

EDU # 8774-02
C # 287-05
SB # 36-05

JOY FERRONTO, :
PETITIONER-RESPONDENT, :
V. : STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE : DECISION
TOWNSHIP OF WEYMOUTH, :
ATLANTIC COUNTY, LINDA N. GAVULA :
AND MARGUERITE BETZ, :
RESPONDENTS-APPELLANTS. :
_____ :

Decided by the Acting Commissioner of Education, August 11, 2005

Decision on motion by the State Board of Education, December 7, 2005

For the Petitioner-Respondent, Press & Tagliatella, LLC (Richard L.
Press, Esq., of Counsel)

For the Respondents-Appellants, William S. Cappuccio, Esq.

For the Amicus Curiae New Jersey School Boards Association, Michael F.
Kaelber, Esq.

Petitioner in this case had been employed by the Weymouth Board of Education (“Board”) since 1987 and had achieved tenure as a school clerk. On July 18, 2002, the Board acted on the recommendation of its Chief School Administrator (“CSA”) to abolish petitioner’s position. In its place, the positions of “aide” and “secretary” were established, and petitioner’s employment was terminated.

The petitioner filed a petition of appeal with the Commissioner of Education, and the matter was transmitted to the Office of Administrative Law for a hearing.

Based on the testimony, the Administrative Law Judge (“ALJ”) concluded that the termination of petitioner’s employment was improper. Finding the CSA’s credibility “to be significantly less than I would normally expect of a Chief School Administrator,” Initial Decision, slip op. at 5, the ALJ rejected the CSA’s explanation that the new configuration was necessary because she needed two people to do the work that petitioner had been performing and that petitioner’s position had to be eliminated and her employment terminated due to the fact that the duties of the newly created jobs overlapped during certain portions of the day. Id. at 4. The ALJ further found that the Board’s claim that it had acted for economic reasons could not be sustained because the facts adduced at the hearing “in no way indicate[d] that economics was the motivating factor behind petitioner’s termination.” Id. at 7. Rather, based on the testimony, the ALJ determined that the CSA was not motivated by economics, but by “a desire to rid herself of an employee she found to be inadequate.” Id. at 8. Since the Board had not followed the requirements of N.J.S.A. 18A:6-10 before terminating petitioner’s employment, the ALJ concluded that its action could not be sustained and that petitioner should be restored to her tenured employment.

The Acting Commissioner found that, for the reasons expressed by the ALJ and as amplified in his decision, the elimination of petitioner’s position was in bad faith. He therefore adopted the relief recommended by the ALJ with the exception of the ALJ’s award of counsel fees, which, the Acting Commissioner noted, the Commissioner does not have authority to award.

The Board appealed to the State Board of Education, arguing as it had before the ALJ and Commissioner that its action was economically motivated.

Appearing as amicus curiae in this matter, the New Jersey School Boards Association (“NJSBA”) contends that the Acting Commissioner’s decision should be reversed or remanded for additional fact-finding and analysis of the issues. The NJSBA argues that, although N.J.S.A. 18A:28-9 addresses teaching staff members only, the Acting Commissioner properly endorsed the ALJ’s reliance on that statute for guidance and that the Board’s action should be sustained as a valid administrative reorganization. NJSBA also argues that the Acting Commissioner’s decision goes beyond determining the Board’s legal obligations in that it focuses on what the Board could have done rather than what it was required to do and that in doing so it ignores the fact that secretarial and clerical positions are separately tenurable. In this respect, NJSBA urges that the seniority rights of clerks should be addressed.

After careful review of the record and the applicable law, the State Board affirms the decision of the Acting Commissioner, but we modify his analysis. In doing so, we find that it is not necessary to rely upon N.J.S.A. 18A:28-9, which by its terms applies only to “teaching staff members,” in order to properly resolve this matter. N.J.S.A. 18A:17-2 specifically governs the tenure of individuals who, like petitioner, are employed in clerical positions. In addition to specifying the statutory requirements for acquiring tenure in such positions, N.J.S.A. 18A:17-2 provides that individuals who acquire tenure under this statute “...shall not be dismissed...except for neglect, misbehavior or other offense and only in the manner prescribed by [N.J.S.A. 18A:6-10].” As set forth in the ALJ’s Initial Decision, N.J.S.A. 18A:6-10 in turn provides that no

person under tenure may be dismissed or reduced in compensation except for inefficiency, incapacity, unbecoming conduct or other just cause and then only after a hearing. In addition, N.J.S.A. 18A:17-2 provides that “[n]othing in this section shall prevent the reduction of the number of any such persons...under the conditions and with the effect provided by law.”

It is axiomatic that an action taken by a district board pursuant to N.J.S.A. 18A:17-2 cannot be sustained if it was taken in bad faith. The record in this case leaves no question that, as the Acting Commissioner concluded, the Board's action to eliminate petitioner's position was taken in bad faith. Acting Commissioner's Decision, slip op. at 11. As the ALJ found, the CSA's testimony that it was necessary to eliminate petitioner's clerical position and establish two new positions as the result of an overlap in the duties of the secretary and aide was not credible. Indeed, the ALJ found that the CSA used the dividing of petitioner's job “as a subterfuge to remove her.” Initial Decision, slip op. at 9.

After reviewing the record carefully, we concur with the ALJ and the Acting Commissioner that the evidence supports the conclusion that the reconfiguration resulting in elimination of petitioner's clerical position was not for economic reasons as the Board argues, but was undertaken because the CSA was not satisfied with petitioner's performance of her clerical responsibilities. As both the ALJ and the Acting Commissioner stressed, the proper way to proceed under such circumstances is to initiate tenure proceedings as provided for by N.J.S.A. 18A:6-10.

In arriving at our conclusion that the Board's action was improper, we reject amicus curiae's contention that affirmance of the decisions below blurs the distinction

between tenure in a clerical position as compared to a secretarial position. As both the ALJ and the Acting Commissioner found, the pertinent duties in the job description for petitioner's clerical position and those for the newly created secretarial position were markedly similar and petitioner credibly testified that she had performed all of those functions while serving in her clerical position. Similarly, we cannot identify any seniority issues under the education statutes resulting from our decision. Petitioner's tenure was as a clerical employee and, as such, her rights were governed by N.J.S.A. 18A:17-2 and N.J.S.A. 18A:6-10. Since the Board did not act in good faith when it eliminated her position, petitioner is entitled to be reinstated to the clerical position she held before the Board terminated her employment. In contrast to teaching staff members who are affected by a reduction in staff pursuant to N.J.S.A. 18A:28-9, the statutes applicable to clerical employees do not require that dismissals resulting from a reduction in staff or reemployment of such individuals be made on the basis of seniority. See N.J.S.A. 18A:28-10 through N.J.S.A. 18A:28-13 (seniority for teaching staff members).

In arriving at our determination, we have not considered whether the Board violated any of its obligations under the Open Public Meetings Act. As amicus curiae points out, although petitioner testified that she did not receive any advance notice, it is unclear from the record whether a discussion about the elimination of petitioner's position occurred in closed session. Accordingly, while a failure to provide notice might indicate that an action in a particular case was taken in bad faith, given the circumstances established in the record in this matter, our conclusion with respect to the

propriety of the Board's action does not rest on whether the Board provided petitioner with notice of its intended action. See Acting Commissioner's Decision, slip op. at 8.

February 1, 2006

Date of mailing _____