

JACK A. PERNA, :
PETITIONER, :
V. : COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT : DECISION
OF THE CITY OF PATERSON,
PASSAIC COUNTY, :
RESPONDENT. :

SYNOPSIS

Petitioner was terminated in 2009 when his position as Supervisor for Grant Acquisition and Management was eliminated in a reduction in force (RIF). He subsequently filed the instant appeal claiming that the respondent Board violated his tenure and or seniority rights. Petitioner was employed by the Board in several different positions between 2001 until 2009. The Board contended that the petitioner never earned tenure in the district and therefore lacked tenure rights.

The ALJ found, *inter alia*, that: there are no material facts at issue and the matter is ripe for summary decision; tenure is a statutory right with precise statutory requirements, and the staff member claiming tenure rights has the burden of proving his right to tenure; in order to gain tenure, a teaching staff member must work in a position for which a teaching certificate is required, hold the appropriate certificate, and serve for the requisite period of time; an endorsement as a school administrator is required in order for an individual to be authorized to serve in any position that involves services as a district-level administrative officer; petitioner's endorsement as a principal did not constitute appropriate certification for tenure-acquisition purposes because his service was not as an administrative officer of a school or comparable unit; conversely his principal endorsement did not authorize him to fulfill the district-level responsibilities with which he was charged; and petitioner bore the primary responsibility for ensuring that he possessed the appropriate certification and endorsement for the positions in which he served. The ALJ concluded that: based on the job descriptions under which petitioner served, he should have possessed an administrative certificate with an endorsement as a school administrator in order to be legally authorized to fulfill such functions; inasmuch as petitioner did not hold the appropriate endorsement for such assignments, he did not earn time toward tenure while serving in a director position; and therefore his length of service falls short of the statutory requirements for acquisition of tenure. The ALJ recommended dismissal of the petition.

Upon review and consideration, the Commissioner concurred with the ALJ that petitioner did not achieve tenure in respondent's district because he was not properly certificated for the positions in which he served. Accordingly, he adopted the Initial Decision as the final decision in this matter, and dismissed the petition.

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.
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January 4, 2012

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This controversy arose when petitioner's employment with respondent was terminated in consequence of the elimination of his position. The Commissioner has reviewed the record, the Initial Decision of the Office of Administrative Law (OAL), petitioner's exceptions to the Initial Decision, and respondent's replies thereto, and is constrained to concur with the Administrative Law Judge (ALJ) that petitioner's separation from employment was not a tenure violation.

Based upon the stipulated facts, it appears that before petitioner came to work in respondent's district he had received training and certification as an educator, and accumulated experience working in the New York school system. In 2000, he was engaged by respondent as a consultant.

In 2001, respondent's Superintendent, Edwin Duroy, sought and received permission from Benjamin Rarick, Director of the Office of State Operated School Districts of the State Department of Education (DOE), to hire petitioner as an "Interim Program Director." Joint Exhibit J-1.¹ After petitioner had served for a year – as "Director of the Paterson Educational Partnership for 21st Century Community Learning Centers" – Duroy again contacted Rarick seeking permission for petitioner to be appointed as "Director of Grant Development and Evaluation." By way of an August 9, 2002 memorandum, Rarick approved the appointment "per [Duroy's] memo to [Rarick] dated August 8, 2002." Joint Exhibit J-6.²

Petitioner then served as Director of Grant Development and Evaluation for approximately five years.³ The Job description for the position was memorialized in December 2003, Joint Exhibit J-3, and included the requirement of an administrative certificate with a supervisor endorsement. A March 15, 2005 revision to the job description also called for a supervisor endorsement. Joint Exhibit J-4. In the course of his service as Director of Grant Development and Evaluation, petitioner earned a masters degree in educational leadership, Joint Exhibit J-7, and an administrative certificate with a principal/supervisor endorsement, Joint Exhibit J-12. The provisional certificate with the principal/supervisor endorsement was issued in January 2005, Joint Exhibit J-11.

At the end of the 2006-07 school year, petitioner's position was abolished, and as of July 1, 2007, petitioner was assigned to be Environmental Science, Health and Safety

¹ J-1 is a memorandum dated July 24, 2001 from Rarick approving the hire and referencing a July 9, 2001 memorandum from Duroy, in which Duroy apparently sought the approval. The latter memorandum – along with any information that may have been annexed thereto -- does not appear to be in the record.

² Duroy's August 8, 2002 "memo," referenced in Rarick's memorandum of approval – along with any information that might have been annexed thereto -- does not appear to be in the record.

³ In December 2006 the job title changed to Director of Grant Development and Evaluation and Pupil Assignment. Joint Exhibit J-13.

Supervisor.⁴ Petitioner challenged respondent's action of moving him from a director position to a supervisor position and the parties eventually – in December 2008 -- settled the controversy via petitioner's reassignment to the position of "Acting Supervisor for the Office of Grant Acquisition and Management." Joint Exhibits J-19, J-20 and J-21. However, four months later, petitioner was advised that, in consequence of "an economic crisis," his and other positions would be eliminated as of July 1, 2009. Joint Exhibit J-24. Petitioner was further advised that his employment would not be renewed. *Ibid.*

In his petition of appeal, petitioner alleged that:

By virtue of his term of service as a director and supervisor in respondent's employ, [he] attained tenure under his Principal/Supervisor Certificate [sic] pursuant to *N.J.S.A.* 18A:28-5 and 6, with seniority rights pursuant to *N.J.A.C.* 6A:32-5.1, *et seq.* (Petition, Para. 3)

It is petitioner's burden to clearly prove that claim, *Canfield v. Pine Hill Bd. of Educ.*, 97 *N.J. Super.* 493 (App. Div. 1967), by showing that during the relevant time period he had met the precise statutory requirements for attaining tenure. *Picogna v. Cherry Hill Bd. of Educ.*, 143 *N.J.* 391, 400 (1996).

Among the requirements for earning tenure is the necessity that the candidate hold the correct certificate and endorsement for his or her position. *See, N.J.S.A.* 18A:28-4; *Nelson v. Old Bridge Bd. of Educ.*, 148 *N.J.* 358, 363 (1997); *Spiewak v. Rutherford Bd. of Educ.*, 90 *N.J.* 63, 74 (1982). The ALJ found, Initial Decision at 16, and the Commissioner concurs, that the job descriptions for each position that petitioner held in respondent's district – except the Environmental Science, Health and Safety Supervisor position – revealed that each of the jobs were comprised completely of district-level responsibilities, and that, consequently, the

⁴ The position title was changed to "Environmental Science, Health and Safety Supervisor/Officer on May 30, 2008.

certification required for the positions was an administrative certificate with a school administrator endorsement. *N.J.A.C.* 6A:9-12.3(a). It is undisputed that petitioner has never held such certification. Thus, the Commissioner agrees with the ALJ that, because petitioner had never held the appropriate certification for his various directorships, he did not earn tenure.

In his exceptions, pages 2-4, petitioner maintains, as a threshold matter, that the ALJ had no authority to determine the correct certification for petitioner's positions, and that the instant controversy should be held in abeyance while the Executive County Superintendent considers the matter. The Commissioner disagrees. As the ALJ explained:

Although *N.J.A.C.* 6A:9-5.5 envisions that a board of education will submit a request to the county superintendent for permission to use an unrecognized title position prior to appointing a candidate and, if approved, the county superintendent will determine the appropriate certification and title for the position, *Duva*⁵ supports this forum's ability to determine the appropriate endorsement for the "director" position titles held by petitioner in order to decide the transmitted controversy between the parties.

(Initial Decision at 15)

Indeed, in *Duva*, the New Jersey State Board of Education explained:

We recognize that the county superintendent is charged with the responsibility in the first instance for determining the appropriate certification for service in an unrecognized title based upon the duties required to be performed. *N.J.A.C.* 6:11-3.3(b) [predecessor of *N.J.A.C.* 6A:9-5.5]. However, there is no indication in the record that the unrecognized position titles in this case were ever submitted to the county superintendent for determination of the appropriate certification. . . . Moreover, it is well established that the State Board of Education has the ultimate administrative authority to determine certification -- see *South River Education Association v. Board of Education of the Borough of South River*, decided by the State Board of Education, November 4, 1987, *aff'd*, Docket #A-1695-87T8 (App. Div. 1990). As the ultimate fact-finder and administrative decision-maker for disputes arising under the school laws, *Dore v. Bedminster Tp. Bd. Of Ed.*, 185 *N.J.*

⁵ *Duva v. State Operated School District of the City of Jersey City, Hudson County*, State Board of Education Decision No. 56-99 (March 6, 2002).

Super. 447 (App. Div. 1982), we have reviewed the record before us, including the job descriptions for the director's assignments held by the petitioner. Based on that review, we conclude that the duties of those assignments were of such character as to require that the individual serving in them possess an Administrative Certificate with an endorsement as a school administrator in order to be authorized by statute and regulation to fulfill such functions.

(*Duva, supra*, at 12.)

Subsequent to *Duva*, and pursuant to *N.J.S.A.* 18A:6-9.1, the Commissioner of Education became the ultimate administrative arbiter of school law disputes. Thus, it is the Commissioner who now has the ultimate administrative authority to determine certification. Since the Commissioner has the discretion to send controversies to the OAL for fact-finding and legal recommendations, it is well within an ALJ's sphere of responsibility to make determinations about certification and present same to the Commissioner for consideration.

Petitioner's reliance on *Joseph Pezzullo v. Board of Education of the Township of Willingboro, Burlington County, 1987 S.L.D. 198* (Commissioner Decision) is unhelpful. That controversy came to the Commissioner by way of a motion for a declaratory judgment. As declaratory judgments are issued to provide prospective guidance, and not to correct an already perpetrated adverse action, it was appropriate in *Pezzullo* for the Commissioner to direct that determinations concerning the proper certification requirements for "unrecognized" titles be made, in the first instance, by the County Superintendent. Moreover, in *Pezzullo*, the record did not appear to include a board-approved job description for the petitioner's position, making any certification determinations by the Commissioner -- or ALJ recommendations about same -- premature.

In petitioner's second exception to the Initial Decision he asks the Commissioner to muddy the clear definitions in and distinctions between *N.J.A.C.* 6A:9-12.3(a), (b) and (c).

The offered rationale is that “in a multiplicity of school districts, district-wide positions such as ‘Director of Special Education’ exist which are held by individuals who hold Principal endorsements,” and that by ruling against petitioner in this case the Commissioner would be rendering illegal the employment of those individuals. Petitioner’s Exceptions at 5.

No facts are offered to support the above referenced proposition; likewise, no explanation of how petitioner might have standing to demand action on behalf of such unidentified employees. The Commissioner cannot make determinations based upon speculation. By way of contrast, the facts of the instant case clearly show that during most of petitioner’s years in respondent’s district his job responsibilities were those contemplated by *N.J.A.C. 6A:9-12.3(a)*, and required an administrative certificate with a school administrator endorsement.

Matarazzo v. Board of Education of the Borough of Cliffside Park, Bergen County, Commissioner Decision No. 127-04 (March 18, 2004), cited on page 7 of petitioner’s exceptions, is not apposite to the instant case. In that case, Matarazzo earned tenure as a supervisor of instruction in respondent’s district and was employed in that position until the district abolished it. Three years later, when the district reintroduced three instructional supervisor positions, petitioner unsuccessfully applied for one. After learning that one of the positions had been given to a non-tenured employee, Matarazzo successfully appealed to the Commissioner, claiming entitlement to it. The Commissioner rejected the respondent board of education’s argument that Matarazzo’s tenure in the instructional supervisor position did not attach to the new instructional supervisor position – because the new position included certain district-wide responsibilities.

Petitioner appears to argue that the Commissioner's decision in favor of Matarazzo stands for the proposition that an employee who holds a supervisor endorsement, as opposed to school administrator endorsement, can earn tenure in a district level administrative position whose gravamen is the formulation of comprehensive district wide goal-setting, planning, budgeting and policy implementation. In so doing petitioner fails to appreciate that the Commissioner found in favor of Matarazzo because the new so-called district-wide supervisor position in Matarazzo's district was fundamentally an instructional supervisor position – whose duties could include some district-wide responsibilities but were nonetheless limited to the realm of instruction and/or curriculum. For such a discrete, program specific position with jurisdiction over a defined “unit”⁶ a principal or supervisor endorsement was sufficient. By way of contrast, the all-inclusive, district-wide administrative position held by petitioner in the case at bar -- did require a school administrator endorsement.

Petitioner also ignores the plain language of *N.J.A.C. 6A:9-12.3(c)* which expressly states that a supervisor endorsement is the required credential for supervisors of instruction -- whose duties are described as “direction and guidance of the work of instructional personnel.” Thus, the language of *N.J.A.C. 6A:9-12.3(c)* contemplates that an instructional supervisor's work will include supervision of certain personnel and instructional matters throughout a district. That does not raise the position of instructional supervisors to the level of district administrator. Matarazzo's attainment of the instructional supervisor position did not signify that an employee with a supervisor endorsement and no school administrator endorsement may hold the kind of district level position that petitioner claims.

In petitioner's third exception he urges that because respondent assigned the wrong certification requirement to his director positions and because the DOE did not “object” to the error,

⁶ See, e.g. *N.J.A.C. 6A:9-12.3(b)*.

he should not be penalized for having held the wrong credentials. Petitioner's Exceptions at 8-9. He also suggests that the Commissioner's approval of a December 2008 settlement between the parties signified that the Commissioner deemed a principal/supervisor endorsement to be the appropriate certification for a district-level position, *i.e.* "Supervisor of Grant Acquisition Management." Petitioner's Exceptions at 10.

At the outset, the Commissioner notes that it is well established that a teaching staff member is charged with the responsibility to ensure that he or she has earned the appropriate certification for the position which he or she seeks or holds. This is so even where a district has improperly assigned the employee duties for which the employee is not certificated. *Stephen Jennings v. Board of Education of the Borough of Highland Park, Middlesex County*, 1989 S.L.D. 1097, 1101 (decided February 28, 1989) (petitioner's reliance upon such actions in the face of clear regulations to the contrary cannot be regarded as reasonable). Thus, respondent's mistake concerning the proper certification for petitioner's jobs will not serve as an excuse for petitioner's failure to have acquired the appropriate endorsement.

Nor can petitioner interpret the above-referenced Commissioner approval of the 2008 settlement or the DOE's consent to petitioner's employment as tacit determinations that petitioner was qualified for the assignments that he was given. Careful scrutiny of the exhibits submitted in this case and the decision authorizing the 2008 settlement reveals no evidence that respondent presented the DOE with the job descriptions for the unrecognized title designations that appeared in the correspondence between respondent and the DOE concerning the employment of petitioner (Joint Exhibits J-1, J-5, J-6, J-9, J-10, J-21, J-22, and J-23).

In summary, petitioner did not achieve tenure in respondent's district because he was not properly certificated for the positions in which he served. While it is regretful that

respondent erred in its determination about the appropriate certification requirements for petitioner's jobs, petitioner was equally and ultimately responsible for ensuring that he held the correct certification. To rule otherwise would be to allow tenure to be established not by statute but by the intentional or unintentional actions of local school districts. *See, e.g., Jennings, supra*, 1989 S.L.D. at 1089-1091. Accordingly, the petition is dismissed.

IT IS SO ORDERED.⁷

ACTING COMMISSIONER OF EDUCATION

Date of Decision: January 4, 2012

Date of Mailing: January 4, 2012

⁷ 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*)