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OAL DKT. NO. EDU 10927-04 (http://lawlibrary.rutgers.edu/oal/html/initial/edu10927-04_1.html)
AGENCY DKT. NO. 405-11/04

WINTHROP McGRIFF, :
 :
 PETITIONER, :
 :
 V. : COMMISSIONER OF EDUCATION
 :
 BOARD OF EDUCATION OF THE : DECISION
 TOWNSHIP OF MONTCLAIR, :
 ESSEX COUNTY, :
 :
 RESPONDENT. :
 _____ :

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner’s exceptions and the Board’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.

Petitioner’s exceptions, in relevant part, essentially recast and reiterate his arguments advanced below. As it is determined that such arguments were comprehensively considered and addressed in the Initial Decision, they will not be revisited herein.

Upon a full and independent review of the record, which included transcripts of the two days of hearing,¹ the Commissioner, giving due deference to the Administrative Law Judge’s (ALJ) credibility determinations,² concurs with the ALJ’s findings of fact and

¹ Hearing was conducted on September 12 and 13, 2005. The record reflects that a hearing tape defect on September 12, 2005 prevented approximately 15 pages of Mr. McGriff’s direct examination from being transcribed. The parties endeavored to reconstruct this testimony from their hearing notes and have submitted Exhibit J-2 as a reasonable reconstruction of the missing testimony.

² The Commissioner “may not reject or modify any findings of fact as to issues of credibility of lay witness testimony unless it is first determined from a review of the record that the findings are arbitrary, capricious or

conclusion that petitioner has failed to sustain his burden of establishing that the Board violated his tenure, seniority and/or preferred eligibility rights by its appointment of a non-tenured individual to the position of Assistant Principal for Athletics and Student Activities.

Upon review, the Commissioner is initially compelled to concur with the ALJ's denial of the Board's Motion to Dismiss this matter on the grounds that petitioner's claim was untimely pursuant to *N.J.A.C. 6A:3-1.3*. The Commissioner finds, as did the ALJ that the instant record, particularly conflicting testimony, precludes a definitive determination as to the specific point in time when petitioner received "adequate notice," within the intendment of *Kaprow v. Board of Education of Berkeley Tp.*, 131 *N.J.* 572 (1993), of his potential cause of action, thereby triggering the running of this regulatory provision. As such, the Commissioner concurs with the ALJ that the motion must be denied and the matter is required to proceed to adjudication on its merits.

In her consideration of the merits of this matter, wherein petitioner claims tenure, seniority and/or preferred eligibility entitlement to an Assistant Principal for Athletics and Student Activities position for which a non-tenured individual has been employed, the Commissioner first is in accord with the ALJ's judgment that any claim of petitioner to entitlement to the position at issue by virtue of his service as a Department Chair is outside the scope of his Petition of Appeal. Notwithstanding this, the Commissioner further agrees that any such claim is without merit. As correctly pointed out in the Board's reply exceptions:

[i]n September 2004, McGriff was transferred from one Department Chair position to another Department Chair position. It is undisputed that in that transfer he suffered no loss of employment, nor loss of salary. McGriff believes that his duties as Department Chairperson were allegedly similar to the duties of

unreasonable or are not supported by sufficient, competent and credible evidence in the record." (*N.J.S.A. 52:14B-10(c)*)

the Assistant Principal for Athletics and Student Activities. The fallacy of this alleged similarity aside, this analysis clearly falls under the purview of *Carpenito*. See, 322 *N.J. Super.* at 530. As pointed out by the Appellate Division, “[s]eniority is a by-product of tenure and comes into play only if tenure rights are reduced by way of dismissal or reduction in tangible employment benefits.” *Id.* at 531. In this matter, any rights Petitioner alleges to have to the position of Assistant Principal for Athletics and Student Activities must flow from his former position as Athletic Director, rather than his position as a Department Chair, since he remains employed by the Board as a Department Chair.
(Board’s Reply Exceptions at 3)

The Commissioner, however, finds it necessary to clarify any misunderstanding which may exist in the Board’s articulation above and the Initial Decision discussion, at pages 40-41 with respect to use of the word “position” when examining a Board’s authority to lawfully assign and transfer tenured employees within the scope of their certification, resulting in no loss of tangible employment benefits, without implicating their tenure and seniority rights. A Board possesses the authority to transfer tenured individuals to another *assignment* within their position, but such employees may not be transferred involuntarily from one *position* to another.

Turning next to petitioner’s allegation that the position of Assistant Principal for Athletics and Student Activities was an unrecognized title requiring, pursuant to *N.J.A.C. 6A:9-5.5*, submission to the County Superintendent to ascertain the appropriate required certification, the Commissioner is in full agreement with the ALJ that:

[s]uffice it to say, irrespective of the specific area for which an assistant principal is assigned, the title is unquestionably recognized. See *N.J.S.A. 18A:28-5*. See also *N.J.A.C. 6A:32-5.1(l)12*. The job description and the evidence, as hereinbefore detailed, do not support petitioner’s apparent claim that the position is not, in fact, one of an assistant principal. The record reveals that when the Board created the new job description of the position a vacant assistant principal position existed at the high school. Additionally, the duties attending the position, as set forth in the job description and the testimony, fail to support petitioner’s stance that they lack the character necessary to require a principal

endorsement. Indeed, responsibilities such as the direction of the activities of school-level supervisors and school-wide responsibility in the principal's absence fall squarely within the parameters of *N.J.A.C. 6A:9-12.3(b)*. Whether every performance responsibility of the position would necessitate an endorsement of principle (sic) is not the pertinent inquiry. Equally unavailing is petitioner's reliance on the various newspaper articles to support his claim to the position. Plainly, those articles have no evidentiary weight in the determination of the nature of the position under review. And, Ms. Belace's service as a consultant, which involved a panoply of responsibilities in preparation for the incoming assistant principal, does not support petitioner's "sham transfer of duties" allegation.
(Initial Decision at 42)

Similarly rejected is petitioner's argument that he was qualified to serve as Assistant Principal for Athletics and Student Activities by virtue of his service under his Supervisor's endorsement under his Administrative Certificate. The Commissioner is in accord with the ALJ's proffered analysis in this regard wherein she stated:

***that the position of "assistant principal" is a separately tenurable position cannot be seriously debated. *See N.J.S.A. 18A:28-5; Nelson, supra; Skowronski, supra; DeCarlo, supra; Miller, supra.* Equally settled is that an educator must serve the statutory required period of time in that position in order to achieve tenure rights to an assistant principal assignment. And, the regulations make clear that a principal endorsement is a *sine qua non* to serve as an assistant principal. *N.J.A.C. 6A:9-12.3(b)*.

In this matter, petitioner attained tenure in the District as a result of his employment as athletic director and department chair. Petitioner was qualified for that service by virtue of his supervisor endorsement. *N.J.A.C. 6A:9-12.3(c)*. Petitioner never served in the position of assistant principal for the District or in any other position that required a principal endorsement. Beyond this, petitioner did not possess a principal endorsement at the time the Board posted and filled the challenged position and, thus, petitioner was not qualified to hold an assistant principal assignment. Pursuant to the express terms of *N.J.S.A. 18A:28-5*, petitioner cannot transfer the tenure he acquired as a supervisor under his supervisor endorsement to the separately tenurable position of assistant principal in which he accrued no work experience and which requires a different endorsement. ***

(Initial Decision at 41)

Next, dismissed as meritless is petitioner's proffer that the duties of the assistant principal position at issue are "substantially similar" to those he performed in his athletic director assignment, thereby entitling him to this position. As noted by the Supreme Court in *Dennery v. Passaic County Reg. High School District Bd. of Educ.*, 131 N.J. 626 (1993):

A mere overlap in duties *** does not mean that two positions are equivalent for tenure purposes. If a newly-created position is similar to a tenure holder's abolished position but also requires additional duties or different responsibilities, then the newly-created position is not considered to be substantially similar to the former position. (at 640)

With this guidance in mind, the Commissioner's full review persuades her of the correctness of the ALJ's conclusion in this regard:

I further CONCLUDE that the position of Assistant Principal for Athletics and Student Activities is significantly different from petitioner's former athletic director assignment. A canvas of the job description coupled with the testimony demonstrates an insufficient identity of duties between the positions and that they are, in fact, qualitatively different positions with substantially distinguishable duties to serve different educational functions. That the assistant principal performs duties previously within the purview of an athletic director does not lead to the conclusion that the positions are the same. Although some of the duties performed by petitioner as athletic director are now performed by the assistant principal, a mere overlap of duties does not give petitioner a right to the new position. Simply put, the assistant principal undertakes numerous responsibilities not required of an athletic director and the duties of the position go well beyond the realm of athletics. A critical distinction between the two posts is the performance of major functions that are entrusted to assistant principals at the high school, such as the imposition of discipline, building-wide responsibility in the principal's absence and the direction and evaluation of supervisors. The assistant principal position also includes various functions that had been performed by other administrators relative to student activities, fire drills, busing and oversight of departments. As previously set forth in the FINDINGS OF FACT, as athletic director petitioner did not perform these duties as well as other performance responsibilities

assigned to the Assistant Principal for Athletics and Student Activities. In short, the duties of the new position are markedly broader in nature and scope than the athletic functions performed by petitioner and deal with matters distinctly different than the work performed by petitioner in his former title.
(Initial Decision at 42-43)

Finally, petitioner's suggestion that the Board's reorganization and/or creation of the challenged position in June 2004 was undertaken in a deliberate, bad faith attempt to exclude him from assuming the position and to circumvent his rights is rejected out of hand. As found by the ALJ, not only is such a claim time-barred pursuant to the 90-day rule but, most importantly, the record is wholly devoid of any credible evidence in support of such a contention.

Accordingly, the Initial Decision is adopted as the final decision in this matter and the instant Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.³

ACTING COMMISSIONER OF EDUCATION

Date of Decision: July 13, 2006

Date of Mailing: July 13, 2006

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.*