

KATHLEEN PARTE-WILLBERGH, :
 :
 PETITIONER, :
 :
 V. : COMMISSIONER OF EDUCATION
 :
 BOARD OF EDUCATION OF THE : DECISION
 TOWNSHIP OF WALL, :
 MONMOUTH COUNTY, :
 :
 RESPONDENT. :

SYNOPSIS

Petitioner alleged that she acquired tenure as a guidance counselor in respondent's district while working in the dual position of Guidance Counselor/Substance Awareness Coordinator, and that the district's failure to hire her as a guidance counselor after her position as an SAC was eliminated during a reduction in force (RIF) was a violation of her tenure and seniority rights.

The ALJ found that: the petitioner was appointed by the Board as a Substance Awareness Coordinator Intermediate School; petitioner has failed to meet her burden to prove that she was appointed to a dual position of Guidance Counselor/Substance Awareness Coordinator so as to entitle her to tenure and seniority in both positions; and therefore the actions of the respondent Board in failing to appoint petitioner as a guidance counselor after her prior position was eliminated did not violate her tenure and seniority rights. The ALJ denied petitioner's appeal and dismissed the case.

Upon a thorough and independent review of the record, the Commissioner initially agreed with the ALJ that petitioner has failed to sustain her burden of establishing that she was appointed to the dual position of Guidance Counselor/Substance Awareness Coordinator, and is therefore unable to sustain her claim of a tenure/seniority right violation against the Board on this basis. However, the Commissioner noted that the Initial Decision did not address an alternative and potentially meritorious theory of violation of petitioner's tenure rights – argued at hearing and in a post-hearing brief – in which petitioner claimed that she is entitled to the position of Guidance Counselor as a consequence of being tenured under her Educational Services certificate over the staff person employed in that position at the time of the RIF, who was not tenured under his Educational Services certificate. Accordingly, the matter was remanded to the OAL to allow the staff person – and any other individual who may potentially be displaced from his or her position as a consequence of petitioner's tenure status – to intervene, and, thereafter, a recommendation be made by the ALJ as to which position currently occupied by another individual, if any, petitioner possesses entitlement.

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.

December 11, 2009

OAL DKT. NO. EDU 6162-08
AGENCY DKT. NO. 143-5/08

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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 the provisions of *N.J.A.C.* 1:1-18.4 – were fully considered by the Commissioner in reaching her determination herein.

Upon her independent and comprehensive review of the entire record, including the transcript of the hearing conducted at the OAL on April 27, 2009, and the parties' exception arguments, the Commissioner is compelled to reject the Administrative Law Judge's (ALJ) conclusion that the instant petitioner has not acquired tenure as a guidance counselor in the District and, therefore, she cannot necessarily accept his further conclusion that petitioner's tenure rights were not violated as a consequence of her reduction in force (RIF) in June 2008. In so determining, the Commissioner initially agrees with the ALJ – for the reasons presented on pages 5-8 of his decision – that petitioner has failed to sustain her burden of establishing, by a preponderance of the credible evidence, that she was appointed to the dual position of

Guidance Counselor/Substance Awareness Coordinator and is therefore unable to sustain her claim of a tenure/seniority right violation against the Board on this basis.

This said, however, the Commissioner notes that petitioner additionally presented a potentially meritorious alternative theory of violation of her tenure rights as a consequence of being reduced in force, argued at hearing and extensively discussed in her post-hearing brief, which was inexplicably left unmentioned and unaddressed in the Initial Decision. Specifically, petitioner claims that she is entitled to the position of Guidance Counselor as a consequence of being tenured under her Educational Services certificate, over Christopher Barnes – who was in the position of Guidance Counselor at the time petitioner’s position was eliminated and was not then tenured under his Educational Services certificate. The instant record reflects that petitioner began employment in the District under her Educational Services certificate in September 1997 and at that time had an endorsement upon this certificate in Student Personnel Services (issued in August 1981) – which authorized her to perform the duties of a Guidance Counselor – and a Certificate of Eligibility with Advanced Standing as a Substance Abuse Coordinator, with the Standard Certificate in this regard being issued in June 1998. She was continuously employed in her position until June 30, 2008 when her position was eliminated. In contrast, petitioner maintains that Christopher Barnes was hired by the District on May 1, 2000 and until June 2006 worked as a Health and Physical Education teacher under his Instructional certificate, attaining tenure in that position in September 2004. She claims that he began working under his Educational Services certificate as a Guidance Counselor on September 1, 2006 and, as such – pursuant to *N.J.S.A. 18A:28-6(b)* – he was not tenured when the RIF at issue here occurred.¹

¹ Of particular interest in this regard, the Commissioner observes that petitioner’s exceptions make the following charge: “Petitioner notes that prior to, during, and after the plenary hearing in this matter, that is, on numerous occasions, the petitioner requested the respondent to provide it with the ‘preferred eligibility list’ also known as the ‘seniority list’ as it is required to do, pursuant to *N.J.S.A. 18A:28-1*. The respondent has never provided it. At the

The Commissioner observes that it is by now well-established that educators holding an Educational Services certificate who achieve tenure under any endorsement they possess on that certificate can, in effect, extend or transfer that tenure to other endorsements they possess that are subsumed under the same certificate, entitling them to any position under this certificate for which they hold an endorsement over any non-tenured individual who is in a position that requires the same certificate and endorsement. See, *Ellicott v. Bd. of Ed. of Frankford*, 251 N.J. Super. 342 (App. Div. 1991; *Dennery v. Board of Education of the Passaic County Regional High School District*, 131 N.J. 626 (1993). Simply stated, even recognizing – as determined above – that the Board appointed petitioner on August 19, 1997 solely to the position of Substance Awareness Coordinator and even assuming, *arguendo*, that petitioner had no demonstrable experience as a Guidance Counselor during all of her years of employment with the Wall Township Board of Education, based on *Ellicott and Dennery, supra.*, she still has an absolute right to the Guidance Counselor position held by any individual who was not tenured in this position at the time she was rified in June 2008.

In light of this determination, the Commissioner finds and concludes that interests of fairness and due process dictate that this matter be remanded to the OAL to allow the opportunity for Christopher Barnes – and any other individual who may potentially be displaced from his or her position as a consequence of petitioner’s tenure status – to intervene and, thereafter, a recommendation be made by the ALJ as to which position currently occupied by another individual, if any, petitioner possesses entitlement.

plenary hearing during its opening statement, the petitioner requested that the ALJ to (*sic*) draw an adverse inference against the respondent for its failure to provide the petitioner with the seniority list that it had a statutory obligation to provide and that would have disclosed that petitioner was entitled to the position of guidance counselor over Christopher Barnes.” (Petitioner’s Exceptions – footnote at 2-3)

Accordingly, the recommended decision of the OAL is adopted only as to its conclusion that petitioner has not established that she was hired by the Wall Township Board of Education in any other position than that of Substance Awareness Coordinator, and is rejected in all other respects. This matter is hereby remanded to the OAL for further action as outlined above.

IT IS SO ORDERED.²

COMMISSIONER OF EDUCATION

Date of Decision: December 11, 2009

Date of Mailing: December 11, 2009

² This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L. 2008, c. 36* (*N.J.S.A. 18A:6-9.1*).