

New Jersey Commissioner of Education

Final Decision

Deanna DeGraff,

Petitioner,

v.

Board of Education of the Township of Belleville,
Essex County,

Respondent.

Synopsis

In this case on remand, the petitioner – formerly employed as a tenured Teacher of Dance by the Belleville Board of Education – claimed that her tenure rights were violated when the Board abolished its dance program and her position as the school district’s only certificated Teacher of Dance. Petitioner appealed the Board’s action in September 2016, alleging that the elimination of the dance program was a violation of the New Jersey Student Learning Standards (NJSLS). The Commissioner issued a decision in this matter in September 2018, holding that the NJSLS require that dance instruction be made available to all students in grades K-12, and remanding the case to the OAL for further proceedings regarding the whether the Board failed to provide dance instruction in violation of the NJSLS and whether petitioner’s tenure rights were violated as a result of the Board’s actions.

On remand, the ALJ found, *inter alia*, that: the Department of Education, through the NJSLS, requires that actual instruction in dance technique be offered to high school students, not just exposure to dance through such things as reading about it in a book or watching someone else dance in a video; the Board failed to meet its obligation under the NJSLS to offer dance instruction, and its action in abolishing its dance program is impermissible; and the Board must restore the program; regarding the petitioner’s tenure rights, while the Board had the statutory right to abolish petitioner’s position, it did not have the authority to abolish the subject she taught; petitioner’s evidence that historical student demand for dance in the school district requires a full-time Teacher of Dance went un rebutted by the Board; and the Board’s actions in eliminating the dance program and petitioner’s position were improper. The ALJ concluded that petitioner is entitled to reinstatement as a full-time teacher, retroactive to the date of her RIF. Accordingly, the ALJ ordered the Board to restore its formal dance program, and to reinstate petitioner as a full-time Teacher of Dance retroactive to the date of her RIF, with full back pay, benefits, and emoluments, less mitigation.

Upon comprehensive review, the Commissioner concurred with the ALJ’s findings and conclusions as thoroughly set forth in the Initial Decision. Accordingly, the recommended decision of the OAL was adopted as the final decision in this matter.

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.

February 4, 2020

OAL Dkt. No. EDU 14208-18
On Remand OAL Dkt. No. EDU 16478-16
Agency Dkt. No. 265-9/16

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v.

Board of Education of the Township of
Belleville, Essex County,

Respondent.

The record of this matter, the Initial Decision of the Office of Administrative Law (OAL), and the exceptions filed by respondent pursuant to *N.J.A.C. 1:1-18.4* have been reviewed.¹

Petitioner in this matter was the school district's only certificated Teacher of Dance. The district abolished its dance program and eliminated petitioner's position. Petitioner appealed, alleging that the elimination of the dance program was, among other things, a violation of the New Jersey Student Learning Standards (NJSLs). The Commissioner issued a decision in this matter on September 20, 2018, holding that the NJSLs require that dance instruction be made available to all students in grades K-12; the Commissioner accordingly remanded the matter to the OAL for further proceedings regarding whether the Board failed to provide dance instruction in violation of the NJSLs and whether such violation implicated petitioner's tenure rights.

On remand, the Administrative Law Judge (ALJ) found that the NJSLs require that students be offered actual instruction in dance technique, not just exposure to dance. The Board failed to meet its obligations under the NJSLs to offer dance instruction, and its action in abolishing

¹ Petitioner did not file a reply to respondent's exceptions.

the dance program was *ultra vires*. Because the Board did not rebut petitioner's evidence that student demand in the district historically required the full-time employment of a Teacher of Dance, the Board was obliged to offer a dance program that would have necessitated the employment of a full-time dance teacher. The ALJ further concluded that the reduction in force (RIF) that abolished petitioner's position was improper in light of the NJSLS requirement and that petitioner was entitled to reinstatement as a full-time teacher, retroactive to the date of the RIF.

In its exceptions, the Board argues that the ALJ erred in holding that the district's provision of exposure to dance does not satisfy the NJSLS. The Board contends that students can be taught about dance through relevant reading materials, videos in other classes such as theatre or music, instruction in physical education classes, or activities and events such as competitive cheer, color guard, musical productions and plays, and talent competitions. The district also offers "Option II," which allows students to receive graduation credit for activities in dance outside of school. According to the Board, these opportunities allow students to meet the benchmark levels set forth in the NJSLS. The Board disagrees with the ALJ's conclusion that the historical student demand in the district necessitated the full-time employment of a certificated Teacher of Dance and contends that three of the five daily classes taught by petitioner were classified as physical education courses. The Board argues that it was not asked to address the issue of student demand and requests that, if the Commissioner finds that issue relevant to the inquiry, the matter be remanded to the OAL for additional factual determinations.

Upon review, the Commissioner concurs with the ALJ's findings and determinations in this matter. As noted in the Commissioner's previous decision, instruction in all four visual and performing arts disciplines – dance, music, theater, and visual arts – must be made available to high school students. The evidence proffered by the Board on remand fails to demonstrate that the Board has met its obligation to offer dance instruction that meets state standards and allows students to fulfill the graduation requirements set forth in *N.J.A.C.* 6A:8-5.1. While the Commissioner

acknowledges that boards of education have a great deal of freedom to implement curricula, none of the activities cited by the Board as providing “exposure to dance” afford students the opportunity to earn graduation credits in the discipline of dance. Moreover, the Board cannot satisfy its obligation to offer dance instruction through the use of Option II, as the purpose of Option II is to allow flexibility for students who are actively engaged in the arts outside of school to earn credit for those outside activities; the choice of whether to utilize Option II belongs to the student, not the district.

The Commissioner further agrees that the Board’s failure to provide dance instruction following the RIF implicates petitioner’s tenure rights. Petitioner was the only tenured teacher in the district qualified to provide dance instruction at the secondary level, so her retention was necessary for the Board to provide dance instruction. Because the Board’s actions leading to petitioner’s RIF were improper, they are void. Petitioner must therefore be restored to the position she held at the time of the RIF.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter. The Board is ordered to reinstate petitioner to her position as a full-time Teacher of Dance retroactive to the date of her RIF, with full back pay, benefits, and emoluments of employment, less mitigation.

IT IS SO ORDERED.²

COMMISSIONER OF EDUCATION

Date of Decision: February 4, 2020
Date of Mailing: February 4, 2020

² 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).



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 14208-18

AGENCY DKT. NO. 265-9/16

On Remand

OAL DKT. NO. EDU 16478-16

DEANNA DEGRAFF,

Petitioner,

v.

**BOARD OF EDUCATION OF THE TOWNSHIP
OF BELLEVILLE, ESSEX COUNTY,**

Respondent.

Sanford Oxfeld, Esq., for petitioner, (Oxfeld Cohen, attorneys)

Marc Mucciolo, Esq., for respondent, (Methfessel and Werbel, attorneys)

Record Closed: November 7, 2019

Decided: November 15, 2019

BEFORE **ELLEN S. BASS, ALJ:**

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, Deanna DeGraff, a tenured Teacher of Dance formerly employed by the Belleville Board of Education (the Board), asserts that the Board improperly terminated her pursuant to a Reduction-in-Force (RIF). New Jersey Student Learning Standards (NJSLs) require the Board to offer dance instruction at the high school level

and DeGraff urges that, upon her termination, it failed to do so. She asks that an order be entered directing the Board to reestablish its dance program and to reinstate her to a full-time position as a Teacher of Dance. The Board replies that its actions were at all times consistent with applicable law and regulation.

DeGraff filed her appeal on September 28, 2016; an answer was filed, and the matter was transmitted to the Office of Administrative Law (OAL) as a contested case, on October 27, 2016. An Initial Decision was issued by the Honorable Diana Sukovich, A.L.J., on August 7, 2018. (C-1.) On September 20, 2018, the Commissioner issued a decision remanding the case to the OAL for additional fact finding. (C-2.) The case was reassigned to me on January 16, 2019.

Counsel agreed that the additional information sought by the remand decision could be submitted via certification. These were filed on March 8, 2019, and May 5, 2019. A legal brief was filed by the Board on August 30, 2019; DeGraff chose not to file a legal argument. At my request, counsel for DeGraff supplemented his client's certification on October 17, 2019. I held the record open until November 7, 2019, to allow the Board an opportunity to reply to that certification. I received no reply, and the record closed.

ISSUES PRESENTED ON REMAND

The remand decision presents the following issues for adjudication:

1. Upon RIFing DeGraff, did the Board violate the New Jersey Student Learning Standards (NJSLs) by failing to offer formal dance instruction to its students; and if so, is it required to restore the formal dance program at its high school?
2. If, subsequent to RIFing DeGraff, the Board failed to meet its obligation to offer formal dance instruction, is DeGraff entitled to reinstatement and back pay?

FINDINGS OF FACT

The factual findings of the Initial Decision (EDU 16478-16) are incorporated herein by reference. The certifications submitted by the parties reveal the following additional uncontroverted facts, and I **FIND**:

DeGraff was employed by the Board as a Teacher of Dance from September 2002 until the end of the 2015-2016 school year. Throughout her employment, she was the only teacher in Belleville who held an Instructional Certificate with a Teacher of Dance endorsement. DeGraff worked full-time; teaching a class load of five dance classes per day. She indicates via certification that “three [of these classes] were labeled ‘Dance’ and two were labeled ‘Dance/P.E.’ classes.” Even in DeGraff’s last year of employment there were enough dance students and dance classes to support her full-time employment, and she held the same instructional load as any other full-time teacher.

DeGraff was RIFed at the end of the 2015-2016 school year, and Belleville has not offered a formal dance program to its students since. Notwithstanding, Superintendent of Schools Richard Tomko agrees that instruction in all four visual and performing arts, to include dance, must be made available to high school students. He urges that the district meets State requirements because the Physical Education department includes curriculum standards that mention or are related to dance, as follows:

- a. **HPE.2.5.12.A.3** - Design and lead a rhythmic activity that includes variations in time, space, force, flow, and relationships (creative, cultural, social and fitness dance).
- b. **HPE.2.5.12.C.3** – Determine the current impact of globalization and technology on the development of, participation in, and viewing of games, sports, dance, and other movement activities, and predict future impact.

- c. **Exit skills** – Explain and perform movement skills that combine mechanically correct movement in smooth flowing sequences in isolated settings (i.e. skill practice) and applied settings (i.e. games, sports, dance, and recreational activities).

These curricular requirements provide “exposure to dance,” and Tomko points to activities that incorporate such exposure; such as yoga, competitive cheerleading, color guard, musical productions, and homecoming dances and proms. Tomko asserts that “students are exposed to dance through other classes, such as theatre and music, in a variety of ways including but not limited to media, reading materials and activities.” And the school district offers an alternative called “Option II,” through which students can receive graduation credits in outside activities/programs in dance and theatre, with curriculum/program approval and monitoring by the building principal.

The Commissioner cites the New Jersey Core Curriculum Content Standards for the Visual and Performing Arts in his remand decision and confirms that while “the Board is able to develop its own instructional methods . . . any such instruction must be aligned to the NJSL and core curriculum.” The remand decision at footnote 8 references a FAQ document that offers additional clarification about visual and performing arts instruction. That document confirms that “all K-12 students must have regular sequential arts instruction in the four arts disciplines included in the standards of the following: dance, music, theatre, and the visual arts.” Relative to high school students, the FAQ page explains that

[i]n grades 9-12, all students are expected to communicate at a basic level in the arts and demonstrate proficiency in at least one arts discipline. This specialization allows for student choice which means that all four arts disciplines must be made available to students. All high school students must successfully complete five credits in at least one visual and performing arts course in order to receive a state-endorsed diploma.

[Emphasis supplied]

As for who is qualified to provide instruction in dance, the FAQ document advises that a certification exists for each area of the arts, to include specific certification as Teacher of Dance. While Tomko points to several physical education activities that allegedly infuse dance, the answer that the FAQ document offers to the question “Can dance be used as a substitute for physical education?” is noteworthy. The document provides:

No. The dance standards are very specific and require a high level of dance execution. Therefore, they are not easily aligned with the physical education standards. For example, a standards-based physical education program may utilize dance forms as part of instruction, but its focus is on fitness and wellness, while a dance class may address various dance techniques and styles. While there are some common elements, it is unlikely that the curricular objectives will align sufficiently. Courses in dance should be used to achieve arts credits.

[Emphasis supplied]

DeGraff points out that New Jersey has adopted the National Core Arts Standards, and attaches a document to her certification entitled “National Core Arts Standards in Dance General Implementation Guidelines.” The document discusses alignment of curriculum with all facets of dance, to include artistic creation (choreography), performance and analysis of artistic work.

Relative to Option II, DeGraff shares that while it is technically offered in Belleville, to her knowledge no one has ever availed themselves of this option for dance instruction. The Board has offered nothing to rebut this assertion. And the Department’s FAQ document couches this as an opportunity for a student to opt out of in-school arts education; not as a vehicle for the school district to absolve itself of its obligation to provide required curricular offerings. The Department explains that “Option Two (sometimes called Plan B or program completion) is available to high school students. Option Two permits a local board of education to approve alternative activities e.g., participation in a dance company, community theater to achieve the New Jersey Student Learning Standards.”

ANALYSIS AND CONCLUSIONS OF LAW

Does the Board offer dance instruction that aligns with and is compliant with NJSLS?

New Jersey has developed standards for student learning that are intended to ensure that all students exit school equipped to successfully pursue their post-secondary paths. See: N.J.A.C. 6A:8-2.1. Local district boards of education are required to guarantee “that curriculum and instruction are designed and delivered in such a way that all students are able to demonstrate the knowledge and skills specified by the NJSLS...” N.J.A.C. 6A:8-3.1. Visual and performing arts are a required course of study in New Jersey schools, and students must earn at least five credits in the arts to earn a State endorsed diploma. N.J.A.C. 6A:8-5.1(a)(vii). As noted in the remand decision, “instruction in all four VPA disciplines [dance, music, theater, and visual arts] must be made available to high school students.”

Ever since abolishing its formal dance program, this Board has failed to offer a visual and performing arts curriculum to its students that aligns with NJSLS. I **CONCLUDE** that the Department of Education, through the NJSLS, requires that actual instruction in dance technique be offered to high school students; not just “exposure to dance;” opportunities to read about it in a book; or opportunities to watch someone else dance in a video. Yoga and physical education are not dance. And Tomko’s assertion that students are being provided instruction in dance because they are given opportunities to attend school dances and proms is particularly insulting to anyone serious about dance as a fine art, and is nothing short of preposterous.

Moreover, I agree with DeGraff that the sort of dance instruction contemplated by the NJSLS must be delivered by a properly certificated teacher. She correctly points out that a Teacher of Dance endorsement is required to teach dance in the public schools. N.J.A.C. 6A:9B-9.3(a)(1)(ii). DeGraff was the only staff member in Belleville to hold a Teacher of Dance endorsement on her Instructional Certificate. The “exposure”

to dance currently being offered in Belleville by physical education or other instructional staff thus does not and cannot meet NJSLS requirements.

The suggestion that this Board has met its obligations in dance instruction by offering Option II is likewise unavailing. As noted above, it is clear that this option is designed to afford flexibility for students who are actively engaged in the arts outside of school. N.J.A.C. 6A:8-5.1(a)(2). It is inconceivable that the drafters of N.J.A.C. 6A:8-5.1(a) intended that a local board could meet its obligations to “develop, adopt, and implement local graduation requirements that prepare students for success...” by telling its students to go out and find instruction elsewhere. I **CONCLUDE** that individual students in Belleville surely can meet their visual and performing arts graduation requirements via Option II, but at their option, not the Board’s.

In summary, I **CONCLUDE** that the Board has failed to meet its obligations to provide dance instruction to its students; that its action in abolishing its dance program was ultra vires; and that the Board must restore the dance program. And having heard nothing to rebut DeGraff’s statement that student demand in Belleville historically required the full-time employment of a duly certificated Teacher of Dance, I am compelled to further **CONCLUDE** that from 2016 to the present, the Board was obliged to offer a dance program that would have necessitated the employment of a full-time dance teacher.

DeGraff’s Rights to Recall

The prerogative of the Board to reduce force is well-established. N.J.S.A. 18A:28-9 provides that

[n]othing in this title or any other law relating to tenure of service shall be held to limit the right of any board of education to reduce the number of teaching staff members employed in the district whenever, in the judgment of the board, it is advisable to abolish any such positions for reasons of economy or because of reduction in the number of pupils or of change in the administrative or supervisory

organization of the district or for other good cause upon compliance with the provisions of this article.

RIFs and recalls of tenured staff must be based on seniority according to standards established by the Commissioner. N.J.S.A. 18A:28-10; see N.J.A.C. 6A:32-5.1; Howley v. Ewing Bd. of Educ., 1982 S.L.D. 1328, aff'd, 1983 S.L.D. 1554.

While here, the Board had the statutory right to abolish DeGraff's position, it lacked the authority to abolish the subject she taught; accordingly, under the unique circumstances of this case, I **CONCLUDE** that DeGraff's RIF was improper. As the Commissioner aptly put it in his remand decision:

...petitioner may be able to establish that termination was improper if, following the RIF, the Board did not have qualified teachers to provide dance instruction and/or failed to provide dance instruction (i.e. violated NJSLs), and that petitioner would have been entitled to the position by virtue of her tenure and seniority and/or because she was the only tenured teacher qualified to provide dance instruction at the secondary level (retention of whom would have been necessary for the Board to provide dance instruction).

The Board violated the NJSLs once DeGraff was RIFed by failing to provide dance instruction. DeGraff was the only tenured teacher in Belleville qualified to provide dance instruction at the secondary level; clearly, her retention would have been necessary for the Board to continue to offer such instruction. DeGraff is incontrovertibly entitled to a Teacher of Dance position in Belleville by virtue of her tenure and seniority. And since DeGraff's description of student demand as necessitating a full-time teacher went un rebutted, I **CONCLUDE** that she is thus entitled to reinstatement as a full-time teacher, retroactive to the date of her RIF.

ORDER

Based on the foregoing, it is hereby **ORDERED** that the Board restore its formal dance program, and that DeGraff be reinstated as a full-time Teacher of Dance

retroactive to the date of her RIF, with full back pay, benefits and emoluments of employment, less mitigation.

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, P.O. 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.

November 15, 2019



DATE

ELLEN S. BASS, ALJ

Date Received at Agency:

November 15, 2019

Date Mailed to Parties:

sej

APPENDIX

Witnesses:

For Petitioner

None

For Respondent

None

Exhibits:

For Petitioner

- P-1 Certification of Deanna DeGraff
- P-2 Supplemental Certification of Deanna DeGraff

For Respondent

- R-1 Certification of Richard Tomko

Judge's Exhibits

- C-1 Initial Decision, EDU
- C-2 Commissioner's Decision, EDU