

#292-07 (OAL Decision: Not yet available on-line)

MALVINA KOHN, :  
PETITIONER, :  
V. : COMMISSIONER OF EDUCATION  
BOARD OF EDUCATION OF THE CITY OF : DECISION  
ORANGE TOWNSHIP, ESSEX COUNTY, :  
RESPONDENT. :  
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SYNOPSIS

Petitioner – a tenured mathematics supervisor employed by the district since 1997 – appealed the district’s withholding of her salary increment for the 2006-2007 school year, which was allegedly based on her performance for the 2005-2006 school year. Petitioner contended that the Board’s action was arbitrary and capricious, and motivated by the personal animosity of petitioner’s supervisor. Respondent contends that its action in withholding petitioner’s salary increment was reasonable and that the Commissioner cannot substitute her judgment for that of the Board.

The ALJ found, *inter alia*, that: there was no independent evaluation of the recommendation to withhold the salary increment, which was made by Ms. Frazier, the petitioner’s supervisor; Ms. Frazier’s recommendation formed the total basis for the Board’s decision; and the reasons stated in that recommendation were largely without merit. Accordingly, the ALJ concluded that the withholding of petitioner’s increment was arbitrary, capricious and unreasonable, and ordered the decision of the Board be reversed.

Upon a full and independent review of the record, the Commissioner agrees with the ALJ, for the reasons comprehensively detailed in her decision, that the petitioner has sustained her burden of establishing – by a preponderance of the credible evidence – that the Board’s withholding of her increment was arbitrary, capricious and unreasonable and must be reversed. Accordingly, the Commissioner directed the Board to fully restore petitioner’s increment for the 2006-2007 school year.

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.

July 19, 2007

OAL DKT. NO. EDU 10582-06  
AGENCY DKT. NO. 290-8/06

MALVINA KOHN, :  
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 PETITIONER, :  
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 V. : COMMISSIONER OF EDUCATION  
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 BOARD OF EDUCATION OF THE CITY OF : DECISION  
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The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The Board’s exceptions to the June 6, 2007 Initial Decision were dated June 22, 2007, and filed June 25, 2007, and were therefore untimely pursuant to *N.J.A.C. 1:1-18.4*; <sup>1</sup> consequently, the exceptions – and petitioner’s reply thereto – are not considered herein.

Upon independent and careful review of the record, the Commissioner determines to adopt the recommended decision of the OAL. In so deciding, the Commissioner was mindful, as was also aptly recognized by the Administrative Law Judge (ALJ), that it is well-established that a school district’s decision to withhold a teacher’s increment may not be overturned unless that decision is “patently arbitrary, without rational basis or induced by improper motives.” *Kopera v. West Orange Bd. of Ed.*, 60 *N.J. Super.* 288, 294 (App. Div. 1960) The scope of the Commissioner’s review in increment withholding matters is “not to substitute [her] judgment for that of those who made the evaluation but to determine whether they had a reasonable basis for

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<sup>1</sup> *N.J.A.C. 1:1-18.4(a)* specifies: “Within 13 days from the date the judge’s initial decision was mailed to the parties, any party may file written exceptions with the agency head.”

their conclusions.” *Id.* at 296. As such, there are *only two* determinations to be made when reviewing the Board’s decision to withhold petitioner’s increment, *i.e.*, 1) whether the underlying facts were as those who made the evaluations claimed, and 2) whether it was unreasonable for them to conclude as they did based upon those facts. Additionally, the burden of proving unreasonableness lies with the petitioner. *Id.* at 296-297.

Notwithstanding such a heavy impediment to the granting of relief, the Commissioner agrees with the ALJ – for the reasons comprehensively detailed in her decision – that petitioner has sustained her burden of establishing by a preponderance of the credible evidence that the Board’s withholding of her increment here was arbitrary, capricious and unreasonable and, therefore, such action must be reversed.

Accordingly, the recommended decision of the OAL is adopted as the final decision in this matter. The Board is hereby directed to fully restore petitioner’s increment for the 2006-2007 school year.

IT IS SO ORDERED.<sup>2</sup>

COMMISSIONER OF EDUCATION

Date of Decision: July 19, 2007

Date of Mailing: July 19, 2007

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<sup>2</sup> 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.*