

HELEN CHELOC, :  
PETITIONER, :  
V. : COMMISSIONER OF EDUCATION  
BOARD OF EDUCATION OF THE : DECISION  
CITY OF ELIZABETH, UNION :  
COUNTY, :  
RESPONDENT. :

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SYNOPSIS

In consolidated matter, petitioner challenged the Board's action withholding her increment for school year 1994-95 and sought reinstatement to her former position of Assistant Board Secretary/Director of Administration. Petitioner contended the Board's actions withholding her increment and reassigning her supervisory duties to a new position of comptroller were arbitrary, capricious, unreasonable and motivated by bad faith (retaliation for her objections to allegedly improper budget-related actions in 1994). The Board argued that petitioner's appeal was untimely filed.

Initially, the ALJ concluded that the first petition was timely filed but that Conscientious Employee Protection Act (CEPA) claims are beyond the jurisdiction of the Commissioner of Education. The ALJ concluded that the Board's decision to withhold petitioner's salary increase was arbitrary because the Board failed to give petitioner sufficient notice that her work was deficient, failed to afford her an opportunity to take corrective action, and failed to articulate the criteria used to reject the recommendation of her supervisor. The ALJ did find that the Board complied with the requirements of the Open Public Meetings Act and acted within its discretion under the Tenure Act. The ALJ concluded that the Board did not act in bad faith, had reasonable grounds to establish a comptroller position with fiscal supervisory duties formerly assigned to petitioner and to demote her on the District organization chart. The ALJ reversed the Board's decision withholding petitioner's salary increase for the school year 1994-95 and affirmed the Board's decision establishing the comptroller position and demoting petitioner.

The Commissioner affirmed in part, modified in part the Initial Decision. The Commissioner concurred with the ALJ that the petition was timely filed and that the Board did not act in bad faith in establishing the comptroller position and demoting petitioner. As to the denial of salary increases, the Commissioner noted that since petitioner was *not* a teaching staff member subject to payment on a salary guide, the Board's actions in twice denying her a salary increase were not reviewable by the Commissioner pursuant to *N.J.S.A. 18A:29-14*. However, since petitioner was not a member of a collective bargaining unit or party to an agreement which might provide a mechanism to resolve such disputes, the Commissioner considered her claim that the Board's actions were taken for retaliatory reasons, but could not find that the Board acted improperly. Petition was dismissed.

June 12, 2000

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The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Both petitioner and the Board filed exceptions and replies in accordance with *N.J.A.C.* 1:1-18.4.

The Board initially excepts to the Administrative Law Judge's (ALJ) treatment of petitioner's denial of a salary increase in December of 1994 as an "increment withholding." In this regard, the Board contends that:

[I]t is undisputed that Petitioner is an administrator and is not part of any bargaining unit that has entered into a collective bargaining agreement with the Board which sets forth her annual salary and subsequent salary increases for specific years. Furthermore, Petitioner is not part of any salary schedule established by the Board. \*\*\* It is also undisputed that Petitioner is not a teacher, and as such, does [not] fall within the statutory mandates of *N.J.S.A.* 18A:29-4.1. Instead, Petitioner's salary is set forth by the Board. (See Exhibit P-1). The Board also has the authority to determine whether Petitioner is entitled to a salary increase. Unlike teachers or other members of a collective bargaining unit, Petitioner is not guaranteed any predetermined increment each year. Therefore, Petitioner was never legally entitled to an "increment." (Board's Exceptions at 3)

The Board further argues that, contrary to the ALJ's finding, petitioner was not without notice that she would be denied a salary increase, even assuming such notice was a prerequisite for the Board's action. The Board then cites to *N.J.S.A. 18A:29-14*, which it points out, "has no requirement for advance written notice of the intent to withhold. Rather, it requires that within 10 days following its action a board must notify the employee of the reasons why the increment is being withheld." (*Id.* at 4) Further, to the extent notice is required, the Board contends that the record clearly demonstrates that petitioner knew, or should have known, that the Board had concerns about her work. Here, the Board reflects on the testimony offered by Linda King, the School Business Administrator/Board Secretary to whom petitioner reports, noting that Ms. King testified that she had to speak with petitioner a number of times about her failure to cooperate with the instructional directors in order to effectuate a successful site-based management system. (*Id.* at pp. 6-8) The Board concludes that its decision to deny petitioner a salary increase in December of 1994, in light of the testimony, was clearly reasonable. (*Id.* at 9)

Petitioner initially objects to the ALJ's conclusion that the Commissioner does not have jurisdiction to consider her claim that the Board's actions violated the Conscientious Employee Protection Act (CEPA), *N.J.S.A. 34:19-1 et seq.*, reasoning, instead, that such claim is "colorable under State Education Law." (Petitioner's Exceptions at 17) Additionally, petitioner notes that the Initial Decision failed to consider her claim that she was denied a *second* salary increase for the 1995-96 school year in July of 1995. (*Id.* at 17-18)

Petitioner further asserts that the ALJ incorrectly concluded that the Board's decision to abolish her position in July 1995 was not improper. Here, petitioner argues that the ALJ cites *N.J.S.A. 18A:28-9*, the statute establishing the standard for abolishing the positions of *teaching staff members*, which she was not. Citing *N.J.S.A. 18A:17-2*, petitioner contends that as

a tenured assistant board secretary, she could be dismissed only for inefficiency, incapacity, unbecoming conduct, or other just cause. (*Id.* at 20, 22) However, to the extent the Commissioner should consider the Board’s action under the “arbitrary and capricious standard,” as did the ALJ, petitioner underscores that “the abolition must be one of substance [and] not merely appearance.” (*Id.* at 21, citing to the Initial Decision at 10, citing to *Viemeister v. Board of Education of Prospect Park*, 5 *N.J. Super.* 215 (App. Div. 1949))

In response to the Board’s exceptions, *supra*, petitioner maintains that her salary increases were arbitrarily denied, notwithstanding that she was not on a salary guide. (Petitioner’s Reply at 1) Further, underscoring that *N.J.S.A.* 18A:29-14 is *not* applicable to the instant matter, although the Board cites to its relevance, petitioner notes that, *if* that provision is applicable, she never received written notice of the Board’s action within 10 days of such denial. (*Id.* at 2) Moreover, petitioner highlights her testimony affirming that she had no notice of deficiencies in her work.

Upon careful and independent review of the record in this matter, which included transcripts from the hearings conducted at the OAL on February 6, 1997, February 7, 1997 and February 10, 1999<sup>1</sup>, the Commissioner affirms in part, and modifies in part, the Initial Decision of the ALJ, for the reasons set forth herein.

Initially, the Commissioner finds, for the reasons set forth by the ALJ, that the petition filed on March 22, 1995 was timely. Additionally, as a preliminary matter, while petitioner contends that the Board retaliated against her in violation of the Conscientious Employee Protection Act (CEPA), *N.J.S.A.* 34:19-1 *et seq.*, inasmuch as petitioner’s counsel asserts that petitioner does not seek “the benefits of that statute in this forum,” but, rather,

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<sup>1</sup> Hereinafter, the transcripts shall be referenced in the following manner: T1 is the transcript for February 6, 1997; T2 is the transcript for February 7, 1997; and T3 is the transcript for February 10, 1999.

attempts to argue “that as a consequence of improprieties pointed out to the Board” by petitioner, she suffered reprisals with respect to her position, (T1 at 143, 144), the Commissioner determines to consider such claims of retaliation within the context of petitioner’s general assertion that the Board’s actions herein were taken in bad faith.<sup>2</sup>

With respect to the Board’s decision to deny petitioner her salary increases on December 21, 1994 and July 12, 1995, the Commissioner notes that the parties do not dispute that petitioner is *not* a “teaching staff member” subject to payment on a salary guide.<sup>3</sup> Consequently, the Board’s actions on the aforementioned dates are not reviewable by the Commissioner pursuant to *N.J.S.A.* 18A:29-14. However, inasmuch as petitioner is not a member of a collective bargaining unit or party to an agreement which might otherwise provide a mechanism to resolve such disputes with the Board, *see Randolph Bd. of Educ. v. Educ. Ass’n*, 328 *N.J. Super.* 540 (App. Div. 2000), the Commissioner herein considers her claim that the Board’s action to twice deny her salary increases was taken for retaliatory reasons.

In this regard, however, where the Board contends, and the record substantiates, that petitioner failed to adapt to its site-based management plan, and was too rigid in carrying out her duties, (Board’s Post-hearing Brief at 11) the Commissioner cannot find that petitioner has demonstrated that the Board’s decision on December 21, 1994 was made for retaliatory reasons. With respect to the Board’s denial of petitioner’s salary increase in July 1995, after the reorganization of the business office, *see infra*, and after the formal evaluation, on which

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<sup>2</sup> In so doing, the Commissioner does not reach the ALJ’s findings with respect to the Commissioner’s jurisdiction to hear and determine CEPA claims. (Initial Decision at 7)

<sup>3</sup> The job description for the Assistant Board Secretary/Director of Administration did not require certification (P-1). Petitioner affirmed in her testimony that, when she was hired in 1985, there was no certification requirement and she did not then possess a certificate (T2 at 21, 22). *See N.J.S.A.* 18A:1-1, and the definition of “teaching staff member.”

petitioner did not receive any “above average” or “outstanding” scores (Board’s Post-hearing Brief at 3)<sup>4</sup>, the Commissioner finds that petitioner has similarly failed to meet her burden.

Turning to the issue of the Board’s reorganization of its business office in 1995, the Commissioner assumes, for the purpose of this discussion, that petitioner was tenured in her prior position as Assistant Board Secretary/Director of Administration (Initial Decision at 2).<sup>5</sup> Like the ALJ, the Commissioner finds that the record supports the conclusion that the Board abolished her prior position subsequent to its reorganization and created the comptroller’s position to “provide greater assurance of fiscal responsibility.”<sup>6</sup> (Board’s Post-hearing Brief at 4) The Board also noted that “to break apart the areas and hire a [comptroller] for some of the duties that Petitioner had been in control of would [help] the district meet all of the state guidelines and regulations in that area.” (*Id.*) The job description for the Comptroller position (P-30), when compared with that of petitioner’s prior position (P-1), demonstrates that the Comptroller was assigned a greater breadth of responsibility and accountability within the District. Additionally, the holder of the new position is required to possess “a valid certificate as a Registered Municipal Accountant or Certified Public Accountant issued by the New Jersey Board of Certified Public [Accountants],” (P-30), a credential which petitioner does not possess. Consequently, the Commissioner cannot find on the record before him that the Board’s abolishment of petitioner’s prior position, its creation of a new Comptroller position and/or its hiring of a properly credentialed individual to fill the new role were arbitrary and capricious.

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<sup>4</sup> The Board indicates that, “[o]f the 20 subparts [to the evaluation], Petitioner received 14 “needs improvement” and 6 “averages.” (Board’s Post-hearing Brief at 3)

<sup>5</sup> Although the Board asserts in its post-hearing submission to the ALJ that petitioner did *not* acquire tenure rights in her prior position (*id.* at 16), it did not object to the ALJ’s finding to the contrary.

Neither can the Commissioner conclude that the Board's actions were retaliatory or otherwise carried out in bad faith. Additionally, like the ALJ, the Commissioner finds this record insufficient to establish *a connection* between petitioner's stated concerns about the Board fiscal practices and the Board's consequent reorganization in July of 1995.

Accordingly, the Initial Decision of the ALJ is affirmed in part, and modified in part, as set forth herein. The Petition of Appeal is dismissed.<sup>7</sup>

IT IS SO ORDERED.<sup>8</sup>

COMMISSIONER OF EDUCATION

Date of Decision: June 12, 2000

Date of Mailing: June 12, 2000

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<sup>6</sup> The Board points out that, as a result of the reorganization of its business office, "many new positions were created." (Board's Post-hearing Brief at 5) A second reorganization took place in July of 1996, with emphasis on the instructional positions in the District. (*Id.*)

<sup>7</sup> In accordance with *N.J.A.C.* 1:1-14.10(j), the Commissioner affirms the ALJ's Interlocutory Order of February 11, 1999.

<sup>8</sup> This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.