

#164-09 (OAL Decision: Not yet available online)

VIRGINIA BUSH, :
PETITIONER, :
V. : COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE WARREN : DECISION
COUNTY VOCATIONAL SCHOOL DISTRICT,
WARREN COUNTY, :
RESPONDENT. :

SYNOPSIS

Petitioner – a tenured secretary formerly employed by the Board – filed a “Petition for Declaratory Ruling”, requesting that the Commissioner construe the provisions of *N.J.S.A.* 18A:6-10 and determine that the respondent acted contrary to the law in terminating her employment, and order respondent to reinstate petitioner to her former position. Petitioner was terminated on December 1, 2007 after she refused to sign employment contracts which were terminable on ten days notice for the 2007-2008 school year, and retroactively for the 2006-2007 school year. She contends that signing the contracts would have been consent to the revocation of her tenure.

The ALJ found, *inter alia*, that: the sole basis for petitioner’s termination was her refusal to execute employment contracts for the 2006-2007 and 2007-2008 school years; petitioner did nothing that could be construed as neglect, misbehavior, or other offense within the meaning of the tenure statute for school secretaries; and petitioner failed to mitigate damages. The ALJ concluded that the Board unlawfully terminated the petitioner without just cause.

The Commissioner found that petitioner’s refusal to sign employment contracts did not equate to constructive resignation or abandonment of her position so as to give the Board cause to terminate her employment, and therefore adopted that part of the ALJ’s decision which concluded that the Board’s termination of petitioner – absent the filing of tenure charges – was contrary to law and violative of her tenure rights. The Commissioner found, however, that the petition was erroneously filed as a “Petition for Declaratory Ruling” and inappropriately proceeded as a declaratory ruling even though the principal relief sought was petitioner’s reinstatement to her tenured position. Accordingly, the Commissioner determined to amend this matter as a regular petition of appeal, and found that the appropriate remedy as a consequence of a Board’s violation of an individual’s tenure rights is reinstatement along with back pay and emoluments. The Commissioner ordered the Board to immediately reinstate the petitioner, and award her back pay – less mitigation – and emoluments consistent with this decision.

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.
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May 27, 2009

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The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties filed no exceptions to the Initial Decision.

Upon full consideration, the Commissioner finds that petitioner’s refusal to execute employment contracts with the Board for the 2007-08 school year and, retroactively, that of 2006-07 did not equate to her constructive resignation from or abandonment of her position so as to give the Board cause to terminate her employment. She, therefore, adopts that portion of the Administrative Law Judge’s (ALJ) decision which concludes that the Board’s dismissal of petitioner from her secretarial position as of December 1, 2007¹ – absent the filing of tenure charges – was contrary to law and violative of her tenure rights. However, the Commissioner rejects that portion of the ALJ’s decision which refuses to grant petitioner’s requested relief.

In this regard it is noted that the petition in this matter was erroneously filed as a “Petition for Declaratory Ruling”, notwithstanding that the principal relief sought therein was petitioner’s reinstatement to her tenured position.² Although the incorrect categorization of this matter, in light of the relief sought, should have been remedied by the agency prior to transmittal to the OAL – or by the ALJ

¹ Petitioner was paid through December 14, 2007 and received health benefits through April 1, 2008.

² Pursuant to *N.J.A.C. 6A:3-2.1(a)1*, a petition for declaratory ruling “may not seek consequential relief beyond a declaration as to the meaning of the statute or rule...”.

when he was advised in post-hearing submissions that the fundamental relief sought by petitioner was reinstatement and damages and he was, therefore, requested to amend the pleadings, *sua sponte*, to allow such recovery – it inappropriately proceeded as a declaratory ruling. Consequently, in light of the obvious intent of the petitioner and the actual nature of her appeal, the Commissioner determines that this matter is amended to a regular petition of appeal to conform to its stated pleadings. This being the case, it is well-established that the appropriate remedy as a consequence of a Board’s violation of an individual’s tenure rights is reinstatement along with back pay and emoluments. The Commissioner finds and concludes that the instant petitioner is entitled to such relief.^{3 4}

Accordingly, the recommended decision of the OAL is adopted in part and rejected in part as discussed above. It is hereby ordered that the Board of Education of the Warren County Vocational School District immediately reinstate petitioner to a secretarial position and award her back pay – less mitigation – and emoluments due her consistent with this decision. If the parties are unable to agree on an appropriate mitigation figure, a new petition of appeal should be filed in this regard.

IT IS SO ORDERED.⁵

COMMISSIONER OF EDUCATION

Date of Decision: May 27, 2009

Date of Mailing: May 27, 2009

³ It is specifically noted, however, that petitioner’s recovery does not include attorney fees as the Commissioner does not have the plenary authority to make such an award. *See Balsley v. North Hunterdon Bd. of Educ.*, 117 N.J. 434, 442, 443 (1990); *State, Dept. of Environ. Protect. v. Ventron Corp.*, 94 N.J. 473, 504 (1983).

⁴ N.J.S.A. 18A:6-30 – discussed by the ALJ in his decision – is not applicable in this matter.

⁵ This decision may be appealed to the Appellate Division of the Superior Court pursuant to P.L. 2008, c. 36.