

CHRISTINA SILVEIRA FRANCISCO, :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE : DECISION

CITY OF ELIZABETH, UNION COUNTY, :

RESPONDENT. :

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### SYNOPSIS

Petitioner – who contends that she had been employed by the respondent Board as a vice principal or principal for four years prior to a reduction-in-force (RIF) at the end of the 2009-2010 school year – filed a petition asserting that she had attained tenure in the position of vice principal. Petitioner claimed that the vice principals who lost their positions due to the RIF in June 2010 were reinstated in March 2011, but petitioner was not offered a vice principal position and remains a class room teacher. The Board contended that petitioner never achieved tenure as a vice principal.

The ALJ found, *inter alia*, that: there is no dispute that by September 2009, the petitioner had successfully completed all of the requirements for a Standard Certificate – Principal, which would entitle her to that certificate; petitioner did not, however, file her required paperwork to complete the certification process in September 2009; the New Jersey Department of Education (Department) did not issue petitioner’s Standard Certificate – Principal until August 2010, at which time the certificate was made retroactive to September 2009; the Department’s action to make petitioner’s certificate retroactive to September 2009 was *ultra vires*, as there is no statutory or regulatory authority governing the retroactive issuance of certificates; therefore, petitioner failed to earn time toward tenure as a vice principal during the 2009-2010 school year because she did not hold the Standard Certificate - Principal until it was issued in August 2010. The ALJ concluded that petitioner never achieved tenure as a vice principal or principal; accordingly, the Board’s decision in June 2010 to return the petitioner to her original teaching position – in which she is tenured – was appropriate. The ALJ dismissed the petition.

Upon comprehensive review, the Commissioner rejected the Initial Decision of the OAL, finding, *inter alia*, that the ALJ acted beyond the scope of his jurisdiction in finding the Department’s action *ultra vires*. In so determining, the Commissioner noted that the Department was not a party to this action and that the actual issue in dispute – whether the petitioner is tenured as a vice principal – was not properly adjudicated because the matter erroneously morphed into a case about the Department’s certification process. Accordingly, the matter was remanded to the OAL for a determination of the petitioner’s tenure and seniority rights based upon the fact that she received a valid Standard Certificate – Principal on August 22, 2010, which bears an effective date of September 2009.

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.

September 14, 2012

CHRISTINA SILVEIRA FRANCISCO, :  
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The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions filed pursuant to *N.J.A.C. 1:1-18.4* by the petitioner Christina Silveira Francisco, and the Board of Education. This matter was transferred from the Superior Court of New Jersey for a determination as to whether the petitioner has obtained tenure as a vice principal.<sup>1</sup>

The Board did not take exception to the Administrative Law Judge’s (ALJ) Initial Decision, but instead urged the Commissioner to issue a final decision that included an order revising the petitioner’s Standard Certificate – Principal to have an effective date of August 2010.

The petitioner filed exceptions arguing that the Initial Decision should not be adopted because the ALJ made several errors in law and fact, and exceeded the scope of his authority and the jurisdiction of the OAL. Specifically, the petitioner maintains that the ALJ’s conclusion that the Department of Education’s (Department) practice of backdating certifications in limited circumstances is an *ultra vires* act. The petitioner points out that the dispute as to

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<sup>1</sup> The parties are currently involved in litigation in the Superior Court of New Jersey involving other aspects of the petitioner’s employment.

whether the petitioner had obtained tenure was limited to a dispute between the petitioner and the Board, and that the Department was not even a party to the contested case. As a result, the petitioner argues that the ALJ exceeded his authority when he determined that the Department's backdating of the petitioner's certification was *ultra vires*. The petitioner also contends that the ALJ's decision to adjudicate the credibility of the petitioner regarding whether she filed her application with the appropriate fee was beyond the scope of the contested case. Petitioner stresses that her credibility was not at issue because the Department had deemed that she was entitled to a certificate effective September 2009.

Additionally, the petitioner takes exception to the ALJ's determination that the Department's practice of backdating certifications is in violation of the rulemaking requirements contained in *Metromedia, Inc. v. Director, Division of Taxation*, 97 N.J. 313, 331-332 (1984). The petitioner also contends that the ALJ's Initial Decision exalts form over substance, noting that the ALJ found that the petitioner "was eligible to receive her Standard Certificate – Principal in September 2009 as, by then, she had met all of the necessary requirements." The petitioner stresses that the Board employed petitioner as a principal until June 2010 despite the fact that her provisional certificate expired in September 2009.

Further, the petitioner contends that the ALJ made findings of fact without the presentation of evidence, i.e. that a reduction-in-force occurred in June 2010 and that it was the reduction-in-force that led to the petitioner's removal as a principal. The petitioner also points out that the alleged reduction-in-force was for vice principals, not principals. Finally notwithstanding the backdating issue, the petitioner contends that the ALJ incorrectly ignored the fact that the Board violated New Jersey law and the contract that the petitioner and the Board entered into in May 2010.

Upon a comprehensive review of the record in this matter, the Commissioner finds that the ALJ acted beyond the scope of his jurisdiction when he found that the Department's action to issue the petitioner's Standard Certificate-Principal retroactive to September 2009 was *ultra vires*. The Commissioner further finds that the ALJ's determination that the Department's process of backdating certifications is in violation of *Metromedia, supra*, is also beyond the scope of his jurisdiction.

It is important to recognize that the Department was not a party to this action and that the underlying issue in this case was limited to a determination as to whether the petitioner obtained tenure as a vice principal. Certainly, a decision deeming a Department process to be *ultra vires* – which would invariably affect other certifications and the certification process as a whole – should not be addressed as a collateral issue in a case where the Department was not even afforded an opportunity to participate in the litigation. If the Board believes that the action of the Department in issuing the petitioner's certification was arbitrary, capricious or unreasonable, the Board would be required to institute an action against the Department challenging the validity of its decision.

With respect to the rulemaking issue: in the course of this matter, the ALJ concluded that the Department violated *Metromedia, supra*, when it failed to promulgate a rule that governs the circumstances under which certificates may be backdated and the procedure to do so. It is, however, well settled that the action or inaction of an administrative agency is a challenge which belongs in the Superior Court of New Jersey, Appellate Division, pursuant to *R. 2:2-3(a)(2)*. See *N.J. Civil Service Ass'n v. State*, 88 *N.J.* 605, 612 (1982). It is without question that the alleged failure to promulgate a rule constitutes agency inaction. Therefore, the OAL is

not the proper forum to determine whether the Department must issue a rule that provides guidelines for the backdating of certifications pursuant to *Metromedia, supra*.

The limited issue in this case is whether the petitioner obtained tenure as a vice principal. Yet the testimony at the April 30, 2012 hearing focused on the Department's procedures for processing applications and issuing certifications, and the petitioner's assertions with respect to her application. In the absence of an actual ruling that the certification issued by the Department was invalid, the issues emphasized at the hearing were beyond the scope and authority of the OAL. In light of the fact that this matter erroneously morphed into a case about the Department's certification process, the actual issue in dispute was not properly adjudicated. It is undisputed that the petitioner received her Standard Certificate – Principal on August 11, 2010, and that the certificate was effective September 2009. As such, the certificate is valid on its face, and it is in the context of these facts that the petitioner's tenure and seniority rights must be evaluated.

Accordingly the Initial Decision is rejected; this matter is remanded to the OAL for a determination of the petitioner's tenure and seniority rights in the District based upon the fact that she received a valid Standard Certificate – Principal on August 11, 2010 with a September 2009 effective date.<sup>2</sup>

IT IS SO ORDERED.<sup>3</sup>

COMMISSIONER OF EDUCATION

Date of Decision: September 14, 2012

Date of Mailing: September 14, 2012

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<sup>2</sup> The tenure and seniority analysis should not be limited to a determination based solely on the petitioner's status during the 2009-2010 school year, but rather a complete evaluation of her employment with the District.

<sup>3</sup> Pursuant to *P.L. 2008, c. 36 (N.J.S.A. 18A:6-9.1)*, Commissioner decisions are appealable to the Superior Court, Appellate Division.