

CASEY MILES, DAVID J. WRONKO :
AND MARY LOUISE SACKS, :
 :
 PETITIONERS, : COMMISSIONER OF EDUCATION
 :
 V. : DECISION
 :
 BOARD OF EDUCATION OF THE :
 CITY OF ASBURY PARK, :
 MONMOUTH COUNTY, :
 :
 RESPONDENT. :
 _____ :

SYNOPSIS

Petitioner Casey Miles – a tenured teacher in respondent’s district, employed since 2004 – alleged that a less senior tenured teacher, Donna Barning, was retained during a reduction in force (RIF) in April 2010 while petitioner was “RIF’d”; Miles sought recovery of lost wages and benefits that she contended she is owed for the period during which she was improperly “RIF’d.” (The other two named petitioners withdrew from the litigation when they were called back to work). The petitioner filed a motion for summary decision, which was opposed by the respondent Board. The Board asserted that it had properly applied the criteria for determining which staff were to be laid off in the RIF.

The ALJ found, *inter alia*, that: the Board’s contention that petitioner’s motion for summary decision should be dismissed due to evidential deficiencies has no merit as the record includes competent proofs of petitioner’s assertions of seniority; the issue at the heart of this controversy is the propriety of the categorization used by the Board to determine which staff would be included in the RIF – a process which is controlled by *N.J.A.C.* 6A:32-5.1; this regulation includes two basic categories of seniority – elementary and secondary; the Board employed Califon Consultants to develop the tenure and seniority list used during the RIF; Califon appears to have created, on its own and without authorization from the regulations, an additional class of categories which included “elementary with math specialization” and “elementary teacher of secondary math”; this unauthorized categorization forms the basis for the Board’s contention that it properly retained Barning over Miles; and the approach used by the Board and its consultant to determine seniority for the purpose of implementing the RIF was outside of the parameters established by *N.J.A.C.* 6A:32-5.1. Accordingly, the ALJ concluded that the petitioner should have been retained in the RIF and granted her motion for summary decision.

Upon careful and independent review, the Commissioner concurred with the ALJ’s determination that summary decision should be granted in petitioner’s favor. The Commissioner ordered, *inter alia*, that the Board: compensate petitioner, pursuant to her uncontested certification, in the amount of \$13,886 for wages and \$9,419 for COBRA premiums; restore to petitioner one personal day, one critical illness day, and four sick days, as well as pension contributions for the period during which she was improperly “RIF’d”; and increase petitioner’s seniority credit for the same period. A copy of this decision was forwarded to the Department of Labor and Workforce Development, Division of Unemployment Insurance, which must be reimbursed for any unemployment insurance which it paid to petitioner during her improper RIF.

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 19, 2013

OAL DKT. NO. EDU 9226-10
AGENCY DKT. NO. 148-7/10

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Before the Commissioner is a dispute concerning the respective seniority of two teachers who were employed by respondent at the time of a reduction in force (RIF) in June 2010: petitioner Casey Miles¹ and Ms. Donna Barning. Upon review of the record, Initial Decision of the Office of Administrative Law (OAL) and parties exceptions, the Commissioner concurs with the Administrative Law Judge (ALJ) that petitioner met her burden to show that she had accrued greater seniority than Barning at the time of the RIF and should have been retained in lieu of Barning.²

The parties agree that petitioner is qualified to teach departmentalized middle school mathematics by virtue of her N-8 elementary teacher endorsement – earned prior to 2004

¹ While this petition was originally filed on behalf of three RIF'd teachers, two of the teachers – David Wronko and Mary Louise Sacks – withdrew from the litigation when they were called back to work.

² A tenured individual has the burden of demonstrating that his or her seniority rights were violated. *Parker v. Bd. of Educ. Matawan-Aberdeen Reg. School Dist.*, 1990 S.L.D. 1778; *Brueck v. Fairview Bd. of Educ.*, 97 N.J.A.R. 2d (EDU) 283, 285 (citing *Howley v. Ewing Twp. Bd. of Educ.*, 1982 S.L.D. 1328, *aff'd*, 1983 S.L.D. 1954).

– and her achievement of “Highly Qualified”³ status as a middle school mathematics teacher. *N.J.A.C.* 6A:9-9.1(a)(3). It is also undisputed that petitioner began teaching combinations of sixth, seventh and eighth grade departmentalized mathematics in respondent’s district in September 2004, and continued doing so until she was RIF’d.

There also appears to be no dispute concerning Barning’s credentials and the length of time she served in respondent’s district. More specifically, Barning is qualified to teach departmentalized middle school mathematics by virtue of her elementary endorsement with a subject matter specialization in mathematics. *N.J.A.C.* 6A:9-9.1(a)(1)ii. She began teaching middle school departmentalized mathematics for respondent in March 2007 and continued through June 2010. In light of the foregoing, at the time of the RIF, Barning’s service to the district teaching departmentalized middle school mathematics was two and one half years less in duration than the petitioner’s – yet respondent retained Barning and RIF’d petitioner Miles.

When a school district makes a "reduction in force," eliminating teaching positions for reasons of economy, it must be based on seniority. *N.J.S.A.* 18A:28-9 to -10. *N.J.A.C.* 6A:32-5.1 articulates the standards for determining seniority. *N.J.A.C.* 6A:32-5.1(b) directs, in pertinent part, that seniority shall be determined by the length of employment in a school district “in specific categories as hereinafter provided.” Those categories are expressly set forth in *N.J.A.C.* 6A:32-5.1(l).

³ Under the No Child Left Behind Act of 2001, all **teachers** teaching in core-academic subjects [like mathematics] must be **highly qualified**. *P.L.* 107-110, § 1119(a)(3). Toward this end, the implementing regulations require State educational agencies to develop plans to ensure that their teachers are highly qualified. *20 U.S.C.* § 6319(a)(2).

In 2006, the United States Department of Education approved New Jersey’s plan, which plan was subsequently set forth in a New Jersey Department of Education memorandum issued on July 30, 2007. The memorandum instructed, *inter alia*, that all elementary school **teachers** working in a self-contained setting for kindergarten through grade five, kindergarten through grade six, or kindergarten through grade eight, and who had not become **highly qualified** by that time, were required to satisfy the following criteria: (1) hold a bachelor’s degree from a regionally accredited institution of higher education; (2) hold a valid New Jersey Teaching Certificate for which no requirement had been waived; and (3) pass the Elementary **Teacher**: Content Knowledge Praxis II Assessment.

Categories 1 through 16 of *N.J.A.C.* 6A:32-5.1(l) pertain to administrative positions and are not germane to this case. Nor is category 19, which relates to educational services positions. The instant controversy concerns the construction of categories 17 and 18 of *N.J.A.C.* 6A:32-5.1(l), *i.e.*, “secondary” instruction and “elementary” instruction.

Respondent’s defense of its decision to RIF petitioner relies upon determinations by a consultant hired to advise about seniority matters. More specifically, respondent retained Randall N. Kantor of Califon Consultants to construe *N.J.A.C.* 6A:32-5.1(l) and create a seniority list for respondent to utilize in determining which employees could be retained and which would have to be laid off. Kantor’s seniority list contained separate seniority categories for “elementary teacher of secondary mathematics” and “elementary teacher with mathematics specialization.”⁴ Presumably, he determined that the position retained by Barning was only available to teachers holding the latter endorsement, since he kept her in it despite petitioner’s longer service.

To the extent that the Commissioner understands Kantor’s explanation for his anomalous seniority categories, it appears to relate to his belief about the reach of *N.J.A.C.* 6A:32-5.1(l)(18)(iv) – the regulation which instructs that persons teaching departmentally organized classes under elementary endorsements in grades seven and eight⁵ shall accrue seniority in the secondary category, limited to grades seven and eight,⁶ and limited to the specific subject area taught in such departmentally organized grades.

⁴ Paragraphs 8 – 10 of the Certification of Randall Kantor filed with the Office of Administrative Law on January 17, 2012 (Kantor Certification).

⁵ And grade six, according to *Unterberger v. Board of Education of Metuchen*, 93 *N.J.A.R.* 2d 59 (November 13, 1992).

⁶ And grade six. *Ibid.*

Kantor opines that *N.J.A.C. 6A:32-5.1(l)(18)(iv)* applies only to teachers such as petitioner who hold the N-8 grade elementary endorsement and teach middle school departmentalized subjects, but not to teachers of departmentalized middle school classes who hold the more recent 5-8 grade elementary endorsement with subject matter specialization⁷ – as does Barning.⁸ He appears to reason that the newer form of endorsement requires a separate seniority category – governed by *N.J.A.C. 6A:32-5.1(l)(17)(i)*.⁹

A macroscopic view of the regulatory scheme reveals that the two instructional categories of seniority are Secondary and Elementary. Both petitioner and Barning have elementary endorsements to their certificates. *N.J.A.C. 6A:32-2.1* defines "elementary" as "kindergarten, grades one through six and grades seven and eight without departmental instruction." There is no authorization to teach grades nine through twelve under an elementary endorsement.

However, *N.J.A.C. 6A:32-5.1(l)(18)* projects the Department of Education's recognition that districts may organize their elementary schools in a way that includes departmentalized instruction for specific subjects. Accordingly, it has allowed for the accrual – by elementary teachers – of seniority credit in the secondary category identified in *N.J.A.C. 6A:32-5.1(l)(17)*, even though the definition of "secondary" implies eligibility to teach grades nine through twelve. *N.J.A.C. 6A:32-2.1* Thus, such accrual by an elementary teacher of seniority in the secondary category is not by virtue of the type of endorsement the teacher holds,

⁷ The latter form of endorsement came into being by way of a reorganization of elementary endorsements in 2004. In lieu of N-8 or K-8 endorsements, the Board of Examiners instituted the following elementary endorsements: Preschool through Grade 3; Elementary Grades K-5; Elementary with subject matter specialization, Grades 5-8; Supplementary Instruction in Reading and Mathematics, K-8. *N.J.A.C. 6A:9-9.1(a)*.

⁸ Paragraphs 18 – 21 of the Kantor Certification.

⁹ Paragraph 19 of the Kantor Certification.

but rather by virtue of the type of service he or she provides within a districts' elementary schools, *i.e.*, teaching departmentalized subject classes.

Kantor's notion that teachers holding the new elementary endorsement for grades 5-8 with subject matter specialization earn secondary seniority in a way that is separate from and/or superior to the manner in which teachers with an older form of elementary endorsement earn secondary seniority is supported neither by the regulatory scheme as a whole, nor the regulatory provision cited by Kantor, *i.e.* *N.J.A.C.* 6A:32-5.1(l)(17)(i), nor case law. *N.J.A.C.* 6A:32-5.1(l)(17)(i) provides that:

[a]ny person holding an instructional certificate with subject area endorsements shall have seniority within the secondary category only in such subject area endorsement(s) under which he or she has actually served.

The purpose of this provision is to advise that (secondary) seniority comes from service under a subject area endorsement rather than the mere possession of such an endorsement. It gives no particular guidance about teachers with elementary endorsements. Rather, it refers to individuals who hold subject area endorsements that allow them to teach in all grades – including grades nine through twelve. *See, N.J.A.C.* 6A:9-9.2(a)(4)(i). Neither Miles nor Barning hold that type of endorsement.

In considering Kantor's emphasis upon the difference in the forms of endorsements held by Miles and Barning, the Commissioner further notes the following. *N.J.A.C.* 6A:9-9.1(a)(5) advises that teachers holding endorsement versions that have not been issued since January 20, 2004 may continue to teach in the subject areas in which they were authorized to teach under the former rules. This indicates that the reorganization of elementary endorsements was not intended to create differences – between teachers of departmentalized middle school subjects who possess earlier elementary endorsements and such teachers who

possess newer elementary endorsements – regarding eligibility for teaching assignments or the emoluments ancillary to those teaching assignments. Accordingly, the regulatory scheme permits petitioner to accrue secondary seniority in the same fashion that Barning may accrue it, *i.e.*, by teaching departmentalized subject classes in grades six, seven and eight.

In sum, at present there are multiple versions of elementary endorsements which permit individuals to teach departmentalized subjects in elementary or middle schools. It is the length of actual service teaching departmentalized subjects, and not the version of elementary endorsement which allows that service, that determines the amount of secondary seniority that a teacher achieves.

Accordingly, the Commissioner concurs with the ALJ that petitioner should not have been RIF'd and must be made whole for the lost wages and benefits that she would have received between June 30, 2010 and the date she was returned to service. Pursuant to an uncontested certification submitted by petitioner, she is owed \$13,886 for wages (\$24,086 less \$10,200 received in unemployment benefits) and \$9,419 for COBRA premiums. In addition, she is owed one personal day, one critical illness day and four sick days. Pension contributions for the period of June 30, 2010 to January 4, 2011 should be restored to petitioner's account, and her seniority credit as a departmentalized middle school mathematics teacher should be increased by the above-referenced period of time.

A copy of this decision and order shall be forwarded to the Department of Labor and Workforce Development, Division of Unemployment Insurance (Division), which must be reimbursed for any amount of unemployment insurance which it paid out. If respondent pays petitioner the full amount of wages due her (\$24,086), she shall be responsible for reimbursing

the Division. If respondent pays petitioner \$13,886 in wages, respondent shall be responsible for reimbursing the Division.

IT IS SO ORDERED.¹⁰

COMMISSIONER OF EDUCATION

Date of Decision: February 19, 2013

Date of Mailing: February 21, 2013

¹⁰ This decision may be appealed to the Superior Court, Appellate Division, pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1).