

#260-06

OAL DKT. NO. EDU 8887-04 ([http://lawlibrary.rutgers.edu/oal/html/initial/edu08887-04\\_1.html](http://lawlibrary.rutgers.edu/oal/html/initial/edu08887-04_1.html))  
AGENCY DKT. NO. 319-9/04

MAURICE S. KAPROW, :  
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 PETITIONER, :  
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 V. : COMMISSIONER OF EDUCATION  
 :  
 BOARD OF EDUCATION OF : DECISION  
 BERKELEY TOWNSHIP, OCEAN COUNTY, :  
 DEBRA EVANS AND MARIE KECK, :  
 :  
 RESPONDENTS. :  
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The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The Board’s exceptions and petitioner’s reply thereto, filed in accordance with *N.J.A.C.* 1:1-18.4, were fully considered by the Commissioner in reaching her determination herein.

On exception, the Board essentially renews its arguments advanced below. First, it charges that the positions of Assistant Superintendent and District Director of Elementary Education (DDEE) (formerly District Supervisor of Education) are not substantially similar. Although conceding that some aspects of the jobs may be analogous, it maintains that a reasoned comparison of the duties of the two positions demonstrates that the tasks of the now-abolished Assistant Superintendent position were “qualitatively more expansive, autonomous and of a higher level than the responsibilities of the DDEE.” (Board’s Exceptions at 1-3) Next, the Board again maintains that, inasmuch as there is no substantial identity of duties between the two positions, because petitioner has never served as a DDEE he cannot transfer tenure achieved in his separately tenurable position of Assistant Superintendent to lay claim to the DDEE job. (Board’s Exceptions at 4)

In reply, petitioner points to Exhibit P-3, a side-by-side comparison of the job descriptions of his prior Assistant Superintendent employment posts with those of the DDEE position, which, he proposes, demonstrates a “task by task virtual identity between the two positions.” In addition

to this identity of duties, petitioner points to other corresponding characteristics between the positions which are of the type, he avers, the Commissioner in *Santarsiero v. Parsippany-Troy Hills Board of Education*,<sup>1</sup> 1984 S.L.D. 854, found persuasive in determining whether or not the two positions at issue in that case were substantially similar. These, he submits, include:

1. There was only one Assistant Superintendent in the District and likewise, there is only one District Director in the District now;
2. Both positions were “directly responsible to the Superintendent of Schools”\*\*\*;
3. Both were twelve (12) month, as opposed to ten (10) month positions;
4. Both had virtually identical “Minimum Requirements for Employment”. In fact, as to this item, Ms. Lippincott agreed on cross examination that the minimum requirements of the two (2) positions were identical, testifying that although there appeared to be additional requirements for Assistant Superintendent, in fact, the District Director had to have those same qualifications in order to qualify for the position;
- 5) Both positions had “district-wide” responsibilities, as opposed to being a “building-based” position, such as Principal.

(Petitioner’s Reply Exceptions at 2-3)

Petitioner submits that, pursuant to the New Jersey Supreme Court’s decision in *Dennery*, *supra*, it is abundantly clear that former teaching staff members terminated in a RIF are entitled, pursuant to their tenure and seniority rights, to be re-employed by their former Board not only in the *position title* of their prior position but also in any position which is *substantially identical* to their former job function. (*Id.* at 5) Here, petitioner charges, the Board attempted to circumvent his tenure rights by resurrecting the position of Assistant Superintendent but camouflaging it under what the Board would have us believe is an “inferior” title, District Director. He cites to *Viemeister v. Board of Education*, 5 N.J. Super. 215 (App. Div. 1949) and *Vogel v. Board of Educ.*, decided by State Board of Education June 5, 1985, as decisions where the Appellate Division and the State Board, respectively, have considered and reached

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<sup>1</sup> Cited with approval by the New Jersey Supreme Court in *Dennery v. Bd. of Educ.*, 131 N.J. 626 (1993).

behind this particular type of façade, finding the job duties of the old and new titles to be substantially identical. (*Id.* at 6)

Petitioner, therefore, urges the Commissioner to adopt the decision of the ALJ as it is supported by the evidence and fully consistent with applicable law.

Upon a full and independent review of the record, which it is noted did not include transcripts of the hearing conducted below, the Commissioner concurs with the ALJ that summary decision is appropriately granted to petitioner.

The record in this matter reflects that effective June 30, 1981, petitioner's employment as Assistant Superintendent was terminated as a result of a reduction in force (RIF). His future employment rights in the District as a tenured Assistant Superintendent were protected by *N.J.S.A.* 18A:28-12 which specifies that any teaching staff member dismissed as a result of a RIF:

shall be and remain upon a preferred eligible list in the order of seniority for reemployment whenever a vacancy occurs in a position for which such person shall be qualified and he shall be reemployed by the body causing dismissal, if and when such vacancy occurs\*\*\*"

As the only Assistant Superintendent in the District at the time of the RIF, petitioner was entitled, as a matter of law, to any assistant superintendency within the scope of his certificate established by the District in the future. Additionally, it is by now well-established that a rified individual's tenure rights may not be circumvented or defeated by a Board's assigning of different job titles to positions essentially subsuming the identical duties performed by such tenured employee under a different job title but, rather, a Board must extend the teaching staff member's tenure rights to such newly created position. (See *Dennery v. Bd. of Educ.*, 131 *N.J.* 626 (1993); *Viemeister and Vogel, supra*).

With this background in mind, the Commissioner turns to the seminal issue in this matter - whether when the Board created the job entitled Supervisor of Elementary Education (subsequently retitled Director of Elementary Education [DDEE]) it created a position whose job functions were substantially identical to the duties and responsibilities of petitioner's former rified Assistant

Superintendent position.<sup>2</sup> Pursuant to *Denney, supra*, if it is determined that the essential duties of the two positions are “substantially similar,” petitioner’s tenure rights as Assistant Superintendent subsume the duties of DDEE and he was, therefore, entitled to the position over those individuals appointed by the Board.<sup>3</sup> The Commissioner’s considered review of the nature and scope of the essential duties of the jobs at issue, looking to substance rather than form, persuades her, for the reasons comprehensively detailed on Pages 12-15 of the Initial Decision, that the two employment posts are functionally equivalent. As such, the Board was required to notify petitioner of his tenure entitlement to the DDEE position and must immediately place him in this job.

Notwithstanding this result, the Commissioner declines to grant petitioner’s request for attorney fees and pre-or post-judgment interest in this matter. With respect to attorney fees, it is by now well established that, due to the lack of express statutory authority for so doing, the Commissioner does not have plenary authority to award counsel fees in determining controversies and disputes presented under Education Law. See *Balsley v. North Hunterdon Bd. of Educ.*, 117 N.J. 434, 442-443 (1990). As to pre-judgment interest, the Commissioner finds that the ALJ was correct in declining to order such interest based on petitioner’s failure to satisfy the requirements of *N.J.A.C.6A: 3-1.17(a)*. Finally, any request for post-judgment interest is premature, as the 60-day timeline relative to the granting of this interest does not even begin to toll until the Commissioner renders her decision in the instant matter. (*N.J.A.C. 6A:3-1.17(c)2*).

Accordingly, the Initial Decision is adopted as the final decision in this matter for the reasons well articulated therein. The Board of Education of Berkeley Township is directed to

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<sup>2</sup> To the extent the Board’s arguments may be interpreted as a claim that the positions of Supervisor and/or Director are separately tenurable, such a contention is erroneous. In that neither of these positions is specifically enumerated in *N.J.S.A. 18A:28-5*, they are not separately tenurable. (See *Nicholas Duva v. State-Operated School District of the City of Jersey City*, decided by the State Board of Education March 6, 2002.)

<sup>3</sup> The record reflects that Respondent Marie Keck was promoted from Principal to the District Supervisor of Elementary Education on July 1, 2002; Respondent Debora Evans was appointed to this position on July 1, 2004. On or about August 18, 2004, the title of the position was changed to District Director of Elementary Education, although the duties and responsibilities remained the same.

immediately appoint petitioner to the position of District Director of Elementary Education and compensate him with back pay, less mitigation, and emoluments due him consistent with this decision.

IT IS SO ORDERED.<sup>4</sup>

ACTING COMMISSIONER OF EDUCATION

Date of Decision: August 2, 2006

Date of Mailing: August 2, 2006

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<sup>4</sup> 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.*