

666-03R

ALBERT ZIEGLER, :
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 PETITIONER, :
 :
 V. : COMMISSIONER OF EDUCATION
 :
 BOARD OF EDUCATION OF : DECISION ON REMAND
 THE CITY OF BAYONNE, :
 HUDSON COUNTY, :
 :
 RESPONDENT. :
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SYNOPSIS

Petitioner, former teacher of Employment Orientation, alleged the Board violated his tenure rights when it terminated his contract two months into the 1998-99 school year on the assertion that he was not certified for the new courses to which he was assigned following elimination of his previously assigned courses. The ALJ found that petitioner was entitled to be reemployed by the Board since his Employment Orientation endorsement permitted him to teach certain vocational courses which the Board was continuing to offer. The Commissioner, however, was not persuaded that the issue of petitioner's qualification to teach these courses could be summarily resolved, and he remanded the matter for further factfinding on the actual content of the courses at issue so as to determine the certification required to teach them.

On remand, the ALJ concluded that the courses to which petitioner claimed entitlement did, in fact, fall within the scope of petitioner's Employment Orientation endorsement, so that petitioner was entitled to be reemployed and assigned to them.

The Commissioner rejected the Initial Decision, finding that the classes at issue were subject area vocational courses requiring appropriate specialized certification, and were thus beyond the limited scope of the Employment Orientation endorsement. The petition was dismissed.

<p>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.</p>

December 22, 2003

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The record of this matter and the Office of Administrative Law’s Initial Decision on Remand have been reviewed. Pursuant to *N.J.A.C.* 1:1-18.4, the respondent Board of Education (Board) filed timely exceptions, to which petitioner duly replied.

In its exceptions, the Board argues that the Administrative Law Judge (ALJ) failed to take account of the full spectrum of evidence in assessing the courses at issue, leading to their mischaracterization as rudimentary introductions to skilled trades and to the erroneous conclusion that petitioner’s Skilled Trades certificate, along with the classroom experience he has gained over the years, authorizes him to teach them. The Board contends that these courses are not introductions to skilled trades, as found by the ALJ, but rather genuine Industrial Arts offerings, clearly distinguishable from Employment Orientation courses and requiring teachers with Industrial Arts certification. By concluding that petitioner may teach them, the Board opines, the ALJ has effectively converted the limited Skilled Trades certificate into a regular instructional certificate encompassing all the industrial arts. (Board’s Exceptions at 2-7, 8-14, 16-18) The Board

additionally rejects the ALJ's "conclusion" that special education students do not require a fully certified teacher (*Id.* at 7-8); his reliance, notwithstanding concerns about petitioner's credibility as raised in the Initial Decision at 4-5, on petitioner's testimony to the effect that the courses at issue are merely "slimmed down" versions of prior Employment Orientation courses (*Id.* at 15-16); his ordering of petitioner's reemployment without any consideration of whether courses within the scope of petitioner's certification and seniority rights are presently being taught in the District (*Id.* at 20); and his ordering of back pay despite insufficient information on record about petitioner's attempts (or lack thereof) to mitigate damages. (*Ibid.*)¹

In reply, petitioner counters that the Board persists in its error of equating what is stated in curriculum guides or course descriptions with what is actually being taught in the classroom, as described by the staff members doing the teaching. In petitioner's view, Shop 9, whether the special or the non-special education section, is "a very basic, introductory level class designed to give students some information and instruction regarding tools and their uses," with "a great deal of flexibility in how the course is taught and a level of instruction somewhat less sophisticated [than] the [specified course] proficiencies appear." (Petitioner's Reply at 2) Shop 10 is "a progression from Shop 9," continuing the subject matter with "somewhat more advanced instruction," and consisting of mostly or all special education students. (*Id.* at 5-6) Maintenance and Repair is limited to special education students and provides basic instruction in the areas of plumbing, masonry, electrical, carpentry, fluid movement, and

¹ The Board also notes the Initial Decision's error in indicating that the record of this matter was closed on February 21, 2003 rather than February 25, 2002, and asks that, if the Initial Decision is otherwise adopted, back pay not be awarded for the period from April 2002 to the present, since petitioner should not receive a windfall at the expense of the Board on account of the ALJ's 16-month delay in issuing a decision. (*Id.* at 19)

painting and decorating, at a level suitable to household repair, janitorial or maintenance work. (*Id.* at 6-7) Industrial Technology covers the same subjects and skills as Shop 9, but in greater depth and with an eye toward their use in society and industry, resulting in a course that is project-based, employs hand and power tools, is taught to both special and non-special education students, and focuses primarily on woodworking with other areas covered if they happened to arise. (*Id.* at 7-8)²

Petitioner reiterates that his Teacher of Employment Orientation endorsement authorizes him to teach these “introductory or rudimentary Skilled Trades” courses, and that he, in fact, did so for years before the Board erroneously determined to characterize them as Industrial Arts courses. Petitioner compares the scope of the Industrial Arts endorsement, which includes graphic arts, drafting, woodworking, metal working, arts and power mechanics, with that of the Teacher of Skilled Trades endorsement, which, although in its present form does not include a specified list of trades, over the years has included aircraft mechanics, appliance repair, auto mechanics, brick and masonry, cabinet making, carpentry, custodial training, drafting, electrical construction trades, painting and decorating. According to petitioner, “each of these skilled trades is, in theory or practice, part of the courses in review in this case,” a significant fact because the Employment Orientation endorsement, which petitioner holds and under which he taught basic introductory skills for years, is a subcategory of the Teacher of Skilled Trades endorsement. (Petitioner’s Reply at 9-13, quotation at 11)

² Petitioner also rejects as baseless the Board’s allegation that the Initial Decision somehow views special education/special needs students as less deserving of fully certified teachers, observing that the ALJ reached no such conclusion but merely analyzed what was actually taking place in the classroom in order to determine the certification required to teach the courses at issue. (*Id.* at 9)

Petitioner further contends that his career in the Board's District has been consistent with the scope of Employment Orientation as described in the Department of Education's 1985 Fact Sheet (Attachment to Stipulation of Facts) that remains valid as shown by its parallel to current regulation:

Employment Orientation is a significant and integral component of the schools' career development sequence for special needs, handicapped or disadvantaged students. It is designed to assist special needs students to develop sound work habits and attitudes and basic vocational and interpersonal skills through the use of vocational evaluation, simulated work and basic vocational instruction. Because Employment Orientation offers in-school, hands-on vocational experiences, it is the major link between career exploratory and awareness activities and specific vocational training for special needs students. (*Cf.*, *N.J.A.C.* 6A:19-1.2 and 6A:19-6.3)

Petitioner contends that throughout his employ, just as contemplated by this description, he taught basic introductory skills, either at the alternative school or the high school, to primarily special education, special needs, and disadvantaged students, in order to provide them with a variety of in-school, hands-on vocational experiences that might interest them in careers or more advanced coursework in masonry, carpentry, plumbing, home repair, welding, electrical work and the like. According to petitioner, there is "very little difference" between the instruction provided by him and that offered in the courses at issue herein; it is "simply a matter of degrees," since petitioner covered a dozen or more skills through use of the Singer work-station system, while the present classes cover fewer skills but retain the same basic instructional level and purpose. It makes no sense, petitioner reasons, to hold that he is qualified to teach a program that covers "far more vocational experiences and career opportunities" and yet is not qualified to teach "fewer skills in the current courses." (Petitioner's Reply at 13-15, quotations at 13-14)

Petitioner reiterates that, since he is qualified to teach the courses at issue and these were assigned to nontenured teachers in sufficient number to have provided him with a full-time schedule, his tenure rights were violated by his termination and he is entitled to all the relief he seeks, including reinstatement, back pay less mitigation, pre-judgment and post-judgment interest, seniority credit, pension credit and contributions, reimbursement for medical insurance and expenses, restoration of any benefits or emoluments received by comparable teaching staff members since the time of his termination, and “[r]eferral of this matter to the County Superintendent’s office for oversight to ensure that the Board complies with its obligations under N.J.S.A. 18A:28-5 in the future.” (Petitioner’s Reply at 16-20, quotation at 20)

Upon review, however, the Commissioner cannot agree with petitioner and the ALJ that petitioner holds appropriate certification to teach the classes to which he herein claims entitlement. Even accepting, *arguendo*, petitioner’s contention that the nature of these courses must be determined by teachers’ testimony about what is actually taught in them rather than by paper syllabi, the Commissioner finds the courses to be beyond the scope of the limited certificate held by petitioner.

Petitioner is certified as a Teacher of Employment Orientation. As he himself notes, at a time when the Employment Orientation endorsement was more commonly in use, the Department of Education described Employment Orientation as

a significant and integral component of the schools’ career development sequence for special needs, handicapped or disadvantaged students[,] designed to assist special needs students to develop sound work habits and attitudes and basic vocational and interpersonal skills through the use of vocational evaluation, simulated work and basic vocational instruction***[, and offering] in-school, hands-on vocational experiences***[so as to serve as] the major link between career

exploratory and awareness activities and specific vocational training for special needs students. (Joint Stipulation, attached “Fact Sheet”)

Consistent with this view, the Department stated that the program objectives of Employment Orientation were:

To identify students’ vocational interests, abilities, aptitudes, and employability characteristics, and develop an individualized vocational profile for each student;

To modify and/or develop and reinforce appropriate work habits and attitudes in line with the world-of-work and the specific needs of the students; and

To provide basic vocational training which will prepare students for entry into a vocational education program. (Joint Exhibit XX)

Elaborating on this three-prong purpose, the Department presented Employment Orientation as a pre-vocational program with three distinct phases: the vocational evaluation phase, the simulated work experience phase, and the initial vocational training and exploration phase. The evaluation phase is designed “to identify and assess each student’s work habits and attitudes, as well as his or her vocational interests, abilities, and aptitudes and to establish an individual student’s profile of vocational potential.” Where necessary, students then participate in simulated work experience, designed to “[modify, develop and/or reinforce] desirable work habits and attitudes;” when ready, they advance to the initial vocational training/exploration phase, where each student is provided “with actual experiences that reinforce his or her potential and capabilities, and to prepare him or her for future employment or vocational training.” This is most commonly accomplished through a de-centralized approach, using a shop or lab where various learning centers are set up, with each addressing one occupational area and designed as a self-contained, self-instructional unit. Successful completion of

Employment Orientation will ideally lead to a student's placement in a regular or cooperative vocational education program. (Joint Exhibit YY at 5-15)

The Department's description of Employment Orientation is entirely consistent with Bayonne's former program as taught by petitioner (Joint Exhibits I, K, L, M, P, R, S, U, V) and described by Principal Wanko, who noted in particular petitioner's use of the Singer system, "a series of carrels, utilizing filmstrips and cassette tapes to acquaint the students with various trades***." (Initial Decision at 4)

The courses petitioner now seeks to teach, however, do not differ from his former Employment Orientation classes merely in degree, as he claims, but in *kind*. Shop 9, Shop 10, Maintenance & Repair and Industrial Technology as they are presently taught at Bayonne High School may well be at the lower end of the vocational education spectrum in content level and student capacity, and may share overlapping elements with the third and culminating phase of Employment Orientation as described above. But that does not alter their fundamental nature as specific subject-area courses requiring appropriate subject-area certification,³ rather than as broad-based introductions to the world of work covered by a generalist endorsement expressly limited in its authorization to exploring the aptitudes and interests of special needs students, enhancing their overall work-readiness, and providing them with introductory exposure to a variety of trades so as to prepare them for entry into actual vocational education programs.

³ Shop 9, despite its rotational structure and occasional limited introduction of other elements, is taught almost entirely as a woodworking and drafting course (Initial Decision at 3, 4-5; Exceptions at 4-5); Shop 10 likewise focuses on woodworking (Initial Decision at 3-4; Exceptions at 6); Maintenance and Repair, although it covers a number of areas, is taught specifically as preparation for custodial and general maintenance work (Initial Decision at 4; Exceptions at 6); and Industrial Technology centers on woodworking at a higher level (Initial Decision at 4; Exceptions at 8).

The record in this matter is clear that, as claimed by the Board, Employment Orientation is no longer offered as a discrete program in the Bayonne School District; rather, the District has incorporated elements of Employment Orientation into its regular vocational class structure.⁴ But petitioner's qualification to teach Employment Orientation does not concomitantly qualify him to teach the classes into which it has been subsumed. While petitioner may, indeed, as found by the ALJ, have acquired, "by virtue of his Employment Orientation Certification and actually teaching the courses[,]***the skills presently***exhibited by the teachers at Bayonne High School" in teaching certain of the school's vocational classes "as presently constituted" (Initial Decision at 7), the fact remains that he does not hold the subject area certifications that would authorize him to do so. As noted by the ALJ in *Deborah Ulrich v. Board of Education of the Monmouth County Vocational School District, Monmouth County*, 96 N.J.A.R.2d(EDU) 290, the "relevant inquiry regarding certification is not what a person *can* teach, but what a person *may* teach." (*emphasis supplied*) (at 293) Nor can the Board be compelled to restructure its program by once again segregating Employment Orientation elements, so as to accommodate petitioner's tenure rights.

Accordingly, for the reasons expressed herein, the Commissioner finds that petitioner is not appropriately certified for the assignments to which he lays claim, so that the Board did not violate his tenure rights by terminating his employment. Thus, the Initial Decision of the Office of Administrative Law is rejected and the Petition of Appeal dismissed with respect to the relief sought. However, in view of his tenure status,

⁴ Such incorporation is fully consistent with the Department's discontinuance of Employment Orientation as a separate endorsement.

petitioner is to be placed on a preferred eligibility list for reemployment if and when any assignment within the scope of his certification becomes available in the District.⁵

IT IS SO ORDERED.⁶

COMMISSIONER OF EDUCATION

Date of Decision: December 22, 2003

Date of Mailing: December 23, 2003

⁵ In light of the decision herein, the Commissioner does not reach the ALJ's conclusions or the parties' arguments with respect to mitigation and other issues pertaining to relief.

⁶ This decision 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.*