

CAROLYN MACCHIA, :
PETITIONER, : COMMISSIONER OF EDUCATION
V. : DECISION
BOARD OF EDUCATION OF THE CITY :
OF BAYONNE, HUDSON COUNTY, :
RESPONDENT. :
:

SYNOPSIS

Petitioner – a former tenured teacher of television production in respondent’s schools whose position was eliminated in a reduction in force (RIF) in 2007 – contends that she is entitled to a permanent substitute position assigned to the in-school suspension program, which was open after the RIF. Another teacher eliminated during the RIF, who had not yet attained tenure, was rehired to serve in the in-school suspension program position.

The ALJ found, *inter alia*, that: the only priority or seniority rights that a tenured teacher who was subjected to a RIF has over a non-tenured teacher applicant are for positions that fall under the same certificate to which the teacher has earned her tenure; the stipulated job duties of the permanent substitute in the in-school suspension program do not call for any instruction to be given and the listing for the position only requires a county substitute certificate; therefore, it is not a teaching staff member position subject to the tenure laws. The ALJ concluded that the petitioner is not entitled to the position as it is outside the scope of her tenure and seniority rights, and denied the petitioner’s request for reinstatement.

The Commissioner rejected the Initial Decision of the OAL, finding that: the factual record in this matter is incomplete and does not provide a determination by the County Superintendent of the appropriate certification, if any, required for the position sought by petitioner in this matter; accordingly, it cannot be concluded that the position of permanent substitute assigned to in-school suspension is not a teaching staff position requiring full instructional certification. The Commissioner directed the respondent Board to submit this position to the County Superintendent immediately for determination of what certification, if any, is necessary to hold it, and the petition was dismissed without prejudice.

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 1396-08
AGENCY DKT. NO. 363-11/07

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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 thereto by the Board of Education (Board), both duly filed pursuant to *N.J.A.C.* 1:1-18.4.

In her exceptions, petitioner contends that the Administrative Law Judge (ALJ) erred in finding that the position of permanent substitute, as constituted in the Board’s district, is not a teaching staff position requiring an instructional certificate. Petitioner asserts that the ALJ failed to recognize the Board’s misuse of the county substitute credential, ignoring that: 1) the permanent substitute is not, as contemplated by *N.J.A.C.* 6A:9-6.5(a), a temporary employee replacing another teacher due to an inadequate supply of certificated staff, but rather a permanent, full-year employee assigned to an in-school suspension position for which certificated staff members – specifically, petitioner – are available; and 2) the Board’s use of the credential as a “minimum” qualification is belied by the fact that a fully certified individual may also – and currently does – hold the position, thus revealing its true character as a teaching staff assignment. Petitioner further asserts that the Initial Decision has erred in its analysis, pursuant

to *David Dowding v. Board of Education of the Township of Monroe, Middlesex County*, 1990 S.L.D. 1711, of the in-school suspension assignment's duties, focusing solely on the absence of instruction rather than on the full scope of the assignment, as well as ignoring that 1) the Board's own handbook provides for monitoring of student behavior by "an assigned teacher" (Exhibit J-1A) and 2) the person assigned is solely responsible for controlling students and identifying misbehavior that may lead to further discipline – duties that fall squarely within the scope of responsibility of a teaching staff member. (Petitioner's Exceptions at 1-2 and 4)¹

In reply, the Board counters that petitioner cites no legal authority precluding it from requiring a county substitute credential for non-teaching positions, and, moreover, even if petitioner's argument is credited, the outcome of this matter would not change because petitioner would not be entitled to a non-teaching staff position regardless of whether its incumbent had a county substitute certificate (*sic*) or no certificate at all. The Board further reiterates that, where there has been no county superintendent determination that an instructional certificate is necessary for an in-school suspension position and the evidential record demonstrates that no instruction is taking place, case precedent is clear that the position is not a teaching staff position to which tenure rights can be asserted. Finally, the Board contends, citing *Board of Education of the Lakeland Regional School District, Passaic County v. City Council of the Borough of Ringwood et al., Passaic County*, 96 N.J.A.R.2d (EDU) 101, that duties relating to monitoring and/or controlling students – as are also performed by classroom aides, bus drivers and security guards – do not translate to "instruction" and do not automatically require an instructional certificate. (Board's Reply at 1-4)

¹ Petitioner additionally incorporates, at 2-4, the entirety of Point III of her OAL brief.

Upon review and consideration, the Commissioner rejects the Initial Decision's conclusion that the Board's in-school suspension assignment is not a teaching staff position, finding instead that the record is insufficient for determination on this point.

The Commissioner concurs with petitioner that a finding of "no instruction" does not, in itself, necessarily end the inquiry as to whether a position is of such character as to require the individual holding it to possess full certification. Unfortunately, neither the stipulated facts nor the documents in evidence in this matter provide any information whatsoever regarding the direction, supervision and reporting responsibilities of the person assigned to the in-school suspension room, who is left alone with students (Stipulation of Facts, Exhibit J-1, No. 17) and apparently performs the duties identified in the record (*Ibid.*, Nos. 16 and 18) in the absence of a certificated staff member (*Ibid.*, No. 19).²

Moreover, because the Board maintains that the in-school suspension assignment and the permanent substitute position – for which no job description exists (*Ibid.*, No. 20) – are not teaching staff positions, it apparently did not submit its staffing configuration to the County Superintendent for "unrecognized title" review pursuant to *N.J.A.C. 6A:9-5.5(b)*.³ However, neither is there any indication that the County Superintendent reviewed the Board's staffing pursuant to regulations requiring approval of the necessary qualification for paraprofessionals, *N.J.A.C. 6A:32-4.7*, notwithstanding that the in-school suspension position as characterized by the Board – as well as the classroom aide duties to which permanent substitutes are also routinely assigned (*Ibid.*, No. 19) – would clearly qualify as "[assisting] in the

² It is irrelevant in this context that the person currently holding the position happens to have an instructional certificate rather than a county substitute credential.

³ Petitioner's representation on exception (Exceptions at 4, footnote) that such review did not, in fact, occur was not challenged by the Board on reply.

supervision of student activities under the direction of a principal, teacher or other designated certified professional personnel.” *N.J.A.C. 6A:32-4.7(a)*⁴

Consequently, this matter comes before the Commissioner with neither a complete factual record nor a determination by the County Superintendent – the official charged by law with assessment of staff qualification as the representative of the Commissioner best in the position to review local district program/staffing configurations in the first instance – of the appropriate certification, if any, required for the position sought by petitioner in this matter. Thus, the Commissioner cannot determine whether the Board is, in fact, assigning the holder of a permanent substitute position to regular duties requiring full certification, in which case its use of the county substitute credential as an acceptable qualification would, indeed, be improper as charged by petitioner, as well as a violation of her tenure rights.⁵

Accordingly, the Initial Decision of the OAL is rejected in so far as it concludes, on the present record, that the Board’s position of permanent substitute assigned to in-school suspension duty is not a teaching staff position requiring full instructional certification. Instead, the Board is directed forthwith to submit this position to the County Superintendent for

⁴ Although the Board notes in its reply exceptions, *supra*, that there has been “no determination” by the County Superintendent that certification is necessary for the position at issue, it does *not* say that the position was *actually reviewed* and *found* not to require certification.

⁵ While it is clearly permissible for a board to retain the holder of a county substitute credential as a permanent employee assigned to report daily for the purpose of filling in for absent teachers on a daily or weekly basis, *Marybeth Driscoll v. Board of Education of the West Essex Regional School District, Essex County*, 95 *N.J.A.R.2d* (EDU) 348, petitioner is correct that the credential cannot be used for regular or long-term assignment to duties requiring full certification. This conclusion is not altered by the Board’s citation to a precedent having no meaning in the present context (*Lakeland Regional, supra*), a budget appeal in which the Commissioner – in sustaining the municipalities’ reduction for other reasons – made no comment on the board’s bare assertion (at 104) that the line-item in question supported the salaries of two aides for “[utilization] in the school discipline process, thus, freeing teachers and supervisors from supervising in-school suspension, lunch room, Saturday detention and bus duties.”

determination of the certification, if any, necessary to hold it, and the petition of appeal is dismissed *without prejudice* to petitioner's right to refile should she believe that her tenure rights continue to be violated following the County Superintendent's determination.

IT IS SO ORDERED.⁶

COMMISSIONER OF EDUCATION

Date of Decision: December 5, 2008

Date of Mailing: December 8, 2008

⁶ This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L. 2008, c. 36*.