#261-09 (OAL Decision: http://lawlibrary.rutgers.edu/oal/html/initial/edu09131-08_1.html)

SHARON FRANCIN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF MAYWOOD, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner – a tenured teacher holding an instructional certificate with an endorsement as a Teacher of Physical Education – was employed by the respondent Board from the 2000-2001 through the 2007-2008 school years as a physical education teacher. From 2000 through 2006, she was also assigned to teach Health. Petitioner's employment was terminated in June 2008 after the Board voted, for reasons of economy and efficiency, to create the position of Health and Physical Education Teacher, which requires endorsements in both subject areas. Petitioner contends, *inter alia*, that her tenure and seniority rights were violated pursuant to *N.J.S.A.* 18A:28-5 and *N.J.A.C.* 6A:32-5.1. The Board asserts that petitioner was terminated because she did not hold an endorsement to teach Health, and had failed to take the necessary steps to obtain the required certification despite communications from the District that she needed to do so. Both parties filed motions for summary decision.

The ALJ found that: the Board's action to abolish the position of Physical Education Teacher in favor of the position of Teacher of Physical Education and Health was in compliance with *N.J.S.A.* 18A:28-9 thru -13, and was not arbitrary, capricious or unreasonable; the Board advised petitioner to obtain the required endorsement to teach health classes almost two years before the Board eliminated the Physical Education Teacher job title; and the Board's actions in abolishing the Teacher of Physical Education position in favor of the new position of Teacher of Health and Physical Education was rooted in public economy, not discrimination. Accordingly, respondent's motion for summary decision was granted and petitioner's cross motion was denied. The ALJ ordered that petitioner's appeal be dismissed with prejudice.

The Commissioner adopted the Initial Decision of the OAL as the final decision in this matter. The petition was dismissed.

August 20, 2009

OAL DKT. NO. EDU 9131-08
AGENCY DKT. NO. 179-6/08

SHARON FRANCIN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF MAYWOOD, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

Petitioner is a certified physical education teacher who earned tenure in respondent's district. Her employment was terminated when the Board of Education voted to create the position of Physical Education/Health Instructor and require dual certification in Physical Education and Health as a qualification for all employees who teach Physical Education or Health. Upon reviewing the record, the Initial Decision of the Office of Administrative Law (OAL), petitioner's exceptions and respondent's replies thereto, the Commissioner concurs with the administrative law judge (ALJ) that respondent's actions in creating the above referenced position – for which petitioner is not properly certified and in terminating petitioner's employment – were not arbitrary, capricious or unreasonable.

The factual background to this controversy, as stipulated by the parties is, in brief, as follows. Sharon Francin has a teaching certificate with an endorsement for Physical Education but not for Health. She gained tenure in Maywood in or about September of 2003. From the onset of her employment in 2000 through the 2005-2006 school year, petitioner

taught Physical Education and Health. The record indicates that it was, in fact, a long-standing practice in respondent's district for Physical Education teachers to also teach Health.

In or about August 2006, the respondent Board was advised by representatives of the State Department of Education that petitioner's teaching certificate did not authorize her to teach Health; it was only appropriate for the teaching of Physical Education. Respondent consequently made adjustments to petitioner's schedule and that of other teachers so that petitioner no longer taught Health. The record indicates that Francin was told in a December 2006 evaluation that she should verify which courses would be needed for her to obtain teaching certification for Health, and that she was advised in at least two other communications from administrators – in August 2006 and December 2007 – that the district expected her to pursue a Health endorsement to her teaching certificate.

On April 28, 2008, respondent adopted Resolution P. 137 (Summary Decision Exhibit J-3) creating the position of "Health and Physical Education Teacher." A true copy of the new job description for the position referenced in the resolution was annexed to the summary decision papers as Exhibit J-4. On May 6, 2008, relying upon Resolution P. 137, respondent's superintendent of schools wrote to petitioner advising her that, since she had failed to secure an endorsement to teach Health, she would not be employed by respondent after June 30, 2008.

At the time that petitioner's employment was terminated, respondent employed three other teachers who are certified in both Physical Education and Health: Jean Kosits – who had more seniority than petitioner; Keith Timmons – tenured; and David Wells – untenured. As of September 2008, respondent hired Michael Halligan, who is certified to teach both Health and Physical Education.

It is undisputed that a local board of education is entitled by statute to abolish a position "for reasons of economy or because of reduction in the number of pupils or of change in the administrative or supervisory organization of the district or for other good cause." *N.J.S.A.* 18A:28-9. In the Initial Decision, the ALJ cited to *Donald Wollman v. Board of Education of the City of Trenton, Mercer County* (Commissioner Decision #140-95), *aff'd.* in pertinent part, State Board Decision #62-95 (January 7, 1998), for the proposition that a petitioner who challenges the board's action must prove that the board's decision was arbitrary, capricious or motivated in bad faith.

In the OAL, petitioner apparently contended that respondent's actions constituted "bad faith" because the Board abolished the position of Physical Education Teacher, while retaining a less senior teacher in a position with substantially the same responsibilities that she could fulfill as a fully credentialed and tenured teacher of Physical Education. This contention referred to the fact that although all the remaining Maywood physical education teachers were dually certified to teach both Health and Physical Education, Timmons' schedule in the first half of the 2008-2009 school year included no Health classes.[1]

In considering petitioner's argument, the ALJ looked to *Caldwell-West Caldwell Educ. Ass'n v. Caldwell-West Caldwell Bd. of Educ.,* 180 *N.J. Super*. 440 (App. Div. 1981), wherein the education association challenged several changes in teaching assignments implemented within the school district. In that case, the Appellate Division explained that a board must have "flexibility and discretion . . . in shaping educational policies and fulfilling its educational obligations," and must have some flexibility in making managerial decisions. *Id*. at 447. The court further stated:

[1] Petitioner also contended that the district's reorganization of Timmons' schedule in February 2009 to include Health classes was the result of its recognition that it improperly terminated petitioner when there was a job that petitioner could have performed.

> Unless there is room in the joints for modification and adaptation necessary to make the system work, educational machinery would become stalled in endless dispute, grievance procedures, arbitration, unfair labor practice charges, hearings, reviews, and appeals.
> [*Ibid*.]

The ALJ concluded that petitioner's position did not properly recognize that unlike the circumstances presented in the cases she cited – *e.g. Lingelbach* v. *Hopatcong Bd. of Educ.*, 1984 *S.L.D.* 1955, *McGlynn v. Sea Girt Bd. of Educ.*, 93 *N.J.A.R.*2d. (EDU) *and Dennery v. Passais County Regional High School District Bd. of Educ*., 131 *N.J.* 626 (1993), where positions were created that were substantially similar to the abolished positions – the positions involved in the instant case are distinct, separately recognizable, and require different endorsements. The ALJ referenced *N.J.A.C.* 6A:9-9.2(a)(2) which lists the separate endorsements relating to Health and/or Physical Education and *N.J.A.C.* 6A:9-11.8 which sets forth the course requirements for a dual Health/Physical Education endorsement. Further, the ALJ viewed petitioner's failure to acquire an endorsement to teach Health as an absolute bar to her employment in the newly created position. Thus, the findings of bad faith in the above cited cases were based upon circumstances not present in this matter.

To further support the reasonableness of respondent's decision to require dual certification in Health and Physical Education, the ALJ pointed to the history in the district of teachers, including petitioner, being required to provide instruction in both Health and Physical Education. Petitioner was only moved into a Physical Education-only position after representatives of the State Department of Education advised respondent that petitioner's teaching certificate did not authorize her to teach Health. At that point in time petitioner was retained, but told to obtain the endorsement to teach Health classes. The ALJ concluded that the

Board's subsequent action of creating the Health and Physical Education position reflected its long-time preference for the dual teaching position, and was reasonably meant to achieve greater efficiency and economy by employing multidisciplinary teachers.

In her first exception, petitioner complains that the cases that the ALJ cited concerning a petitioner's burden to prove that a board of education's action is arbitrary or driven by bad faith were inapposite to the fact pattern in the instant case and that the ALJ was incorrect in concluding that it is necessary for her to meet that burden. While the Commissioner notes that the ALJ could have relied on cases with fact patterns closer to the matter at hand, she nonetheless rejects the petitioner's suggestion that she need not show arbitrariness, unreasonableness or bad faith by respondent.

The consolidation of positions in a school district, such as the consolidation that was mandated by respondent, is one of many actions which a board has authority to make. *Dunellen Board of Education v. Dunellen Education Asso.*, 64 *N.J.* 17, 30 (1973). If that action is challenged, the challenger must show that under the circumstances of his or her case, the action was arbitrary, capricious, unreasonable or in bad faith. For example, in *Dennery, supra,* a consolidation of supervisory positions – and an accompanying requirement of dual certification for the newly created position – was at issue. The Supreme Court applied the above articulated standard and was "unable to conclude . . . that the requirement of two certificates to qualify for a single education position is anomalous, arbitrary, or irrational. Nor is it unlawful or invalid." *Dennery v. Bd. of Educ*., 131 *N.J.* 626, at 638-39. Thus, the action of the instant respondent in combining the teaching of Health and Physical Education and in requiring dual certification of teachers of those subjects is valid unless petitioner can prove arbitrariness, unreasonableness or bad faith.

The remaining issue in petitioner's first exception is her contention that the ALJ failed to recognize that her tenure rights must be honored "even when a board claims goals of economy or educational policy." (Petitioner's Exceptions at 3) For the proposition that her tenure rights were violated by respondent she cites *Bednar v. Westwood Bd. of Ed.*, 221 *N.J. Super* 239 (App. Div. 1987), *certif. denied* 110 *N.J.* 512 (1988), in which a non-tenured art teacher was retained in a full-time job while the hours of Bednar – a tenured teacher certified to instruct in all grade levels of art – were reduced. The Board's rationale for its action, *i.e.*, that the untenured teacher had more experience teaching at the Junior High School level, was rejected by the Appellate Division which explained that:

> Seniority is a statutory concept created by Chapter 28 of Title 18A, a chapter which deals only with the various aspects of tenure. *Old Bridge Tp. Bd. of Educ. v. Old Bridge Educ. Ass'n.*, 98 *N.J.* 523, 531 (1985). It does not purport to create employment rights for non-tenured employees. This court has thus held that non-tenured teachers whose contracts are not renewed by reason of a RIF are not entitled to the reemployment rights conferred by Chapter 28. *Union Cty. Bd. of Ed. v. Union Cty. Teach. Assn.*, 145 *N.J. Super.* 435 (App Div. 1976), certif. den. 74 *N.J.* 248 (1977). Chapter 28 surely does not contemplate use of the concept of seniority to justify retaining a non-tenured teacher in a position within the certificate of a dismissed tenured teacher. *Capodilupo v. West Orange Tp. Ed. Bd., supra*.

Thus, the Commissioner cannot agree that *Bednar* is apposite to the instant case. In that case the tenured petitioner possessed the appropriate certification for the available full time position. In the case at hand, petitioner does not hold the dual certification necessary for the Health/Physical Education teaching position. In other words, petitioner can no longer be considered qualified for a vacancy because there is no longer a position calling for certification solely in Physical Education, and she does not possess the dual certification necessary for the available Health/Physical Education positions in Maywood**.** *See, Francey v. Board of Education*

of the City of Salem, Salem County, 286 *N.J. Super.* (App. Div. 1996) (The scope of the position to which tenure protection attached was initially limited by the scope of the certificate the staff member was required to possess in order to satisfy the qualifications for such employment [citing *Capodilupo v. West Orange Bd. of Ed*, 1986 *S.L.D.* 3010, *aff'd*, 218 *N.J. Super.* 510 (App. Div. 1987), *certif. den.*, 109 *N.J.* 514 (1987), p.5]).

In summary, respondent's action in creating a new, consolidated position requiring dual certification – which petitioner does not have – was proper, so long as it was not arbitrary or unreasonable under the facts of this matter, and as long as no bad faith was involved. *See, e.g., Dennery, supra*; *Kopko v. Board of Education of the Borough of Carteret, Middlesex County,* Commissioner Decision No. 570-97, October 30, 1997; *Yucht v. Board of Education of the Borough of Milltown, Middlesex County,* State Board Decision #84-97, July 5, 2000. Petitioner did not meet her burden to prove either the existence of arbitrariness and unreasonableness or the perpetration of bad faith by respondent.

Petitioner's second exception to the Initial Decision concerns the ALJ's failure to address her contention that respondent erred in not terminating her by name via a resolution based upon a roll-call vote. This alleged error by respondent, in petitioner's view, entitles her to reinstatement and back pay and benefits. In support of this position, petitioner cites to *N.J.S.A.* 18A:27-4.1(a):

> A board of education shall appoint, transfer or remove a certificated or non-certificated officer or employee only upon the recommendation of the chief school administrator and by a recorded roll-call majority vote of the full membership of the board. The board shall not withhold its approval for arbitrary and capricious reasons.

The Commissioner finds that no harmful error results from the absence in the Initial Decision of a specific response to this argument by petitioner. The petitioner's separation

from respondent's district was the result of the termination of a position, in keeping with the rules regarding reductions in force. *N.J.S.A.* 18A:28-9. It was not a specific termination of petitioner. In point of fact, had petitioner possessed the required dual certification, she would have remained employed in Maywood.

The fact that petitioner's colleague, Timmons, did not receive a letter like the Maywood Superintendent's May 6, 2008 letter to petitioner advising her of the elimination of the position of Physical Education Teacher, flows from the fact that Timmons' dual certification in Health and Physical Education rendered him qualified to fill the new, consolidated position. The fact that Timmons happened to teach only Physical Education classes for a period of time after the creation of the new consolidated position is not germane to the question of whether he held the certification required for the new position.

In petitioner's third exception she describes the 2008-2009 teaching schedules of two non-tenured teachers – David Wells and Michael Halligan. These two instructors, together, were teaching seven periods of Physical Education per day in Maywood during the 2008-2009 school year. Petitioner contends that the schedules show that there was sufficient need for Physical Education classes to continue petitioner's employment. Citing to case law relating to tenure rights, petitioner argues that respondent was obligated to retain her to teach the above-mentioned Physical Education classes instead of hiring a new, non-tenured teacher.

Similarly, petitioner references the 2008-2009 schedule of Keith Timmons, who taught only Physical Education classes until February 2009, when he was assigned Health classes. At the time of her separation from service petitioner admittedly had more experience than Timmons teaching Physical Education in respondent's district, and thus argued that her

seniority in that subject was superior. This, petitioner reasoned, required respondent to retain her over Timmons.

Once again, petitioner ignores respondent's previously discussed authority to create positions which will provide the managerial flexibility (including the discretion to schedule work as they see fit) discussed in *Caldwell-West Caldwell Educ. Ass'n v. Caldwell-West Caldwell Bd. of Educ., supra,* 180 *N.J. Super.* at 447. And without the required certification, petitioner has no right to employment in those positions.

Petitioner's reliance on *Miles v. Board of Education of the Borough of Watchung, Somerset County*, 1984 *S.L.D.* 1058 (Commissioner of Education) *aff'd.* 1984 *S.L.D.* 1072 (State Board of Education), *aff'd.* 1985 *S.L.D.* 1969 (App. Div. 1985); *Prysinanzny v. Board of Education of the Borough of Sayreville*, OAL DKT. NO. EDU 2722-79 (March19,1980); and *Viemeister v. Board of Education of the Borough of Prospect Park,* 5 *N.J. Super.* 215 (App. Div. 1949) is misplaced. In those cases the petitioners were restored to employment because they were tenured and held the certification required for the positions in question. More specifically, in *Miles*, the tenured petitioner whose work hours had been reduced, was restored to a full-time schedule because she possessed the certification necessary for the position of full-time vocal music teacher. Similarly, in *Prysinanzny*, the petitioner was restored to work as a social studies teacher because she had the proper certificate and endorsement for the position, notwithstanding the fact that there were less senior teachers in the district who had additional endorsements which were superfluous to the job requirements. In *Viemeister,* a tenured principal was installed into the new position of "Teaching Principal" because he was qualified to be both a principal and a teacher.

Petitioner's fourth exception poses a novel argument. Without any evidential proffer, petitioner maintains that no economy was achieved in respondent's district during the 2008-2009 school year by the creation of the new Health/Physical Education position. Bootstrapping on that assertion, petitioner reasons that respondent's creation of the new position was fraudulent.[2] (Petitioner's Exceptions at 24- 25) This line of argument does not persuade the Commissioner, both because it is not grounded in evidence and because there is no authority in school law for the proposition that a board of education's action may be deemed arbitrary, irrational or in bad faith based on a retrospective evaluation of its success in accomplishing the intended purpose. Moreover, even if it were appropriate to impose such an unusual standard, it is doubtful that an evaluation could be fairly made solely on the basis of the first year of implementation of the action or policy.

There are ancillary arguments in petitioner's fourth exception. First, petitioner suggests that Timmons' teaching schedule of only Physical Education classes at the beginning of the 2008-2009 school year was proof that the position of Physical Education teacher had not been abolished, and that she consequently should have been retained to fill that position. That argument fails insofar as petitioner confuses schedules with positions. Second, petitioner asserts that there had never been a formal written job description for 'Physical Education Teacher' in respondent's District and that the absence of same necessarily signified that such a position could not have been abolished. This argument fails, since the position of Physical Education Teacher clearly existed *de facto* in Maywood, whether or not there was a formal written job description. Third, petitioner contends that the wording of the job description for the new Health/Physical

[2] Petitioner also claims that because during the 2008-2009 school year none of respondent's teachers taught both Health and Physical Education in the same class to the same students, the goal of multidisciplinary curriculum, which served as one of the rationales for the creation of the new position, was also "a fraud." (Petitioner's Exceptions at 25)

Education position (J-4) allowed persons with only an endorsement in Physical Education to qualify for the position. She relies on the following text in a footnote on the first page of the job description:

> This sample reflects the endorsement for a teacher eligible to teach both health and physical education in all grades. Teachers may be eligible to teach health or physical education with the appropriate endorsement.

Petitioner's interpretation of the foregoing ambiguous language is unpersuasive, in light of the fact that the first qualification listed on the "Health and Physical Education Teacher" job description unequivocally requires "Valid New Jersey Instructional Certificate and Health and Physical Education Endorsement or eligibility." Moreover, this dual certification requirement is paralleled in the first line item of the "Performance Responsibilities" section of the job description where it states that a teacher in the position would be responsible for "teaching skills in comprehensive health and physical education." (J-4, page 1)

Petitioner begins her fifth exception by alleging that the Initial Decision contains no analysis of petitioner's claim that bad faith underlay respondent's creation of the new Health/Physical Education position. The Commissioner notes, however, that the issue was squarely addressed in the Initial Decision on page 13 – particularly in the second full paragraph – and rejects petitioner's assertions about bad faith for essentially the same reasons articulated by the Administrative Law Judge.[3]

The balance of petitioner's fifth exception reiterates arguments made in prior exceptions – particularly the fourth exception. The Commissioner finds nothing therein that

[3] Petitioner's comments about not falsifying her credentials are not germane to the issue of whether she holds the right ones for the position at issue in this case. Nor is her statement that she taught Health [without a proper endorsement] because she was told to, and no problems were created by her exclusive teaching of Physical Education in 2007-2007 and 2007-2008. What is germane is the fact that respondent advised petitioner to look into obtaining a Health endorsement, but in the two years subsequent to being so advised petitioner chose not to do so.

persuades her that bad faith drove respondent to create a position requiring dual certification in Health and Physical Education, particularly in light of the district's history of assigning teachers to instruct both subjects. Further, there is nothing in the record that would suggest that respondent's action was precipitated by the specific intent to terminate petitioner from her employment. To the contrary, it is undisputed that at least three of petitioner's supervisors advised her – immediately after being informed by the State Department of Education that petitioner was unqualified to teach Health and at least two years prior to respondent's creation of the new Health/Physical Education position – to seek the Health endorsement to her instructional certificate which, if pursued, might have avoided the instant controversy. *See*, Joint Exhibits J-27, J-28, J-29, annexed to the parties' Stipulation of Facts.

In summary, for the reasons expressed above, the Commissioner adopts the Initial Decision as the final decision in this case. The petition is hereby dismissed.

IT IS SO ORDERED.[4]

COMMISSIONER OF EDUCATION

Date of Decision: August 20, 2009

Date of Mailing: August 20, 2009

[4] This decision may be appealed to the Superior Court, Appellate Division, pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1).