2 of the Initial Decision states that he attained tenure in 1979 which is apparently a typographical error.

position was an extracurricular, stipended assignment ³ and, therefore, the only loss petitioner suffered was the extracurricular stipend he received as an AD. Of this, the Board states:

In the present controversy, the Board determined not to reassign Petitioner to the position of AD. Such action was a proper exercise of the board's authority. Despite this authority, Petitioner alleges that the Board improperly reduced his salary by not reassigning him to the AD position. However, this allegation is unsupported by the law. *** Mr. Barratt is a tenured teacher for which he cannot be dismissed or reduced in salary. *N.J.S.A.* 18A:6-10; 18A:28-5. However, a transfer is not a demotion. [*Lascari, supra*] Mr. Barratt's only loss is the stipend he received as an AD. There is no impact on his salary earned as a tenured teacher. If the duties of an AD were engrafted into his duties as a teacher, the protections afforded by the tenure statute would apply. However, there is no evidence that the AD duties were part of Mr. Barratt's duties as a teacher. (Board's Reply Brief In Opposition to Petitioner's Request for Summary Decision at 10-11).

The Commissioner notes that the boards of education in *Connor, supra*, and *Reinhardt v. Freehold Regional High School District*, 97 N.J.A.R.2d (EDU) 186 (1996) argued in a similar vein that the tenured petitioners therein did not suffer a loss of salary because the AD positions they held were stipended; however, the boards did not prevail in those matters because records in both matters did not support such a claim. Moreover, the position in the *Connor* matter was a hybrid position, wherein part of the petitioner's workday was comprised of a teaching assignment and part of it was devoted to AD duties before it became a full-time AD position; while the AD position under dispute in *Reinhardt* initially consisted of a reduced teaching load before it became a full-time AD position.

Thus, any determination as to whether tenure rights were violated in this matter will rest substantially on whether or not the AD position at issue was, in fact, an extracurricular stipended

³ The Commissioner notes that petitioner himself states at page 1 of his April 14, 2000 Brief for Summary Disposition that the Board "violated his tenure rights at the end of the 1998-99 academic year by refusing to renew his appointment for the following year to the *extracurricular position of Athletic Director*" and at page 3 that "from September, 1980 through the end of the 1998-99 school year, he was appointed to the *extracurricular position of Athletic Director* at Glassboro High School." (emphasis supplied)

assignment, as opposed to a salaried position.⁴ In the instant matter, the Initial Decision does not address the Board's claim that petitioner's employment as AD was an extracurricular, stipended assignment, rather than a salaried position. Furthermore, the record is void of any *specific* information about petitioner's actual work day or the details of his salary/compensation, so as to permit the Commissioner to make such a determination himself. Consequently, the Commissioner finds and determines that the matter must be remanded to the OAL for supplementation of the record with respect to these issues and a determination as to whether the factual circumstances of petitioner's employment as an AD are akin to those in *Connor, supra*, and/or *Reinhardt, supra*, which, if so found, may warrant a conclusion that petitioner's tenure rights were violated by the Board in assigning him to a position within the scope of his certification and commensurate with his tenured position as teacher for the 1999-2000 school year, but at a salary less than that which he received for the prior school year.

Accordingly, the matter is remanded to the OAL, for the reasons expressed herein, for further proceedings on the issue of whether or not the Board violated petitioner's tenure rights by assigning him to a position within the scope of his certification for the 1999-2000 school year.

IT IS SO ORDERED.⁵

COMMISSIONER OF EDUCATION

Date of Decision: January 11, 2001

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⁴ It is well established that no tenure protections flow from extracurricular positions, *Norcross, supra*.

⁵ 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.