

EDU #8917-92
C # 83-94
SB # 26-94

DANIEL WICKENHEISSER, :
PETITIONER-APPELLANT, :
V. : STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE : DECISION
BOROUGH OF NORTH ARLINGTON,
BERGEN COUNTY, :
RESPONDENT-CROSS/APPELLANT. :

Decided by the Commissioner of Education, April 18, 1994

For the Petitioner-Appellant, Bucceri & Pincus (Gregory T. Syrek, Esq.,
of Counsel)

For the Respondent-Cross/Appellant, Glenn Leonard, Esq.

Daniel Wickenheisser (hereinafter "petitioner") began his employment with the Board of Education of the Borough of North Arlington (hereinafter "Board") in 1964 as a teacher. In 1976, he was appointed the department chairperson for physical education, health, family life and driver education, a position he retained through the 1991-92 school year. In 1991-92, he received a stipend in the amount of \$1,400 for such employment. On March 26, 1992, petitioner submitted a letter to the Board indicating his interest in participating in the district's early retirement program and requesting approval for his retirement effective June 30, 1993. The Board subsequently approved petitioner's request.

Thereafter, in a memorandum dated June 23, 1992, the school principal advised petitioner that: "As per conversation with Mr. William A. Mancuso, Superintendent of Schools, next year you will not be Chairperson of the Physical Education Department and will have a full teaching schedule." Exhibit P-44, in evidence. The Board reassigned petitioner to a full-time teaching position in 1992-93. The Board also appointed a staff member who was not tenured as a supervisor to the newly-consolidated position of Supervisor of History, English, Foreign Language and Physical Education, which included a yearly stipend in the amount of \$4,400. Petitioner did not receive a stipend in 1992-93.

On September 18, 1992, petitioner filed a petition of appeal with the Commissioner of Education alleging that the Board had violated his tenure rights in reassigning him to a teaching position while employing a non-tenured individual in a supervisory position. The Board countered that petitioner had waived his right to the department chairperson position or, in the alternative, was barred by equitable estoppel from claiming that position. According to the Board, petitioner had agreed to relinquish his supervisory position and return to a teaching position in exchange for a favorable recommendation from the district superintendent on his request for early retirement. Petitioner denied that he had agreed to such an arrangement.

On February 28, 1994, an Administrative Law Judge ("ALJ") determined that the Board had violated petitioner's tenure rights. The ALJ found that petitioner had indicated to the district superintendent that the loss of his department chairmanship in 1992-93 "would not be a problem," initial decision, slip op. at 6, which the superintendent had interpreted as an acceptance of his offer to recommend that the

Board approve petitioner's request for early retirement if petitioner agreed not to challenge the loss of his department chairmanship in 1992-93. The ALJ concluded that petitioner, in so doing, had not waived his rights to that position since he had not intentionally relinquished a known right. The ALJ observed that "the essence of the agreement as described by Superintendent Mancuso was that petitioner would not assert his tenure right to the position of department head for physical education. Under the circumstances, I conclude that petitioner did not waive his tenure rights to the position of department head for physical education." Id. at 7.

The ALJ also determined that petitioner was not barred by the doctrine of equitable estoppel from asserting his tenure rights to such position, concluding that the Board had failed to demonstrate its detrimental reliance on petitioner's actions or that approval of petitioner's request for early retirement had been detrimental to the Board.

The ALJ concluded that petitioner "was tenured in the position of department head for physical education, that the position was not abolished, that petitioner was not the subject of proceedings under N.J.S.A. 18A:6-10 [the Tenure Employees Hearing Law] and that petitioner was not transferred by respondent to the position of teacher." Id. at 7. He found that "[p]etitioner was never informed that the position of chairperson of the department of physical education was abolished, and in fact, respondent did not abolish that position." Id. at 4. The ALJ therefore recommended that the Board pay petitioner a stipend in the amount of \$1,400 for the 1992-93 school year, along with pre- and post-judgment interest. Since he found that the Board had not abolished petitioner's position as department head for physical education, the ALJ concluded that

petitioner was not entitled to the larger stipend for the position of Supervisor of History, English, Foreign Language and Physical Education.

On April 18, 1994, the Commissioner adopted the ALJ's recommended decision and directed the Board to pay petitioner the stipend he would have received in 1992-93 as department chair of physical education, along with pre- and post-judgment interest. The Commissioner concurred with the ALJ that absent the abolishment of petitioner's position, a transfer to the separately tenurable position of teacher, or proceedings under the Tenure Employees Hearing Law, petitioner was entitled to his stipend as department head for physical education. The Commissioner also agreed that petitioner had not waived his entitlement to a specifically known right, and that petitioner had no entitlement to the larger stipend since his position had not been abolished by the Board.

Petitioner filed the instant appeal to the State Board, arguing that he was entitled, by virtue of the tenure status he achieved during his employment as the department head for physical education, to the \$4,400 stipend attendant to the position of Supervisor of History, English, Foreign Language and Physical Education. Petitioner alleges that, notwithstanding the Board's failure to take formal action to abolish his department chairmanship, that position ceased to exist for all intents and purposes after the Board reorganized its supervisory staff in 1992-93. As a result, petitioner maintains that he was entitled to any other supervisory assignments within the scope of his tenure as against non-tenured individuals.

The Board filed a cross-appeal, contending that it had not violated petitioner's tenure rights. The Board renews its argument that petitioner waived his right to his

department chairmanship in physical education and that his claim was barred by equitable estoppel.

After a thorough review of the record,¹ we affirm in part, as clarified herein, and reverse in part the decision of the Commissioner.

We agree with the Commissioner's determination that petitioner did not make a knowing and voluntary waiver of his rights to a supervisory position. Indeed, the newly-consolidated supervisory assignment in History, English, Foreign Language and Physical Education, with its increased stipend, did not even exist at the time petitioner allegedly waived his rights thereto. Nor is there is any indication that petitioner was informed or aware at the time of such alleged waiver that he was relinquishing his tenure rights to any supervisory assignment within the scope of his certification.

We also agree that petitioner was not barred by the doctrine of equitable estoppel from asserting his tenure rights to a supervisory position. Based upon the record before us, including the testimony of the district superintendent,² we concur with the Commissioner that the Board has failed to demonstrate that it relied on petitioner's actions to its detriment.

Consequently, we turn to the issue of the remedy to which petitioner is entitled by virtue of the Board's action. There is no indication in the record that the Board took any formal action to abolish petitioner's position. See Guerra v. Board of Education of Hudson County Area Vocational and Technical Schools, decided by the Commissioner,

¹ We note that the hearing transcripts requested by the parties, which provide the testimony of the district superintendent on December 6 and 7, 1993, were not transmitted to the Commissioner by the Office of Administrative Law until after the Commissioner had rendered his decision in this matter. Consequently, we have carefully reviewed these transcripts in determining this matter.

1990 S.L.D. 340, 352, aff'd by the State Board, 1990 S.L.D. 354, aff'd, Docket #A-6638-89T1 (App. Div. 1991). Nor did the Board take formal action to transfer petitioner to a teaching position with his consent. And, indeed, the record reveals that the job description for the newly-consolidated supervisory assignment in History, English, Foreign Language and Physical Education was not even adopted by the Board until September 21, 1992, subsequent to the commencement of the 1992-93 school year and petitioner's return to a full-time teaching position. Exhibits P-3 and R-2, in evidence. Under these circumstances, we agree with the Commissioner that petitioner was entitled to the stipend he would have received in 1992-93 as the department head for physical education, but not to the larger stipend for the newly-consolidated supervisory assignment in History, English, Foreign Language and Physical Education.

However, we reverse the Commissioner's adoption of the ALJ's recommendation to grant pre- and post-judgment interest to petitioner. The criteria to be applied when awarding pre- and post-judgment interest are set forth in N.J.A.C. 6:24-1.16(c), which provides that:

1. Pre-judgment interest shall be awarded by the Commissioner when he or she has concluded that the denial of the monetary claim was an action taken in bad faith and/or has been determined to have been taken in deliberate violation of statute or rule.
2. Post-judgment interest shall be awarded when a respondent has been determined through adjudication to be responsible for such payment, the precise amount of such claim has been established or could have been established and the party responsible for the payment of the judgment has neither applied for nor obtained a stay of the decision but has failed to satisfy the claim within 60 days of its award.

² See n.1, supra.

Petitioner herein has failed to establish his entitlement to either pre-judgment or post-judgment interest. There has been no showing that the Board acted in bad faith when it denied petitioner's claim so as to entitle him to pre-judgment interest. Nor was it appropriate for the Commissioner to award post-judgment interest before 60 days had passed from the date of his award, and petitioner has not alleged that the Board failed to satisfy that claim within 60 days of the Commissioner's decision.

Consequently, we affirm, as clarified herein, that portion of the Commissioner's decision finding that petitioner was entitled to the stipend he would have received in 1992-93 as the department head for physical education, but reverse that part of the Commissioner's decision awarding pre- and post-judgment interest to petitioner.

February 5, 1997

Date of mailing _____