

New Jersey Commissioner of Education
Decision

Katherine Herbst,

Petitioner,

v.

Board of Education of the Village of
Ridgefield Park, Bergen County,

Respondent.

Synopsis

Petitioner alleged that the respondent Board violated her tenure and seniority rights when it transferred her without her consent to the position of Assistant Principal for Attendance and Discipline and replaced her with a non-tenured staff member hired under a newly created and unapproved title of Director of Curriculum, Instruction and Operations (DCIO). Petitioner, who had worked for the school district since 2002, most recently holding the positions of Assistant Principal/Curriculum Coordinator (AP/CC) and Director of Curriculum (DC), claimed entitlement to this newly created position. The Board contended that petitioner was not eligible for the DCIO position because she does not possess the required school administrator endorsement. The parties filed cross motions for summary decision.

The ALJ found, *inter alia*, that: there are no material facts at issue here, and the matter is ripe for summary decision; petitioner did not earn tenure in her positions as AP/CC and DC because those positions had district-wide responsibilities and therefore required a school administrator endorsement, which petitioner does not have; further, the DCIO position involved distinct tasks, such that it was not substantially similar to petitioner's previous positions for tenure purposes. The ALJ concluded that the Board did not violate petitioner's tenure rights when it selected a non-tenured staff member for the DCIO position. Accordingly, the ALJ granted the Board's motion for summary decision.

Upon review, the Commissioner denied the parties' cross motions for summary decision and remanded the matter to the OAL for further proceedings. In so doing, the Commissioner found, *inter alia*, that: the ALJ erred in determining that petitioner could not have earned tenure in the DC position because she did not hold a school administrator endorsement; circumstances surrounding various vacancy notices and job descriptions for the DCIO position that were identified during the proceedings raise genuine questions regarding whether additions to the job description for the DCIO position – which were made subsequent to the filing of petitioner's appeal – are meaningful; these questions are critical to determining both the appropriate endorsement and whether the DCIO position is substantially similar to the DC position, such that petitioner may assert tenure rights to the DCIO position.

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.

105-21

OAL Dkt. No. EDU 07213-20

Agency Dkt. No. 158-7/20

New Jersey Commissioner of Education

Final Decision

Katherine Herbst,

Petitioner,

v.

Board of Education of the Village of
Ridgefield Park, Bergen County,

Respondent.

The record of this matter, the Initial Decision of the Office of Administrative Law (OAL), the exceptions filed by petitioner pursuant to *N.J.A.C.* 1:1-18.4, and the Board's reply thereto, have been reviewed and considered.

The petitioner in this matter, who had served as the Ridgefield Park school district's Assistant Principal/Curriculum Coordinator (AP/CC) and Director of Curriculum (DC), claims that the Board violated her tenure rights when it appointed a non-tenured staff member to the newly created position of Director of Curriculum, Instruction, and Operations (DCIO). The Administrative Law Judge (ALJ) found that the matter was appropriate for summary decision and concluded that petitioner did not earn tenure in her positions as AP/CC and DC because those positions had district-wide responsibilities and therefore required a school administrator endorsement, which petitioner does not have. The ALJ further found that the DCIO position involved distinct tasks, such that it was not substantially similar to petitioner's positions for tenure purposes. The ALJ concluded that the Board did not violate petitioner's tenure rights

when it selected a non-tenured staff member for the DCIO position. Accordingly, the ALJ granted the Board's motion for summary decision.

In her exceptions, petitioner argues that her service in the AP/CC and DC roles gave rise to tenure rights, pointing to precedent holding that when the duties of a position in which an employee has acquired tenure are substantially identical to the duties of the position that the employee seeks, a board of education may not sidestep the employee's tenure rights by merely renaming the position or tacking on additional meaningless requirements. Petitioner also contends that the plain language of *N.J.A.C. 6A:9B-12.3(a)* and (b) allows holders of a principal endorsement to serve in the director title at issue in this matter, but the ALJ disregarded the regulations and the District's own job descriptions in concluding that she could not achieve tenure because she did not possess a chief school administrator endorsement, instead improperly relying on a job description that was created only after the petition of appeal was filed. Finally, petitioner claims that the ALJ failed to take judicial notice of a communication from the Department of Education (DOE), indicating that individuals could serve as directors in a district-level role under either the chief school administrator or principal endorsements.

In reply, the Board argues that petitioner did not hold the appropriate endorsement to obtain tenure in a director position with district-wide responsibilities, and that – even if she had – she is not entitled to the new position involving operations because it is not substantially similar to her former position. The Board also contends that the ALJ properly considered all versions of the job description for the DCIO position and properly refused to take judicial notice of the DOE communication.

Upon review, the Commissioner disagrees with the ALJ that petitioner could not earn tenure as Director of Curriculum. Although *N.J.A.C. 6A:9B-12.3(a)* requires anyone

serving in a “position that involves services as a district-level administrative officer” to possess a school administrator endorsement, *N.J.A.C. 6A:9B-12.3(b)* provides that a principal endorsement is sufficient to serve in a position as “an administrative officer of a school *or other comparable unit* within a school *or school district*.” (emphasis added). Notably, while the general position of assistant superintendent is a district-level position requiring a school administrator endorsement, *N.J.A.C. 6A:9B-12.3(a)*, the position of assistant superintendent for curriculum and instruction is specifically identified as a position for which the principal endorsement is sufficient. *N.J.A.C. 6A:9B-12.3(b)*. This distinction demonstrates that the person serving as an assistant superintendent for curriculum and instruction should be deemed to be serving as the administrative officer of a comparable unit within a school district. The Commissioner finds no reason to treat the title of “Director of Curriculum” as different than “assistant superintendent for curriculum and instruction” – indeed, if anything, “Director” would suggest a lower level of district-wide responsibility than “assistant superintendent.” The Commissioner has previously noted that a principal endorsement was sufficient when the duties of a position included “some district-wide responsibilities but were nonetheless limited to the realm of instruction and/or curriculum. For such a discrete, program specific position with jurisdiction over a defined ‘unit’ a principal or supervisor endorsement was sufficient.” *Perna v. State-Operated School District of the City of Paterson*, Commissioner Decision No. 2-12 (Jan. 4, 2012) (discussing *Matarazzo v. Bd. of Educ. of the Borough of Cliffside Park*, Commissioner Decision No. 127-04 (March 18, 2004)).¹

However, while the Commissioner concludes that petitioner could have earned tenure as Director of Curriculum with a principal endorsement, she is unable to conclude on the

¹ Because the Commissioner bases this conclusion on the language of *N.J.A.C. 6A:9B-12.3* that is specific to curriculum and instruction positions, as well as prior decisions, she finds it unnecessary to address the email from Robert Higgins concerning the appropriate endorsements for director titles in general.

current record whether petitioner did earn tenure. As petitioner acknowledges, her time in the DC position was not long enough to earn tenure pursuant to *N.J.S.A.* 18A:26-6, which requires service in a promotional or transfer title for two academic years plus the beginning of the next academic year. Petitioner therefore urges the Commissioner to count her time serving in the position of AP/CC, arguing that the job duties of the AP/CC and DC positions are substantially the same. While the job description for the AP/CC position appears to be substantially similar to the job description the Board approved shortly before petitioner was transferred to the DC title, that job description was revised several months later. The ALJ noted that the job duties in the revised description were more expansive but encompassed the same tasks as the original job description. However, the Commissioner finds that the differences raise genuine issues of material fact about the actual duties and responsibilities of each position that preclude summary decision on the issue of whether the positions were substantially similar, and therefore whether they can be combined for purposes of determining whether petitioner met the time requirements of *N.J.S.A.* 18A:26-6.²

Additionally, even if the facts demonstrate that the AP/CC and DC positions are substantially similar, and thus that petitioner obtained tenure as DC, further inquiry is necessary to determine whether she is entitled to the position of DCIO. First, additional information is needed to determine the appropriate endorsement for the DCIO position. Should the evidence demonstrate that the school administrator endorsement is appropriate, then petitioner may not

² The Commissioner notes that if the decision on remand concludes that the AP/CC and DC positions are substantially similar and that petitioner's time as AP/CC should be combined with her time as DC, her time as AP/CC cannot also be combined with her time as assistant principal to afford her tenure as assistant principal. *N.J.S.A.* 18A:28-5(c) provides that tenure in any of the administrative or supervisory positions enumerated in the statute – including assistant principal – shall accrue only by employment in that position. If petitioner's time as AP/CC is considered employment as DC, then petitioner will not have served as assistant principal for the time period required by law. Furthermore, service in a promotional or transfer title is only tacked onto a former title under *N.J.S.A.* 18A:28-6 if the employee does not achieve tenure in the promotional or transfer title, so if petitioner's time is included in earning her tenure as DC, this provision cannot apply to her circumstances.

serve in this role, even if she did acquire tenure as DC, because she does not possess a school administrator endorsement. While the ECS has approved the unrecognized title of DCIO with an endorsement of school administrator, the ultimate authority to determine the appropriate certification and title rests with the Commissioner. *See Nicholas Duva v. State-operated School District of the City of Jersey City, Hudson County, State Board Decision No. 56-99 (March 6, 2002), and Jack A. Perna v. State-Operated School District of the City of Paterson, Passaic County, Commissioner Decision No. 2-12 (January 4, 2012).* The circumstances surrounding the various vacancy notices and job descriptions for the DCIO position that have been identified during the course of the proceedings raise genuine questions regarding whether the additions to the job description for the DCIO position are meaningful; these questions are critical to determining both the appropriate endorsement and whether the DCIO position is substantially similar to the DC position, such that petitioner may assert tenure rights to the DCIO position.

Accordingly, the parties' cross-motions for summary decision are denied, and the matter is remanded to the OAL for further proceedings consistent with this decision.

IT IS SO ORDERED.


ACTING COMMISSIONER OF EDUCATION

Date of Decision: May 13, 2021
Date of Mailing: May 18, 2021



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDU 07213-20

AGENCY DKT. NO. 158-7/20

KATHERINE HERBST,

Petitioner,

v.

**RIDGEFIELD PARK BOARD OF
EDUCATION,**

Respondent.

Andrew L. Schwartz, Esq., for petitioner (Schwartz Law Group, LLC, attorneys)

Kerri A. Wright, Esq., for respondent (Porzio, Bromberg & Newman, P.C., attorneys)

Record Closed: December 29, 2020

Decided: February 11, 2021

BEFORE **NANCI G. STOKES**, ALJ:

STATEMENT OF THE CASE

Petitioner Katherine Herbst did not possess a school administrator endorsement and served in various director positions with the Ridgefield Park School District

(District), encompassing district-wide responsibilities. Did petitioner earn tenure as a director? No. Under N.J.A.C. 6A:9B-12.3(a), a district-level administrative officer must hold a school administrator endorsement for the requisite time to earn tenure under either N.J.S.A. 18A:28-5 or -6.

PROCEDURAL HISTORY

On July 16, 2020, petitioner filed a Verified Petition with the Commissioner of Education (Commissioner) contesting a non-tenured staff member's appointment to the newly created title of Director of Curriculum, Instruction, and Operations (DCIO). Petitioner asserts that because she served as an Assistant Principal/Curriculum Coordinator (AP/CC) and Director of Curriculum (DC), she attained tenure as a director under N.J.S.A. 18A:28-5 and -6, with seniority rights under N.J.A.C. 6A:32-5.1.

Petitioner maintains that the Ridgefield Park School District's action in removing petitioner from the previous DC title and replacing her with a non-tenured staff member constituted a violation of her tenure and seniority rights. Petitioner seeks reinstatement to the DCIO title with all back pay and benefits.

On August 6, 2020, the District filed a motion to dismiss the petition in lieu of answer.

On August 10, 2020, the Department of Education (DOE) transmitted this case to the Office of Administrative Law, as a contested case under the Administrative Procedure Act, N.J.S.A. 52:14B-1 to -15, and the act establishing the OAL, N.J.S.A. 52:14F-1 to -13, for a hearing under the Uniform Administrative Procedure Rules, N.J.A.C. 1:1-1.1 to -21.6.

On September 3, 2020, I held a pre-hearing conference wherein the parties agreed that the material facts were undisputed, and no hearing was necessary to resolve the legal issue presented. Moreover, the parties agreed that the District's

motion to dismiss would be considered a motion for summary decision. See R. 4:6-2 (motion to dismiss “shall be treated as one for summary judgment” when considering matters outside the pleadings).

On September 7, 2020, petitioner filed her response and cross-motion for summary decision, and on September 24, 2020, the District replied.

On October 15, 2020, petitioner responded to the District’s opposition, and on November 2, 2020, the District presented its sur-reply.

On November 18, 2020, I scheduled oral argument via Zoom. However, petitioner desired to submit previously unavailable materials. I granted petitioner’s request and rescheduled the oral argument for December 10, 2020, via Zoom. On November 20, 2020, petitioner supplemented her supporting moving papers, including a certification attaching a 2017 e-mail from the DOE, Office of Induction and Certification, and on December 1, 2020, the District replied.

On December 10, 2020, I heard oral argument and closed the record.

On December 21, 2020, however, petitioner received documents under an Open Public Records Act (OPRA) request designating the 2017 e-mail as an official record and sought consideration of these materials, and I re-opened the record.

On December 29, 2020, the District replied, and I again closed the record.

FINDINGS OF FACT

Based on the documents submitted in support of and in opposition to the motions for summary decision, when viewed in the light most favorable to the non-moving party, I **FIND** the following as **FACT** for purposes of these motions only:

The District employed petitioner as a mathematics teacher with the required mathematics teacher certificate from 2002 until September 2008, and she acquired tenure as a teacher.

From September 2008 until August 2015, petitioner served as a supervisor of mathematics with the appropriate supervisor certificate, and petitioner attained tenure as a supervisor. After that, petitioner continued her service in the District as a mathematics supervisor and began performing an assistant principal's responsibilities. Effective January 1, 2016, petitioner was promoted to the title of assistant principal, and at all times while performing assistant principal duties, petitioner possessed the principal certificate.

Petitioner does not hold a New Jersey Administrative Certificate with an endorsement as a school administrator.

On June 9, 2017, Robert Higgins, the DOE's Office of Induction and Certification director, e-mailed all executive county superintendents (ECS) and certification personnel regarding principal endorsements. Higgins advised that the DOE intended to clarify the code that "anyone holding a chief school administrator endorsement, or a principal endorsement may serve as a director either district-wide or in a school building (or its equivalent)." Notably, the director designated the e-mail as "confidential." After the e-mail, the DOE made no regulatory changes to effectuate this clarification. The e-mail is not available on the DOE website.

On June 28, 2017, the District abolished the District's Assistant Superintendent of Curriculum and Instruction position because of a reduction in force, and no longer employed any assistant superintendent. The District has several schools.

On September 1, 2017, the District transferred petitioner to the AP/CC title. Qualifications include a valid certification as a principal in New Jersey, a master's degree or higher from an accredited college or university, and a minimum of five years

of teaching experience. The position's goal was "to provide leadership, supervision, and coordination of the total educational program within the school and coordinate a K through 12 curriculum, professional development, and standardized testing." (Emphasis added). Yet, many responsibilities were district-wide. Indeed, the role included:

- The oversight and implementation of district-wide professional development plans,
- Serving as the "District Testing Coordinator,"
- Selection, placement, and orientation of new district personnel, and
- Development and coordinating district-wide educational programs with Little Ferry.

Effective July 1, 2018, the District reassigned petitioner to the DC title, established by the District's Board of Education (BOE) on May 23, 2018. The DC position included the same qualifications. Yet, the goal changed from coordination of the educational program "within the school" to "within the District." Moreover, the DC now reported to the superintendent, not the principal. The DC title now excluded the obligations of "coordinating major [Jr. Sr. High School] events (BTSN, parent-teacher conferences, sports dinner academic awards, etc.)" and the "supervision of departments as assigned." All other performance responsibilities of the AP/CC title remained the same for the DC position, including district-wide duties.

Given petitioner's service under the promotional title of assistant principal from January 1, 2016, until June 30, 2018, she attained tenure as an assistant principal.

On November 14, 2018, the BOE approved a revised job description for the DC, still noting that the position required a valid New Jersey Principal Certificate. The job description provided detailed and expanded performance responsibilities under designated headings of "curriculum and instruction," "meetings and committees," "constructive interaction with staff," "information and resources," "District Testing Coordinator," and "other" responsibilities. The District delineated thirty-four

performance responsibilities for this role compared to the fifteen listed under the May 23, 2018, job description, or the seventeen listed for the 2017 position. Even though more expansive, the 2018 job description was comparable to the prior roles. In other words, the previous duties were more general, but would broadly encompass the same tasks.

The District again employed petitioner as the Director of Curriculum and Instruction (DCI) from July 1, 2019, until June 30, 2020. The District used the DC and DCI titles interchangeably until creating a different tile in 2020. The District's organizational chart places the DCI directly below the superintendent of schools.

On September 11, 2019, petitioner corresponded to all District K–12 principals and supervisors regarding district-wide procedures for teaching staff evaluations and observations.

On April 24, 2020, the superintendent of schools verbally informed petitioner that she would be recommending petitioner's removal as DC and reassignment to the Assistant Principal, Attendance, and Discipline (APAD) title for the 2020–21 school year. Petitioner did not agree to her transfer.

On May 4, 2020, the superintendent provided written notification to petitioner of her transfer from the DC position to the APAD job.

On May 21, 2020, the superintendent posted the DC job, noting that the title required a valid New Jersey Administrative Certificate for a "district-level administrative" position. Qualifications now also included:

- Extensive knowledge of educational laws.
- Experience in grant writing.
- Ability to analyze statistical data and present findings to the public.

- Knowledge of State compliance regulations and preparation of compliance reports.
- Ability to work with diverse populations.

On June 10, 2020, the BOE approved the job description for the DCIO title replacing the DC position, advising that the role required either the New Jersey Administrative Certificate or the Principal Certificate. The November 1, 2018, and June 10, 2020, performance responsibilities only differed slightly, with thirty-eight duties in the new narrative. However, despite mirroring the new role qualifications identified in the May 20, 2020, posting, including grant writing, statistical data analysis, and preparation of State compliance reports, the June 10, 2020, performance responsibilities failed to list these duties.

Because the DCIO position is an unrecognized title, the Bergen ECS must approve the District's request to use the title and identify the appropriate certificate needed for the position under N.J.A.C. 6A:9B-5.5. In September 2020, the District submitted its proposal and revised job description for the title to the ECS, encompassing all qualifications listed in the May 21, 2020, posting. The District maintains that any delay in submitting the title for ECS approval was due to difficulties in planning for schools' re-opening during the COVID-19 pandemic. The revised description now included an "operations" section noting that the DCIO would develop programs to "support the District's commitment to social justice and to ensure an accessible, inclusive, diverse, and equitable educational environment." The "operations" section also required the analysis of statistical data, preparation of State compliance reports, and availability to assume the superintendent's duties in the superintendent's absence. Lastly, performance responsibilities included a section entitled "grant writing."

On September 16, 2020, the Bergen ECS approved the title and determined that the position required a school administrator endorsement. On that same date, the BOE approved the corrected description for the DCIO title.

Petitioner applied for the DCIO position but was not selected.

The District appointed a non-tenured staff member to the DCIO title.

On November 19, 2020, the Board made an OPRA request for “correspondence from Robert Higgins to all Executive County Superintendents regarding the certification necessary to be a Director during the period of June 5, 2017 through June 5, 2018.”

On December 1, 2020, the State denied the request, stating that no such record was made or maintained by the DOE.

On December 3, 2020, petitioner made a similar OPRA request for “correspondence from the Office of Certification and Induction and/or Robert Higgins to the State County Executive Superintendent offices regarding service in the title of ‘director’ under either the chief school administrator or principal endorsement between the months of May 2017 and September 2017.” Petitioner’s request also included background information regarding the “confidential draft” letter and seeking the final official letter.

On December 21, 2020, petitioner received a copy of the June 9, 2017, e-mail as a DOE government record responsive to the OPRA request.

DISCUSSION AND CONCLUSIONS OF LAW

Summary-Decision Standard

A party may move for summary decision upon all or any of the substantive issues in a contested case. N.J.A.C. 1:1-12.5(a). The motion shall be served with briefs, with or without affidavits. When the filed papers and discovery, together with any affidavits, show that no genuine issue of material fact exists and that the moving party is entitled to prevail as a matter of law, the judge may grant the motion. N.J.A.C. 1:1-12.5(b). When

such a motion is made and supported, an adverse party, to prevail, must submit an affidavit setting forth specific facts showing that a genuine issue of material fact exists that can only be determined in an evidentiary proceeding. Ibid.

Even though a statute calls for a “hearing,” where a motion for summary decision is made and supported by documentary evidence and where the objector submits no evidence to demonstrate that a genuine issue of material fact exists, the motion procedure constitutes the hearing and no trial-type hearing is necessary. Contini v. Newark Bd. of Educ., 286 N.J. Super. 106, 120–21 (App. Div. 1995), certif. denied, 145 N.J. 372 (1996).

To determine whether a genuine issue of material fact exists that precludes summary judgment, the motion judge must consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to demonstrate that the moving party is entitled to a judgment as a matter of law. Brill v. Guardian Life Ins., 142 N.J. 520, 540 (1995).

Moreover, even if the non-movant comes forward with some evidence, the court must grant summary judgment if the evidence is “so one-sided that [the movant] must prevail as a matter of law.” Ibid. at 536 (citation omitted). If the non-moving party’s evidence is “merely colorable or is not significantly probative,” the judge should not deny summary judgment. Bowles v. City of Camden, 993 F. Supp. 255, 261 (D.N.J. 1998).

In this case, no genuine issue as to the material facts exists, and the only question presented is whether petitioner obtained tenure in the title of director. More pointedly, no genuine issue exists that petitioner does not possess a New Jersey Administrative Certificate with a school administrator endorsement or whether she held a position with district-wide responsibilities from September 1, 2017, through June 30, 2020. During this period, petitioner possessed a principal endorsement, and the District undeniably only required the principal endorsement. Moreover, the District created the unrecognized title of DCIO for the 2020–21 school year, ultimately requiring a school

administrator endorsement, and hired a non-tenured staff member to serve in that role despite petitioner's application for the position. Since these facts are clear and undisputed, I **CONCLUDE** that this case is ripe for summary decision.

Tenure Requirements

Tenure laws, N.J.S.A. 18A:28-1 to -18, define the conditions under which teaching staff members can attain the security of tenure, and seek to aid "the establishment of a competent and efficient school system by affording teaching staff members 'a measure of security in the ranks they hold after years of service.'" Carpenito v. Rumson Bd. of Educ., 322 N.J. Super. 522, 528–29 (App. Div. 1999) (quoting Viemeister v. Prospect Park Bd. of Educ., 5 N.J. Super. 215, 218 (App. Div. 1949)).

Courts describe tenure as a "statutory right" imposed upon a teaching staff member's contractual employment status. Zimmerman v. Newark Bd. of Educ., 38 N.J. 65, 72 (1962), cert. denied, 371 U.S. 956 (1963). Indeed, the "right to tenure is created and governed entirely by statute." Breitwieser v. State-Operated Sch. Dist. of Jersey City, 286 N.J. Super. 633, 637 (App. Div. 1996).

Under N.J.S.A. 18A:28-5(a), teaching staff members must hold certificates required by their positions for a requisite time to be protected by tenure laws:

The services of all teaching staff members employed prior to the effective date of P.L.2012, c.26 (C.18A:6-117 et al.) in the positions of teacher, principal, . . . assistant principal, vice-principal, assistant superintendent, and all school nurses . . . and such other employees as are in positions which require them to hold appropriate certificates issued by the board of examiners, serving in any school district or under any board of education, excepting those who are not the holders of proper certificates in full force and effect . . ., shall be under tenure during good behavior and efficiency and they shall not be dismissed or reduced in compensation except for inefficiency, incapacity, or conduct unbecoming

such a teaching staff member or other just cause . . . after employment in such district or by such board for:

- (a) Three consecutive calendar years . . . ; or
- (b) Three consecutive academic years, together with employment at the beginning of the next succeeding academic year; or
- (c) The equivalent of more than three academic years within a period of any four consecutive academic years.

[Emphasis added.]

Moreover, under N.J.S.A. 18A:28-6(b), a tenured or tenure-eligible teaching staff member promoted or transferred to another position will not obtain tenure until (1) the expiration of two consecutive calendar years of employment in the new position; or (2) employment in the new position for two academic years and at the commencement of the next academic year; or (3) employment within any three consecutive academic years equaling more than two academic years. Also, if service in the promotional title ceases prior to the necessary period of time to attain tenure, then “the period of employment in such new position shall be included in determining the tenure and seniority rights in the former position held.” N.J.S.A. 18A:28-6(b).

Accordingly, to gain tenure a teaching staff member must: (1) work in a position that requires a teaching certificate; (2) hold the appropriate certificate; and (3) serve the requisite period of time. Spiewak v. Rutherford Bd. of Educ., 90 N.J. 63, 74 (1982).

Under N.J.A.C. 6A:9B-5.1(a), “any person employed as a teaching staff member by a district board of education shall hold a valid and appropriate certificate.” Indeed, N.J.S.A. 18A:28-5 excludes from tenure protection those teaching staff members “who are not the holders of proper certificates in full force and effect.” Also, N.J.S.A. 18A:28-4 provides that “[n]o teaching staff member shall acquire tenure in any position in the

public schools . . . who is not the holder of an appropriate certificate for such position, issued by the State Board of Examiners [State Board], in full force and effect”

The State Board issues certificates under rules and regulations prescribed by the State Board of Education. N.J.S.A. 18A:6-38. Under N.J.A.C. 6A:9B-5.3(a), the State Board issues three categories of educational certificates: Instructional, Administrative, and Educational Services. Further, the State Board designates endorsements for each type of certificate, identifying the specific area in which a certificate holder has authority to serve. Employment in a particular assignment requires that the educator hold the appropriate endorsement. Nelson v. Old Bridge Bd. of Educ., 148 N.J. 358, 363 (1997).

Here, the issue surrounds the required endorsement under an Administrative Certificate to perform the duties of the AP/CC and the DC. Under N.J.A.C. 6A:9B-12.3(a), an individual authorized to serve in “any position that involves services as a district-level administrative officer” must possess an endorsement as a school administrator. (Emphasis added.) Such positions include superintendent, assistant superintendent, and director. This endorsement also allows the holder to serve as a principal or supervisor. Holders of this endorsement can “[p]rovide educational leadership by directing the formulation of districtwide goals, plans, policies, and budgets, by recommending their approval by the district board of education and by directing their districtwide implementation.” Moreover, school administrator endorsement holders have the authority to “[r]ecommend for approval by the district board of education all staff appointments and other personnel actions,” as well as to “[d]irect school district operations and programs,” “[s]upervise and evaluate building administrators and central office staff, including school business administrators,” and “[o]versee the administration and supervision of school-level operations, staff, and programs.”

Petitioner holds a principal endorsement, but no school administrator endorsement. Under N.J.A.C. 6A:9B-12.3(b), “any position that involves service as an administrative officer of a school or other comparable unit within a school or school

district” requires a principal endorsement. (Emphasis added). Such positions include assistant superintendent for curriculum and instruction, principal, assistant principal, vice principal, and director. The holder of a principal endorsement can also serve in the position of supervisor. Principal endorsement holders have authority to “[p]rovide educational leadership by directing the formulation of goals, plans, policies, budgets, and personnel actions of the school or other comparable unit, by recommending them to the chief district administrator, and by directing their implementation in the school or other comparable unit.” Also, such endorsement holders can “[d]irect and supervise all school operations and programs,” “[e]valuate school staff,” and “[d]irect the activities of school-level supervisors.”

The District contends that petitioner’s district-wide duties commencing September 1, 2017, required a school administrator endorsement until June 30, 2020. Without that endorsement, service in those roles, director or not, cannot count toward tenure. Thus, the District maintains that petitioner’s length of service falls short of attaining tenure. Moreover, while the District required only the principal endorsement, its error does not absolve petitioner of the need to possess the school administrator endorsement. Indeed, the District asserts that if petitioner’s position were correct, this would ignore the difference between an administrator with district-wide responsibilities and a principal without district-wide authority. In essence, petitioner’s view would mean that no director position would require a director to hold the administrator’s endorsement to obtain tenure.

The duties performed, and not the title of a position, are controlling to ascertain tenure accrual. See Christie v. Bd. of Educ. of E. Orange, 1985 S.L.D. 307 (Comm’r). Indeed, the analysis focuses on the job descriptions’ duties to determine the certification and endorsement requirements of those assignments. Duva v. State-Operated Sch. Dist. of Jersey City, EDU 9801-98, State Bd. of Educ. (March 6, 2002), <https://njlaw.rutgers.edu/collections/oal/>.

The analysis in Duva is instructive because the State Board addressed the unrecognized director's title and how to determine what endorsement applies to that role. In Duva, the petitioner (Duva) served as a director for the Jersey City school district (Jersey City) from 1980 until 1998, holding both an administrator and a supervisor endorsement until the school district eliminated his position. Because he served as a director, Duva claimed that he acquired tenure rights entitling him to employment as a supervisor over any non-tenured individuals. The administrative law judge (ALJ) "concluded that [Duva] had achieved tenure as a 'director,' finding that a directorship constituted a distinct position for tenure purposes." Even though Duva possessed a supervisor endorsement, the ALJ determined that Duva's tenure rights from his service as a "director" did not "permit him to claim a supervisory assignment" because "director" and "supervisor" were "separately tenurable position[s]."

The State Board disagreed, holding that because "director" and "supervisor" are not explicitly listed in N.J.S.A. 18A:28-5 "there is no basis to hold that these assignments constitute 'separately tenurable positions.'" The State Board explained that N.J.S.A. 18A:28-5 initially defines the "scope" of tenurable positions, providing that "an individual must be a teaching staff member serving either in a capacity specifically designated in the statute or serving in a 'position' requiring him to hold an appropriate certificate in order to be eligible to achieve tenure." See also Ellicott v. Frankford Twp. Bd. of Educ., 251 N.J. Super. 342, 347 (App. Div. 1991).

Further, the State Board clarified that "the starting point for determining the scope of [Duva's] tenure protection is the certification that was required . . . to serve in the capacity" in which the school district employed him. Moreover, "[b]ecause [Duva's] service as a 'director' was in an unrecognized position title," examination of Duva's duties under the job description is necessary "to ascertain the certification requirements of those assignments." The State Board recognized that this determination usually fell within the responsibility of the county superintendent. However, because Jersey City did not submit Duva's positions to the county superintendent, the State Board exercised

its jurisdiction to determine the issue, having “ultimate administrative authority to determine certification.”

In reviewing the job descriptions for the director assignments held by Duva, the State Board “conclude[d] that the duties of those assignments were of such character as to require that the individual serving in them possess an Administrative Certificate with an endorsement as a school administrator . . . to [statutorily] fulfill such functions.” The State Board acknowledged that under N.J.A.C. 6:11-9.3 (now N.J.A.C. 6A:9B-12.3), the school administrator and principal endorsements authorize service as a “director.” Still, the State Board determined that “an Administrative Certificate with an endorsement as a principal would not constitute appropriate certification,” because “every job description under which [Duva] served involved district-level responsibilities,” and the principal endorsement would not have authorized him to fulfill those responsibilities.

However, because Duva held a school administrator endorsement while serving as a director, the State Board found that “he fulfilled the statutory requirements of N.J.S.A. 18A:28-5.” Moreover, “[Duva’s] tenure protection under his Administrative Certificate extended to all assignments for which he was qualified by virtue of possessing a supervisor’s endorsement,” and, therefore, “upon abolishment of his director’s assignment, [Duva] was entitled to be employed in assignments requiring a supervisor endorsement in preference to any non-tenured individuals.” In other words, Duva earned tenure under his school administrator endorsement authorizing district-wide responsibilities, which extended to other assignments, such as a supervisor, for which he held an appropriate endorsement. See also N.J.A.C. 6A:9B-12.3(a) (holders of a school administrator endorsement may serve as a principal or supervisor).

The District primarily relies upon Perna v. State-Operated School District of Paterson, EDU 09761-09, Initial Decision (November 10, 2011), aff’d, Comm’r (January 4, 2012), <http://njlaw.rutgers.edu/collections/oal/>, which follows Duva’s conclusions regarding the scope of school administrator endorsements. In Perna, the

Commissioner held that although Perna served in various district-wide director positions over the requisite three years, Perna did not earn tenure because he failed to possess the required school administrator endorsement. See also City Ass'n of Supervisors & Adm'rs v. State-Operated Sch. Dist. of Newark, EDU 00849-13, Initial Decision (August 27, 2014), <https://njlaw.rutgers.edu/collections/oal/>, adopted, Comm'r (August 13, 2015),¹ <https://nj.gov/education/legal/> (where the ALJ explained in EDU 00849-13 that “the principal endorsement is intended to authorize its holder to perform school building level administrative functions,” while the administrator endorsement holder is “responsible for . . . tasks at the central office or district-wide level”).

As in this case, Perna's deciding issue was whether a principal endorsement was appropriate for service in various district-wide director positions. Similarly, the Paterson school district also failed to require the correct administrator endorsement for district-wide assignments. Regardless, the Commissioner held that the staff member must ensure that he or she has the proper endorsement for the position even where a district “improperly assigned the employee duties for which the employee is not certificated.” Perna, EDU 09761-09, Comm'r, <http://njlaw.rutgers.edu/collections/oal/>. In essence, statutory requirements establish tenure by holding the “correct certificate and endorsement” for the position rather than by “intentional or unintentional actions of local school districts.” Ibid.; see also Ledwitz v. Manalapan-Englishtown Bd. of Educ., 1988 S.L.D. 2497 (St. Bd.), aff'd, No. A-2861-87 (App. Div. Feb. 16, 1989) (holding that it is the “primary responsibility” of the staff member to obtain appropriate certification). In Perna, the Commissioner confirmed that he had discretion to send controversies to the OAL, and that an ALJ can make determinations about the appropriate certification for the Commissioner’s consideration.

Moreover, a board of education does not have the authority to establish certification requirements that contradict the tenure laws. Jennings v. Bd. of Educ. of

¹ Initially, the Commissioner remanded the case for additional fact-finding, but later affirmed both Initial Decisions (EDU 00788-15, Initial Decision on Remand of EDU 00849-13 (July 13, 2015), <https://njlaw.rutgers.edu/collections/oal/>, adopted, Comm'r (August 13, 2015), <https://nj.gov/education/legal/>).

Highland Park, 1989 S.L.D. 1085 (St. Bd.). In Jennings, the petitioner (Jennings) held an endorsement to teach physical education but did not possess an endorsement to teach health, despite being hired to teach health. However, the State Board concluded that the school district's "improper action in assigning [Jennings] to teach health without the appropriate certification cannot be used to excuse [Jennings'] failure to acquire a health endorsement." Further, any reliance on the school district's actions was not reasonable given the "clear regulations to the contrary." Under the incorrect endorsement, Jennings' service did not count toward tenure despite his teaching health and the school district's representation that Jennings acquired tenure.

Petitioner here disagrees that she did not acquire tenure, noting that courts interpreting the tenure laws should "look to the substance rather than the form" of the title. Viemeister, 5 N.J. Super. at 218 (holding that a district cannot avoid tenure laws by abolishing one title and creating a substantially similar position under a different name). Petitioner served as the AP/CC from September 1, 2017, until June 30, 2018, and as the DC from July 1, 2018, through June 30, 2020. Petitioner maintains that she performed these services under a principal endorsement that contemplates the district-wide responsibilities she undertook in these roles, regardless of any limitations placed on an individual possessing only a principal endorsement. Indeed, the "principal" endorsement permits service as a "director" and "assistant superintendent for curriculum and instruction." Given petitioner's service as a "director" for the requisite time, she asserts that she earned tenure entitling her to the DCIO position. The District abolished the Assistant Superintendent for Curriculum and Instruction title and replaced it with variations of the same job. Thus, the District violated her tenure rights in hiring a non-tenured staff member for the DCIO job. Petitioner asserts that the District's attempt to change job titles while maintaining the position's substance should not discredit petitioner's service.

To support her position, petitioner relies upon Jacquelin v. Dennis Township Board of Education, EDU 9335-10, Initial Decision (November 16, 2012), aff'd, Comm'r (December 21, 2012), <http://njlaw.rutgers.edu/collections/oal/>. Petitioner highlights that

the Commissioner upheld the Jacquelin decision after Perna, and considers this decision to be analogous to her situation. In Jacquelin, the ALJ concluded that “[w]hile the expressed scope of authority granted to ‘directors’ under the administrator’s endorsement versus a principal’s endorsement is not perfect, clearly the [L]egislature authorized the holder of a principal’s endorsement to be a ‘director’ with significant authority.” Moreover, “[t]o upset the district’s management alignment on a questionable interpretation of the term ‘director’ as it appears in both section (a) and (b) of the statute in question, after [the employee] has been in that title for [seven] years, would be a disservice to the district, the staff and students.”

However, Jacquelin is distinguishable from this case. In 2005, the Dennis school district (Dennis) hired the current director of special education. In 2010, Dennis eliminated Jacquelin’s director of curriculum and instruction position in a reduction in force, and Jacquelin only then contested the director of special education qualifications. Jacquelin possessed an administrator endorsement while the holder of the director of special education title did not. Yet, the current director of special education held a principal certificate with an endorsement as a teacher of the disabled. Significantly, the Commissioner concurred with the ALJ, noting that “the position of Director of Special Education/Child Study Team . . . did not require a School Administrator Endorsement because the position was not a district-wide administrative position.” (Emphasis added.) Indeed, special-education services may be a “comparable unit within a school or district,” as the director may have responsibilities to students throughout the district, but not the district as a whole. However, despite petitioner’s urging, a DC cannot be considered an “administrative head” of a “unit of curriculum and instruction within the school district” without resolving the position’s duties. Indeed, all positions held by petitioner included clear district-wide administrative responsibilities, and Jacquelin does not support petitioner’s entitlement to tenure.

Petitioner also relies upon Still v. State-Operated School District of Camden, EDU 14246-16, Initial Decision (January 4, 2017), aff’d, Comm’r (February 21, 2017), <http://njlaw.rutgers.edu/collections/oal/>. In Still, the Commissioner noted that “holding

[Still] accountable in any way for the Board's administrative failure would contravene the principles of fairness and equity." Still served in the Camden school district (Camden) for nearly fourteen years as the technology coordinator, a position for which Camden required a teaching certificate. For less than two school terms, Still then served Camden in the lead educator title under a provisional principal certificate. Camden terminated Still as lead educator, advising her that she had no entitlement to other positions within Camden. Specifically, Still did not accrue tenure under the teaching certificate because technology coordinator was a non-instructional position. The ALJ rejected this argument, concluding that Camden required a teaching certificate, that Still possessed the certificate, and that Still accrued sufficient time to earn tenure under the certificate. Here, petitioner held the certificate required by the District's approved job descriptions, and, therefore, petitioner maintains that she earned tenure as a director under the principal endorsement.

Yet, Still also presents a different situation. In Still, Camden required a teaching certification, and Still possessed this certificate. Unlike this case, Camden did not assign duties to Still for which Still did not hold a required certificate or endorsement. The ALJ concluded that Camden's later attempt to dispute Still's tenure as a teacher because the technology coordinator position was "non-instructional" was unfair because Still held a teaching certificate. Indeed, the Commissioner rejected Camden's arguments regarding Still's lack of classroom instruction as a technology coordinator because "a teaching staff member has tenure in all positions for which his instructional certificate qualifies him." Still, EDU 14246-16, Comm'r Decision, <http://njlaw.rutgers.edu/collections/oal/> (quoting Ellicott, 251 N.J. Super. at 349). On the contrary, the "director" position is an unrecognized title under N.J.S.A. 18A:28-5, where the determination of the necessary endorsement requires analysis of the duties performed in that role. Petitioner does not hold a school administrator endorsement authorizing her to perform district-wide tasks, whereas Still possessed a teaching certificate qualifying her to teach. Therefore, Still does not support petitioner's entitlement to tenure.

While petitioner relies upon a confidential e-mail to all ECS and certification personnel to support that a principal endorsement permits the holder to perform district-wide administrative responsibilities, the regulations do not allow those activities. To date, the Department of Education proposed no administrative code changes to effectuate a clarification of permitted duties under the principal or school administrator endorsements. Under N.J.S.A. 52:14B-4(a), such code amendments would require publication and a public comment period before adoption. In Metromedia, Inc. v. Director, Division of Taxation, 97 N.J. 313, 331–32 (1984), the Supreme Court explained that administrative guidance must often occur by rule-making, including when it “prescribes a legal standard or directive that is not otherwise expressly provided by or clearly and obviously inferable from the enabling statutory authorization,” or “reflects an administrative policy that . . . was not previously expressed in any official and explicit agency determination, adjudication or rule.”

Moreover, under N.J.S.A. 52:14B-3a(b), “[n]o State agency shall utilize regulatory guidance documents that have not been adopted as rules . . . unless the agency makes such documents readily available to the regulated community through appropriate means, including but not limited to posting in a prominent place on the website for the agency.” Further, a regulatory guidance document not yet adopted as a rule cannot “impose any new or additional requirements that are not included in the State or federal law or rule that the regulatory guidance document is intended to clarify or explain.” N.J.S.A. 52:14B-3a(c)(1).

The e-mail contains a confidential designation and is not posted on the DOE website or other DOE source. Moreover, the e-mail cannot be considered readily available to the regulated community if OPRA requests yield differing results concerning its status. Significantly, the clarification would permit a principal endorsement holder to effectuate district-wide responsibilities not previously authorized under the regulation; it requires rulemaking. Therefore, I **CONCLUDE** that considering the e-mail as dispositive, or even guidance, on the responsibilities allowed under the principal endorsement is not appropriate.

A review of the various job descriptions reveals that, while serving as an AP/CC and DC, petitioner was responsible for planning and implementing district-wide professional-improvement plans, acting as the “District Testing Coordinator,” and selecting and placing new personnel in the District. Even though the DC’s and AP/CC’s duties appear comparable, the focus is whether petitioner performed district-wide responsibilities or did not. Like in Duva and Perna, petitioner’s obligations specified in each job description under which she served involved district-level tasks. However, unlike in Duva, petitioner does not possess a school administrator endorsement.

Although a principal endorsement lists “director” as a position under the endorsement, N.J.A.C. 6A:9B-12.3(b) provides that “[t]he principal endorsement . . . [applies to] service as an administrative officer of a school or other comparable unit within a school or school district.” The job descriptions for the titles held by petitioner demonstrate that petitioner’s duties extended beyond the school and involved service as a district-level administrative officer outside the scope of petitioner’s endorsement as a principal. Like in Perna, petitioner did not possess the administrator endorsement while serving in director positions with district-wide responsibilities. Therefore, I **CONCLUDE** that petitioner did not earn time toward tenure in the AP/CC or the DC position given her district-wide responsibilities without a school administrator endorsement. Moreover, I **CONCLUDE** that petitioner was primarily responsible for ensuring that she possessed the appropriate certification and endorsement for the positions she held, but she did not.

Even if petitioner obtained tenure, the DCIO title must be substantially similar to the DC position she held to provide petitioner with tenure rights over the non-tenured staff member. The District points to Denney v. Passaic County Regional High School District #1, 131 N.J. 626, 640 (1993), which held that “[a] mere overlap in duties . . . does not mean that two positions are equivalent for tenure purposes. If a newly created position is similar to a tenure holder’s abolished position but also requires additional

duties or different responsibilities, then the newly-created position is not considered to be substantially similar to the former position.”

Undeniably, all roles involved district-wide responsibilities. However, the District highlights that the May 21, 2020, posting and the June 10, 2020, job description required different qualifications above and beyond those in the previous DC title. The new title involved operational tasks, including preparation of State compliance reports and implementing a diversity plan in educational programming, and required the availability to step into the superintendent’s role in the superintendent’s absence. Notably, the job also required knowledge and experience in grant writing. Yet, the June 10, 2020, performance responsibilities largely matched the duties in the November 1, 2018, job description, inadvertently not addressing the new tasks. Regardless, the job description submitted for ECS approval did not change the intended qualifications, but only included operations and grant-writing duties to match the new requirements. Petitioner’s suggestion that the District added new duties to evade tenure obligations after filing her petition is unsupported. Instead, I **CONCLUDE** that the evidence demonstrates that the District intended the DCIO title to include distinct operational and grant-writing tasks, but the June 10, 2020, responsibilities were incomplete, and later corrected.

Petitioner also asserts that administrative errors do not allow school districts to avoid tenure rights accrued by individuals. Indeed, a school district that terminates an employee prior to earning tenure but allows the individual to remain in that role, whether under a different title or not, cannot discount time after discharge for tenure purposes. See *Platia v. Bd. of Educ. of Hamilton, Mercer Cty.*, 434 N.J. Super. 382, 393 (App. Div. 2014) (citation omitted) (holding that “because Platia was employed for the equivalent of more than three academic years . . . ,’ tenure was conferred upon her”). Similarly, an “administrative oversight” that allowed an individual to complete the requisite period needed for tenure did not preclude that individual from earning tenure protections. Cohen v. Bd. of Educ. of East Brunswick, OAL Dkt. No. EDU 5643-81, Initial Decision (August 11, 1982), aff’d, Comm’r (September 30, 1982). However, neither case

involves a situation where the staff member did not hold the proper certification for the position at issue. Irrespective of the delay in presenting the DCIO title to the ECS for approval, this oversight is not of the same nature. Moreover, the incomplete job description approved on June 10, 2020, does not alter the new duties intended through the additional qualifications. The job description submitted to the ECS for authorization and then approved by the BOE included other responsibilities consistent with the new qualifications. Unlike in Platia and Cullen, the District terminated petitioner, and she did not serve in the new DCIO title.

Thus, I **CONCLUDE** that the DCIO title has several distinct additional job-performance responsibilities, making it dissimilar to petitioner's DC positions for tenure purposes. Moreover, the ECS determined that the title required a school administrator endorsement, which petitioner does not hold. Accordingly, I **CONCLUDE** that the District acted consistently with tenure and seniority requirements when it selected a non-tenured staff member to serve as the DCIO, and is entitled to prevail as a matter of law.

ORDER


Given my findings of fact and conclusions of law, I **ORDER** that the District be **GRANTED** summary decision, and that petitioner be **DENIED** summary decision. I further **ORDER** that petitioner's Petition of Appeal be **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified, or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify, or reject this decision within forty-five days and

unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.



February 11, 2021

DATE

NANCI G. STOKES, ALJ

Date Received at Agency:

February 11, 2021

Date Mailed to Parties:

February 11, 2021

ljb