

ELBERT SMITH, :
 :
 PETITIONER, :
 :
 V. :
 :
 BOARD OF EDUCATION OF THE :
 CITY OF ORANGE, ESSEX COUNTY, :
 :
 RESPONDENT, :
 :
 AND :
 :
 CURTIS RICHBURG, :
 :
 PETITIONER, :
 :
 V. :
 :
 BOARD OF EDUCATION OF THE :
 CITY OF ORANGE, ESSEX COUNTY, :
 :
 RESPONDENT, :
 :
 AND :
 :
 MALVINA KOHN, :
 :
 PETITIONER, :
 :
 V. :
 :
 BOARD OF EDUCATION OF THE :
 CITY OF ORANGE, ESSEX COUNTY, :
 :
 RESPONDENT, :
 :
 AND :
 :
 SAUNDRA GRAY, :
 :
 PETITIONER, :
 :
 V. :
 :
 BOARD OF EDUCATION OF THE :
 CITY OF ORANGE, ESSEX COUNTY, :
 :
 RESPONDENT. :
 :

SYNOPSIS

The four petitioners in this consolidated case were employed under tenure as administrators by respondent Board when their positions were eliminated in a reorganization and reduction in force (RIF) effective July 1, 2009. Petitioners asserted entitlement to administrative positions currently held by non-tenured teaching staff members, including several new positions titled Assistant Director which were created during the 2009 reorganization of the Curriculum and Testing Department. Respondent contended that petitioners neither held the certifications required for the positions they seek, nor were entitled to these positions by virtue of their tenure or seniority rights. Candace Wallace, Director of Curriculum and Testing for the respondent, was granted the right to intervene in this case after petitioners alleged that they were entitled to Wallace's position by virtue of their tenure status.

The ALJ found, *inter alia*, that: the petitioners are entitled to any positions in which they hold tenure that are currently held by non-tenured staff members; all of the petitioners held their positions of employment as supervisors under tenure, and petitioner Gray had additionally earned tenure as an Athletic Director; the petitioners correctly asserted that their tenure protection extends to the Assistant Director positions established by the respondent Board in 2009; the additional certification requirements imposed by the Board for these new positions cannot defeat the clear tenure entitlements of the petitioners, as the additional certifications are not necessary to properly develop curriculum in language arts, science or mathematics; the requirement that the Assistant Directors hold appropriate subject-matter certification is reasonable and petitioners do not assert rights to positions for which they are not properly certified as to subject matter; and none of the petitioners are entitled by virtue of tenure to the position of Director of Curriculum and Testing currently held by Candace Wallace. The ALJ concluded that: petitioner Gray is entitled to the position of Athletic Director, retroactive to June 30, 2009; two of the remaining petitioners are entitled to compensation for lost wages and benefits during the 2009-2010 school year due to the respondent's failure to appoint them to one of the Assistant director positions created in 2009; and, as to the position of Assistant Director for Mathematics and Science K-12, the respondent is directed to select between petitioners Richburg and Kohn, and immediately appoint the petitioner deemed better qualified for the position; the petitioner selected shall be compensated for lost salary and benefits retroactive to July 1, 2010.

Upon independent review of the record, the Commissioner, *inter alia*, concurred in part with the ALJ – albeit for different reasons – that Candace Wallace is entitled to serve as Director of Curriculum and Testing. The Commissioner also concurred that Sandra Gray is entitled to the Director of Athletics position, and that additional endorsements – beyond the appropriate subject matter endorsements – are not required for the new positions. The Commissioner went on to modify the ALJ's conclusions with respect to the Assistant Director positions, and directed that these positions be re-titled as Supervisors as there is no need for the district to utilize an unrecognized director title since the job descriptions for the positions in question do not specify that the holders will supervise other supervisors. Accordingly, the Commissioner ordered the Board: to appoint Gray as Athletic Director; to leave Candace Wallace in her role as Director of Curriculum and Testing; to compensate two of the remaining petitioners for lost wages due to its failure to appoint them to one of the new positions in the 2009-2010 school year; and to appoint either petitioner Richburg or petitioner Kohn – recognizing their seniority rights – to the position of Supervisor for Mathematics and Science K-12, and compensate that petitioner for lost salary and benefits retroactive to July 1, 2010.

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.
--

February 1, 2012

OAL DKT. NO. EDU 11566-09, 11567-09, 11568-09 AND 11598-09 (CONSOLIDATED)
AGENCY DKT. NO. 194-8/09, 207-8/09, 192-8/09 AND 203-8/09

ELBERT SMITH, :

PETITIONER, :

V. :

BOARD OF EDUCATION OF THE :
CITY OF ORANGE, ESSEX COUNTY, :

RESPONDENT, :

AND :

CURTIS RICHBURG, :

PETITIONER, :

V. :

BOARD OF EDUCATION OF THE :
CITY OF ORANGE, ESSEX COUNTY, :

RESPONDENT, :

AND :

MALVINA KOHN, :

PETITIONER, :

V. :

BOARD OF EDUCATION OF THE :
CITY OF ORANGE, ESSEX COUNTY, :

RESPONDENT, :

AND :

SAUNDRA GRAY, :

PETITIONER, :

V. :

BOARD OF EDUCATION OF THE :
CITY OF ORANGE, ESSEX COUNTY, :

RESPONDENT. :

COMMISSIONER OF EDUCATION

DECISION

The record of these consolidated matters and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions filed pursuant to *N.J.A.C. 1:1-18.4* by the petitioners, the Board and intervenor, Candace Wallace.¹ This consolidated matter involves claims by four tenured supervisors whose positions were abolished during reorganization. These petitioners claim an entitlement to the newly created Assistant Director positions, to the Director of Curriculum and Testing position, held by the intervenor, and also to the position of Athletic Director. They do not contend that the Board improperly abolished their supervisory positions, nor are any of the relevant facts concerning the certifications and/or endorsements that are held by each of the petitioners in dispute.

In their exceptions, the petitioners agree with the conclusions of the Administrative Law Judge (ALJ) that Sandra Gray, pursuant to her tenure and seniority rights, is appropriately the Athletic Director under the new reorganization. They agree, as the ALJ found, that each petitioner has the necessary certification and endorsements and each is thus qualified to undertake one of the new titles of Assistant Director. The petitioners only challenge the ALJ's conclusion in which, they assert, she erroneously determined that the petitioners were not entitled to the position of Director of Curriculum and Instruction, which is currently held by Ms. Wallace, who does not have tenure. The petitioners contend that the ALJ incorrectly found that the appropriate certification for the job was the school administrator endorsement despite the fact that all that was required by the Board in the job description² was an administrative certificate with a principal endorsement, which each of them currently holds. Additionally the petitioners argue that the ALJ improperly sought to distinguish the Director of Curriculum and Testing position from the Assistant Director titles by concluding that the position was a "qualitatively

¹ Both the Board and the Intervenor filed motions to file exceptions out of time. The Commissioner's decisions granting those motions required the Commissioner to obtain extensions for issuing the final decision.

² On May 9, 2009, the Executive County Superintendent of Schools, Essex County, issued approval of the new titles of Assistant Director with a principal endorsement. It is unclear what exactly was provided for the Superintendent to review and whether or not he had the opportunity to review the addition of the dual content-specific certification requirement.

higher level of administrative responsibility than that entrusted to a supervisor.” The petitioners claim it is irrelevant that Ms. Wallace had a supervisory role over the Assistant Director positions, but instead argue that the controlling factor is that both titles are unrecognized under *N.J.S.A.* 18A:28-5, and both titles fall under the administrative certificate. Further, Ms. Wallace does not have tenure as compared to the petitioners, each of whom is a tenured supervisor. Therefore, the petitioners maintain that under *Duva v. State Operated School District of the City of Jersey City*, EDU 9801-98, State Bd. of Educ. (March 6, 2002), the petitioners are entitled to the Director of Curriculum and Instruction position.

In its exceptions, the Board argues that the ALJ improperly determined that the petitioners were entitled to the Assistant Director positions.³ The Board takes exception to the ALJ’s finding that the additional certification requirements imposed by the Board cannot serve to defeat the tenure entitlements of the petitioners. The job descriptions for the Assistant Director positions require that, in addition to an endorsement for Principal, each must also hold an Educational Services certificate or a Special Education or ESL endorsement. The Board contends that its requirement that the Assistant Directors hold dual certification was to focus on the needs of certain student population groups and to raise the bar. The Board further argues that the decision to require a dual certification was sound and its educational expertise in approving the creation of the new positions should not be second guessed. *Dennery v. Board of Education*, 131 *N.J.* 626, 638 (1993). As a result, the Board contends that since none of the petitioners holds a dual certification, none is qualified for the position of Assistant Director.

In reply exceptions, intervenor Candace Wallace agreed with the ALJ that none of the petitioners is entitled to the Director of Curriculum and Testing position that Ms. Wallace currently holds. Ms. Wallace argues that before the reorganization, she supervised the very individuals who now seek to replace her and many of their duties have been assigned to building principals. In their former titles, all petitioners were responsible for the supervision of their limited content areas and some were further limited by grade level. In contrast, the intervenor maintains that her duties are significantly and

³ The Board agrees with the ALJ’s determination that petitioner Sandra Gray has tenure and seniority rights to the position of Athletic Director retroactive to July 1, 2009.

qualitatively different from any of petitioners' prior supervisory functions. Allowing a subordinate to "bump up" into a position of greater scope and level of responsibility without support of law would create an anomalous result. Moreover, she asserts, the ALJ correctly held that Ms. Wallace was fully qualified and met the requirements for this position.

Upon a comprehensive review of the record and exceptions filed in this matter, the Commissioner concurs in part with the Administrative Law Judge that intervenor Candace Wallace is entitled to serve as Director of Curriculum and Testing (but not for the reasons articulated by the ALJ) and that petitioner Sandra Gray, by virtue of her tenure and seniority rights, is entitled to the Director of Athletics position. The Commissioner agrees with the ALJ that – other than subject matter endorsements – the additional certifications are not required, and modifies the ALJ's remaining conclusions as follows.

Initially, the Commissioner agrees with petitioners that pursuant to *Duva v. State-Operated School District of Jersey City, supra*, both the "Director of Curriculum and Testing" and the "Assistant Director" titles are unrecognized position titles and are, therefore, subject to the requirements of *N.J.A.C. 6A:9-5.5*. That regulation provides that the district must submit to the county superintendent a written request for permission to use the proposed title, together with a detailed job description. The county superintendent is then required to approve or disapprove use of the title and, if approved, to specify the appropriate certification and identify the actual title under which the teaching staff member will accrue tenure and seniority rights. There is no evidence in the record that the district complied with this requirement regarding the "Director of Curriculum and Testing" position, but – as in *Duva, supra*, and *Jack A. Perna v. State-Operated School District of the City of Paterson, Passaic County*, Commissioner's Decision No. 2-12, decided January 4, 2012 – there is no need to remand this matter to the Executive County Superintendent to consider the merits. The Commissioner of Education is the ultimate arbiter of school law disputes and thus has the ultimate authority and responsibility to determine certification. The Commissioner agrees with the ALJ's general description of Ms. Wallace's job duties as district-wide and would agree with the judge's conclusion concerning the appropriate certification, but for the fact that the administrative code carves out an exception to the rule that district-wide job duties require an administrator's endorsement. Specifically, *N.J.A.C. 6A:9-12.3(b)* and (c) provide that an Assistant

Superintendent for Curriculum and Instruction may perform those job duties for the district with either a principal endorsement or a supervisor endorsement. The Commissioner, upon review of the job description for Director of Curriculum and Testing, determines that the duties are actually those of an Assistant Superintendent for Curriculum and Instruction and that the necessary certification is either a principal or supervisor endorsement. The district may utilize the title “Director of Curriculum and Testing,” but Ms. Wallace will accrue tenure and seniority rights as an Assistant Superintendent in charge of curriculum and instruction. Since this is a lesser included title under the assistant superintendent rubric, there is not a problem with her continuing to report to another Assistant Superintendent, and – pursuant to *N.J.A.C. 6A:32-5.1(1)2i* – each assistant superintendency shall be a separate category for seniority purposes.

With respect to the Assistant Director positions, the Commissioner determines to disapprove the use of that unrecognized title and instead directs that the respective positions be re-titled as Supervisors. Tenure and seniority will accrue under the recognized position title of Supervisor. There is no need for the district to utilize an unrecognized director title for these positions because the job descriptions do not specify that the holders will supervise other supervisors.

For the foregoing reasons, the Commissioner hereby orders the Board to immediately appoint Sandra Gray to the position of Athletic Director together with back pay from June 30, 2009, subject to mitigation, as well as restoration of all benefits and emoluments consistent with that position; further, the Board shall leave Candace Wallace undisturbed in her role as Director of Curriculum and Testing. With respect to the remaining petitioners, all of them hold appropriate endorsements for the supervisor positions in issue during the 2009-2010 school year, including subject matter certification in mathematics, science or physical education. Effective with the 2010-2011 school year, only petitioners Richburg and Kohn continue to have an entitlement to the positions in question by virtue of their tenure rights. They both hold the subject matter certification required for the Supervisor for Mathematics and Science K-12 position. Accordingly, the Board is directed to compensate two of the remaining petitioners for any lost wages, benefits or emoluments, less mitigation, due to its failure to appoint them to these positions for the 2009-2010 school year in accordance with their tenure and seniority rights. As to the position of Supervisor for Mathematics and Science K-12, the

Board is directed to appoint either Curtis Richburg or Malvina Kohn – recognizing their respective seniority rights – and compensate that petitioner for all lost salary, benefits and emoluments, less mitigation, retroactive to July 1, 2010. If a dispute arises concerning seniority rights, a new petition shall be filed.

IT IS SO ORDERED.⁴

ACTING COMMISSIONER OF EDUCATION

Date of Decision: February 1, 2012
Date of Mailing: February 2, 2012

⁴ Pursuant to *P.L. 2008, c. 36 (N.J.S.A. 18A:6-9.1)*, Commissioner decisions are appealable to the Superior Court, Appellate Division.