

ALBERT ZIEGLER, :  
PETITIONER, : COMMISSIONER OF EDUCATION  
V. : DECISION ON REMAND  
BOARD OF EDUCATION OF :  
THE CITY OF BAYONNE, :  
HUDSON COUNTY, :  
RESPONDENT. :

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### SYNOPSIS

Petitioner, a tenured teacher with an instructional certificate in Skilled Trades – Employment Orientation, was employed by the respondent Board from 1984 until 1999, at which time he was terminated upon the Board’s being advised by the NJDOE that the Employment Orientation certification did not authorize petitioner to teach the industrial arts courses to which he was assigned. Petitioner challenged his termination. On appeal in 2005, the petitioner prevailed before the State Board of Education, which ruled that his authorization extended to carpentry – the experience on which his Skilled Trades certification had been issued – and that he was improperly terminated from his tenured employment during the 1998-99 school year. The State Board directed the respondent to reinstate petitioner with back pay, less mitigation, and the matter was remanded to the OAL for determination of the appropriate amount to be awarded.

On remand, the ALJ found that: the petitioner adequately mitigated his damages, so that the appropriate back pay award is the total income the petitioner would have earned had he remained an employee of the Board, less actual income earned and unemployment benefits received; and petitioner is entitled to receive his accumulated sick time during periods of unemployment dating back to the date of termination, but is not entitled to compensation for out of pocket medical and dental expenses or reimbursement for tuition paid. The ALJ recommended that back pay be awarded in the amount of \$187,762.24, covering the 1998-99 through 2005-06 school years.

The Commissioner adopted the Initial Decision of the OAL with modification. While concurring with the ALJ that petitioner did not fail to mitigate damages and was due accumulated sick leave, the Commissioner did not agree that the petitioner was entitled to back pay and sick time for the 2003-04 through 2005-2006 school years. Finding that the record supported the Board’s representation that, after June 30, 2003, petitioner could not have been employed in the district because no position within the scope of his certification was vacant or held by a less senior tenured staff member, the Commissioner concluded that petitioner is due back pay in the amount of \$140,167.24, and is to be credited with sick time for periods of unemployment from the date of his termination through the end of the 2002-03 school year.

<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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September 17, 2007

OAL DKT. NO. EDU 11305-05  
(EDU 1526-00 ON REMAND)  
AGENCY DKT. NO. 21-2/99

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The record of this matter and the Initial Decision on Remand of the Office of Administrative Law (OAL) have been reviewed, as have exceptions and replies filed by each party in accordance with *N.J.A.C.* 1-18.4 and 1-18.8.

In its exceptions, the Board of Education (Board) contends that the Administrative Law Judge (ALJ) erred in calculating petitioner's damages for the period at issue, basing them simply on the difference between petitioner's projected earnings as a teacher at Bayonne High School and his actual earnings together with unemployment compensation, without taking other factors into account. The Board urges the Commissioner to consider anew its arguments on failure to mitigate, and additionally to consider its arguments – not addressed by the ALJ – as to the unavailability of an appropriate position since the end of the 2002-03 school year and the effect of a delay in prior proceedings at the OAL.

The Board first asserts that petitioner had an obligation to mitigate his damages and failed to do so. According to the Board, petitioner should not be granted back pay or accumulated sick leave from February 1999 up until the time he obtained a position with the

Hunterdon County Polytech in October 2000, or from June 2001 until through January 2, 2002, the date he was employed by Union City; during these times, the Board avers, petitioner rejected appropriate and available work as a substitute teacher or applied for jobs for which he was either unqualified or uncertain of his qualification, thus using his time “collecting unemployment compensation and taking courses to earn a degree and become certified in an unrelated area” instead of making a good faith effort to find alternative employment. (Board’s Exceptions and Reply at 4-8<sup>1</sup>)

The Board further asserts that petitioner should not be entitled to damages for the 2003-04, 2004-05 and 2005-06 school years, since – subsequent to June 30, 2003 – there was no position at Bayonne High School to which he could have been assigned, so that he would have been placed on a preferred eligibility list rather than actually employed in the district. The Board explains that by the end of the 2002-03 school year, three of the four courses on which the State Board based its directive for reinstatement had been eliminated, while the remaining course (Industrial Technology I) had been completely revised to focus on building trades rather than woodworking and has since been taught solely by teachers certified in Industrial Arts; moreover, while the Board does offer carpentry courses which petitioner is presumably qualified to teach, they are taught almost exclusively by a full-time carpentry teacher with ten years’ greater seniority. (Board’s Exceptions and Reply at 8-10)

Finally, the Board renews its claim that, as a matter of fundamental fairness, no back pay should be awarded for the period from April 11, 2002 to August 8, 2003, which reflects a sixteen-month delay in the ALJ’s issuance of an Initial Decision on the Commissioner’s prior remand for determination of the scope of petitioner’s certification. According to the Board, this

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<sup>1</sup> The Board incorporates its primary and reply exceptions into a single submission.

delay “should not result in a windfall for Petitioner to the detriment of the Board of Education and the taxpayers of the City of Bayonne.” (Board’s Exceptions and Reply at 11)

In summation, the Board urges the Commissioner to limit petitioner’s damages to \$14,006.04, reflecting the difference between what he would have earned as a teacher in Bayonne and what he actually earned during those portions of the 2000-01 and 2001-02 school years when he was employed, less amounts attributable to the delay in the ALJ’s earlier Initial Decision on Remand. (Board’s Exceptions and Reply at 13-14)

Petitioner’s exceptions urge adoption of the Initial Decision in all respects, except for modification to “restate the respondent’s obligation to reinstate the petitioner,” since that has not yet occurred. (Petitioner’s Exceptions at 1) Consistent with its own exceptions, the Board replies that such contention must be rejected because there is not now – nor has there been since the end of the 2002-03 school year – any position for which petitioner qualifies that is not held by a more senior staff member. (Board’s Exceptions and Reply at 12) Petitioner counters:<sup>2</sup>

This assertion ignores both the scope of the remand order and the fact that the respondent was previously directed to reinstate the petitioner. Based upon the reinstatement order, it was respondent’s legal and moral obligation to notify the petitioner if his reinstated position was to be eliminated. *N.J.S.A. 18A:28-9 et seq.* It did not do so. If it had, other legal rights and obligations may have arisen. It simply chose, once again, to ignore the law and the petitioner in the hope that this would all simply go away. It has not and the respondent may not deprive the petitioner of his legal remedies. (Petitioner’s Reply Exceptions at 1)

Upon review, the Commissioner adopts the Initial Decision of the ALJ with modification as set forth below.

Initially, the Commissioner concurs with the ALJ that petitioner did not fail to mitigate his damages so as to warrant reduction of back pay. In this regard – being fully satisfied

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<sup>2</sup> This argument is made by Petitioner in reply to the Board’s primary exceptions. Petitioner’s reply does not address the Board’s other arguments.

that the ALJ carefully considered the arguments and evidence of the parties as to appropriate and available work, as well as petitioner's efforts to procure it – the Commissioner adopts the ALJ's analysis and conclusions as set forth in the Initial Decision. Nor is the Commissioner dissuaded by the fact that petitioner took college courses during 1999-2001 in order to obtain standard certification as a Teacher of the Handicapped (issued February 2002, Exhibit P-5); to the contrary, the record is clear that petitioner was having little success in locating comparable employment with his existing skilled trades credential, and that he either worked or continued seeking work during the periods he attended school (Exhibits P-1 and P-3) and promptly used his newly acquired certification to obtain a full-time teaching position which he held continuously thereafter. Additionally, the Commissioner concurs with the ALJ's determinations – to which neither party took exception – as to the types of emoluments due (or not due) to petitioner.

The Commissioner cannot agree, however, that petitioner is entitled to back pay and sick time for the entire period extending from the 1998-99 through the 2005-06 school years as recommended in the Initial Decision. Although the ALJ (inexplicably) did not address the Board's argument on this point,<sup>3</sup> the Commissioner finds nothing in the record to counter the Board's assertion, supported by Exhibits J-4 through J-9 as well as the stipulated facts, that as of June 30, 2003 – due to the elimination and redesign of various industrial arts/vocational courses – had petitioner been employed in the district, he would have been reduced in force and placed on a preferred eligibility list because the only positions within the scope of his Skilled Trades certification – even as construed by the State Board – were held by more senior staff members. In the absence of evidence – or indeed, even argument – to the contrary, the Commissioner must agree with the Board that, because petitioner would not have been employed in the district

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<sup>3</sup> Clearly raised in the Board's Post-Hearing Brief at 16-18. The record included neither transcripts of proceedings nor a prehearing order.

subsequent to June 30, 2003 even if he had not been improperly terminated, he is entitled to neither back pay nor sick leave for the 2003-04, 2004-05 or 2005-06 school years, as found by the ALJ.<sup>4</sup>

Moreover, with respect to the 2005-06 school year, the Commissioner additionally notes that petitioner's entitlement to reinstatement arose with the State Board's decision of July 6, 2005, prior to the start of the 2005-06 school year, and that petitioner brought no action – either at the time of the State Board ruling or any time since<sup>5</sup> – alleging that the Board was failing to employ him as required. Where, as in the present instance, a teaching staff member is ordered reinstated following a finding of termination in violation of tenure/seniority rights, actual reemployment is necessarily contingent upon the existence of a position which the aggrieved party is qualified to fill and is not held by a more senior tenured staff member; otherwise the employee's rights are vindicated by placement on the appropriate preferred eligibility list(s) for recall when such a position becomes available, with any allegation of a board's failure to employ as required pursuable as a new cause of action. Having thus far made no such claim, petitioner cannot in this context be found entitled to back pay for the 2005-06 school year, nor can he use the present proceeding – the scope of which was expressly limited by the State Board to determining, in the absence of a record sufficient to permit its own findings, “the specific amount of damages to which the petitioner is entitled” (Slip Opinion at 7) – as a vehicle for demanding reinstatement to active employment.<sup>6</sup>

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<sup>4</sup> The Commissioner rejects any notion that the Board was required to notify petitioner of reductions prior to the State Board's ruling finding him qualified to teach courses other than employment orientation.

<sup>5</sup> The State Board's decision was neither stayed pending reconsideration and appeal, nor reversed.

<sup>6</sup> Nothing herein is intended to preclude the filing of a Petition of Appeal in pursuit of such claim, whether with respect to petitioner's Skilled Trades endorsement or the Teacher of the Handicapped endorsement he acquired in February 2002; similarly, nothing herein precludes the Board from raising such affirmative defenses, including untimely filing, as it deems appropriate in response to any such petition.

Finally, the Commissioner rejects the Board’s contention – likewise not addressed by the ALJ – that petitioner’s award should be further reduced as a result of a delay in proceedings at the OAL. In this regard, the Board does not even claim – let alone demonstrate – that petitioner was in any way responsible for such delay, and, absent a showing of fault, there is precedent in neither equity nor law for reducing an aggrieved party’s damages based on the length of time it took to vindicate his right(s).

In summation, then, the Commissioner finds petitioner to be due back pay and sick leave as follows:

<b>School Year</b>	<b>Projected Earnings</b>	<b>Actual Earnings</b>	<b>Unemployment</b>	<b>Offset</b>
1998-99	\$55,525.00	\$36,107.00	\$10,582.00	\$8,836.00*
1999-00	\$62,000.00	\$0.00	\$0.00	\$62,000.00*
2000-01	\$67,500.00	\$41,773.16	\$8,028.00	\$17,698.84*
2001-02	\$70,000.00	\$32,457.60	\$3,325.00	\$34,217.40*
2002-03	\$74,200.00	\$56,785.00	\$0.00	\$17,415.00*
2003-04	\$76,500.00	\$61,271.00	\$0.00	\$0.00**
2004-05	\$79,800.00	\$63,807.00	\$0.00	\$0.00**
2005-06	\$82,760.00	\$66,387.00	\$0.00	\$0.00**
<b>Total</b>	<b>\$568,285.00</b>	<b>\$358,587.76</b>	<b>\$21,935.00</b>	<b>\$140,167.24</b>

\* Sick Leave to accrue as found by the ALJ.

\*\* No sick leave to accrue as held herein.

Accordingly, the Initial Decision of the OAL is adopted with modification as set forth above.<sup>7</sup> Back pay in the amount of \$140,167.24 shall be remitted to petitioner, who is

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<sup>7</sup> In the interest of accuracy, the Commissioner also clarifies the ALJ’s statement (at 2) that the State Board “found that the petitioner’s certification in Employment Orientation no longer existed and so, retroactively granted him a new certificate, entitling him to teach unspecified industrial arts courses.” What the Board actually held was that, at the time petitioner’s certificate was issued, regulations (as opposed to Department practice) provided for no specifications on the Skilled Trades endorsement, so that petitioner was not limited by the Employment Orientation specification on his certificate as issued, but was also entitled to teach courses falling within the scope of the carpentry experience on which the Skilled Trades endorsement had been based. Indeed, in a ruling on motion for

additionally to be credited with sick time for periods of unemployment from the date of his termination through the end of the 2002-03 school year. The Board is further directed to reimburse the Department of Labor, Division of Unemployment Compensation, for monies paid to petitioner,<sup>8</sup> and a copy of this decision shall be forwarded to the Division so as to facilitate prompt effectuation of such reimbursement.

IT IS SO ORDERED.<sup>9</sup>

COMMISSIONER OF EDUCATION

Date of Issue: September 17, 2007

Date of Mailing: September 17, 2007

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reconsideration of its July 6, 2005 decision, the State Board specifically denied granting petitioner “retroactive certification in carpentry” as claimed by the Board. (Decision on Motions, September 7, 2005, slip opinion at 5-7)

<sup>8</sup> See *John Scott and Charles Yarnall v. Board of Education of the City of Trenton, Mercer County, et al.*, decided by the Commissioner September 30, 2002, affirmed State Board June 2, 2004, appeal dismissed by Appellate Division January 11, 2005 (A 00637603T5).

<sup>9</sup> This decision, as the Commissioner’s final determination in this matter, 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.*