

DOUGLAS AUSTIN, :
 :
 PETITIONER, :
 : COMMISSIONER OF EDUCATION
 V. :
 :
 : DECISION
 BOARD OF EDUCATION OF THE :
 TOWNSHIP OF WILLINGBORO, :
 BURLINGTON COUNTY, :
 :
 RESPONDENT. :
 :
 _____ :

SYNOPSIS

Petitioner claimed tenure in the position of principal, assistant principal and vice-principal in respondent's school district, alleging that his termination violated his tenure and seniority rights. The Board claimed petitioner's termination was permissible because he had not accrued sufficient time in either the position of principal or vice principal – which is “one and the same” as assistant principal – to achieve tenure. Both parties filed motions for summary decision.

The ALJ found, *inter alia*, that: the material facts are not in dispute, and the matter is ripe for summary judgment; petitioner's tenure in the district began to accrue after he received his provisional certificate as a principal/supervisor in November 2000; petitioner's tenure as principal began to accrue from August 1, 2002, when the position he had been filling on a temporary basis became vacant; and petitioner was, therefore, employed for a sufficient period of time to acquire tenure as a principal and was unlawfully terminated from his position. The ALJ ordered the Board to restore petitioner to the position of principal and pay him lost salary and benefits retroactive to his termination date of August 18, 2005.

The Commissioner modified and amplified the Initial Decision of the OAL. She concurred with the ALJ that the petitioner had acquired tenure, and was therefore removed from his position in violation of his rights, but found, *inter alia*, that – pursuant to *N.J.S.A. 18A:28-6* – such tenure was attained on August 1, 2004, rather than on August 1, 2005, as stated by the ALJ, and that petitioner had also acquired tenure in the positions of assistant principal and vice principal – positions which are separately tenurable as a matter of law. The Commissioner directed the Board to restore petitioner to a position as principal and reimburse him for lost salary and benefits retroactive to August 18, 2005, less mitigation as appropriate; or, if no such position is available due to the greater seniority of the district's incumbent principals, to accord him the appropriate placement on a preferred eligibility list and proceed thereafter to honor his tenure and seniority rights as vice principal and assistant principal.

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.

OAL DKT. NO. EDU 8923-05
AGENCY DKT. NO. 286-10/05

DOUGLAS AUSTIN, :
 :
 PETITIONER, :
 : COMMISSIONER OF EDUCATION
 V. :
 : DECISION
 BOARD OF EDUCATION OF THE :
 TOWNSHIP OF WILLINGBORO, :
 BURLINGTON COUNTY, :
 :
 RESPONDENT. :
 _____ :
 :

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have petitioner’s exceptions and the reply of the Board of Education (Board) filed pursuant to *N.J.A.C.* 1:1-18.4.

On exception, while petitioner fully concurs with the Administrative Law Judge (ALJ) that he acquired tenure as a principal in the Willingboro school district and was dismissed in violation of that right, he contends that the ALJ erred by: 1) failing to address his claim of tenure in the position of vice principal; and 2) finding that he acquired tenure as a principal on August 1, 2005 rather than on August 1, 2004, since *N.J.S.A.* 18A:28-6 – which applies in this instance since petitioner was promoted to the position of principal from another tenure-eligible position in the district – requires *two* years’ service for acquisition of tenure, not three. (Petitioner’s Exceptions at 1-3)

In reply, the Board rejects petitioner’s claim of tenured status as a vice principal on grounds that his service as interim principal from January 2002 to

August 1, 2002 cannot count toward acquisition of tenure in any position, since he was serving in a substitute capacity during that time. (Board's Reply at 1)

Upon consideration, the Commissioner adopts the Initial Decision with modification and amplification as set forth below.

Initially, the Commissioner concurs with the ALJ – for the reasons set forth in the Initial Decision – that petitioner did, in fact, acquire tenure as a principal in the district and was removed from that position in violation of his rights. However, the Commissioner also concurs with petitioner that the ALJ erred in calculating the date on which such tenured status was obtained. In this regard, the record is clear that petitioner was promoted to the position of principal from the tenure-eligible position of vice principal, thus triggering the following provision of *N.J.S.A.* 18A:28-6, omitted by the ALJ in his recitation and application (Initial Decision at 4-5) of that statute:

Any such teaching staff member under tenure or eligible to obtain tenure under this chapter, who is transferred or promoted with his consent to another position covered by this chapter on or after July 1, 1962, shall not obtain tenure in the new position until after:

- (a) the expiration of a period of employment of *two consecutive calendar years* in the new position unless a shorter period is fixed by the employing board for such purpose; or
- (b) employment for two academic years in the new position together with employment in the new position at the beginning of the next succeeding academic year; or
- (c) employment in the new position within a period of any three consecutive academic years, for the equivalent of more than two academic years;*** (*emphasis supplied*)

Consequently, under the plain language of controlling statute, petitioner acquired tenure as a principal on August 1, 2004 – after the passage of two consecutive calendar years – rather than on August 1, 2005, after passage of three years as stated by the ALJ (*Id.* at 9).

See *Alan R. Sitek v. Board of Education of the Southern Regional High School District, Ocean County*, 1988 *S.L.D.* 2247; affirmed State Board of Education. 1989 *S.L.D.* 3079.

Moreover, petitioner is correct in asserting that the Initial Decision did not squarely address his claim with respect to the position of vice principal, and the Commissioner further notes that his claim to tenure in the position of assistant principal – as raised in the Petition of Appeal and argued in petitioner’s Brief in Support of Motion for Summary Judgment – is similarly omitted, notwithstanding that petitioner did not object to such omission on exception.¹ Additionally, the ALJ appears not to have contemplated the possibility that there may not be a principal position in the district held by a nontenured or less senior principal so as to enable petitioner to obtain the relief ordered for having prevailed in this matter. The Commissioner, therefore, finds it appropriate to address the question of petitioner’s status as assistant principal and vice principal.

In this regard, the record shows that petitioner began accruing time toward acquisition of tenure in the position of assistant principal upon his receipt of provisional certification in November 2000, and as vice principal upon his appointment to that position on December 1, 2000. Thus, given his subsequent continuous service within the district – together with the clear language of *N.J.S.A.* 18A:28-6 providing that “the period of employment in [a] new position to which a tenure-eligible employee is promoted or transferred] shall be included in determining the tenure and seniority rights in the former position held by such teaching staff member” – petitioner had, at the time of his unlawful termination, unquestionably satisfied the requirements of *N.J.S.A.* 18A:28-5 and 18A:28-6, respectively, for acquisition of tenure as both an assistant principal and a

¹ See Note 2 below.

vice principal.² The Commissioner rejects, as entirely without merit, the Board's contention that petitioner could not accrue tenure in *any* position while serving as interim principal; while he clearly could not accrue tenure as a *principal* as a result of such service, *N.J.S.A.* 18A:16-1.1, there can be no question that he continued to accrue tenure as an assistant principal and vice principal while acting as principal, the latter circumstance correctly noted by the ALJ. (Initial Decision at 8)

Accordingly, as modified and amplified above, the Initial Decision of the OAL is adopted as the final decision in this matter. The Willingboro Board of Education is directed to restore petitioner to a position as principal and reimburse him for lost salary and benefits retroactive to August 18, 2005, less mitigation as appropriate; or, if no such position is available due to the greater seniority of the district's incumbent principals, to accord him the appropriate placement on a preferred eligibility list and proceed thereafter to honor his tenure and seniority rights as vice principal and assistant principal.

IT IS SO ORDERED.³

COMMISSIONER OF EDUCATION

Date of Decision: April 26, 2007

Date of Mailing: April 26, 2007

² Notwithstanding the Board's stance to the contrary (Brief in Support of Cross-Motion for Summary Disposition at 1) and petitioner's apparent acquiescence to it for purposes of this proceeding (Letter Memorandum of May 16, 2006 at 1, together with omission of references to tenure as assistant principal in all subsequent submissions), these positions are – as correctly noted by the ALJ – separately tenurable as a matter of law. (Initial Decision at 5)

³ 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.*