

PAULA MELNYK, :  
PETITIONER, :  
V. : COMMISSIONER OF EDUCATION  
BOARD OF EDUCATION OF THE : DECISION  
DELSEA REGIONAL HIGH SCHOOL :  
DISTRICT, GLOUCESTER COUNTY, :  
RESPONDENT. :

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SYNOPSIS

Petitioner – a tenured special education teacher who has been employed by the respondent Board’s school district since 1991– appealed the determination of the Board to terminate her employment as a part-time special education teacher in an alternative education program which is held after regular school hours. Petitioner alleged that she had acquired tenure in the part-time position, and sought reinstatement with back pay. The Board denied that it violated petitioner’s tenure or seniority rights with respect to the part-time position. The parties filed opposing motions for summary decision.

The ALJ found, *inter alia*, that: there are no material facts in dispute here, and the matter is ripe for summary decision; at issue in this case is whether the petitioner’s tenure rights were violated by the Board when it declined to assign her to teach English in an after school program for the 2015-2016 school year; petitioner was not separately entitled to tenure for her time teaching English inside a classroom during her alternative education assignment as the position was “extracurricular,” and the position in the alternative education program did not require any additional certificate; petitioner was not entitled to compensation from the extracurricular position because the alternative program’s duties were not engrafted onto her regular duties as a special education teacher; further, the remuneration for her extracurricular service was established separately from her employment contract; and petitioner was paid an hourly wage for the after school assignment, not as part of her contracted salary. The ALJ concluded that petitioner has not met her burden of proof to demonstrate that she is entitled to judgment as a matter of law. Accordingly, the Board’s motion for summary decision was granted, the petitioner’s cross motion was denied, and the matter was dismissed.

The Commissioner concurred with the findings and conclusions of the ALJ, and adopted the Initial Decision as the final decision in this matter. The petition was dismissed.

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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OAL DKT. NO. EDU 12061-15  
AGENCY DKT. NO. 161-7/15

PAULA MELNYK, :  
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 PETITIONER, :  
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 V. : COMMISSIONER OF EDUCATION  
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 BOARD OF EDUCATION OF THE : DECISION  
 DELSEA REGIONAL HIGH SCHOOL :  
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 RESPONDENT. :

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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 petitioner, Paula Melnyk, and the Delsea Regional High School Board of Education’s (Board) reply thereto. In this case, the petitioner – a tenured special education teacher – alleges that the Board violated her tenure rights when it terminated her position as a teacher in the Delsea Regional High School District’s (District) alternative education program, which is held after regular school hours.<sup>1</sup>

The Administrative Law Judge (ALJ) determined that the petitioner did not acquire tenure in the alternative program teaching position because the assignment did not require a certificate separate from the one under which she acquired tenure in her teaching position in the general education program. The ALJ also found that the petitioner is not entitled to compensation as a result of her termination from the position because the duties of the alternative education program were extracurricular and were not engrafted onto her duties as a

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<sup>1</sup> Since 1991, the petitioner has been employed by the Board as a full time special education teacher assigned to teach classes during the day. Beginning in or around 2002, petitioner was also assigned as a special education teacher to teach special education classes during the evening in the District’s alternative education program.

regular program teacher, nor were her salary and stipend treated as one. Therefore, the ALJ granted the Board's motion for summary decision and dismissed the petition of appeal.

Upon a comprehensive review of the record in this matter, the Commissioner concurs with the ALJ – for the reasons thoroughly set forth in the Initial Decision – that the petitioner did not acquire tenure in the alternative education program position. The petitioner acquired tenure in the District as a special education teacher employed by the District since 1991 and the petitioner continues to be a teacher in the general education program. The petitioner's tenure protections, however, do not extend to the alternative education program position because it is well recognized that “no tenure protections flow from extracurricular positions unless the position requires additional certification.” *John Manley v. Board of Educ. of the Township of Old Bridge, Middlesex County*, EDU 10644-04 (November 4, 2005), adopted by the Commissioner, December 19, 2005 (Decision No. 450-05) (citations omitted). It is undisputed that the petitioner's general education position and the alternative education program position both require an Instructional Certificate. Moreover, the two positions were sufficiently separate so that the teaching position at the alternative education program is clearly extracurricular.<sup>2</sup>

The Commissioner is also in accord with the ALJ's determination that the stipend received by the petitioner for the teaching position at the alternative education program is not protected by tenure; therefore, the petitioner has suffered no reduction in salary. The petitioner is not entitled to compensation because the Board did not treat the stipend that the petitioner received for the alternative education program as an “integral portion” of the petitioner's salary. Instead the stipend was based on an hourly rate pursuant to a separate agreement, and as such,

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<sup>2</sup> It is important to note that if the teaching staff member taught exclusively as a teacher in the District's alternative education program, the teaching staff member could accrue tenure by virtue of the requisite years of service in that position. Under the circumstances in this case, the alternative education position was an extracurricular position for the petitioner that did not require any additional certificate and, therefore, was not a separately tenurable position.

constituted extra compensation. *John Manley v. Board of Educ. of the Township of Old Bridge, Middlesex County*, Commissioner Decision No. 450-05, decided December 19, 2005. Finally, the Commissioner finds the exceptions submitted by the petitioner to be unpersuasive as they largely replicate the arguments advanced at the OAL, which were fully considered and appropriately addressed by the ALJ in the Initial Decision.

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

IT IS SO ORDERED.<sup>3</sup>

COMMISSIONER OF EDUCATION

Date of Decision: October 12, 2017

Date of Mailing: October 12, 2017

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<sup>3</sup> 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.



**State of New Jersey**  
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**

**SUMMARY DECISION**

OAL DKT. NO. EDU 12061-15

AGENCY DKT. 161-7/15

**PAULA MELNYK,**

Petitioner,

v.

**DELSEA REGIONAL HIGH SCHOOL**

**DISTRICT BOARD OF EDUCATION,**

**GLOUCESTER COUNTY,**

Respondent.

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**Keith Waldman, Esq.,** for petitioner (Selikoff & Cohen, PA, attorneys)

**Andrew W. Li, Esq.,** for respondent (Parker McKay, PA, attorneys)

Record Closed: June 29, 2017

Decided: July 12, 2017

BEFORE **SUSAN M. SCAROLA, ALJ:**

**STATEMENT OF THE CASE**

The petitioner, Paula Melnyk, a full-time, tenured special education teacher in the general education program, appeals the determination of respondent, Board of Education of the Delsea Regional High School District, Gloucester County (Board), to

terminate her employment as a part-time special education teacher in an alternative education program held after regular school hours, alleging that she had acquired tenure in the part-time position.

### **PROCEDURAL HISTORY**

Sometime prior to July 2015 the petitioner was advised that she would not be reappointed to the part-time position, and on July 7, 2015, she petitioned the Commissioner of Education for reinstatement to that assignment with back pay, as her tenure rights had been violated. On August 7, 2015, the Board filed an answer denying that it violated her tenure or seniority rights with respect to the assignment.

On August 11, 2015, the Commissioner transmitted the matter to the OAL, where it was filed as a contested case on August 12, 2015. **N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13.** On March 9, 2017, the parties filed cross-motions for summary decision. Briefs were filed on April 4 and 28, 2017. After a conference call on June 29, 2017, the record closed.

### **FACTUAL DISCUSSION**

The following **FACTS** are not in dispute:

Since September 1991 the petitioner has been employed by the Board “as a full-time special education teacher assigned to teach classes during the day.” The petitioner, who holds an Instructional Certificate with “Teacher of the Handicapped and Elementary School Teacher” endorsements and “highly qualified status in English instruction,” has tenure in her position as a special education teacher in the general education program. According to her 2014–2015 “Teacher’s Contract,” her salary was \$82,874, and “[i]t is further understood that if compensation is to be made to the teacher for extra-curricular duties, such compensation shall be made to the teacher at the completion of the extra-curricular duties unless otherwise stated in writing.”

In September 2002 the Board assigned the petitioner “as Special Education Alternative Program Teacher to teach special education classes in the evening.” The alternative education program to which the petitioner was assigned was known as “BookBinders,” which was offered by the Board in accordance with N.J.A.C. 6A:16-9.1 to -9.3.<sup>4</sup> Classes were held after regular school hours in the afternoon and evening. While the program was “separate and distinct from the already existing programs operated by the Board,” “[i]ndividualized instruction to all pupils shall address the Core Curriculum Content Standards,” and, “[f]or a pupil with a disability, the alternative education program shall be consistent with the pupil’s Individualized Education Program (IEP).” As such, in order to participate in an alternative education program such as BookBinders, “[i]nstructional staff . . . shall be appropriately certified.” According to the petitioner, her BookBinders assignment “require[d] an Instructional Certificate with a Teacher of the Handicapped endorsement.”

With the exception of the 2009–2010 school year, the petitioner served in this position continuously until the end of the 2014–2015 school year. On August 7, 2014, the Board’s superintendent, Piera Gravenor, notified Melnyk by letter that the Board had approved her for a position as “Bookbinders Teacher—English . . . [a]t a rate of \$20.00 per hour” for the 2014–2015 school year. However, for the 2015–2016 school year, the Board assigned another teacher, Chelsea Glenn, to teach English in the BookBinders program, but not the petitioner.

The petitioner petitioned the Commissioner of Education for reinstatement to her BookBinders assignment with back pay, alleging that she had achieved tenure in her

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<sup>4</sup> According to N.J.A.C. 6A:16-9.1, “[e]ach district board of education choosing to operate an alternative education program, pursuant to N.J.A.C. 6A:16-1.3, shall approve the alternative education program.” Under N.J.A.C. 6A:16-1.3, “alternative education program” is defined as

a comprehensive educational program designed to address the individual learning, behavior, and health needs of students who are not succeeding in the general education program or who have been mandated for removal from general education, pursuant to N.J.A.C. 6A:16-5.5, 5.6 and, as appropriate, 5.7. The alternative education program shall provide a variety of approaches to meet the State-adopted standards, such as, through non-traditional programs, services, and methodologies to ensure curriculum and instruction are delivered in a way that enables students to demonstrate the knowledge and skills specified for all students in N.J.A.C. 6A:8.

BookBinders assignment and that the Board had violated her tenure and seniority rights by hiring “a replacement teacher for Petitioner in her alternative school assignment effectively terminating Petitioner’s alternative school assignment . . . at the end of the 2014–2015 school year.”

The Board denied that it had violated the petitioner’s tenure or seniority rights with respect to the BookBinders assignment and asserted that she “was not reappointed to an extra-duty position in the alternative program and she is not automatically entitled to reappointment in that position by virtue of tenure/seniority akin to any other extra-duty assignment.”

The issue is whether the petitioner separately acquired tenure in the alternative education teacher position, such that she is entitled to reinstatement, together with full back pay, benefits, and emoluments of the position, with interest, retroactive to June 2015.<sup>5</sup>

## **LEGAL ANALYSIS AND CONCLUSION**

### **Legal Analysis**

#### **I. Summary Decision Standard**

Under the Uniform Administrative Procedure Rules, N.J.A.C. 1:1-1.1 to -21.6, “[a] party may move for summary decision upon all or any of the substantive issues in a contested case.” N.J.A.C. 1:1-12.5(a). Summary decision may be granted “if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law.” N.J.A.C. 1:1-12.5(b).

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<sup>5</sup> The Board argues that the petitioner is barred by laches because she left the position in 2009 for a one-year period. The Board argues, essentially, that it reasonably relied on her failure to institute litigation to its unfair detriment. The argument lacks merit, however, because the petitioner was gone only a year and returned to serve for five subsequent years—indicating that she was in fact voluntarily “taking a break” as she asserts. Nothing in the record suggests that the Board declined to renew the petitioner for the alternative education program in 2009. She cannot be found to have failed to act on her rights when it is unclear that she previously had any rights that were violated. The petitioner argues that the Board failed to assert laches in its answer to the complaint and is therefore unable to claim the affirmative defense.



Here, there are no genuine issues of material fact, and this matter is ripe for summary decision.

## II. Tenure Law

The purpose of teaching-staff tenure laws is “to aid in the establishment of a competent and efficient school system by affording teaching staff members ‘a measure of security in the ranks they hold after years of service.’” Carpenito v. Rumson Bd. of Educ., 322 N.J. Super. 522, 528–29 (App. Div. 1999) (quoting Viemeister v. Prospect Park Bd. of Educ., 5 N.J. Super. 215, 218 (App. Div. 1949)). Thus, tenured teaching staff members “shall not be dismissed or reduced in compensation except for inefficiency, incapacity, or conduct unbecoming such a teaching staff member or other just cause.” N.J.S.A. 18A:28-5.

In order to acquire tenure, a teaching staff member “must comply with the precise conditions articulated in the [tenure] statute.” Zimmerman v. Bd. of Educ. of Newark, 38 N.J. 65, 72 (1962). Thus, a teaching staff member “is entitled to tenure if (1) she works in a position for which a teaching certificate is required; (2) she holds the appropriate certificate; and (3) she has served the requisite period of time.” Spiewak v. Summit Bd. of Educ., 90 N.J. 63, 74 (1982). Under N.J.S.A. 18A:28-5(a), “teaching staff members,”<sup>6</sup> including teachers, principals, and vice principals, who hold appropriate certificates acquire tenure after employment for:

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<sup>6</sup> A “teaching staff member” is defined as

a member of the professional staff of any district or regional Board of education, or any Board of education of a county vocational school, holding office, position or employment of such character that the qualifications, for such office, position or employment, require him to hold a valid and effective standard, provisional or emergency certificate, appropriate to his office, position or employment, issued by the State Board of Examiners and includes a school nurse and a school athletic trainer.

[N.J.S.A. 18A:1-1.]

These timeframes apply to “[t]he services of all teaching staff members employed prior to the effective date of P.L.2012, c.26 (C.18A:6-117 et al.),” which was August 6, 2012. N.J.S.A. 18A:28-5(a).

- (1) Three consecutive calendar years, or any shorter period which may be fixed by the employing board for such purpose; or
- (2) Three consecutive academic years, together with employment at the beginning of the next succeeding academic year; or
- (3) The equivalent of more than three academic years within a period of any four consecutive academic years.

Importantly, “the positions listed in N.J.S.A. 18A:28-5 are . . . separately tenurable,” and “tenure is achieved in a specific ‘position,’ and the scope of the tenured position is initially limited by the ‘certificate’ the teaching staff member must hold to satisfy the prerequisite of qualifications for his or her employment . . . .” Nelson v. Bd. of Educ., 148 N.J. 358, 368 (1997) (quoting Ellicott v. Bd. of Educ. of Frankford, 251 N.J. Super. 342, 348 (App. Div. 1991)).

**III. Were the petitioner’s tenure rights violated by the Board when it declined to assign her to teach English in the BookBinders program for the 2015–2016 school year?**

The issue is whether the petitioner acquired tenure rights with respect to her BookBinders assignment as a special education teacher where the BookBinders assignment was an extracurricular duty performed in the evenings that did not require additional certification beyond that required by the petitioner for her primary position as a special education teacher during regular school hours. In Dignan v. Board of Education of Rumson-Fair-Haven Regional High School, 71 S.L.D. 336, 341, aff’d, St. Bd. of Educ., 74 S.L.D. 1376, aff’d, App. Div., 75 S.L.D. 1083, the Commissioner held that a tenured teacher who was assigned to an extracurricular position as faculty advisor to the school newspaper had no tenure rights thereunder, because “a board of education has the authority to assign and reassign teachers to extra-classroom curricular duties in addition to their regularly-scheduled classroom-instruction assignment and to pay such additional remuneration as it deems reasonable and appropriate therefor,” and, “absent a requirement for a certificate other than that of a

teacher, no tenure status accrues to such assignments, and they are renewed or discontinued at the discretion of the board.” Dignan, supra, 71 S.L.D. at 343.

Under the facts of that case, a tenured teacher, Joseph Dignan, was assigned by the school board to the extra-classroom duty of faculty advisor for the school newspaper as an “annual assignment” from the 1961--1962 school year through the 1969--1970 school year, and “was paid a sum as an honorarium in addition to his regular salary as a teacher.” Id. at 341. However, after the school board declined to renew his assignment for the 1970--1971 school year and instead appointed another teacher as faculty advisor, Dignan claimed that he had tenure rights to the faculty-advisor position and the associated compensation. Ibid.

While the Commissioner recognized that Dignan had tenure as a teacher, and could not be dismissed from that position without cause, the Commissioner rejected Dignan’s “claim to any special status or tenure as a faculty advisor for the school newspaper.” Ibid. Instead, the Commissioner explained:

[i]t is clear that [under N.J.S.A. 18A:27-4] a board of education has the right to assign and transfer or reassign teachers in its employ. . . . [Dignan] was relieved of an extra-classroom duty which had been assigned to him each year for a certain number of years. The Board was not obligated to continue this assignment for each succeeding year. [Dignan’s] duties as faculty advisor were not permanently engrafted on his duties as a teacher, either by rule or by the terms of his employment. . . .

. . . .

It is [also] clear that the extra compensation ceases when the extra-classroom assignment is no longer performed.

[Id. at 341, 342 (citation omitted).]

Thus, in that case, the school board “acted reasonably and within its discretionary authority in relieving [Dignan] of his extra compensation, and assigning that responsibility and extra remuneration to another member of the faculty.” Id. at 346.

In contrast, in Ocasal v. Elmwood Park Board of Education, 97 N.J.A.R.2d (EDU) 623, a tenured teacher, who had both an instructional certificate and a supervisory certificate, also achieved tenure in his extra position as “staff development departmental facilitator” and was entitled to the stipend associated with the position because the additional job, unlike his teaching position, required a supervisory certificate and not an instructional certificate, and he served under his supervisory certificate for the requisite number of years.

Traditionally, “extracurricular” is the word used to describe school programs designed to enhance the education of students outside of the classroom, or regular curriculum, such as the school newspaper or athletics. See Smith v. Bd. of Educ. of Paramus, 68 S.L.D. 62 (stating that “extracurricular or cocurricular activities comprise all those events and programs which are sponsored by the school and may reasonably be characterized as a supplement to the established program of studies in the classroom in order to enrich the learning and self-development opportunities of pupils”), aff’d, St. Bd. of Educ. (Feb 5, 1969).

However, the definition of “extracurricular” also includes “lying outside one’s regular duties or routine.” Merriam-Webster Online Dictionary, “extracurricular,” <<https://www.merriam-webster.com/>>. Thus, while the petitioner taught English inside a classroom during her BookBinders assignment, the assignment was extracurricular in the sense that it fell outside her usual duties as a special education teacher during regular school hours. Here, as in Dignan, and not as in Ocasal, the position was extracurricular and did not require additional certification beyond the petitioner’s teaching certificate. Accordingly, the petitioner was not separately entitled to tenure in the alternative education position.

Moreover, Melnyk is not entitled to compensation for removal from her extracurricular or cocurricular position because the alternative program’s duties were not engrafted onto her regular duties as a special education teacher, and, further, because the remuneration that she was paid for her extracurricular service was established separately from her employment contracts. Nothing in the petitioner’s contract as a special education teacher required her to participate in the alternative

program. Instead, for the 2014–2015 school year, she received a salary of \$82,874 for her teaching position in the general education program, and she received separate remuneration of twenty dollars an hour for her extracurricular duty as an English teacher in the BookBinders program. Therefore, her compensation for her work in the alternative program was not an integral part of her contractual salary. Cf. Shriener v. Bd. of Educ. of Boonton, 75 S.L.D. 939 (finding that a tenured teacher was entitled to compensation as athletic director because the school board incorporated his stipend into his contract salary, and in all other ways treated the stipend as salary, and thus the stipend amount was protected by tenure even though the position for which he received the stipend was not). Consequently, as the petitioner’s former position in the alternative program was neither engrafted onto her primary tenured position nor compensated as an integral part of her salary, the petitioner is not entitled to back pay or other compensation.

### **Conclusions**

The petitioner did not acquire tenure in the BookBinders position because the assignment did not require a certificate separate from the one under which she acquired tenure in her teaching position in the general education program and was extracurricular. Furthermore, she is not entitled to compensation because the duties of the alternative education program were not engrafted onto her duties as a regular program teacher, nor were her salary and stipend treated as one integral whole.

Accordingly, because the petitioner has not met her burden of proof and demonstrated that she is entitled to judgment as a matter of law, her motion for summary decision shall be denied, and her petition shall be dismissed.

The Board, however, has met its burden of proof that it is entitled to judgment as a matter of law; therefore, its motion for summary decision shall be granted.

**ORDER**


It is hereby **ORDERED** that the motion for summary decision filed by the Board of Education of the Delsea Regional High School District, Gloucester County, is **GRANTED**, and the motion for summary decision filed by the petitioner is **DENIED**. It is further **ORDERED** that the petition be and is hereby **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

July 12, 2017  
\_\_\_\_\_  
DATE

  
\_\_\_\_\_  
**SUSAN M. SCAROLA, ALJ**

Date Received at Agency: \_\_\_\_\_

Date Mailed to Parties: \_\_\_\_\_

**APPENDIX**

**WITNESSES**

**For petitioner:**

None

**For respondent:**

None

**EXHIBITS**

**For petitioner:**

Brief

**For respondent:**

Brief