

#85-10 (OAL Decision: Not yet available online)

LAURA FATTAL AND :
STEVEN P. MISSAL, :
: PETITIONERS, :
: COMMISSIONER OF EDUCATION
V. :
: DECISION
BOARD OF EDUCATION OF THE :
CITY OF PLAINFIELD, :
UNION COUNTY, :
: RESPONDENT.
_____ :

SYNOPSIS

In this consolidated matter, petitioners appealed the abolishment of their positions – as Supervisor of Curriculum and Instruction/Fine and Performing Arts, and Supervisor of Social Studies, respectively – during staff reorganization by the respondent Board, which allegedly circumvented their tenure rights. Petitioners contend that respondent 1) created vice-principal positions with the same responsibilities as their supervisory positions, but required principal endorsements which they did not possess at the time, and 2) created positions with titles not recognized by the Department of Education, and then hired employees in these positions who lacked tenure and seniority superior to that of petitioners. Respondent asserted that reorganization was undertaken for reasons of economy and efficiency as authorized pursuant to *N.J.S.A. 18A:28-9*, and petitioners did not possess the requisite certification to maintain employment in the newly created positions.

The ALJ found that: a local board of education has the authority, pursuant to *N.J.S.A. 18A28-9*, to engage in a reduction of the work force for reasons of economy; a board of education has broad discretionary authority and is entitled to a presumption of lawfulness and good faith; petitioners have the burden of proving by a preponderance of the credible evidence that the abolition of their positions was undertaken in bad faith or was arbitrary and capricious or otherwise unlawful; the elimination of petitioners’ positions was not arbitrary, capricious or unreasonable, as the district’s reorganization was necessitated by the elimination of \$6 million in Abbott funding; the positions that petitioners sought required certifications which they did not possess; and petitioners failed to carry their burden to prove that the respondent violated their tenure and seniority rights. Accordingly, the ALJ ordered the petitions dismissed with prejudice.

Upon a thorough and independent review of the record, the Commissioner adopted that portion of the Initial Decision which dismisses petitioner Missal’s appeal and the first count of petitioner Fattal’s appeal, but remands the second count of Fattal’s petition to the OAL with direction to reevaluate her tenure rights with respect to her potential claim to the position of Director of Educational Services.

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.

March 22, 2010

OAL DKT. NOS. EDU 9750-08 AND EDU 9751-08 (CONSOLIDATED)
AGENCY DKT. NOS. 199-7/08 AND 203-7/08

LAURA FATTAL AND :
STEVEN P. MISSAL, :
 :
 PETITIONERS, : COMMISSIONER OF EDUCATION
 :
 V. :
 : DECISION
 :
 BOARD OF EDUCATION OF THE :
 CITY OF PLAINFIELD, :
 UNION COUNTY, :
 :
 RESPONDENT. :
 _____ :

In this consolidated case, petitioners – who were each tenured supervisors in respondent’s district but whose positions were abolished in a reorganization driven by revenue losses – assert that they are entitled to positions which were filled by allegedly untenured individuals or individuals with less seniority. A hearing was held in the Office of Administrative Law (OAL) on September 10, 2009,¹ and the Initial Decision was issued on December 21, 2009.

Each petitioner’s first count alleges that, in order to circumvent petitioners’ tenure rights, respondent created vice-principal positions that called for the same responsibilities as those executed in petitioners’ supervisory positions, but required “principal” endorsements, which petitioners did not possess at the time. Petitioners’ second counts each allege that as part of its reorganization, respondent created positions with titles “not recognized by the Department of Education which require supervisor certificates” and that respondent “employed persons in those positions who do not have tenure as [] supervisor[s] or have less seniority as [] supervisor[s] than petitioners.”

¹ Transcripts of the hearing were not provided to the Commissioner.

It is undisputed that at the time petitioner Laura Fattal's (Fattal) supervisor position was abolished, she held an instructional certificate with an endorsement in art, and an administrative certificate with endorsements for supervisor and school administrator. (Initial Decision at 7) In the Initial Decision the Administrative Law Judge (ALJ) recounted Fattal's testimony that, after learning of the elimination of her supervisor position, she applied for the newly-created positions of 1) Vice-Principal of Arts, Talents and Life Skills, 2) Vice-Principal of Content Areas, 3) Coordinator of Special Projects, and 4) Director of Educational Services. (Initial Decision at 3)

Similarly, the ALJ found that at the time petitioner Steven P. Missal's supervisor position was abolished, he held an instructional certificate with endorsements in elementary education and social studies, and an administrative certificate with a supervisor endorsement.² (Initial Decision at 7) After losing his supervisor position to the reorganization, Missal applied for the newly created positions of 1) Assistant Superintendent for Educational Services, 2) Vice-Principal of Math, Science, and Social Studies, and 3) Vice-Principal of Content Areas. (Initial Decision at 4)

Undisputed testimony was presented by respondent's Assistant Superintendent of Administrative Services, Garnell Bailey, that the respondent district had substantial reasons for eliminating jobs and reorganizing staff positions in the wake of the February 2007 announcement of drastic reductions in state funding. With regard to the specific employment claims made by petitioners, Bailey testified that the parameters of the new district-wide vice-principal positions created in the reorganization included responsibilities over and above those required in the supervisory positions that petitioners had held. (Initial Decision at 5) Nonetheless, four

² Subsequent to the period of time at issue, Missal acquired the endorsements needed for the positions of principal, district administrator and superintendent. (Initial Decision at 3-4)

Plainfield supervisors whose positions had been eliminated in the reorganization were hired to fill four of the newly created vice-principal positions because, *inter alia*, they possessed the appropriate certifications and endorsements. (*Ibid.*)

It is undisputed that at the time of the reorganization, neither petitioner had a “principal” endorsement. In light of that fact, and in light of the evidence that the new vice-principal positions required more responsibilities than had petitioners’ supervisory positions, the Commissioner must find that petitioners had no tenure or seniority rights relative to the vice-principal positions. Indeed, in their exceptions, petitioners conceded that they were not qualified to take the positions. (Petitioners’ Exceptions at 2) The Commissioner accordingly dismisses the first counts of the respective petitions and turns his attention to examination of the facts relevant to the allegations in the second counts.

It is axiomatic that the burden of persuasion falls upon petitioners to advance the claims in their second counts. *See, e.g. Sharon Francin v. Board of Education of the Borough of Maywood, Bergen County*, Commissioner Decision No. 261-09, decided August 20, 2009, at 5. And to the extent that petitioners may be challenging the elimination of their positions and the creation of new and different positions, they have the burden of proving – by a preponderance of the credible evidence – that the abolition of their positions was undertaken in bad faith, was arbitrary and capricious, or was in some other fashion contrary to the dictates of *N.J.S.A. 18A:28-9*. *See, e.g., Dearden v. Trenton BOE*, 96 *N.J.A.R.2d* (EDU) 321, 323. Thus, it was incumbent upon petitioners to produce facts which supported their allegations that 1) after eliminating petitioners’ jobs respondent created, in bad faith, positions with titles not recognized by the Department of Education which require supervisor certificates; 2) petitioners applied for those positions, possessed the appropriate certification/endorsements and had a tenure claim to

them; and 3) respondent employed persons in those positions who did not have tenure as supervisors or had seniority inferior to petitioners.

As to petitioner Missal, who applied for two vice-principal positions and the position of Assistant Superintendent for Educational Services, it is undisputed that at the time the positions were offered he did not possess the required certification for the vice-principal positions, as stated above. The Commissioner finds that he also lacked the required certification to serve in the assistant superintendent position. More specifically, Exhibit J-27 illustrates that the assistant superintendent position required an administrative certificate with a “school administrator” endorsement, which Missal did not have. The Commissioner notes that all three positions for which Missal applied were district-level supervisory positions. Pursuant to *N.J.A.C. 6A:9-12.3(a)*, “any position that involves services as a district-level administrative officer” requires the “school administrator” endorsement.

Further, the Commissioner finds that Missal had not achieved the employment experience in that separately tenurable position of assistant superintendent which would have been necessary for him to claim superior rights to the job he sought. *See, N.J.S.A. 18A:28-5; Nelson v. Old Bridge Board of Education*, 148 *N.J.* 358 (1997).

Petitioner Fattal also applied for two vice-principal positions which, as stated above, required a “principal” endorsement that she concededly did not possess. She further applied for the position of Coordinator of Special Projects, which required a “principal” endorsement which, again, she did not have.³

Lastly, Fattal applied for the position of Director of Educational Services, which required an administrative certificate with a “school administrator” endorsement. It is

³ The Office of Licensing and Credentials of the New Jersey Department of Education has a list containing over eleven hundred job titles and the certifications designated for same. Petitioners have provided no evidence to support their contention that the allegedly “unrecognized” positions posted by respondent are not on the list.

undisputed that Fattal did hold a “school administrator” endorsement at the time, although she had no employment experience in a position requiring same. Nonetheless, relying on *Nicholas Duva v. State-Operated School District of the City of Jersey City, Hudson County*, State Board of Education Decision # 56-99 (March 6, 2002), petitioner contends in her exceptions that her undisputed tenure as a supervisor gives her tenure in any position – not specifically enumerated in *N.J.S.A.* 18A:28-5 – that requires an administrative certificate with a “school administrator” endorsement.

In *Duva*, the petitioner held an administrative certificate with both a “supervisor” and a “school administrator” endorsement. He served for many years in a director’s position, which in the judgment of the State Board of Education, required a “school administrator” endorsement. When *Duva*’s director position was eliminated, he was placed in an educational services position for which he was certificated. However, he petitioned the Commissioner of Education contending that he was entitled to – and should have been given – a supervisory position if, at the time of the RIF, there had been any such positions vacant or held by untenured individuals.

The Commissioner disagreed, but the State Board reversed the Commissioner, stating *inter alia* that:

[P]etitioner’s tenure protection extended to all assignments under his administrative certificate for which he held the proper endorsement, except for those positions enumerated in *N.J.S.A.* 18A:28-5. . . . [T]he scope of petitioner’s tenure protection under his administrative certificate extended to all assignments for which he was qualified by virtue of possessing a supervisor’s endorsement. Hence, upon abolishment of his director’s assignment, the petitioner was entitled to be employed in assignments requiring a supervisor endorsement in preference to any non-tenured individuals. *Duva, supra* at 17-18.

Thus, the State-Operated School District of Jersey City was obliged to compensate Duva for the period of time in which he was barred from a supervisory position – subject, of course, to mitigation.

In light of the foregoing the Commissioner is constrained to agree with petitioner Fattal that she had a potential claim to positions that required a “school administrator” endorsement – except for the separately tenurable positions set forth in *N.J.S.A. 18A:28-5* – and were vacant at the time of the reorganization, or were held by untenured personnel. However, the record is not clear about 1) who besides Fattal may have applied for the position of Director of Educational Services, 2) whether any such individuals had tenure in positions requiring administrative certificates, and 3) how petitioner may have ranked as compared with any other tenured applicants.

In sum, petitioners did not produce evidence suggesting that the reorganization was executed in bad faith and Missal did not demonstrate that he had entitlement to any of the positions for which he made application when his supervisory job was eliminated. Fattal, however, had a potential claim to the position of Director of Educational Services, depending upon the status of the other applicants for the job – which status is not clearly set forth in the record.

A month and a half after the hearing in this matter, petitioners sent the ALJ an article from the Star Ledger which alleged that two inadequately credentialed individuals had been hired for administrative positions in respondent’s district. They asked the ALJ to reopen the record to give them the opportunity to submit a copy of the Union County Superintendent’s determination concerning said individuals. The ALJ apparently accepted a copy of the Star Ledger article as Exhibit P-1.

On February 22, 2010, petitioners submitted to the Commissioner a letter dated October 19, 2009 from Carmen Centuolo, Ed.D., Union County Superintendent, to Dr. Steve Gallon, III, Plainfield Superintendent of Schools. In the letter, Centuolo advised Gallon that since there were certificated staff members in the Plainfield district's Office of Assessment or Office of Professional Development who regularly reported to the two employees under scrutiny, the positions held by those employees "are supervisory in nature and require a supervisor's, principal or administrator's certificate [sic]. . . ." Since the employees in question did not have such credentials, Centuolo ordered their removal from the subject positions and the rescission of their contracts.

Relying on this letter, petitioners requested, in their exceptions, a determination by the Commissioner that they should be given the positions previously held by the improperly credentialed employees. The Commissioner must decline the request.

First, neither the ALJ nor the Commissioner may rely exclusively on the unauthenticated letter to Gallon – which letter was not presented at the hearing – in weighing the totality of the evidence in the instant case. Second, no evidence concerning the nature of the positions referenced in Centuolo's letter was presented at the hearing in the Office of Administrative Law, or to the Commissioner. Third, there is no evidence in the record indicating what the new certification requirements will be for the positions in question – if indeed the positions will be retained at all. Fourth, there are no facts in the record indicating how many other rified employees might be eligible for the positions, if the positions are not eliminated. Finally, there are no facts in the record that would allow a determination about the respective qualifications of all potential applicants for the positions.

Accordingly, the Commissioner adopts that portion of the Initial Decision of the Office of Administrative Law which dismisses Missal's petition and the first count of Fattal's petition. However, as to Fattal's second count, the Commissioner remands the issue to the OAL with direction to reevaluate petitioner Fattal's tenure rights in accordance with the principles of law set forth herein.

IT IS SO ORDERED.⁴

COMMISSIONER OF EDUCATION

Date of Decision: March 22, 2010

Date of Mailing: March 22, 2010

⁴ This decision may be appealed to the Superior Court, Appellate Division, pursuant to *P.L. 2008, c. 36*.