

DEANNA DeGRAFF, :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE TOWNSHIP : DECISION

OF BELLEVILLE, ESSEX COUNTY, :

RESPONDENTS. :

SYNOPSIS

The petitioner appealed her termination as a tenured Teacher of Dance following the elimination of Belleville’s high school dance program at the end of the 2015-2016 school year, pursuant to a reduction in force (RIF). Petitioner contended, *inter alia*, that she should be reinstated to her tenured position with back pay because the respondent Board violated the No Child Left Behind Act (NCLB) and the New Jersey Student Learning Standards (NJSLS) when it eliminated the dance program, arguing that Visual and Performing Arts (VPA) are considered “core” subjects under these state and federal laws, and are therefore constitutionally mandated. Petitioner also alleges she was improperly terminated because the Board failed to take formal action on her employment pursuant *N.J.S.A.* 18A:27-4.1(a); instead, she received a letter of termination from the Superintendent of Schools, which was sent at the direction of the State Monitor. The Board contended, *inter alia*, that petitioner was properly terminated when the dance program was abolished because petitioner was not certified to teach any other subjects, and the State Monitor is authorized pursuant to *N.J.S.A.* 18A:7A-55 to oversee district staffing, including terminations. Further, the Board argued that dance is not a “core” subject under State law, and the Commissioner lacks jurisdiction over petitioner’s NCLB claim. The petitioner filed a motion for summary decision; the Board responded with a cross motion for summary decision.

The ALJ found, *inter alia*, that: pursuant to *N.J.S.A.* 18A:27-6.1, the Board must vote to terminate an employee; a State Monitor cannot remove a District employee until after a vote regarding the matter by the Board; through the NJSLS, which is designed to implement the “thoroughness” component on the State constitution, VPA – including dance – is part of the core curriculum, and therefore dance instruction is constitutionally mandated; dance instruction can be offered to students in various ways; however, the respondent Board did not address whether or how the District has addressed this requirement in the absence of a formal dance program; and the Board’s elimination of the dance program and resulting termination of petitioner’s employment should be reversed because dance instruction is constitutionally mandated. The ALJ concluded that the petitioner’s motion for summary decision should be granted and the Board’s cross-motion should be denied. The ALJ ordered the Board to reinstate the dance program and petitioner, with back pay and benefits from the effective date of petitioner’s termination, subject to mitigation.

Upon comprehensive review, the Commissioner remanded the matter to the OAL for additional fact finding on the issue of whether the Board failed to provide dance instruction in violation of NJSLS, and whether such violation implicated petitioner’s tenure rights. In so doing, the Commissioner found, *inter alia*, that: petitioner’s claims under the NCLB are beyond the scope of this tribunal; dance instruction is not constitutionally mandated; however, NJSLS does require that dance instruction be made available to high school students; the ALJ failed to explore whether the Board continued to offer dance instruction following the RIF, and if so, whether such instruction comports with applicable State law; and the State Monitor’s recommendation to the Board pertaining to the RIF was for budgetary purposes, and did not negate the District’s obligation to make all four strands of the VPA disciplines available to its middle and high school students.

<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>

OAL DKT. NO. EDU 16478-16
AGENCY DKT. NO. 265-9/16

DEANNA DeGRAFF, :
PETITIONER, :
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OF BELLEVILLE, ESSEX COUNTY, :
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The record of this matter, the Initial Decision of the Office of Administrative Law (OAL), and respondent’s exceptions filed pursuant to *N.J.A.C.* 1:1-18.4, have been reviewed. Upon comprehensive review, the Commissioner remands the matter to the OAL for further consideration of the limited issue specified herein.¹

In this matter, petitioner filed an appeal alleging that she should be reinstated – with back pay – to her tenured position as a teacher of dance in the District because the Board violated State and Federal statutory schemes.² Specifically, petitioner alleges that the District’s elimination of the dance program – which also resulted in her termination – violates the No Child Left Behind Act (NCLB) and the New Jersey Student Learning Standards (NJSLS). Petitioner argues that Visual and Performing Arts (VPA) are considered “core” subjects under NCLB and

¹ Further fact finding must be conducted to determine whether the Board failed to provide dance instruction in violation of the NJSLS, and whether such violation implicated petitioner’s tenure rights to her teaching position as a dance teacher in the District.

² Petitioner’s position was eliminated following a reduction in force (RIF) based on a directive from the State Monitor to the Board.

NJSLS, and elimination of the dance program therefore violates State and Federal laws.³ Petitioner further alleges that the Board improperly terminated her employment when the Superintendent of Schools sent petitioner a letter – at the direction of the State Monitor – notifying that her teaching position had been eliminated. Petitioner alleges, and respondent concedes, that no formal action was taken by the Board in eliminating petitioner’s position.⁴ The Board contends that petitioner was properly terminated when the dance program was abolished because petitioner was not certified to teach any other subjects. Respondent further contends that no Board action was required, as the State Monitor directed the Board to abolish the dance program and the teaching position associated with same, pursuant to the State Monitor’s authority under *N.J.S.A.* 18A:7A-55 to oversee all district staffing – including the ability to hire, promote and terminate employees. The Board submits that the Commissioner lacks jurisdiction over NCLB, but can adjudicate petitioner’s tenure rights claim, which were not violated when the dance program was abolished and petitioner was terminated pursuant to a reduction in force (RIF). Additionally, the Board argues that dance is not a “core” subject under State law, and the District may provide dance instruction without a formal dance program.

The Administrative Law Judge (ALJ) determined that the Board’s abolishment of the dance program and termination of petitioner’s employment from the District should be reversed because of NJSLS. The ALJ found that dance instruction is “constitutionally mandated” because the NJSLS requires provision of dance and the standards are designed to implement the “thoroughness” component of the State constitutional requirements. The ALJ further found that

³ Petitioner clarified that not only is arts education mandated, but all four art disciplines under VPA – dance, theater, music, and visual arts – must be made available to high school students.

⁴ In subsequent submissions during the course of the litigation, petitioner clarified her position that Board action was required pursuant to *N.J.S.A.* 18A:27-4.1 – despite the State Monitor having the authority to oversee hiring, termination, and promotion of employees under *N.J.S.A.* 18A:7A-55.

while dance instruction can be offered in various ways, the Board did not address whether and how the District had provided such instruction in the absence of a dance program. The ALJ concluded that the Board should reinstate the dance program, and return petitioner to her former position with back pay and benefits. In its exceptions, the Board argues that the ALJ erred in holding that school districts in New Jersey are required to have a dance program in order to fulfill the requirements of NJSLS and CCCS. Specifically, the Board disagrees with the ALJ's conclusion that dance is constitutionally mandated. The Board argues that while school districts are required to provide educational programs in VPA, boards of education may meet such requirements without offering a specific dance program. The Board further argues that while the NJSLS provides guidance on the level of proficiency students should meet in the various subject areas, there are no specific methods of instruction mandated by the NJSLS or any State statute or regulation. Respondent submits that dance instruction, in the absence of a formal program, can be provided to students through reading materials and videos in other classes, such as theatre or music; here, however, information pertaining to how the Board addressed its provision of dance instruction to meet the requirements of NJSLS and CCCS, after the elimination of the formal dance program, was never discussed as part of the Joint Stipulation of Facts prepared and agreed to by the parties. As such, respondent also takes exception to the ALJ's granting of summary decision to the petitioner, as the ALJ clearly found the absence of material facts pertaining to the Board's fulfillment of dance instruction in lieu of maintaining a formal dance program to be relevant to her determination; hence, an entry of summary decision is precluded.

As a preliminary matter, the Commissioner finds that the ALJ improperly held that it was not necessary to rule on petitioner's claims pertaining to the Board's alleged violation of the NCLB on the basis that provision of dance instruction is constitutionally mandated.

First, the Commissioner clarifies that petitioner’s claims under NCLB cannot be adjudicated in this tribunal as it is beyond the scope of the Commissioner’s jurisdiction. Second, the Commissioner further clarifies that dance instruction is not constitutionally mandated. While the NJSLs are developed to confer upon students a “thorough and efficient” education as guaranteed under the State Constitution, finding that dance is constitutionally mandated is an overstatement.⁵

Although dance is not constitutionally mandated, the NJSLs require that dance instruction be made available to all students in grades K-12. Specifically, the VPA standards provide that, by the end of fifth grade, *all* students communicate at a basic level in each of the four VPA disciplines.⁶ Beginning in sixth grade, students are able to choose from one out of the four VPA disciplines; by the end of twelfth grade, every student must demonstrate proficiency (and complete five credits to meet the high school graduation requirements) in at least one out of the four VPA disciplines. Significantly, student instruction in grades nine through twelve focuses on one out of the four VPA discipline, as chosen by the student. Accordingly, instruction in all four VPA disciplines must be made available to high school students.⁷

The Board has proffered that there is a distinction between the existence of a “formal” dance program, and the provision of dance instruction. The Board has argued that a “formal” dance program is not necessary to provide its students with dance instruction. The

⁵ Presently, the NJSLs provide local school districts with benchmarks for student achievement in nine content areas, including VPA. The standards are revised every five years in conjunction with panels of teachers, administrators, parents, students, and representatives from higher education, business, and the community, and are influenced by national standards, research-based practice, and student needs. To suggest that specific components of the standards are constitutionally mandated – *i.e.*, cannot be changed without violating the State Constitution – fails to acknowledge the adaptability of the standards and the need to revise them as deemed appropriate and necessary to prepare students for college and careers.

⁶ As noted earlier, dance, music, theater, and visual arts are the four separate disciplines that constitute VPA.

⁷ It is important to note that the State’s core curriculum is intended to apply to all school districts equally. Allowing a school district to forego instruction in a certain area of study within the core subjects would result in inequitable educational services to the students in said district.

Board further argues that the method of instruction is not prescribed by the State standards and, therefore, the Board is able to develop methods best suited to its students' needs. The Commissioner agrees that the Board is able to develop its own instructional methods, and further notes that school districts and students are able to meet the VPA graduation requirements at the high school level as defined within *N.J.A.C. 6A:8-5.1(a)(2)*; however, any such instruction must be aligned to the NJSLS and core curriculum.⁸

The State Monitor's recommendation to the Board pertaining to the subject RIF was for budgetary purposes, and did not negate the District's obligation to make all four strands of the VPA disciplines available to its middle and high school students. It is unclear to the Commissioner how the Board has ensured availability of dance instruction to students that meets State standards and allows high school seniors to fulfill the graduation requirements set forth in *N.J.A.C. 6A:8-5.1*, as the ALJ failed to explore whether the Board continued to offer students dance instruction following the RIF. The Commissioner is therefore willing to allow the Board an opportunity to establish that it has not violated NJSLS. In order to properly determine whether there has been any violation of NJSLS, further fact-finding must be conducted, to wit: respondent must demonstrate that dance instruction – aligned with the State standards and requirements, and the governing regulations – was made available to its students following the RIF. The Commissioner's review will take into consideration a board's ability to design its own instructional methods, and the latitude provided to students and school districts to fulfill graduation requirements pursuant to *N.J.A.C. 6A:8-5.1(a)(2)*. If the Board has violated the

⁸ The Commissioner incorporates by reference the content of the New Jersey Core Curriculum Content Standards for VPA. For additional clarification on the requirements, the Commissioner incorporates by reference the information provided on the NJSLS-VPA FAQs webpage, <https://www.nj.us/education/aps/cccs/arts/faq.htm>.

NJSLS, petitioner must then establish that her tenure rights were implicated as a result of the Board's violation of NJSLS.⁹

Petitioner also asserts that her tenure rights were violated when the Board failed to conduct a recorded roll call majority vote of the full membership pursuant to *N.J.S.A.* 18A:27-4.1.¹⁰ Petitioner argues that the Board was required to vote on the RIF first, and only then could the State Monitor decide whether or not to override the Board's decision.¹¹ Respondent contends that the State Monitor is authorized by statute to hire, terminate or promote Board employees, so the absence of formal Board action does not affect the legitimacy of petitioner's termination.¹² In the context of a RIF, a tenured staff member may be dismissed or reduced in salary "for reasons of economy or because of reduction in the number of pupils or of change in the administrative or supervisory organization of the district or for other good cause. . . ." See *N.J.S.A.* 18A:28-9; see also *Carpenito v. Bd. of Educ. of Boro of Rumson, Monmouth County*, 322 *N.J. Super.* 522 (App. Div. 1999); *Bassett v. Bd. of Educ. Boro of Oakland, Bergen County*, 223 *N.J. Super.* 136 (App. Div. 1988); *Reinertsen v. Bd. of Educ. of Twp. of East Brunswick, Middlesex County*, 1998 *N.J. AGEN LEXIS* 302 (May 27, 1998).

⁹ The Commissioner notes that typically a board's violation of NJSLS would not implicate a teacher's tenure rights. However, in the unique circumstances of this case, petitioner may be able to establish that termination was improper if, following the RIF, the Board did not have qualified teachers to provide dance instruction and/or failed to provide dance instruction (*i.e.*, violated NJSLS), and that petitioner would have been entitled to the position by virtue of her tenure and seniority and/or because she was the only the tenured teacher qualified to provide dance instruction at the secondary level (retention of whom would have been necessary for the Board to provide dance instruction).

¹⁰ *N.J.S.A.* 18A:27-4.1 sets forth in pertinent part: Notwithstanding the provisions of any law, rule or regulation to the contrary, a. A board of education shall appoint, transfer or remove a certificated or non-certificated officer or employee only upon the recommendation of the chief school administrator and by a recorded roll call majority vote of the full membership of the board. The board shall not withhold its approval for arbitrary and capricious reasons.

¹¹ Petitioner relies on the language of *N.J.S.A.* 18A:27-4.1(a) in conjunction with *N.J.S.A.* 18A:7A-55(b)(5), which states that a State monitor shall have authority to "override a chief school administrator's action and a vote by the board of education on any of the matters set forth in this subsection, except that all actions of the State monitor shall be subject to the education, labor, and employment laws and regulations"

¹² Respondent cites *N.J.S.A.* 18A:27-4.1(b)(4), which states that a State monitor shall "oversee all district staffing, including the ability to hire, promote, and terminate employees."

In this matter, the RIF was predicated on the State Monitor's directive to the Board for reasons of economy, which also affected petitioner's position.

The presence of a State monitor does not mean that the local board of education should cease its typical functions. The board of education is still the governing body for its school district. *See N.J.S.A. 18A:11-1*. The appointment of a State monitor is not intended to usurp board powers or duties; however, a State monitor has substantial discretion and authority to ensure that their directives are being followed. While the Commissioner agrees that the proper procedure for the Board would have been to publicly vote on the RIF following its closed session meeting, the Board's technical failure to do so under the circumstances of this case did not constitute an improper termination, as it related to the State Monitor's directive pursuant to his ability to hire, promote, and terminate employees.¹³

Arguing that a State monitor has the authority to take action only after a board has voted suggests that, if a board fails to act or vote – or chooses not to vote in an effort to circumvent the State monitor's directive – the State monitor is without recourse, which defeats the purpose and intent of the governing statute. A board's inaction or failure to adhere to a State monitor's directives is sufficient to allow a State monitor to follow through with their directive on their own accord. Additionally, subsections (b)(1) through (b)(7) of *N.J.S.A. 18A:7A-55* should be read as separate powers belonging to the State monitor. Petitioner has interpreted subsections (b)(1) through (b)(4) as only applicable *after* the board vote referenced in (b)(5) takes place, which is incorrect. The authority to override the chief school administrator's (CSA) decisions and board votes under (b)(5) is an additional power granted to the State monitor to

¹³ In this case, it is clear that the Board was in agreement with the State Monitor so it is unclear why the Board failed to vote on the RIF. As a matter of best practice, board should vote on State monitor directives on matters where a Board would typically vote.

ensure that the actions taken by the board are fiscally sound. As such, the Commissioner cannot find that petitioner's tenure rights were violated when the CSA sent petitioner a notice of termination consistent with the State monitor's directive.

Accordingly, the Commissioner remands this matter to the OAL for further proceedings consistent with the issues discussed herein, *i.e.*, whether the Board failed to provide dance instruction in violation of the NJSLS, and whether such violation implicated petitioner's tenure rights to her teaching position as a dance instructor in the District.

IT IS SO ORDERED.¹⁴

COMMISSIONER OF EDUCATION

Date of Decision: September 20, 2018

Date of Mailing: September 21, 2018

¹⁴ 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.