

EDU #1102-96
C # 183-97
SB # 48-97

CAROL DE LYON, :

PETITIONER-CROSS/APPELLANT, :

V. : STATE BOARD OF EDUCATION

BOARD OF EDUCATION OF THE : DECISION
BOROUGH OF OLD TAPPAN, BERGEN
COUNTY, :

RESPONDENT-APPELLANT. :

Decided by the Commissioner of Education, April 14, 1997

For the Petitioner-Cross/Appellant, Balk, Oxfeld, Mandell & Cohen
(Nancy I. Oxfeld, Esq., of Counsel)

For the Respondent-Appellant, Rand, Algeier, Tosti & Woodruff (Robert M.
Tosti, Esq., of Counsel)

Carol De Lyon (hereinafter "petitioner"), a tenured teaching staff member, filed a petition of appeal with the Commissioner of Education alleging that the Board of Education of the Borough of Old Tappan (hereinafter "Board") had reduced her salary during the 1995-96 school year in violation of her tenure rights. Due to a clerical error, the Board had erroneously placed petitioner on the wrong step of the district's negotiated salary guide for the 1994-95 school year. The petitioner should have been placed on Step 15 of the column applicable to teachers with a bachelor degree, which entitled her to an annual salary of \$51,970. Instead, the Board incorrectly placed her on Step 15 for teachers with 15 or more graduate credits, which provided her with a salary

of \$53,464. Consequently, the petitioner received \$1,494 more in 1994-95 than she was entitled to receive under the negotiated guide.

In September 1995, the school business administrator notified petitioner of the error and advised her that her salary for the 1995-96 school year would be reduced to \$51,970. In addition, he gave her the option of either reimbursing the Board immediately for the overpayment from 1994-95 – \$1,494 – or by having regular deductions taken from her paychecks until the full amount of the overpayment was recouped. The Board made no further attempt to collect the overpayment made in 1994-95 and restored petitioner's salary to \$53,464 in 1996-97 pending the outcome of this case.

Petitioner challenged the Board's action, contending that it could freeze her salary at the higher level until the salary guide caught up to that level but was prohibited by the tenure laws from reducing her salary. The Board countered that petitioner had failed to verify her correct salary in 1994-95 and, therefore, was equally responsible for the mistake. It filed a counterclaim seeking restitution of its loss.

On February 27, 1997, an administrative law judge ("ALJ") determined that the Board's action in reducing petitioner's salary in 1995-96 had violated her tenure rights under N.J.S.A. 18A:28-5. The ALJ concluded that:

the remedy most faithful to the dual objectives of protecting a teacher's tenure rights and preventing misuse of public funds is to allow a school board to freeze a tenured employee's salary until such time as the corresponding step on the salary guide is reached and the board has recovered any overpayments. If this method is used, the teacher will not suffer any immediate deduction that might be construed as a reduction in compensation. Equally important, the public will eventually be compensated for any salary payments which

exceed the teacher's entitlement under the negotiated agreement.

Initial Decision, slip op. at 8.

The ALJ found that both the Board and the petitioner had been under the mistaken impression that the salary figure of \$53,464 in 1994-95 was correct, and he recommended that petitioner's "annual salary remain frozen at \$53,464 until a teacher of comparable training and experience would receive that level based on the negotiated salary guide and until the Board has recovered all overpayments resulting from her incorrect placement on the guide." *Id.* at 9. The ALJ further recommended that the Board pay \$1,494 to petitioner to reimburse her for the improper reduction of her salary in 1995-96.

On April 14, 1997, the Commissioner adopted in part and modified in part the ALJ's recommended decision. Initially, the Commissioner concurred with the ALJ's determination that the Board's adjustment of petitioner's salary in the 1995-96 school year constituted a reduction in compensation in violation of her tenure rights. The Commissioner agreed that there was ample support in case law to freeze the petitioner's salary at the erroneous level until such time as her salary on the negotiated salary guide equaled or surpassed that which she was being paid.

However, contrary to the ALJ's recommendation, the Commissioner declined to direct the Board to maintain such a salary freeze until it had recovered the full amount of the overpayment. While acknowledging that the Board's recoupment of the overpayment would not constitute a violation of the education laws, the Commissioner concluded that "inasmuch as the parties agree that the error resulted from a mutual mistake [footnote omitted], they should be made to share the cost of the mutual error,

however innocent or inadvertent.” Commissioner’s Decision, slip op. at 16 (emphasis in original). He therefore directed the Board to reimburse petitioner in the amount of \$1,494 for the improper reduction of her salary in the 1995-96 school year and to continue to freeze her salary at \$53,464 until it had recouped one-half of the total amount of the overpayment.

The Board filed the instant appeal to the State Board, and the petitioner filed a cross-appeal.

After a thorough review of the record, we reverse the Commissioner’s decision to the extent that it did not permit the Board to recover the full amount of the overpayment. When a district board makes an error in the placement of a tenured staff member on the negotiated salary guide or incorrectly establishes such employee’s salary under the terms of that guide, action by the board to freeze the staff member’s salary until such time as the overpayment is recouped does not constitute an impermissible reduction in compensation under the tenure laws. E.g., Cerato v. Board of Education of the City of Newark, decided by the Commissioner of Education, 94 N.J.A.R.2d (EDU) 248, aff’d by the State Board of Education, 94 N.J.A.R.2d (EDU) 422; Markot v. Board of Education of the Township of East Brunswick, decided by the State Board of Education, 1989 S.L.D. 3043, aff’d, Docket #A-345-89-T5 (App. Div. 1990). See also Trenton Education Association, et al. v. Board of Education of the City of Trenton, decided by the State Board of Education, December 1, 1999 (district board’s recoupment of an overpayment to tenured custodial employees by reducing six bi-weekly paychecks after the board erred in calculating the specific amounts to be included in the custodians’ paychecks

based on their established annual salaries did not constitute an impermissible reduction in compensation as contemplated by N.J.S.A. 18A:17-3 and 17-4).

Although the Commissioner in the instant matter has attempted, in essence, to “split the difference,” the petitioner had no entitlement under the school laws, implementing regulations or case law to retain any of the moneys paid to her in error. Thus, notwithstanding the fact that the overpayment may have resulted from a mutual mistake, we agree with the ALJ that petitioner’s salary should remain frozen until the Board has recovered the full amount of the overpayment resulting from her incorrect placement on the salary guide.

February 2, 2000

Date of mailing _____