

ALBERT ZIEGLER, :
 :
 PETITIONER, : COMMISSIONER OF EDUCATION
 :
 V. : DECISION
 :
 BOARD OF EDUCATION OF :
 THE CITY OF BAYONNE, :
 HUDSON COUNTY, :
 :
 RESPONDENT. :

SYNOPSIS

Petitioner – formerly a tenured teacher in the district who previously challenged his termination and in 2005 prevailed on appeal to the State Board, subsequently being awarded back pay covering the 1998-99 through 2002-03 school years – submitted a petition in August 2008 contending that, for the 2008-09 school year, the respondent Board planned to employ non-tenured and/or less senior teachers in positions for which the petitioner is qualified by virtue of his Teacher of the Handicapped endorsement and reemployment rights under *N.J.S.A. 18A:28-12*. The Board sought dismissal of the petition as untimely under the 90-day rule, *N.J.A.C. 6A:3-1.3(i)*, and further argued that petitioner had not acquired tenure under his Teacher of the Handicapped endorsement.

The ALJ found, *inter alia*, that: the State Board previously determined that the petitioner was improperly terminated from his tenured position by the respondent Board during the 1998 school year; the State Board’s July 2005 decision directed the respondent to reinstate Ziegler, and remanded the matter solely for the purpose of determining the specific amount of back pay to which he was entitled, at which time the Commissioner determined that Ziegler was only entitled to back pay through June 30, 2003, since a RIF occurred on that date which would have resulted in his legitimate dismissal; by that date petitioner already possessed the Teacher of the Handicapped endorsement, which he obtained in February 2002; Ziegler was entitled to tenure rights based on all of the endorsements he possessed at the time the Board voted to implement the RIF that would have resulted in his dismissal in June 2003; among those tenure rights was placement on a preferred eligible list in respondent’s school district for reemployment in any position he was qualified for at the time of the 2003 RIF, including positions requiring a Teacher of the Handicapped endorsement; the respondent failed to offer petitioner reemployment and instead hired non-tenured teachers for positions that Ziegler was qualified for. Accordingly, the ALJ ordered that petitioner is entitled to back pay in the amount of \$7,997 plus benefits and emoluments, and remains entitled to reemployment over non-tenured teachers in any position for which he is qualified.

The Commissioner concurred with the findings and conclusions of the ALJ and adopted the Initial Decision of the OAL as the final decision in this matter. The Board was ordered to reimburse petitioner \$7,997 in back pay plus all other benefits and emoluments.

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.

July 15, 2013

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The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions filed pursuant to *N.J.A.C. 1:1-18.4* by the Board of Education and the petitioner's reply thereto.

The petitioner, Albert Ziegler, filed the current appeal in August 2008, alleging a violation of his tenure rights due to the Board's decision to hire non-tenured special education teachers in the 2008-09 school year to fill positions he contends he should have been offered by virtue of his Teacher of the Handicapped endorsement and reemployment rights under *N.J.S.A. 18A:28-12*.¹ On February 29, 2012, the Administrative Law Judge (ALJ) issued an Order denying the Board's motion to dismiss the petition as untimely under the 90-day rule. In the subsequent Initial Decision, the ALJ found that the petitioner was entitled to be placed on a preferred eligibility list in June 2003, following the reduction in force (RIF), for all the positions for which he was qualified – including those positions requiring a Teacher of the Handicapped endorsement². As

¹ This is the third case in a series of litigation between the petitioner and the Board that commenced in 1999. The extensive history is thoroughly outlined in the Initial Decision and will not be repeated here.

² In a prior decision, the Commissioner determined that the petitioner's claims with respect to the Board's obligation to the petitioner for the 2003-04, 2004-05, 2005-06 and 2006-07 schools years was not timely filed under the 90-day rule. *Albert Ziegler v. Board of Education of the City of Bayonne, Hudson County*, Commissioner's Decision No. 441-08, decided November 3, 2008.

a result, the ALJ ordered the Board to reimburse the petitioner \$7,997.00 in back pay plus all other benefits and emoluments of employment for the 2008-09 school year and subsequent school years in which the Board employed non-tenured teachers in any position for which he was qualified. Additionally, the ALJ found that the petitioner remains entitled to reemployment over non-tenured teachers in any position for which he is qualified.

In its exceptions, the Board largely reiterated the substance of its motion to dismiss at the OAL, recasting the arguments therein to support the contention that the ALJ erroneously found that the petition was timely filed pursuant to *N.J.A.C. 6A:3-1.3(i)*. The Board maintains that the petitioner's claim of violation of his tenure and seniority rights based on the hiring and/or retention of non-tenured or less senior staff members did not arise in August 2008, when the current petition was filed, but rather in July 2005 – when the State Board ordered petitioner reinstated to a teaching assignment within the scope of his Skilled Trades-Employment Orientation (skilled trades) certification. The Board states that its position has been, and remains, that there is no teaching assignment within the scope of the petitioner's skilled trades certification.

The Board also contends that the ALJ erred in failing to require petitioner to meet his burden of demonstrating that he would have acquired tenure under a Teacher of the Handicapped endorsement had he actually been teaching in the district when his position was eliminated. In its exceptions, the Board states that there is no basis for concluding that had the petitioner remained a teacher in the district until the RIF in June 2003³, he would have gone back to school to take courses to acquire a Bachelor's degree and then acquire an Instructional Certificate with a Teacher of the Handicapped endorsement. The Board argues that the petitioner should not have "bumping rights"

³ The petitioner was terminated by the Board in January 1999. In a prior decision, the State Board determined that the petitioner was improperly terminated from his tenured position, and therefore he should have remained employed by the Board until the reduction in force occurred in 2003. *Albert Ziegler v. Board of Education of the City of Bayonne, Hudson County*, State Board Decision No. 5-04, decided July 6, 2005. It is undisputed that the petitioner obtained his Teacher of the Handicapped endorsement in 2002.

based on an endorsement he was only able to obtain after he was unemployed. Additionally, the Board contends that an award of “back pay” stemming from the wrongful termination in 1999 is not the equivalent of being an actual tenured staff member, with all of the rights afforded thereto, when he was not actively teaching and was employed by another district.

Finally, the Board takes exception to the ALJ’s reliance on *Ressler v. Board of Educ. of Saddle Brook*, 96 N.J.A.R. 2nd (EDU) 955; *rev’d and remanded*, State Board of Education (February 4, 1998) to find that the petitioner had tenure rights under his Teacher of the Handicapped endorsement. The Board maintains that the facts in *Ressler, supra*, were clearly distinguishable because the petitioner in that matter was subject to a RIF in April 1992 and he obtained his additional endorsement in June 1992; therefore, he had already been working toward his endorsement prior to the RIF. In this case, the petitioner had yet to begin to acquire the Teacher of the Handicapped endorsement before he was terminated and there is no basis for finding that, had the petitioner remained a teacher in Bayonne after January 1999, he would have earned additional endorsements. Finally, the Board stresses that there was no way for the Board to assume in 2003 that the petitioner could assert tenure rights when he was employed in another district; and to afford him with rights now would have the effect of upsetting the certainty and finality that are the cornerstone of our tenure laws. Therefore, the Board urges the Commissioner to reject the Initial Decision and dismiss the petition of appeal.

In reply, the petitioner likewise reiterates the arguments advanced in his brief in opposition to the Board’s motion to dismiss at the OAL, arguing that his petition of appeal was timely filed. The petitioner points out that the current petition was filed on August 8, 2008 and this is a new cause of action that alleges a violation of his tenure rights due to the Board’s decision to hire non-tenured staff for the 2008-09 school year to fill positions for which he is qualified. Moreover, the petitioner contends that the Board’s assertion that his challenge to the Board’s violation of his rights in the past bars him in perpetuity from asserting claims to subsequent violations is unfounded.

Additionally, the petitioner contends that in its exceptions the Board invented a new burden of proof, erroneously asserting that the petitioner who was wrongfully terminated must again prove his tenure status in the district. The petitioner emphasizes that his Teacher of the Handicapped endorsement was obtained in 2002 and it was in effect prior to the time that his employment would have properly ceased in the district following the June 2003 RIF. As such, his tenure status extends to his Teacher of the Handicapped endorsement, and there is no burden to prove that he would have obtained the endorsement had he still continued teaching after the wrongful termination. Finally, the petitioner argues that the ALJ properly analyzed the decision in *Ressler, supra*, and the only difference present in this case is the amount of time it took to litigate the initial violation of the petitioner's rights. As a result, the petitioner contends that the Initial Decision should be adopted as the final decision in this matter.

As a threshold matter, the Commissioner finds that the petition of appeal was timely filed under *N.J.A.C. 6A:3-1.3(i)* for the reasons thoroughly expressed in the ALJ's February 29, 2012 Order denying the Board's motion to dismiss. The petitioner filed the current petition on August 8, 2008 alleging a violation of his tenure rights for the 2008-09 school year, and as a result it clearly satisfied the 90-day limitation period. Further, the prior decision of the Commissioner dated November 3, 2008 – finding that the petitioner's claim for rights associated with the 2003-04, 2004-05, 2005-06 and 2006-07 school years was untimely filed by the petitioner in a previous action – did not bar the petitioner from seeking recourse for future years.

The Commissioner is also in accord with the ALJ's determination – for the reasons stated in the Initial Decision – that the petitioner was entitled to be placed on a preferred eligibility list in June 2003 for all the positions that he was qualified for, including those positions requiring a Teacher of the Handicapped endorsement. It is undisputed that the petitioner obtained his Teacher of the Handicapped endorsement in 2002 and, but for his wrongful termination in 1999, he would have remained employed by the district until the RIF in June, 2003. The Commissioner further finds the

arguments outlined in the respondent's exceptions to be unpersuasive, basically reflecting arguments and objections previously raised before the ALJ and taken into account by him in concluding that the petitioner had tenure rights associated with his Teacher of the Handicapped endorsement.

Accordingly, the Initial Decision is adopted as the final decision in this matter. The Board is ordered to reimburse the petitioner \$7,997.00 in back pay plus all other benefits and emoluments of employment for the 2008-09 school year and subsequent school years in which the Board employed non-tenured teachers in any position for which he was qualified.⁴ The petitioner also remains entitled to reemployment over non-tenured teachers in any position for which he is qualified.

IT IS SO ORDERED.⁵

ACTING COMMISSIONER OF EDUCATION

Date of Decision: July 15, 2013

Date of Mailing: July 16, 2013

⁴ The parties submitted a joint stipulation of facts identifying non-tenured staff members appointed by the Board to special education positions requiring a Teacher of the Handicapped endorsement during and after the 2008-09 school year. The joint stipulation also identified the salary the petitioner received from the Union City Board of Education between 2008 and 2013, and the salary he would have been entitled to had he been employed as a special education teacher with the Board.

⁵ Pursuant to *P.L. 2008, c. 36 (N.J.S.A. 18A:6-9.1)*, Commissioner decisions are appealable to the Superior Court, Appellate Division.