

#327-00

NANCY J. DI COMO, :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

STATE-OPERATED SCHOOL DISTRICT OF : DECISION

THE CITY OF NEWARK, ESSEX COUNTY, :

RESPONDENT. :

SYNOPSIS

Petitioner asserted tenure and seniority entitlement to a supervisory position and sought reinstatement to tenured vice principal position with back pay. The District contended that although petitioner was tenured as a teacher, she was not tenured as a vice principal or supervisor. The District challenged petitioner’s assertion that under *N.J.S.A. 18A:7A-44*, a central office employee hired in a position subsequent to a reorganization immediately acquires tenure in that position regardless of whether he or she served in that position previously.

The ALJ concluded that while petitioner would not be entitled to tenure as a vice principal under the transfer provisions of *N.J.S.A. 18A:28-6*, these provisions were superseded by the plain language of *N.J.S.A. 18A:7A-44* which states that individuals hired after the State takeover will be hired with tenure if they had tenure in their prior position. As such, petitioner was hired with tenure when she was appointed to the position of vice principal after the State takeover. Thus, petitioner could only be removed from this position or reduced in compensation pursuant to the provisions of the Tenure Employees Hearing Law. The ALJ determined that these provisions were not followed when petitioner was demoted from vice principal and, as a result, petitioner’s tenure rights were violated. The ALJ ordered reinstatement of petitioner to the position of vice principal and awarded her back pay to cover the difference in petitioner’s salary as vice principal and what she received as a classroom teacher since the date of her demotion.

The Commissioner rejected the ALJ’s recommended decision and remedy in this matter. The Commissioner found that this matter presented for the first time the circumstance wherein a central office administrative/supervisory employee, whose position was abolished pursuant to *N.J.S.A. 18A:7A-44*, was not, upon reorganization, either terminated or returned to an “other than central office” position to which he or she was entitled by virtue of tenure and/or seniority rights, but rather, was placed in a school-based administrative position in which the individual had not previously attained tenure. The Commissioner determined that the provisions of *N.J.S.A. 18A:7A-44* *solely* address *central office* administrative and supervisory positions and the reorganization of the central office and do not apply to the hiring of staff to the *non-central office* administrative or supervisory positions. The Commissioner found that petitioner herein, whose central office supervisory position was abolished, was not hired by the State superintendent, upon reorganization of the State-operated District, to fill a *central office* administrative or supervisory position. Thus, the Commissioner determined that the disputed wording of the statute herein did not, as concluded by the ALJ, bestow tenure on petitioner upon her hiring to fill the *school-based* position of vice principal, a position in which she never served and in which she never acquired tenure by operation of either *N.J.S.A. 18A:28-5* or *6*. The Commissioner noted that a vice principal position is, pursuant to *N.J.S.A. 18A:28-5*, separately tenurable from that of supervisor; it requires an endorsement different from that of supervisor; and it constitutes a *school-based* rather than a *central office* position. Petition was dismissed.

October 2, 2000

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The record and Initial Decision issued by the Office of Administrative Law (OAL) have been reviewed. Respondent's (District) exceptions and petitioner's reply thereto were timely filed pursuant to *N.J.A.C. 1:1-18.4*.

Initially, the District's exceptions reiterate petitioner's employment history, noting that for employment years 16-36, she served as a central office staff administrator, and that her tenure as a central office Supervisor of Special Projects K-12 is not at issue in this matter. The exceptions next address the provisions of *N.J.S.A. 18A:7A-44* and the legal conclusions reached by the ALJ with respect to this statute under the facts of this matter. *N.J.S.A. 18A:7A-44* reads in pertinent part:

Notwithstanding any other provision of law or contract, the positions of the central administrative and supervisory staff, instructional and noninstructional, other than those positions abolished pursuant to subsection a. of this section [the positions of the district's chief school administrator and those executive administrators responsible for curriculum, business and finance, and personnel] shall be abolished upon the reorganization of the State-operated school district's staff. The State district superintendent may hire an individual whose position is so

abolished, based upon the evaluation of the individual and the staffing needs of the reorganized district staff. These individuals shall be hired with tenure if they had tenure in their prior position. If they did not have tenure in their prior position, they may obtain tenure pursuant to the provisions of N.J.S. 18A:28-6.***Any employee whose position is abolished by operation of this subsection shall be entitled to assert a claim to any position or to placement upon a preferred eligibility list for any position to which the employee may be entitled by virtue of tenure or seniority within the district. No employee whose position is abolished by operation of this subsection shall retain any right to tenure or seniority in the positions abolished herein.

The District avers that, in accordance with the above statutory provisions, petitioner's tenure in her central administrative supervisory position was abolished and she retained no tenure or seniority rights to any administrative/supervisory positions. See *Van Dyke, supra*, in which it was determined that former district supervisors whose positions were abolished under reorganization did not retain a right to tenure and seniority in supervisory positions, and that their bumping rights extended only to non-supervisory positions to which they were entitled based upon their tenure and seniority.¹

It is the District's contention that when the State took over the District and petitioner was appointed to a building position as vice principal, no tenure rights accrued to that position pursuant to *N.J.S.A.* 18A:28-6 because the statute requires an employment period of more than two academic years and the beginning of the next succeeding academic year -- a period of service petitioner did not attain. As such, the District argues that petitioner is wrong in her legal argument with respect to *N.J.S.A.* 18A:7A-44, *i.e.*, "that if she 'had tenure in a prior position, she was transferred to the position of vice-principal with tenure.'" (District's Exceptions at 4, quoting Petitioner's Post-hearing Brief) As to this claim, the District

¹ As indicated at page 10 of the Initial Decision, petitioner argues that her claim is distinguishable from those in *Van Dyke* because she was appointed to the position of vice principal after reorganization and thus acquired tenure rights in that position.

emphasizes that it was asserted for the first time by petitioner in her brief submitted to the OAL dated January 5, 2000, and the Administrative Law Judge (ALJ) erroneously accepted it when determining that petitioner achieved tenure under *N.J.S.A.* 18A:7A-44 on her first day of employment as a vice principal. With respect to this, the District argues:

The State of New Jersey Department of Education presently recognizes four (4) separate endorsements for holders of administrative certificates. These distinctions are set forth in N.J.A.C. 6:11-9.3, which establish separate credentials for school administrator, principal, supervisor and school business administrator. As such, distinctions between school building administrators and central staff administrators are established. While Petitioner held the credentials for service as both central administration staff and as a school based principal or vice-principal, she never served in any school based category. To grant Petitioner automatic tenure on the first day of appointment contravenes other provisions of law which require her to serve the required two years and a day in that position. *** The “Take Over” statute expressly requires tenure provisions to be governed by those provisions set forth in N.J.S.A. 18A:28-5 or 6, which make a distinction between tenure within the District, and tenure within a job title. Indeed, the statute itself [*N.J.S.A.* 18A:28-5] expressly established that “tenure in any of the administrative or supervisory positions enumerated herein shall accrue only by employment in that administrative or supervisory position.” Consequently, while Petitioner may hold tenure within the District as an appropriately credentialed instructional employee, she failed to hold tenure within the vice principal position to which she was transferred, and indeed, had never served a day in any school based administrative assignment. (District’s Exceptions at 6-7)

The District also argues that the legislative history of the takeover statutes demonstrates that the Legislature intended central administrative staff not rehired in the central office to return to those former school based positions to which they have existing tenure and seniority rights, and that *res judicata* requires a determination that petitioner was not entitled to school-based administrative/supervisory position when her central administrative position was abolished. As to this, the District contends that the ALJ’s determination of automatic tenure as a

vice principal runs counter to long-standing tenure laws within the State of New Jersey which establish that, for any and all transfer positions, employees must serve the requisite statutory period under the new endorsement before tenure in that position can accrue and that tenure as a vice principal may not be achieved without actual service as a vice principal for the statutory time period. Thus, the District avers, “petitioner cannot attain through Reorganization of a district taken over by the State more than she could attain through any tenure statute.” (*Id.* at 13) As to the *res judicata* argument, the District avers that petitioner’s situation is not unique and is similar to the petitioners in *Leong, supra*, wherein it was determined that when a central office supervisory position is abolished pursuant to *N.J.S.A.* 18A:7A-44, all tenure and seniority rights to, and originating from, that position are abolished and petitioners retained only tenure and seniority rights which were attained in connection with their former central office supervisory positions.² More specifically, the District argues with respect to this point that:

Having the same fact pattern, and having determined that Petitioner did not statutorily earn tenure as a vice-principal, the holding must be identical. Petitioner is not entitled to enhanced tenure protections. Petitioner was properly bumped to her tenured teaching position. Although the ALJ incorrectly applied the statutory formula for the calculation of tenure in an administrative position, his opinion is not based upon whether Petitioner had tenure rights that were transferable by endorsement, by “tacking” or any other legally recognized method, but rather that Petitioner earned tenure as a school based vice principal after one day of service. Clearly this determination exceeds any protection afforded by the legislature.

The ALJ erred in his determination that *Nelson v. Old Bridge, supra*, is not applicable in the case at bar. [Initial Decision] at 10. While the parties acknowledge that *Nelson* established that tenure accrued only as a result of actual work experience in separately tenurable positions specifically enumerated in *N.J.S.A.* 18A:28-5,

² At page 14 of its Exceptions, the District maintains, *inter alia*, that what distinguishes petitioner from those in *Leong, supra*, is the fact that Di Como was offered a school-based vice principal position within the District, which was not based upon tenure and seniority rights; thus, petitioner’s bumping rights were only implicated when she was not renewed in the vice principal position.

the ALJ ignores the fact that Petitioner failed to earn tenure in a separately tenurable vice principal position, and could not “tack” experience from her prior position. Petitioner[’s] allegation that “she acquired tenure in that position from the first day she worked as (a vice-principal) under *N.J.S.A. 18A:7A-44* has no legal or factual merit. Moreover, petitioner offered no factual or legal substantiation for her claim of exemption under *N.J.S.A. 18A:28-5*. Moreover, the ALJ specifically referenced that Petitioner “conceded once again that she retained no tenure rights relating to her central office position.” [Initial Decision] at 10. Prior case law demands that the ALJ’s decision be overturned and that the Commissioner recognize that Petitioner’s tenure and seniority rights were properly applied by the District***. (*Id.* at 16-17)

Upon review of the record and the Initial Decision, the Commissioner rejects the ALJ’s legal conclusions and recommended remedy in this matter for the reasons set forth below. Initially, the Commissioner would point out that the ALJ is correct when he states at page 11 of the Initial Decision that this matter appears to be a case of first impression. Contrary to the District’s assertion that petitioner’s situation is not “unique” and that it is similar to the petitioners in *Leong, supra*, this matter does present for the first time in a contested case the circumstance wherein a central office administrative/supervisory employee, whose position was abolished pursuant to *N.J.S.A. 18A:7A-44*, was not, upon reorganization, either terminated or returned to an “other than central office” position to which he or she was entitled by virtue of tenure and/or seniority rights, but rather, is placed in a *school-based* administrative position in which the individual has not previously attained tenure. Hence, this particular circumstance is a critical factor which distinguishes the instant matter substantively from prior matters cited by the District.

Having thoroughly considered the provisions of *N.J.S.A. 18A:7A-44* in dispute herein, the Commissioner does not agree with the conclusion of the ALJ that petitioner attained

automatic tenure as vice principal when, upon reorganization of the State-operated District's central office, she was hired in that position in the Dr. William Horton School.

In the Commissioner's judgment, the provisions of *N.J.S.A. 18A:7A-44* *solely* address central office administrative and supervisory positions and the reorganization of the central office: Section a. deals with the abolishment of the chief school administrative position and executive administrators responsible for curriculum, business and finance and personnel, each of which is a central office position; Section b. mandates that the State district superintendent prepare, within one year of takeover, a reorganization of the district's central office administrative and supervisory positions; and Section c. deals with the abolishment of all central office administrative and supervisory positions other than those set forth in Section a., which, unlike Section a., authorizes the State district superintendent to hire an individual who held an abolished position to fill an administrative/supervisory position in the reorganized central office, if so determined by the State district superintendent upon evaluation of the individual and staffing needs. Further, the Commissioner concludes that Section c., the specific portion of *N.J.S.A. 18A:7A-44* under dispute herein, refers *solely* to the hiring of such individuals to fill *central office administrative/supervisory staff* in the newly *reorganized central office* and does not apply to the hiring of such staff to *non-central office* administrative or supervisory positions.

In the instant matter, petitioner, whose central office supervisory position was abolished, was not hired by the State superintendent, upon reorganization of the State-operated District, to fill a *central office* administrative or supervisory position. Consequently, the Commissioner determines that the disputed wording of the statute herein did not, as concluded by the ALJ, bestow tenure on petitioner upon her hiring to fill the *school-based* position of vice principal, a position in which she never served and in which she never acquired tenure by

operation of either *N.J.S.A. 18A:28-5* or 6. In so holding, the Commissioner is in full agreement with the District that a vice principal position is, pursuant to *N.J.S.A. 18A:28-5*, separately tenurable from that of supervisor; it requires an endorsement different from that of supervisor; and it constitutes a *school-based* rather than a *central office* position. Under applicable statutes and decisional law, tenure accruing to a vice principal position cannot be achieved without actual service in the position for the requisite statutory length of time. *Nelson, supra*. Further, as argued by the District, the Commissioner concludes that petitioner cannot attain, through the reorganization of a state-operated district, tenure status in a *school-based* administrative position.

Accordingly, the recommended decision of the ALJ is rejected and petitioner's motion for summary judgment denied and for reasons expressed herein, the petition is hereby dismissed.

IT IS SO ORDERED.³

COMMISSIONER OF EDUCATION

Date of Decision: October 2, 2000

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³ 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.