

GAIL SARCONE, :  
PETITIONER, :  
V. : COMMISSIONER OF EDUCATION  
BOARD OF EDUCATION OF THE : DECISION  
TOWN OF HACKETTSTOWN,  
WARREN COUNTY, :  
RESPONDENT. :

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SYNOPSIS

Petitioner disputed the respondent Board's authority to recoup any or all of a salary overpayment resulting from a purported error in calculating her salary increment for the 1994-95 school year; such mistake was carried forward, effecting salary calculations through the 2001-02 school year. Respondent Board discovered the error in March 2003, and sought to recover the alleged overpayments by freezing petitioner's salary at the then current level until the full amount of the overpayment is recovered.

The ALJ found, *inter alia*, that the parties incorporated the salary mistake in a subsequent negotiated agreement, and that tenure law prevents a board from reducing a tenured teacher's salary where both parties have "undertaken performance of the contract" and the teacher has already started to work. The ALJ concluded that: there was an overpayment totaling \$2,500 for school years 1994-95 and 1995-96; all salary calculations flowing from the base year 1996-97 forward were properly grounded in a duly negotiated agreement; and that by the time respondent Board sought to recover the overpayments in March 2003, the petitioner's negotiated salary for that year exceeded the salary level at which the salary was frozen. The ALJ ordered the Board to restore the petitioner to the salary of \$60,204 for the 2004-05 school year, and to reimburse the petitioner amounts improperly withheld for the 2002-03 and 2003-04 school years.

Upon a full and independent review of the record in this matter, the Commissioner initially rejects the ALJ's conclusion with respect to whether the Board may recoup \$2,500 in overpayments to petitioner for the 1994-96 school years, and emphasizes that there is no allegation that the Board delayed in acting to correct a salary overpayment once it was discovered, and no evidence that petitioner was prejudiced in pursuing her claim. The Commissioner finds that the equities lie with the Board's fiduciary responsibility to recoup the 1994-95 and 1995-96 salary overpayments in the amount of \$2,500. With respect to the issue of the effect of the contracted agreement incorporating the salary levels erroneously fixed in 1994-95 and 1995-96, the Commissioner finds that this issue does not fall within the scope of his jurisdiction. Accordingly, the Commissioner sustains the Board's action to recoup \$2,500 in overpayments to petitioner for the 1994-95 and 1995-96 school years and dismisses petitioner's contractual claims for lack of jurisdiction. This matter is hereby forwarded to the PERC for action as that agency deems appropriate.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

OAL DKT. NO. EDU 5952-03  
AGENCY DKT. NO. 165-5/03

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The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The Hackettstown Board of Education’s (Board) exceptions and petitioner’s reply thereto were submitted in accordance with *N.J.A.C.* 1:1-18.4 and were duly considered by the Commissioner in reaching his determination. To the extent these submissions essentially reiterate arguments raised before the ALJ, they are not recounted herein.

In its exceptions, the Board avers, *inter alia*, that the Administrative Law Judge (ALJ) failed to consider the applicable case law on recoupment and asserts that the older cases relied on by the Administrative Law Judge (ALJ) are no longer “good law.” (Board’s Exceptions at 7) The Board claims that the decision which should control in this case is the State Board determination in *Carol DeLyon v. Board of Education of the Borough of Old Tappan, Bergen County*, decided by the State Board, February 2, 2000, in that the facts in *DeLyon* are analogous to those herein, noting that the Board in that matter had erroneously placed Ms. DeLyon on the wrong step of the salary guide and did not discover the error until some

15 months after the error had been made. (*Id.* at 8) The Board contends that the State Board decision in *DeLyon* “permits a board of education that made a mistake with respect to the salary payment for a tenured teacher to rectify that mistake by freezing the teacher’s salary, so as to recoup the prior salary overpayment \*\*\* until the teacher’s salary is at the level it would have been absent a mistake.” The Board further complains that the *DeLyon* decision was ignored by the ALJ, notwithstanding its prevailing precedent and the extensive analysis provided in the parties’ briefs. (*Id.* at 10)

Moreover, the Board reasons, it appears that there were two factors relied on by the ALJ in denying it relief. (*Id.* at 11) One factor was the span of time between the mistake and the Board’s freezing of petitioner’s salary to rectify the mistake. (*Ibid.*) The Board observes that nothing was submitted to the ALJ for the proposition that the mistake was anything other than a good faith error and the Board can only guess at the ALJ’s reasoning, adding that there is no support in case law that rectification of a salary mistake cannot occur if there is too long a gap between the mistake and the attempted rectification. (*Id.* at 11-12) Additionally, the Board notes its agreement that a teacher’s salary may not be reduced to rectify a mistake and states that it can only assume that the ALJ mistakenly equates the freezing of an employee’s salary with a reduction in salary. (*Id.* at 12) The Board further asserts that “[r]eduction of salary in this context, of course, means actually paying the teacher less than the teacher had been making the year before,” which is prohibited by *Harris, supra*; *DeLyon, supra*; and *Stockton, supra*. (*Id.* at 12-13) However, the Board contends, these same cases also state that “freezing a salary is *not* reducing one’s salary in violation of *N.J.S.A.* 18A:28-5 when it is done in order to rectify an agreed-upon mistake.” (emphasis in text) (*Ibid.*)

The second factor relied on by the ALJ in denying it relief, the Board submits, was the finding that the mistake in the salary figure was ratified in the 1996-99 collective bargaining agreement and, thus, no correction of this mistake was permitted. (*Id.* at 13) The Board argues that the Commissioner does not have jurisdiction to decide this matter in that jurisdiction on this issue rests with the Public Employment Relations Commission (PERC), a fact the Board claims was acknowledged by petitioner when she filed the Unfair Practice Charge with PERC, which has been held in abeyance pending the resolution of petitioner's appeal under the education laws. (*Ibid.*) The Board notes that petitioner addresses the rescission argument concerning the collective bargaining agreement in her initial brief and refers to it as being resolved "in the appropriate forum." (*Ibid.*) The Board also takes issue with the ALJ's ruling on what it contends is a labor relations issue arising under PERC law, contending that -- notwithstanding the ALJ's ruling on the labor relations question of the Board's 2003 freezing of petitioner's salary, which found that it represented a reduction or rescission of her salary as fixed in the 1996-1999 collective bargaining agreement -- this question is not before the Commissioner. (*Id.* at 15)

Additionally, the Board questions, "even if the Court were jurisdictionally correct in holding that Respondent could not fix the salary mistake because the mistake had been memorialized in a 1996-1999 collective bargaining agreement, why does that conclusion preclude the Board from remedying a mistake before and after that agreement?" (*Ibid.*) The Board argues that "the ALJ provided no legal support for his conclusion that, even if petitioner's salary were fixed at the contractual amount for the 1998-1999 school year, that amount was immutable and the mistake represented therein could never be remedied" and asserts that this

conclusion is not only beyond the jurisdictional authority of the ALJ, but also completely unsupported in the Initial Decision. (*Id.* at 15-16)

In her exceptions, petitioner contends, *inter alia*, that the ALJ's determination is entirely consistent with the State Board's decision in *DeLyon*, arguing that under no theory of the case can she be deemed to have been overpaid in terms of her placement on the salary guide because she was paid precisely what the .5 school psychologist was to be paid between 1996 and 1999. (Petitioner's Exceptions at 4) Petitioner further points out that she was paid according to the amounts established in the 1996-99 collective bargaining agreement and, if the 1996-97 salary is used as the base, all the salaries subsequent to 1999 are also correct. (*Id.* at 4-5)

With respect to the Board's rescission argument, petitioner notes that the Board has not moved for reformation or rescission of the 1996-1999 collective bargaining agreement and claims that there are only two bases for reformation of the contract: mistake or fraud. (*Id.* at 6) Petitioner points out that there has been no claim of fraud and there was no "mutuality of mistake" because the mistake was the product of an allegedly erroneous calculation that was never specifically agreed upon in any prior negotiations or written agreement. (*Ibid.*)

Upon a thorough and independent review of the record in this matter, the Commissioner rejects the Administrative Law Judge's conclusion with respect to whether the Board may recoup the \$2,500 in overpayments to petitioner for the 1994-95 and 1995-96 school years. As found by the State Board in *DeLyon, supra*,

When a district board makes an error in the placement of a tenured staff member on the negotiated salary guide or incorrectly establishes such employer's salary under the terms of that guide, action by the board to freeze the staff member's salary until such time as the overpayment is recouped does not constitute an impermissible reduction in compensation under the tenure laws. (citations omitted) (slip op. at 4)

As noted by the ALJ, “[i]t is clear from the testimony and documentary evidence adduced, that there was a miscalculation of the base salary, caused by the addition of the full off-guide amount of \$2,500 rather than the .5 amount of \$1,250.” (Initial Decision at 6) As a result, the additional amount of \$1,250 was included for each subsequent year. (*Ibid.*) Accordingly, for each of the school years of 1994-95 and 1995-96, petitioner received an overpayment of \$1,250, for a total of \$2,500. Although petitioner argues that it is fundamentally unfair to permit the Board to recoup these overpayments in that “there is no case which allows recovery for nine years” (Petitioner’s Initial Brief at 37-38), petitioner has presented no evidence that the Board unreasonably delayed or was negligent in pursuing its claim nor has petitioner established that her defense was disadvantaged by her reliance on the Board’s conduct. At the hearing, the board secretary testified that the salary error was discovered in the 2002-03 school year during contract negotiations (*Tr.* at 110), and by letter of February 27, 2003, petitioner was advised of the overpayment. (Petition of Appeal at 2-3, No. 5) On March 31, 2003, the Board passed a resolution freezing petitioner’s salary until the salary overpayments were recouped. (*Id.* at 3, No. 6)

*Black’s Law Dictionary, seventh edition*, at 879, defines *laches* as an “unreasonable delay or negligence in pursuing a right or claim – almost always an equitable one – in a way that prejudices the party against whom relief is sought.” *See, also, Enfield v. FWL, Inc.*, 256 *N.J. Super.* 502, 520-522 (Ch. Div. 1991). Given the specific facts in this matter where there is no allegation that the Board delayed in acting to correct a salary overpayment once it was discovered, albeit nine years later, and no evidence that petitioner was prejudiced by the Board’s negligence in pursuing it claim, the Commissioner declines to apply *laches* and finds, instead,

that the equities lie with the Board's fiduciary responsibility in its management of public funds to recoup the 1994-95 and 1995-96 salary overpayments in the amount of \$2,500.

With respect to the issue of the effect of the contracted agreement incorporating the salary levels erroneously fixed in 1994-95 and 1995-96, the Commissioner finds that this issue does not fall within the scope of his jurisdiction. Therefore, this decision, and the full record herein, shall be transmitted to the PERC, where the issue is currently pending.

Accordingly, as set forth above, the Commissioner sustains the Board's action to recoup \$2,500 in overpayments to petitioner for the 1994-95 and 1995-96 school years and dismisses petitioner's contractual claims for lack of jurisdiction. This matter is hereby forwarded to the PERC for action as that agency deems appropriate.

IT IS SO ORDERED.\*

COMMISSIONER OF EDUCATION

Date of Decision: May 26, 2005

Date of Mailing: May 26, 2005

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\* 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*