#25-12 (OAL Decision: Not yet available online)

DONNA TRISUZZI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF KINNELON, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner, a non-tenured special education teacher formerly employed by respondent's school district, appealed the Board's determination not to offer her a teaching contract for the 2010-2011 school year. Petitioner asserted that the action of the respondent Board were arbitrary, capricious and unreasonable, citing, *inter alia*, an email inadvertently sent to petitioner by the principal in which a vice principal was directed to revise petitioner's evaluation to make it "more negative". Respondent Board contended that petitioner was not offered a contract for a fourth year of employment because her performance in her first three years did not rise to the level expected for tenure candidates in the Kinnelon school district.

The ALJ found, *inter alia*, that: petitioner was employed by respondent for three consecutive academic years; petitioner received timely notice that she was not being recommended for a fourth consecutive contract; the evidence presented by both parties indicated a factual basis for respondent's determination to non-renew petitioner for a fourth year, which would have allowed her to achieve tenure; changes made in petitioner's evaluations subsequent to the email exchange between the principal and vice principal are consistent with petitioner's earlier evaluations; the decision not to offer petitioner a contract for a fourth year was based on the consensus of eight administrators who met in January 2010 to discuss candidates for tenure in the next school year; petitioner was not tenured pursuant to *N.J.S.A.* 18A:28-5 at the time of her non-renewal; and local boards of education have an almost complete right to terminate the services of a non-tenured teacher. The ALJ concluded that petitioner failed to meet her burden to prove that respondent's reasons for not offering her a contract for the 2010-2011 school year were arbitrary, capricious or in bad faith. Accordingly, the ALJ denied petitioner's appeal.

Upon a full and independent review, the Commissioner concurred with the Administrative Law Judge that petitioner failed to meet her burden to show that respondent acted in an arbitrary, capricious or unreasonable manner, and dismissed the petition. In so doing, the Commissioner noted that respondent did not assert that petitioner was a substandard employee, but rather that she did not rise to the level it expected for tenure candidates.

OAL DKT. NO. EDU 9477-10
AGENCY DKT. NO. 314-8/10

DONNA TRISUZZI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF KINNELON, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

Before the Commissioner is an appeal of respondent's decision not to rehire petitioner for a fourth year of employment as a special education teacher. After review of the record, Initial Decision of the Office of Administrative Law (OAL), petitioner's exceptions and respondent's reply thereto, the Commissioner concurs with the Administrative Law Judge's (ALJ) conclusion that petitioner failed to meet her burden to show that respondent acted arbitrarily, capriciously, or unreasonably.

At the outset, the Commissioner notes that respondent has not asserted that petitioner was a substandard employee. Rather, respondent explains that petitioner did not rise to the level that it expected for tenure candidates. A review of petitioner's evaluations reveals that throughout her three contract years she consistently received average ratings – by six different evaluators. In regular evaluations that included 16 to 22 performance categories, petitioner only once received more than three ratings of the highest level: "Masters District Standard." Her annual evaluations were also average. The testimony of respondent's high school principal, Wayne Merckling, indicated that when deciding whether to allow an employee to achieve tenure – a more permanent status in the district – the administration would usually recommend teachers

who had achieved more of the higher level ratings. (T1 at 230[1]) Also manifest in the record is evidence that petitioner was informed on multiple occasions both verbally and in writing that specific aspects of her performance needed improvement.

Some of respondent's concerns about petitioner were unresolved when it was time to decide whether to recommend her for a fourth year – and tenure. Such concerns have been held to be sufficient grounds for the nonrenewal of non-tenured employees, which nonrenewal is not subject to the same level of scrutiny as is applicable when districts decide to end the employment of tenured individuals:

> [A]bsent constitutional constraints or legislation affecting the tenure rights of a teacher, local boards of education have an almost complete right to terminate the services of a teacher who has no tenure and is regarded as undesirable by the local board.
> *Dore v. Bedminister Town Bd. of Educ.,* 185 *N.J.* 447, 456 (1982*).*

Further, the allowable reasons relied upon by local boards are not limited to those set forth in the evaluations of subject employees. *Id*. at 454. Local boards have the right to reach conclusions about non-tenured teachers based upon a broad range of input received from a variety of people, including members of the public, parents of students and board members' own knowledge of teachers. *Ibid.* Ultimately, the standard by which to evaluate a local board's approval of the chief school administrator's recommendation not to renew an employment contract is found in *N.J.S.A.* 18A:27-4.1 (b). That statute instructs simply that "[t]he board shall not withhold its approval for arbitrary and capricious reasons." The Commissioner is satisfied that enough evidence exists in the record to support the proposition that 1) respondent had on-going concerns about petitioner and 2) did not arbitrarily decline to renew her.

[1] T1 represents the transcript of the first day – February 3, 2011 – of the hearing in this matter.

Petitioner's exceptions rely heavily on her contention that emails from Principal Merckling to Vice Principal Matthew Scalon concerning the drafting and redrafting of her Spring 2010 tenure recommendation forms – which emails were inadvertently copied to her – revealed "arbitrary and capricious acts such as lying and manufactured reasons by the Board." (Petitioner's Exceptions at 4) Petitioner urges that the two referenced emails – Petitioner's Exhibits P-G and P-J – in which Merckling asked Scalon to "make [the drafts] more negative," signified malicious intent which, petitioner maintains, must be regarded as the kind of arbitrariness that necessarily invalidates respondent's action of declining to renew her contract.

One can understand how the unexpected receipt of copies of Merckling's negative and cryptic emails to Scalon could have caused petitioner distress. The emails were erroneously transmitted, and signaled that – contrary to petitioner's expectations – her employment might be at risk. However, the Commissioner finds no basis in the record to accept petitioner's suggestion that the emails and altered drafts denoted bad faith.

Both Merckling and respondent's Superintendent, James Opiekun, testified that the decision not to rehire petitioner had been made months before the April 2010 emails. In January 2010, a meeting of district administrators ("Administrator's Table" as per Merckling on T1 at 171) had been held to discuss the six district teachers who were then up for tenure, at which a consensus had been manifest that petitioner and three other teachers should not be recommended for rehire.[2] Merckling testified that his April 8, 2010 emails to Scalon – a former English teacher who was assisting with drafts of petitioner's summary evaluation and tenure recommendation – were not intended to fabricate deficiencies, but rather were ill-worded

[2] The ALJ found this testimony to be credible, and the Commissioner must accept the ALJ's credibility determinations unless the record blatantly contradicts same, which it does not in the instant case,. *See, e.g., N.J.S.A.* 52:14B-10(c); *D.L. and Z.Y. on behalf of minor children, T.L. and K.L. v. Board of Education of the Princeton Regional School District,* 366 *N.J. Super.* 269, 273 (App. Div. 2004).

attempts to better incorporate the concerns that had been expressed at the January "Administrator's Table". (T1 at 205-208)

Further, as the respondent alleges, the changes that were actually made to the drafts of petitioner's summary evaluation/tenure recommendation were not extensive. (T1 at 121) There were few changes to the multiple choice sections of the evaluation (some for the better). Also, the narratives added to the fifth and sixth pages of the revised draft were not inconsistent with notations in previous evaluations and other notices to petitioner addressing issues concerning her performance.

Thus, the Commissioner finds that the emails between Merckling and Scalon resulted in an evaluation which was consistent with previously expressed concerns about petitioner's performance level. Similarly, the reasons for petitioner's non-renewal – provided to her in a letter dated May 20, 2010 from Superintendent Opiekun, *see* Petitioner's Exhibit B, page 2 – corresponded to issues about which petitioner had been previously advised.

In summary, petitioner has not shown that respondent's action in declining to renew her employment was arbitrary, capricious or unreasonable. The petition is accordingly dismissed.

IT IS SO ORDERED.[3]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: January 23, 2012
Date of Mailing: January 24, 2012

[3] 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)