

JOY FERRONTO, :
 :
 PETITIONER, :
 :
 V. : COMMISSIONER OF EDUCATION
 :
 BOARD OF EDUCATION OF THE : DECISION
 TOWNSHIP OF WEYMOUTH, ET AL,
 ATLANTIC COUNTY, :
 :
 RESPONDENT. :

SYNOPSIS

Petitioner challenged the validity of the Board's reduction in force, claiming violation of her tenure and contractual rights, when her position as School Clerk was eliminated after the 2001-2002 school year, her prior responsibilities were divided between two newly created part-time positions, and the Board failed to offer her an alternate full-time position.

The ALJ found: that the petitioner's termination was the direct result of the Chief School Administrator's determination that the petitioner was not competent to perform her clerical duties; that Board was required to comply with the provisions of *N.J.S.A. 18A:6-10* before it could terminate petitioner under the facts contained in the record; and that the Board failed to substantiate its argument that it terminated petitioner in the course of a valid RIF based upon economic considerations. The ALJ ordered that the petitioner be restored to her employment with the Board, and that she receive full back pay to the date of her termination, adjusted for other earnings. The ALJ further ordered the Board to pay petitioner's counsel fees.

Upon a thorough and independent review of the record in this matter the Commissioner concurs with the findings and conclusions in the Initial Decision. Accordingly, the Initial Decision is adopted as the final decision, with one exception. As the Commissioner is without authority to award counsel fees, that portion of the ALJ's order that awards same is rejected.

<p>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.</p>

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 PETITIONER, : COMMISSIONER OF EDUCATION
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 V. : DECISION
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 BOARD OF EDUCATION OF THE :
 TOWNSHIP OF WEYMOUTH, :
 ATLANTIC COUNTY, :
 LINDA N. GAVULA AND :
 MARGUERITE BETZ, :
 :
 RESPONDENTS. :
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This appeal followed the Weymouth Board of Education’s (the Board) elimination of petitioner’s position of “School Clerk.” Petitioner challenges the validity of the reduction in force (RIF), and alleges that the Board’s action violated her tenure and contractual rights. The Commissioner has carefully and independently reviewed the record, the Initial Decision of the Office of Administrative Law (OAL), and petitioner’s reply exceptions¹, and for the following reasons is constrained to adopt the Initial Decision of the Administrative Law Judge (ALJ).

Petitioner worked for the Board as a school aide from the 1988-1989 school year through the 1993-1994 school year. In 1994, she accepted the position of “School Clerk.” It is undisputed that in the position of School Clerk, which petitioner held for the next eight years, she

¹ Respondent’s exceptions were not timely received and have not been considered. The OAL has indicated that the initial decision was mailed to the parties on July 6, 2005. Respondent’s exceptions were received on July 20, 2005, past the thirteen day period in which exceptions may be filed.

achieved tenure. Examination of the School Clerk job description (P-11) indicates that, as the School Clerk, petitioner performed both school aide responsibilities and most of the clerical tasks and office routines listed in the job description for the position of secretary. The record includes copies of several certificates indicating that petitioner took training in computer literacy and DOS before she commenced the position of School Clerk, and in Excel (beginning, intermediate and advanced) during her tenure as School Clerk. (P7)

On July 18, 2002, upon the recommendation of a new chief school administrator, respondent Linda Gavula, the Board voted to eliminate petitioner's position of School Clerk and create two part-time positions (P-15), i.e., secretary and school aide. (P-J; P-8) Each of the two positions was to be 25 hours per week. (P-4) The Board also decided not to renew one of the three cafeteria/playground aides that had been working during the 2001-2002 school year. (P-1; Initial Decision at 2)

The schedules formulated for the new part-time secretary and part-time aide overlapped 1) during the students' lunch hour, 2) in the last two periods of the school day, and 3) for about ten minutes at the end of the day for bus duty. (P-6A; P-6B) Ms. Gavula maintained that the aide work and clerical work that petitioner had been performing needed to be done simultaneously, and that consequently the School Clerk position had to be eliminated. (Initial Decision at 4)

Neither the certified minutes of the July 18, 2002 Board meeting (P-15) nor the testimony before the ALJ demonstrated economic exigencies as the reason for the abolishment of the School Clerk position. (Initial Decision at 5-8) (As there are no transcripts in the record, the Commissioner must rely on the ALJ's account of the testimony.) An economic analysis of the action was not undertaken until Marguerite "Maggie" Betz, Business Administrator/Board

Secretary, prepared one for the OAL hearing. (R-4; Initial Decision at 5) Because no benefits need be paid to the new part-time secretary and aide, the combined payroll cost for them was less than petitioner's School Clerk job with benefits. *Ibid.*

Ms. Betz testified, however, that she was unaware of anything that indicated that the Board eliminated petitioner's job and created two part-time positions for economic reasons. (*Id.* at 6) She further denied that petitioner was terminated to enable the Board to avoid health benefit costs. *Ibid.* Petitioner's salary for the 2002-2003 school year had been included in the district budget. *Ibid.*

The ALJ noted that, on redirect examination, "after prodding by respondent's [sic] counsel," Ms. Betz changed her position, stating that economy had been discussed during both the open and closed portions of the July 18, 2002 Board meeting, and that the District needed to use the money saved from petitioner's benefits to create the new positions, which had not been included in the 2002-2003 budget. *Ibid.* She conceded, however, that there was no mention of same in the meeting minutes. *Ibid.*

Testimony by Ms. Gavula also shed some doubt on the efficacy of the Board's action. She conceded that subsequent to the 'reorganization,' an additional aide had been hired to work ten hours per week. (*Id.* at 4)

It appears that Ms. Gavula had not, before recommending the elimination of petitioner's position, attempted to work with petitioner to configure a new schedule which would allow petitioner to keep her job. *Ibid.* According to the ALJ, Ms. Gavula "could not explain why petitioner could not continue to work buses from 8:00 a.m. to 9:00 a.m., then work as a secretary from 10:30 a.m. to 3:00 p.m. . . ." *Ibid.* (The schedule for part-time secretary that was disseminated by respondents was 10:30 a.m. to 4:00 p.m.) In fact, prior to the Board's action,

respondents had never discussed with petitioner their plans to abolish her position. *Ibid.* Petitioner testified that she had never received notice that the Board intended to take action which could affect her employment, and had never been afforded the opportunity to meet with the Board and explain why she should be retained as School Clerk. (*Id.* at 7)

The record contains a copy of a notice dated July 22, 2002, advertising the two new part-time positions of aide and secretary, job descriptions with the same date for both positions (P-8; P-9), and copies of letters to petitioner dated July 23, 2002, and July 22, 2002, from Ms. Gavula and Ms. Betz (also respondents) about the ‘reorganization.’ (P-13; R-3) Ms. Betz’s letter informed petitioner that she could choose to continue her medical benefits through COBRA, for \$1272.62 per month. Ms. Gavula’s letter, which advised petitioner that her position had been abolished, also informed her that she would be receiving COBRA information from Ms. Betz, a clear indication that petitioner was terminated.

The letter also included job descriptions for the two new part-time positions, and encouraged petitioner to apply for the aide position: “I truly hope you will apply for the aide’s position. I’ve been pleased with what I’ve seen when you work with children and I feel you would be an asset in this capacity.” (P-13) Noticeably absent was any suggestion that petitioner apply for the part-time secretary job. Ms. Gavula sent petitioner another short letter on July 29, 2002, advising that the deadline for letters of interest for the two new part-time positions was August 9, 2002. (P-14)

At the hearing Ms. Gavula revealed that she did not believe that petitioner would be a good candidate for the new secretary position. She doubted whether petitioner could multi-task and work independently. (Initial Decision at 4) She did not regard petitioner as astute

or proficient in spelling and grammar, and stated that petitioner's work had to be corrected before it could be sent out. *Ibid.*

Petitioner testified that she had performed and was well able to perform both the clerical and aide functions of her job, but Ms. Gavula had reduced her clerical tasks and increased her playground and cafeteria duties. (*Id.* at 6) Ms. Gavula's explanation to petitioner for the change was that she needed petitioner elsewhere. *Ibid.* The only job evaluation Ms. Gavula prepared for petitioner was generally positive, with the instructions that petitioner comply with directives and let Ms. Gavula know when she has completed her work and can assume more. (P-10)

The ALJ found Ms. Gavula's credibility to be less than he would expect from a chief school administrator. He perceived her to be following a scripted story and resistant to questions that deviated from the script. (Initial Decision at 5) Notwithstanding her twenty years as a school administrator, she said she had no knowledge of seniority or bumping rights. (*Id.* at 4) She did not take into account petitioner's seven years as an aide, could not say whether petitioner should have been moved into one of the new jobs, but rather took the position that once the School Clerk position was eliminated, petitioner had no further right to employment. *Ibid.*

The ALJ was ultimately not convinced that the facts adduced at the hearing supported respondents' position that Ms. Gavula's recommendation and the Board's action to eliminate petitioner's job were driven by economic necessity. (*Id.* at 7) Thus, the ALJ concluded that respondents had not satisfied *N.J.S.A.* 18A:28-9, which requires that reductions in tenured

staff be necessitated by economy, pupil reduction, or changes in the administrative or supervisory organization of the district, or for other good cause.² (*Ibid*)

Nor was the ALJ persuaded that the facts supported respondents' contention that petitioner's termination was the necessary consequence of the creation of separate and primarily simultaneous positions for part-time secretary and part-time aide. In the ALJ's view, respondents violated petitioner's tenure and seniority rights by declining to assign petitioner the new secretarial position and let her continue the morning bus greeting activities she had performed as School Clerk. (*Id.* at 9) Together, these duties would have allowed her to work 32.5 hours per week and retain her benefits, and respondents could not explain why this was not done. *Ibid.*

The ALJ determined that the facts before him supported an impermissible motive for eliminating petitioner's job, i.e., Ms. Gavula's perception that petitioner's performance, at least with regard to clerical duties, was inadequate. (*Id.* at 8) This determination was based upon Ms. Gavula's testimony about petitioner's capabilities, upon petitioner's statement that Ms. Gavula reduced her clerical responsibilities, and upon Ms. Gavula's July 23, 2002, letter to petitioner in which she invited petitioner to apply for the part-time aide position, but not the secretarial position. *Ibid.* The ALJ concluded that the dividing of the School Clerk position was a subterfuge to remove petitioner. (*Id.* at 9)

While the ALJ allowed that Ms. Gavula may have been correct about petitioner's capabilities, he explained that "the law sets forth specific requirements for removing an incompetent or inefficient tenured employee, and none of those requirements was complied with here." *Ibid.* More specifically, the ALJ cited *N.J.S.A.* 18A:6-10, which sets forth allowable

² On its face, *N.J.S.A.* 18A:28-9 refers only to teaching staff. However, the Commissioner endorses the ALJ's reliance on the statute for guidance in evaluating professed reductions in force of clerical or secretarial employees.

grounds for dismissal of a tenured employee, and requires certain procedural rights, such as written charges and a hearing before the Commissioner of Education or his/her designee. (*Id.* at 9-10) Further, the ALJ cited *N.J.S.A.* 18A:6-11, which requires, in the case of allegations of inefficiency, that the Board provide written notice to the employee specifying the perceived deficiencies and a period of 90 days or more for the employee to correct same. (*Id.* at 10)

Thus, while the ALJ made no findings about petitioner's efficiency or competence, he found that respondents did not substantiate their argument that petitioner was terminated for economic reasons; that the termination was rather motivated by Ms. Gavula's dissatisfaction with petitioner's performance; and that respondents did not follow the legal preconditions to terminating a tenured employee. *Ibid.* He reversed the Board's action terminating petitioner and directed that she be restored to her employment with back pay (less any amount earned during the applicable time period) and counsel fees. (*Id.* at 11)

Having reviewed the entire record, the Commissioner concludes that respondent has presented no basis to reject the ALJ's determination that the elimination of petitioner's School Clerk position was not based upon permissible grounds, i.e. economy of cost or scheduling. There were no transcripts or evidence provided to the Commissioner that would show that the district discussed financial considerations or sought advice about same prior to the Board action eliminating petitioner's job.

Regarding respondent's argument about scheduling, consideration of the proposed hours for the two new part-time positions alone is not adequate to conclusively resolve the question of whether the district could have kept petitioner on as a full-time or almost full-time employee. The record reveals that there were three part-time aides in addition to School Clerk at the end of the 2001-2002 school year. The district abolished the School Clerk position and let go

one part-time aide, at the same time that it added a part-time secretary and part-time aide position. The net result was an extra part-time secretary and a deficit in number of hours devoted to aide work.

This was at a time when, according to respondent's counsel, pupil enrollment was up. (Respondent's brief at 2) Indeed, it appears from the record that the district had to hire another part-time aide to ameliorate the deficit. (Initial Decision at 4) As the ALJ noted, respondent's witnesses were unable to explain why the aide hours could not be arranged so that petitioner could work the hours of the new part-time aide position created in 2002, plus the bus greeting hour every morning, which would constitute a full-time position, albeit at less hours than petitioner worked as School Clerk. Nor could respondents explain why the hours of the part time secretary could not be combined with bus greeting to comprise a full time job.

The foregoing, as well as other facts mentioned by the ALJ suggest a disregard of petitioner's rights and a lack of good faith in reorganizing the non-professional staff. There is no evidence, for instance, that respondent notified petitioner before the Board action eliminating her position. As a tenured employee, she was entitled to reasonable advance notice, so that she could request that the matter be openly debated at the Board meeting before the execution of any action. *Rice v. Union County Regional High School Board of Education*, 155 N.J. Super. 64, 73 (App. Div. 1977).

Nor is there anything in the record which would justify discounting the ALJ's determination that respondent's main witness, Ms. Gavula, lacked credibility. Generally, the head of an agency must give substantial weight to the ALJ's credibility determinations and to all findings based on these determinations, since it was the ALJ who had an opportunity to hear the testimony of the witnesses and to assess their demeanor. See *Clowes v. Terminix International*,

Inc., 109 *N.J.* 575, 587 (1988); *Renan Realty Corp. v. Department of Community Affairs*, 182 *N.J.* Super. 415, 419 (App. Div. 1981). Where the agency head believes it is necessary to reject or modify a factual finding of the ALJ, he or she must first determine that the findings are arbitrary, capricious or unreasonable, or are not supported by sufficient, competent evidence in the record. *N.J.S.A.* 52:14B-10 (c). Further, the agency head must state with particularity the substantial, credible, competent evidence in the record on which he or she relies in making new or modified findings. *N.J.A.C.* 1:1-18.6 (d). After thorough review of the record, applying the legal standards set forth above, the Commissioner is constrained to accept the ALJ's credibility determination.

It is undisputed that petitioner had tenure in Weymouth as a clerk, that she had years of experience as an aide, and that, in fact, the business administrator, Ms. Gavula, had praised her performance as an aide. Thus, the ALJ was correct in determining that best efforts should have been expended to retain her. Unless respondent could prove one of the criteria in *N.J.S.A.* 18A: 6-10 for dismissing tenured employees, e.g., conduct unbecoming, inefficiency, incapacity or other just cause, it did not have the right to violate petitioner's tenure. (And in the case of inefficiency charges, employees are entitled to written notice and 90 days to cure.) (*N.J.S.A.* 18A:6-11)

Under the school laws, the only other way respondents could terminate petitioner was by way of a RIF. *N.J.S.A.* 18A:6-10. As mentioned above, the permissible reasons for reductions in teaching staff are set forth in *N.J.S.A.* 18A:28-9, and will be used by the Commissioner as guidance. They include economy, reduction in number of pupils, change in the administrative or supervisory organization of the district, or other good cause. There is nothing in the record to indicate that there was a district reorganization of the administration or

supervisory staff, and the pupil population, according to respondent, increased during the time period at issue. Since, as has been established above, the Commissioner must adopt the ALJ's conclusion that the record did not support the notion that economy drove the elimination of the School Clerk position, respondent has not satisfied the Commissioner that there was a legitimate basis for the alleged RIF.

The ALJ also appears to have concluded, and the Commissioner agrees, that petitioner should have had precedence over any non-tenured secretary who might take the newly created, part-time secretary position. Tenure in the position of secretary is not generally interchangeable with tenure as a clerk. *Rita Hibo and Susan Arillo v. Board of Education of the West Essex Regional School District, Essex County, decided by the Commissioner December 29, 1997*; *Diane Giardina v. Board of Education of the Township of Pequannock, Morris County, Commissioner's decision dated April 1, 2005*. However, there is precedent in the case law for disregarding job titles and, rather, determining whether an employee has tenure in a sought after "position" by examining the actual duties and tasks the employee has been performing over the years and deciding whether same meet the requirements of the desired position - notwithstanding official title designations. In other words, substance is to prevail over form. *Quinlan v. Board of Education of the Township of North Bergen, 73 N.J. Super. 40, 50 (App. Div. 1962)*; *Viemeister v. Board of Education of the Borough of Prospect Park, Passaic County, 5 N.J. Super. 215, 218 (App. Div. 1949)*; *Rita Hibo and Susan Arillo v. Board of Education of the West Essex Regional School District, Essex County, decided by the Commissioner December 29, 1997*.

Under the circumstances of this case, petitioner's tenure in the School Clerk position was applicable to the new part-time secretary assignment, as it was described in the

posting. The job description for that new position was very similar to the description of the clerical duties in the School Clerk position, and petitioner testified that she had performed all of the listed job functions. (Initial Decision at 6)

Hence, because of her tenure and capabilities, petitioner had tenure rights over the non-tenured individual who was given the newly created secretarial job. Regarding respondent's alleged scheduling needs, petitioner could have been assigned the secretarial job in combination with the bus greeting duties, to keep her at full time. At the very least, respondents could have shown some good faith by allowing petitioner to work as an aide for both the hours designated for the new job, and the bus greeting hours. That would have added up to a full-time position, albeit most probably at a lower salary than her previous job.

If Ms. Gavula's allegations about petitioner's secretarial deficiencies were true, the remedy under the school laws should have been written notice, a 90-day period to cure, and proper tenure proceedings. The Commissioner agrees with the ALJ that Ms. Gavula's action, of reducing petitioner's clerical responsibilities in the School Clerk job rather than implementing a performance improvement plan, suggests bad faith. To conclude otherwise would be to "permit a local school board to control the rights of employees who had tenure by restricting the amount of work covered by tenure which it assigned to them." *Quinlan, supra*, 73 N.J. Super. at 51. And Ms. Gavula's specific invitation to petitioner to apply for the new aide job, but not the secretarial job, also denotes a desire to remove petitioner from her clerical position without following tenure procedures.

Accordingly, for the reasons expressed by the ALJ and stated herein, the Commissioner finds that the elimination of petitioner's position was in bad faith, and qualified neither as a legitimate RIF nor a proper observance of the school laws regarding tenure. The

ALJ's recommended order for relief is to be implemented forthwith, with one exception. As the Commissioner is without authority to award counsel fees, *Balsley v. North Hunterdon Regional School District Board of Education*, 117 N.J. 434, 447 (1990), that portion of the ALJ's order that awards same is rejected.

IT IS SO ORDERED.³

ACTING COMMISSIONER OF EDUCATION

Date of decision: August 11, 2005

Date of mailing: August 11, 2005

³ This decision may be appealed to the State Board of Education pursuant to *N.J.S.A. 18A:6-27 et seq.* and *N.J.A.C. 6A:4-1.1 et seq.*