299-04 (Link to OAL Decision: http://lawlibrary.rutgers.edu/oal/html/initial/edu09449-01_1.html)

OAL DKT. NO. EDU 9449-01
AGENCY DKT. NO. 398-9/01

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| MARK KRAMER, | : | |
| PETITIONER, | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| BOARD OF EDUCATION OF THE CITY OF EAST ORANGE, ESSEX COUNTY, | : | DECISION |
| RESPONDENT. | : | |

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner's exceptions and the Board's reply thereto are duly noted as submitted in accordance with *N.J.A.C.* 1:1-18.4.

Petitioner excepts to the Administrative Law Judge's (ALJ) conclusion that the Board acted pursuant to its discretionary authority under *N.J.S.A.* 18A:11-1, inasmuch as that statute requires that a Board's actions be consistent with law. Here, petitioner argues that while the Board "may have the authority to amend its policies, *** it cannot do so with impunity where such action has the effect of reducing the tenured Petitioner's compensation." (Petitioner's Exceptions at 3)

Petitioner additionally asserts that the ALJ's determination that the Board's change in its interpretation of policy governing vehicle use by employees did not effect a reduction in his compensation "defies the factual findings made," including the testimony and documentary evidence supporting petitioner's declaration of the vehicle on his income tax

returns and his consideration of such vehicle as a "fringe benefit." (*Id.* at 3-4) In this connection, petitioner contends that the ALJ "has restricted her review of the issue in this case by limiting her interpretation of the term 'compensation' to the definition set forth at *N.J.S.A.* 18A:66-2d." (*Id.* at 5) Relying upon regulations promulgated by the Department of Treasury, petitioner contends that because the value of his personal use of the district owned vehicle was reported in regular, periodic installments in accordance with the Board's payroll cycle, it must be considered within the definition of "base salary" as per *N.J.A.C.* 17:3-4.1.[1]

In reply, the Board underscores that it has been given broad powers by the Legislature, pursuant to *N.J.S.A.* 18A:16-1[2], *N.J.S.A.* 18A:17-14.1[3], *N.J.S.A.* 18A:17-5[4] and *N.J.S.A.* 18A:11-1(c) to fix petitioner's compensation by a majority roll call vote. Moreover, the Board argues that the only administrator in its district with authorization for personal use of a vehicle is the Superintendent, "who has an express clause in his contract which was passed by a majority roll call vote of the Board." (Board's Reply at 3) The Board reasons that no Board member, including the Superintendent of Schools as an *ex-officio* member, can unilaterally fix petitioner's compensation. (*Id.*)

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[1] This regulation defines "base salary" as "the annual compensation of a member, in accordance with contracts, ordinances, resolutions, or other established salary policies of the member's employer for all employees in the same position, or all employees covered by the same collective bargaining agreement, which is reported in regular, periodic installments with the payroll cycle of the employer ***." *N.J.A.C.* 17:3-4.1

[2] This statute provides that "Each local board of education *** shall employ and may dismiss a secretary or a school business administrator to act as secretary *** and fix and alter their compensation and the length of their terms of employment." *N.J.S.A.* 18A:16-1.

[3] Concerning the appointment of school business administrators, *N.J.S.A.* 18A:17-14.1 provides that local board(s) of education may appoint a school business administrator by a majority vote of all members of the board, define his duties and fix his salary.

[4] This statute provides, in pertinent part, that each school board secretary shall be appointed by the board by a recorded roll call majority vote of its full membership and the board shall fix his compensation. *N.J.S.A.* 18A:17-5.

The Board further contends that the ALJ correctly determined that compensation is contractual, pursuant to *N.J.S.A.* 18A:66-2d, and it never made any determination, contractual or otherwise, that the use of a vehicle was to be included as "compensation" for petitioner. (*Id.* at 2) Further, the Board supports the ALJ's finding that petitioner's choice to pay taxes on the value of the use of the car is not binding on the Board, noting that "Board [m]ember Carolyn Nelson testified that no member of the Board knew that Petitioner paid taxes on the car." (*Id.* at 4) As to the itemization of the car on petitioner's pay stub, the Board points out that it was petitioner's office that was responsible for putting certain line items into employees' pay stubs, and as per the testimony of other Board employees who used cars, none had line items placed into their respective pay stubs. The Board reasons, therefore, that "this was not a blanket policy that was authorized by the Board, and that Petitioner through his office unilaterally decided to place this line item into his stub." (*Ibid.*)

Upon careful and independent review of the record herein, the Commissioner determines to modify the Initial Decision, as set forth below.

Initially, the Commissioner notes that the parties stipulate that petitioner, a school business administrator, acquired tenure in his position pursuant to *N.J.S.A.* 18A:28-5.[5] (Initial Decision at 2) Further, the Commissioner concurs with the ALJ that the central issue in this matter is whether the Board reduced petitioner's compensation in violation of applicable tenure statutes when it directed that all district-owned vehicles were to be returned to the Board

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[5] The Commissioner acknowledges that petitioner also contends that he has acquired tenure pursuant to *N.J.S.A.* 18A:17-2a. (Petitioner's Letter Brief, January 26, 2004 at 9) (See, for example, *Shenekji v. Passaic County Vo-Tech School Board of Education*, Commissioner Decision No. 292-88, November 18, 1988, *aff'd* as modified, State Board of Education, Dkt. No. 64-88, May 3, 1999)

premises at night, thus preventing petitioner from the use of such vehicle on a 24-hour basis, as he had enjoyed from the time of his employment in 1994 until June 28, 2001. The Commissioner additionally concurs with the ALJ that the testimony of the former Superintendent of Schools is not necessary to resolve this controversy (Initial Decision at 4); neither is it essential to address whether petitioner was acting in conformity with Board policy, practice or convention when he used the district-owned vehicles on a 24-hour basis.

It is undisputed that, pursuant to *N.J.S.A.* 18A:28-5, "teaching staff members" serving in any school district or under any board of education "shall not be dismissed or reduced in compensation" except as specifically prescribed under *N.J.S.A.* 18A:6-10(b). In this connection, the ALJ appears to rely on the definition of compensation as provided in the Teacher's Pension and Annuity Fund Law at *N.J.S.A.* 18A:66-2d to determine that petitioner's use of a district vehicle was not "compensation," since it was not specifically included in his contract (Exhibits P-7, P-8); consequently, the ALJ concludes that the Board properly exercised its discretionary authority pursuant to *N.J.S.A.* 18A:11-1, in adopting, or amending, its district-owned vehicle policy. The Commissioner finds it unnecessary to reach the ALJ's analysis, however, in light of a recent decision interpreting "compensation" within the intendment of the tenure laws.

In *Arlene C. Allen, et al. v. Board of Education of the Township of Clark, Union County*, Commissioner Decision No. 189-04, April 30, 2004, petitioners, tenured teachers formerly employed by the Union County Regional High School District No. 1, alleged that the respondent Clark School Board, their new employer when the Regional District was dissolved, violated their rights under *N.J.S.A.* 18A:6-31.5 and *N.J.S.A.* 18A:13-64 when it improperly calculated their compensation for sick leave upon retirement in that they were entitled to

compensation for sick leave accumulated while employed by the Regional School District at the rate provided in the collective bargaining agreement in effect at the time the days were accumulated. Additionally, the petitioners in *Allen* argued "that the word 'compensation' as used in the tenure statutes includes the payment for accumulated, unused sick leave upon retirement." *Allen, supra,* slip. op. at 14. Thus, they reasoned, respondent's failure to provide them with their requested sick leave payments constituted a "reduction in compensation" in violation of *N.J.S.A.* 18A:6-10.

Upon review of applicable case law, and, in particular, the State Board of Education's decision in *Stagaard v. Contini*, 97 *N.J.A.R.* 2d (EDU) 217, the Commissioner found that:

> it was implicitly determined that payment for accumulated sick leave was not entitled to protection or preservation pursuant to *N.J.S.A.* 18A:13-64 either as a tenure right or under the "other benefits" provision of that statute. First, the decision in *Stagaard* evidences that the State Board accepted that the tenure entitlement of the petitioners in that matter was satisfied by the preservation of their salary. Had the State Board found any other claimed right of petitioners in that matter to be one which was protected by tenure, they would have identified and included it. **Therefore, the Commissioner concludes that "compensation" for purposes of the protections provided by *N.J.S.A.* 18A:6-10 and *N.J.S.A.* 18A:13-64 has implicitly been defined as "salary."** *Allen, supra* at 44-45 (emphasis supplied)

Thus, notwithstanding that *Allen* addressed the issue of petitioners' tenure rights in conjunction with the "save harmless" provisions of *N.J.S.A.* 18A:13-64 and the case law arising therefrom, the Commissioner must likewise conclude in the instant matter that "compensation" for the purpose of *N.J.S.A.* 18A:28-5, implicitly defined in a related tenure statute as "salary," does not include the value of petitioner's prior use of a district-owned vehicle[6].

[6] This analysis would similarly apply to the protections provided in *N.J.S.A.* 18A:17-2(c).

Accordingly, the Initial Decision of the ALJ is modified as set forth above and the Petition of Appeal is dismissed.

IT IS SO ORDERED.[7]

COMMISSIONER OF EDUCATION

Date of Decision: July 12, 2004

Date of Mailing: July 13, 2004

[7] This decision 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.*