#384-12 (OAL Decision: Not yet available online)

DEBBIE LYNN FITZGERALD; KIMBERLY SCOTT; MARGARET WATKINS AND SUSAN GRIMM,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE ASBURY PARK SCHOOL DISTRICT, MONMOUTH COUNTY,	:	DECISION
RESPONDENT	:	
AND	:	
JANETTE MOEN; CATHLEEN CLOSHOSEY; KRISTINA FIORE AND DANA AURICHIO,	:	
INTERVENORS	:	

SYNOPSIS

Petitioners in these consolidated cases – all tenured teachers holding instructional certificates with endorsements in Elementary Education – asserted that the respondent Board's action in terminating their employment on June 30, 2010, in a reduction in force (RIF), violated their tenure and seniority rights. Petitioners contended that their standard elementary endorsements are valid for grades nursery through eight and therefore entitle them to teach nursery school. As such, they claimed tenure and/or seniority rights over personnel who were retained by the district in pre-kindergarten teaching positions. The Board contended that, pursuant to *N.J.A.C.* 6A:9-9.1(a)(3) and *N.J.A.C.* 6A:9-11.1(h), petitioners were not qualified for a pre-school position. All petitioners except for Margaret Watkins filed motions for summary decision, and the Board filed a cross motion.

The ALJ found, *inter alia*, that: a pre-school through third grade (P-3) endorsement was created by the Department of Education in 2001 in the context of Abbott v. Burke, 163 *N.J.* 95, 108 (2000); pursuant to *N.J.A.C.* 6A:9-9.1(a)(3), a teacher with an elementary endorsement issued before March 2008 (as were those held by the petitioners) must demonstrate appropriate content knowledge for the subject taught; pursuant to *N.J.A.C.* 6A:9-11.1(h), a teacher with an elementary endorsement, without reference to when it was issued, may teach preschool if he or she has "the equivalent of two academic years of full-time experience teaching three and four year-olds"; none of the petitioners possess the P-3 endorsement, nor did they submit any evidence to establish their qualification as a pre-school teacher based on the experiential requirement; the Board's decision not to place the "riffed" petitioners in any of the pre-school positions held by non-tenured or less senior employees was therefore not arbitrary, capricious or unreasonable. Accordingly, the ALJ granted summary decision to the Board and dismissed the petitions.

Upon independent review, the Commissioner concurred with the ALJ's determination to dismiss the petitioners' appeal, and adopted the Initial Decision as the final decision in this matter.

September 21, 2012

OAL DKT. NOS. EDU 9198-10, EDU 9204-10, EDU 9225-10 & EDU 9227-10
AGENCY DKT. NOS. 162-7/10, 176-7/10, 178-7/10 & 179-7/10
(CONSOLIDATED)

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The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioners Grimm and Fitzgerald requested and were granted extensions of time within which to file exceptions, and concomitant extensions were granted to the Board and the Intervenors for reply exceptions.[1] Such exceptions – filed in accordance with the adjusted timelines – were fully considered by the Commissioner in reaching his determination herein.

As a threshold matter, the Board objects to the consideration of the exceptions filed by petitioner Watkins – who, pursuant to her petition of appeal, like the other petitioners in

[1] Grant of these exception extensions necessitated that the Commissioner seek an extension of time within which to issue his decision in this matter.

this matter, holds an elementary endorsement on an instructional certificate – as it charges these are procedurally improper in several respects and prejudicial to both the Board and the intervenors. Because any details whatsoever with respect to this petitioner were totally omitted from the Administrative Law Judge's (ALJ) Initial Decision and in light of the Board's highly unusual request for exclusion of consideration of her exceptions, the Board's objections in this regard are being presented in their entirety:

> It is undisputed that Petitioner Watkins did not file a motion for summary decision, nor did she oppose the summary decision cross-motions in this matter. In fact she specifically refused to file any documents relative to the same. As the procedural history of this matter plainly shows, Petitioners Fitzgerald and Grimm filed motions for summary decision in accordance with Judge Masin's letter order, in which Petitioner Scott joined. Thereafter, on March 22, 2012, the Board filed its opposition and a cross-motion for summary decision, in which the Intervenor[s] joined with supplementation. Petitioners Fitzgerald, Grimm and Scott each filed replies to the Board's cross-motion. At no point did Petitioner Watkins file a motion, opposition, or a reply. Rather, by letter dated February 21, 2012 to Judge Masin, Petitioner Watkins' counsel specifically refused to file a motion, stating "I will not file a Motion for Summary Decision on behalf of Petitioner Margaret Watkins," and instead, "reserved the right to file a response to any Summary Decision motions…" Ms. Watkins' counsel was again reminded on March 5, 2012 of the ability to reply to the Board's position, and again reserved the same right on March 7, 2012 in a letter to Judge Masin.
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> Despite twice reserving a right to respond, at no point in the three months between Petitioner Watkins' receipt of the Board's cross-motion…and the issuance of Judge Masin's initial decision…did Ms. Watkins file even one shred of paper in defense of her claims. The Board's cross-motion for dismissal was willingly and deliberately unopposed. Ms. Watkins cannot now be heard to complain in any fashion that summary decision was granted against her because her counsel "anticipated that an evidentiary hearing would be scheduled" and decided not to oppose the Board's motion. Quite simply, Ms. Watkins made a procedural gamble and lost. She determined to sit on the sidelines while the other parties' motions were heard, assuming that they would all be denied and that a hearing would be scheduled. Obviously, the opposite occurred. Now, in what can only be described as a second chance, Ms. Watkins seeks to file opposition to the Board's motion – armed with the full knowledge of how the motion was decided and the opportunity to tailor her "opposition/response" to the same. Given this background and deliberate (in)action by Petitioner Watkins, it is wholly unfair and prejudicial to the Board and Intervenor[s] for her exceptions …to be considered.

> Furthermore, Ms. Watkins has shown complete disregard for *N.J.A.C.* 1:1-18.4(c) and its prohibition against presenting evidence through exceptions that was not submitted below. As noted, Ms. Watkins intentionally did not participate in the motion process below, and presented no defense to the Board's motion whatsoever. Now, as part of her exceptions, she seeks to submit evidence in the form of uncertified attachments to oppose the Board's motion and demonstrate why the ALJ was allegedly incorrect. Even assuming that the documents presented were relevant, there is no reason why they could not have been presented below. Petitioner was not prevented from submitting any documents or affidavits in her defense. Such after the fact gamesmanship is exactly what *N.J.A.C.* 1:1-18.4(c) was intended to prevent…(Board's Reply Exceptions at 3-5)

Under these circumstances – which as to their historical recitation are confirmed by the record in this matter – petitioner Watkins' exceptions here are improper and will not be considered.

The remaining petitioners' exceptions, in pertinent part, merely recast and reiterate their arguments advanced below, specifically 1) petitioners Fitzgerald and Grimm argue that they are qualified to teach pre-K because their endorsements authorized them to do so as of the date they were obtained (both prior to 2001) and once granted the scope of such endorsements cannot be limited by subsequent regulations; and 2) A review by the Board of petitioners' transcripts, educational degrees and past lower elementary grade teaching experience should have made it abundantly obvious to them that petitioners had the necessary "content knowledge" to teach young children in the district, particularly since the skills to teach pre-K are less rigorous than those required to teach the lower elementary grades. As such, they maintain that every certified elementary teacher, by definition, has the "appropriate content knowledge" to teach pre-K.

Upon full review and consideration of the instant record, the Commissioner concurs with the ALJ's determination that petitioners' appeals are appropriately dismissed. In so determining, the Commissioner is in full accord with the ALJ that there are two separate issues with respect to petitioners' claims here. The first of these is whether they hold the correct

certification and endorsement to allow them to teach pre-K. The second issue, which is only relevant if the first issue is decided in petitioners' favor, is whether any or all of them have tenure or seniority rights superior to those of personnel who were retained in the district. The ALJ correctly recognized that should petitioners prevail on the first issue here, resolution of their potential tenure and/or seniority rights *vis-a-vis* each other and the intervenors would necessitate an evidentiary hearing. In that the Commissioner agrees with the ALJ that petitioners have failed to demonstrate that they were qualified to teach pre-K, he finds and concludes that summary decision is properly granted to the Board and the Intervenors.

As recognized in the ALJ's decision, although *N.J.A.C.* 6:11-6.1, amended, effective February 20, 1990 – the provision in effect when petitioners Fitzgerald and Grimm acquired their elementary endorsement – authorized teaching of grades nursery through eight with an elementary endorsement, this situation was altered in 2001 when the State Board – in accordance with the dictates of *Abbott v. Burke*, 163 *N.J.* 95 – determined that specialized knowledge and experience in preschool education was required in order to provide high quality preschool education to the children of the state. With the enactment of *N.J.A.C.* 6A:9-9.2(b)(4) establishing a Pre-K through grade 3 endorsement (authorizing its holders to teach preschool through grade 3 in public schools and to teach public school students in approved settings providing early childhood education), an elementary endorsement, by itself, was no longer sufficient to qualify its holder to teach pre-K. However, recognizing a need to balance the requirement for refined qualifications with a need to accommodate current endorsement holders affected by these new rules, two additional regulatory provisions effectively offered a "grandfathering" opportunity to certain of these individuals. Specifically, *N.J.A.C.* 6A:9-11.1(h) which specifies:

> A teacher holding a standard elementary school endorsement with the equivalent of two academic years of full-time experience teaching three and four-year olds under the certificate may teach children in preschool in a public school or Department of Human Services facility. The teaching experience must be in a position that would require the Preschool through Grade 3 endorsement. It shall be the responsibility of the public school district and Department of Human Services facility to maintain a copy of documentation that supports the preschool teaching experience for each teacher affected by this subsection.

and *N.J.A.C.* 6A:9-9.1(a)(3) which, in pertinent part, reads:

> Teachers with elementary school endorsements that are valid in grades nursery through eight issued no later than March 1, 2008 may teach in grades nursery through eight in any employing school district. *These teachers must demonstrate to the school district that they have content knowledge appropriate to the subject(s) taught.* (emphasis added)[2]

Consequently, as of 2001, the Code clearly states that preschool may only be taught by:

1) a teacher holding a preschool through grade 3 endorsement *or*
2) a teacher holding an elementary endorsement who either
   (a) has two full years of experience teaching three and four year olds or
   (b) is able to demonstrate appropriate content knowledge to teach preschool.

It is undisputed that the instant petitioners did not hold a preschool through grade 3 endorsement. The Commissioner is also in full agreement with the ALJ that the record here contains no evidence that any of the petitioners satisfied the experience requirement of *N.J.A.C.* 6A:9-11.1(h) or the required affirmative demonstration to the Board sufficient to persuade it of their "content knowledge" required by *N.J.A.C.* 6A:9-9.1(a)(3). As such, as none of the petitioners qualified for the available pre-K positions, the Board determination not to place any of them in one of these positions cannot be termed arbitrary, capricious or unreasonable.

[2] To the extent petitioners may be challenging the validity of either or both of these rules, the Commissioner of Education lacks the jurisdictional authority to entertain such a challenge. Rather, challenges of this nature are under the jurisdictional purview of the Superior Court.

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

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: September 21, 2012

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[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).