#325-11 (OAL Decision: http://lawlibrary.rutgers.edu/oal/html/initial/edu04504-11_1.html)

JOSEPH WONSETLER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF WOODBURY, GLOUCESTER COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner – formerly a custodian employed in respondent's district under a series of one year contracts – challenged the Board's termination of his employment in the middle of his annual contract. Petitioner contended that following his termination he was denied a written statement of reasons and an appearance before the Board, contrary to his right to such an appearance pursuant to *Donaldson v. Board of Education of North Wildwood*, 65 *N.J.* 236 (1974). The Board argued that petitioner had failed to state a claim upon which relief can be granted, as no such right to an appearance before the Board exists. The matter was transferred to the Office of Administrative Law (OAL) as a contested case, and both parties filed motions for summary decision.

The ALJ found, *inter alia*, that: the essential facts in the matter were not in dispute, and the matter was ripe for summary decision; resolution of this matter lies in the application of the statutory provisions of *N.J.S.A.* 18A:27-4.1 (a) and (b); the plain language of *N.J.S.A.* 18A:27-4.1 (a) applies to matters involving a Board decision to remove an employee who has no tenure protection, and includes no requirement for any notification of the recommendation to remove, nor does it contain any language incorporating a right to a written statement of reasons for termination or an informal appearance before the Board; these rights *are* included in the language of subsection (b) of the above, which deals specifically with non-renewal determinations; and accordingly, there is no support for applying the principles of *Donaldson, supra*, in cases involving removals or terminations. The ALJ ordered the petition dismissed.

Upon full review and consideration, the Commissioner concurred with the ALJ that petitioner's rights were not violated when the Board terminated his employment pursuant to *N.J.S.A.* 18A:27-4.1 (a), without providing him with a written statement of reasons or a *Donaldson* hearing. Accordingly, the Commissioner adopted the Initial Decision as the final decision in this matter.

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.

August 17, 2011

OAL DKT. NO. EDU 4504-11
AGENCY DKT. NO. 54-3/11

JOSEPH WONSETLER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF WOODBURY, GLOUCESTER COUNTY,	:	DECISION
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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 – filed in accordance with the requirements of *N.J.A.C.* 1:1-18.4 – were fully considered by the Commissioner in reaching his determination herein.

Petitioner challenges the Administrative Law Judge's (ALJ) conclusion – on page 7 of his decision – that "[w]hile there may be much to say for the inclusion of *Donaldson*[1] rights in removal/terminations…, in the face of [*N.J.S.A.* 18A:27-4.1] (a) and (b) by the Legislature, there is no support for applying *Donaldson* to this sort of termination." In so concluding, petitioner charges, the ALJ failed to recognize the legislative history which resulted in the adoption of *N.J.S.A.* 18A:27-4.1 in 1995. (Petitioner's Exceptions at 1)

Petitioner advances that in 1974, *Donaldson*, *supra,* set forth the guiding principle that an employee who is not retained should have an opportunity for an informal appearance before the Board. Such right, petitioner maintains, exists independent of any statutory enactment. He charges that what happened in 1994 and 1995 is no more than a legal red herring in this matter.

[1] *Donaldson v. North Wildwood Bd. of Ed.*, 65 *N.J.* 236 (1974)

Specifically, he avers, in 1994 the Appellate Division overturned the State Board of Education and ruled that a local school board had the authority to employ a teacher who had not been recommended by the chief school administrator.[2] In 1995 the Legislature reacted, petitioner maintains, by adopting *N.J.S.A.* 18A:27-4.1, which – according to the sponsor's statement to the legislation – was to correct the law as a consequence of this Appellate Division decision. Therefore, petitioner contends – notwithstanding that this later legislative enactment in some measure "parrots the rights set forth by the New Jersey Supreme Court in *Donaldson*" – the enactment of *N.J.S.A.* 18A:27-4.1 did not serve to abrogate *Donaldson,* but was only intended to clarify the Appellate Division in *Rotondo*. Because *Donaldson* did not interpret a right granted by statute, petitioner argues, the Legislature – through the enactment of this statute – did not or could not abrogate the right conferred by *Donaldson.* (*Id*. at 2)

In reply, the Board proposes that – irrespective of the petitioner's reliance on *Donaldson – N.J.S.A.* 18A:27-4.1 embodies all the protection a terminated or non-renewed school employee is entitled to. Citing the New Jersey Supreme Court's decision in *Leang v. Jersey City Bd. of Educ.*, 198 *N.J.* 557, 578-79 (2009) – wherein the Court stated:

> Those statutory rights (pursuant to *N.J.S.A.* 18A:27-3.2 and *N.J.S.A.* 18A:27-4.1) are the embodiment of the process created by the Legislature through which plaintiff could seek to challenge and to be heard about the Board's non-renewal decision…

– the Board posits that it is clear that school employees who are transferred or removed pursuant to *N.J.S.A.* 18A:27-4.1 (a) are entitled to only those rights enunciated by the statute, which does not include a hearing for a terminated employee. The Board argues that, significantly, the Donaldson Court did not contemplate encroaching on the role of the Legislature, as evidenced when it stated:

> It must be borne in mind that our Legislature has not at any time said that no reasons need be given when a nontenured teacher is not rehired. Bills bearing generally on the subject have been introduced periodically but **thus far no pertinent legislation has been enacted; in the circumstances it is clear that no controlling inference as to intent may be drawn from the legislative silence.** (65 *N.J.* at 240, emphasis added)

[2] *Rotondo v. Carlstadt-East Rutherford Regional High School District*, 276 *N.J. Super.* 36 (App. Div. 1994).

Rather, the Board proposes, it is obvious that the Court intended its holding to be a gap-filler for law that had been considered by the Legislature but not yet enacted. Subsequently, it points out, the Legislature broke its silence and closed the gap by enacting a statutory provision which addresses separately the termination of an employee and the non-renewal of an employee, according different procedural rights to each. (Board's Reply Exceptions at 1-2, quotation at 2)

Wholly irrelevant, the Board argues, is petitioner's allegation that the sponsor's statement to *N.J.S.A.* 18A:27-4.1 indicates that this provision was designed to correct the law as a consequence of the Appellate Division's decision in *Rotondo, supra.* The plain language of this statute, it avers, is abundantly clear:

> [s]ubsection (b) of [this provision] addresses the renewal or nonrenewal of employees and describes the rights of employees subject to nonrenewal: notice, a written statement of reasons, and a formal appearance before the Board. Subsection (a), which addresses the removal or termination of employees, does not articulate the same procedural rights as those articulated in subsection (b). The plain language of the statute "occupies the field" previously addressed by *Donaldson*, compelling the conclusion that the petitioner, as a terminated employee, is not entitled to a hearing before the Board. (*Id.* at 2-4, quotation at 4)

Finally, the Board advances – even assuming, *arguendo*, that the Commissioner were to determine that petitioner was entitled to a hearing pursuant to *N.J.S.A.* 18A:27-4.1 – petitioner would not be entitled to the relief he seeks here, *i.e.*, back pay and attorney's fees. It cites to *Roseann E. Brown v. Board of Education of the City of Camden, Camden County and Annette D. Knox, Superintendent*, Commissioner Decision #262-05, decided July 22, 2005, which in turn cited to *Dore v. Bd. of Educ. Of Bedminster Twp., Somerset County*, 185 *N.J. Super.* 447, 455 (App. Div. 1982), for the proposition that "[a] school board's lack of strict compliance with *N.J.S.A.* 18A:27-4.1 is not sufficient reason to order the board to provide the employee with a financial reward." (*Id.* at 6) Moreover, it points out, even though *N.J.S.A.* 18A:27-4.1(b) sets forth a procedure to be utilized when non-renewing employees, it nonetheless does not provide any penalty should a board fail to follow these procedures. The Board, therefore, urges that because the

Legislature has conferred no power to impose a penalty for non-compliance with this statute, the Commissioner does not have independent authority to either reinstate or impose a financial penalty on the Board. Consequently, it proffers, even if petitioner were to prevail in this matter, he would be entitled to no greater relief than the award of a hearing. (*Id.* at 6-7)

Upon full review and consideration, the Commissioner – finding petitioner's exception arguments without merit – concurs with the Administrative Law Judge, for the reasons clearly presented in his decision, that petitioner's rights were not violated when the Board terminated his employment, pursuant to *N.J.S.A.* 18A:27-4.1(a), effective December 8, 2010, without providing him with a written statement of reasons or a *Donaldson*[3]*, supra,* hearing.

Accordingly, the recommended decision of the OAL is adopted as the final decision in this matter and the instant petition of appeal is hereby dismissed.

IT IS SO ORDERED.[4]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: August 17, 2011
Date of Mailing: August 19, 2011

[3] As recognized by the ALJ, the *Donaldson* case itself was a non-renewal action, not a removal or termination.

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