

FRANKIE NICHOLSON, SONDRA MINUSKIN :  
AND ANN MARIE GRAF, :  
 :  
 PETITIONERS, :  
 :  
 V. : COMMISSIONER OF EDUCATION  
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 BOARD OF EDUCATION OF THE : DECISION  
 CITY OF ASBURY PARK, :  
 MONMOUTH COUNTY, :  
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 RESPONDENT. :  
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The three petitioners in this case were employed under tenure as Supervisors of Curriculum by the respondent Board when their positions were eliminated in a reduction in force (RIF) and district-wide reorganization in 2010. Petitioners asserted entitlement to one of the Assistant Director of Curriculum and Instruction positions (Assistant Director) created by the school district as part of the reorganization, for which non-tenured teaching staff members were selected over the petitioners. 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 rights.

The ALJ found, *inter alia*, that: petitioners in this matter are tenured supervisors in respondent's district; pursuant to *N.J.S.A. 18A:28-1 et seq.*, they are entitled to any district supervisor positions that are currently held by non-tenured staff; the district's new Assistant Director positions do not require the supervision of principals or other supervisors; therefore, the Commissioner's holding in *Elbert Smith, et al. v. Board of Education of the City of Orange, Essex County – i.e.*, that a key component of an assistant director title is the supervision of other supervisors – is applicable in the instant matter; accordingly, the administrator/principal endorsement was not required for the positions at issue, and these positions should be re-titled as supervisor; the enhanced certification requirements for the Assistant Directors – *i.e.*, a secondary teacher of English and/or math endorsement for the grade 9-12 position, and either an elementary teaching endorsement or one of the middle school endorsements for the grade 4-8 position – bore a logical nexus to the positions, and were appropriate for the respondent to include in the job requirements; petitioner Graf holds a math and science certification, qualifying her for the Assistant Director for grades 9-12 position; petitioner Minuskin holds an elementary teaching certification, qualifying her for the Assistant Director for grades 4-8 position; petitioner Nicholson does not have the requisite certifications for either of the reconfigured positions at issue in the instant appeal. Accordingly, the ALJ concluded that petitioner Minuskin and Graf are entitled by tenure to these positions, and ordered respondent to immediately appoint them with full salary and benefits, retroactive to June 30, 2010.

The Assistant Commissioner, to whom this matter was delegated pursuant to *N.J.S.A. 18A:4-34*, concurred with the ALJ's conclusions in this matter, and adopted the Initial Decision as the final decision in this matter. In so doing, the Commissioner noted, *inter alia*, that the unrecognized Assistant Director position titles at issue here were improperly determined by the Executive County Superintendent not to require approval prior to the appointment of candidates. However, as the Commissioner has the ultimate authority and responsibility to determine certification, there is no need to remand this matter to the Executive County Superintendent for consideration of the merits. Accordingly, the Assistant Commissioner ordered the Board to re-title the positions as Supervisor of Curriculum and Instruction, and to appoint petitioners Minuskin and Graf to these positions as directed in the Initial Decision.

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.

September 16, 2013

OAL DKT. NO. EDU 9228-10  
AGENCY DKT. NO. 161-7/10

FRANKIE NICHOLSON, SONDRA MINUSKIN:  
AND ANN MARIE GRAF,

PETITIONERS,

V.

BOARD OF EDUCATION OF THE  
CITY OF ASBURY PARK,  
MONMOUTH COUNTY,

RESPONDENT.

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COMMISSIONER OF EDUCATION

DECISION

The record of this matter 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 petitioner Frankie Nicholson and the Board of Education's (Board) reply thereto, as well as the Board's exceptions and the petitioners' reply thereto.<sup>1</sup> This matter involves claims by three tenured supervisors whose positions were abolished. The petitioners claim an entitlement to the newly created Assistant Director of Curriculum and Instruction titles, one for grades PreK-3, one for grades 4-8 and one for grades 9-12. The Administrative Law Judge (ALJ) determined that a school administrator/principal endorsement was not required for the Assistant Director positions, and that the positions should be re-titled as Supervisor positions. The ALJ also concluded that the additional instructional certificates bore a logical nexus to the positions and it was appropriate for the Board to include them as a requirement for the positions. As a result, petitioner Sondra Minuskin was entitled to the position of Assistant Director of Curriculum and Instruction for grades 4-8, and petitioner Ann Marie Graf was entitled to Assistant Director of Curriculum and Instruction for grades 9-12.

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<sup>1</sup> The record included a transcript from the hearing at the OAL on September 27, 2012; however there was no transcript from the hearing conducted on July 26, 2012.

Finally, because petitioner Nicholson did not hold the necessary instructional endorsement, she was not entitled to any of the Assistant Director positions.

In her exceptions, petitioner Frankie Nicholson, contends that the ALJ erroneously determined that she was not qualified to hold any of the Assistant Director titles because she did not have either the math or English teaching endorsement or the standard secondary teaching endorsement required for the position of Assistant Director of Curriculum and Instruction for grades 9-12, or the elementary endorsement required for the position of Assistant Director of Curriculum and Instruction for grades PreK-3 and 4-8. Nicholson states that she holds three teaching endorsements: a teacher of general business studies, a teacher of secretarial studies and a teacher of typewriting. Nicholson maintains that her K-12 business education certificate qualifies her to teacher at both elementary and middle school levels, in addition to high school grades. Therefore, contrary to the ALJ's determination in the Initial Decision, Nicholson is at the very least qualified to hold the Assistant Director of Curriculum and Instruction title for grades 4-8. Nicholson also notes that the ALJ determined that petitioner Sondra Minuskin was entitled to the position of Assistant Director of Curriculum and Instruction title for grades 4-8. Nicholson maintains that Minuskin is also qualified for the position of Assistant Director of Curriculum and Instruction for grades PreK-3; therefore, Minuskin can take that position while Nicholson is entitled to reinstatement as Assistant Director of Curriculum and Instruction for grades 4-8.

In reply, the Board argues that Nicholson's exceptions concerning the Assistant Director of Curriculum and Instruction for grades PreK-3 position should not be considered because the issue of the PreK-3 position was not raised until after the hearing, in the petitioners' post-hearing submission. The Board maintains that since there was no evidence concerning the PreK-3 position presented at the hearing or even an entitlement to such, the Commissioner cannot consider the new information at this time. Additionally, the Board contends that in her exceptions

Nicholson attempts to introduce Dr. Lowe's certification for Commissioner review.<sup>2</sup> The Board asserts that the ALJ refused to introduce Dr. Lowe's certification into evidence, requiring counsel to submit a motion if he wished same to be included. No motion was filed by the petitioners, and therefore the certification and its exhibits should not be considered by the Commissioner. Even assuming that the Commissioner considers the new information, the Board argues that the ALJ properly determined that the instructional endorsement requirements bore a logical nexus to the Assistant Director positions. The Assistant Director of Curriculum and Instruction for grades 4-8 required the employee to hold an elementary teacher, teacher of reading or one of the middle schools teaching endorsements. The Board stresses that Nicholson does not hold any of these endorsements and her business studies K-12 endorsement is not an elementary or reading endorsement, nor is it one of the middle school endorsements. Therefore, the Board contends that the ALJ properly determined that Nicholson was not entitled to any Assistant Director position.

In its exceptions, the Board argues that the ALJ erroneously concluded that petitioners Minuskin and Graf are entitled to be appointed as Assistant Directors by virtue of their previous tenure as a Supervisor. Specifically, the Board contends that the ALJ wrongfully found the case of *Elbert Smith, et al. v. Board of Education of the City of Orange, Essex County*, Commissioner Decision No. 41-12, decided February 1, 2012,<sup>3</sup> to be controlling in this case, and she also misread the holding therein. The Board notes that the ALJ stated in her Initial Decision that the Commissioner "appears to have determined that a key component of an assistant director title is the supervision of other supervisors." The Board argues that this overly simplistic statement is erroneous as a matter of law, and that the Commissioner was not setting a blanket principle of law that in order to use the title assistant director the employee must supervise other supervisors.

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<sup>2</sup> Dr. Lowe's certification was attached to the petitioners' motion for summary decision. The ALJ never decided the motion because the parties later agreed that there were issues of material facts in dispute.

<sup>3</sup> The Initial Decision and the parties' submissions refer to this case as *Kohn v. Orange Board of Education*; however the first petitioner in that consolidated case was Elbert Smith.

The Board also maintains that *Smith, supra*, is distinguishable because, in that case, the reorganization of supervisors to assistant directors was a sham, and the responsibilities of the assistant director in that case did not require a new title. Here the Board stresses that the ALJ found that Dr. Lowe testified credibly that her reorganization plan was rational and logical and that the Assistant Directors need more authority to implement pressing curriculum needs. Additionally, a new title was fully warranted to reflect the upgraded requirements and responsibilities of the position. The Board emphasizes that the ALJ acknowledged that at the time the positions were created, Dr. Lowe's plan called for the Assistant Directors to supervise principals – something that supervisors could not legally do under their supervisor endorsement pursuant to *N.J.A.C. 6A:9-12.3*. Therefore, the Board argues that, other than utilizing the title assistant director, there is very little similarity between *Smith, supra*, and the instant case, and as a result the Commissioner must reject the ALJ's reliance on *Smith, supra*.

Additionally, the Board contends that the ALJ erred as a matter of law when she analyzed the Assistant Director positions and evaluated their actual day-to-day duties months after creation and appointment, as opposed to the duties at the time the positions were created. The Board maintains that the Commissioner must measure the job duties at the time the positions were created and filled and it is undisputed that Dr. Lowe's plan called for the Assistant Directors to supervise the principals. Further, the plan to have the Assistant Directors supervise the principals continued until the end of August, when the State Monitor blocked Dr. Lowe from implementing that portion of her plan. The Board asserts that it should not be penalized for the State Monitor's late game veto. Finally, the Board argues that the ALJ's recognition of the significant, distinct differences between the Supervisor and Assistant Director positions cannot be forgotten. Therefore, the Board requests that the Commissioner reject the Initial Decision and find that the Assistant Director positions are not substantially similar to the former Supervisor positions, and that the petitioners' prior tenure rights do not extend to the same.

In reply, the petitioners contend that *Smith, supra*, is controlling precedent in this matter. The petitioners maintain that when it comes to positions and/or titles not enumerated in the tenure law, the case law has defined the scope of the tenure protection to be afforded by the scope of the certificate required. See, *Duva v. State Operated School District of the City of Jersey City, Hudson County*, State Board Decision No. 56-99, decided March 6, 2002, and *Smith, supra*. Also the petitioners argue that as in *Duva, supra*, and *Smith, supra*, the Board here decided to ignore the tenure status of the former supervisors and employ in their place non-tenured staff members in positions which, in essence, are supervisory in scope and which petitioners are qualified to hold. The ALJ correctly determined that the petitioners' rights were similarly violated in the instant matter.

Further the petitioners argue that the ALJ properly examined this matter based on the facts as they existed, not what was in the mind of Dr. Lowe. The petitioners point out that the State Monitor did not give his approval for the Assistant Directors to supervise the principals, and the Assistant Directors were never actually assigned to supervise and/or evaluate the principals. The petitioners stress that re-titling a position does not by itself give the position more or less authority, and there was no reason why the Board could not have used the title of supervisor and reconfigure it to have authority over specific grades, i.e. PreK-3, 4-8 and 9-12. Simply reclassifying a title, recasting the focus of some duties and re-juggling its certification requirements should not be used as a vehicle to deny tenure. Therefore, for the reasons set forth in Nicholson's exceptions, and the petitioners' reply to the Board exceptions, the petitioners submit that their tenure rights entitle them all to reinstatement and back pay from July 1, 2010.

Initially, the Commissioner<sup>4</sup> notes that pursuant to *Duva, supra*, 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

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<sup>4</sup> This matter has been delegated to the undersigned Assistant Commissioner pursuant to *N.J.S.A. 18A:4-34*.

description, prior to appointing a candidate. *N.J.A.C. 6A:9-5.5(b)1*. 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.

In this case, the Board sent the Executive County Superintendent a letter only after the Assistant Director positions were created, requesting permission to use the title. The Executive County Superintendent improperly determined that the Assistant Director title did not require approval; however, there is no need to remand this matter to the Executive County Superintendent to consider the merits. See, *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. The Commissioner of Education is the ultimate arbiter of school law disputes and thus has the ultimate authority and responsibility to determine certification.

With respect to the Assistant Director positions, the Commissioner is in accord with the ALJ's determination that the school administrator/principal endorsement was not required for the Assistant Director positions and directs that the positions be re-titled as Supervisors. Although Dr. Lowe may have envisioned a scenario where the Assistant Directors would supervise principals, that concept was never implemented or even approved by the State Monitor. Additionally, the job description does not specifically say the Assistant Directors will supervise the building principals, but rather it says, "[s]upervise assigned personnel, conduct observations and complete annual performance appraisals and make recommendations for appropriate employment action." (Exhibit 18). The job duties of the Assistant Directors were substantially similar to the Supervisor positions held by the plaintiffs. Instead of supervising one subject area for the entire district, the newly created positions included the supervision of all subject areas for select grade levels. Further, since the Assistant Directors did not in fact supervise the principals, the school administrator/principal endorsement was not required for the Assistant Director positions. As the

petitioners correctly point out in their submission, the re-titling of a position does not by itself give the position more or less authority, and there was no reason why the Board could not have used the title of supervisor and reconfigured it to have authority over specific grades, i.e. PreK-3, 4-8 and 9-12.

In its exceptions, the Board's contends that the ALJ erroneously suggested that *Smith, supra*, established a blanket principle of law that in order to use the title of assistant director the employee must supervise other supervisors. It should be noted that the ALJ stated in the Initial Decision that in *Smith, supra*, the Commissioner "determined that a key component of an assistant director title is the supervision of other supervisors." (Initial Decision at 14-15). The Commissioner finds that the ALJ did not misinterpret *Smith, supra*; and although it is not strictly required that in order to use the title of assistant director the position must include the supervision of supervisors, it is a factor to consider when analyzing the appropriate certificate for the unrecognized title.

The Commissioner also concurs with the ALJ's determination – for the reasons stated in the Initial Decision – that the additional instructional certificates bore a logical nexus to the positions, and it was appropriate for the Board to include them as a requirement for the positions. As a result, because petitioner Nicholson did not hold the necessary instructional endorsement, she was not entitled to any of the Assistant Director positions. Despite Nicholson's arguments to the contrary, the Commissioner is not persuaded that the business endorsement was the equivalent of an elementary teacher, teacher of reading or one of the middle schools teaching endorsements required for the Assistant Director of Curriculum and Instruction for grades 4-8 position.<sup>5</sup>

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<sup>5</sup> The Board contends that the petitioners should be barred from asserting an entitlement to the position of Assistant Director of Curriculum and Instruction for grades PreK-3 because they did not make any argument for that position at the hearing. In the original petition of appeal and the amended petition of appeal, the plaintiffs made a general claim of entitlement to the Assistant Director positions, and as such the plaintiffs are not barred from making an argument for the entitlement to the Assistant Director of Curriculum and Instruction for grades PreK-3 position. The fact that the petitioners did not present any proofs at hearing in connection with that position goes to whether



Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter. The Board is directed to re-title the positions as Supervisor of Curriculum and Instruction for grades, PreK-3, 4-8 and 9-12. Additionally petitioner Minuskin shall be reinstated to the position of Supervisor of Curriculum and Instruction for grades 4-8, and petitioner Graf shall be reinstated to the position of Supervisor of Curriculum and Instruction for grades 9-12. Finally, the Board shall reimburse petitioners Minuskin and Graf for any lost wages, benefits or emoluments, less mitigation retroactive to June 30, 2010.

IT IS SO ORDERED.<sup>6</sup>

ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: September 16, 2013

Date of Mailing: September 17, 2013

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they met their burden of proving an entitlement to that position. It should also be noted that the ALJ included a footnote in the Initial Decision stating that Intervenor Birdean Clinton, who held the position of Assistant Director of Curriculum and Instruction for grades PreK-3, withdrew from the matter based on the petitioners' failure to assert a claim to that position. It appears from the record that Intervenor Clinton actually withdrew from the matter because she accepted employment in another school district.

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