

COTA POSSIEN-KANIA, :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF : DECISION

THE BOROUGH OF DUNELLEN, :

MIDDLESEX COUNTY, :

RESPONDENT. :

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SYNOPSIS

Petitioner, tenured school social worker and substance awareness coordinator, contended that the Board’s assigning her to be an in-class support instructor was violative of law and code since she did not possess certification as a teacher. She sought appointment to one of two positions for which she was qualified.

ALJ determined that because the relief requested by petitioner could no longer be granted in this matter due to changed circumstances since petitioner was no longer assigned to the position of in-class support instructor, the case did not present any issue of great public importance compelling a definitive resolution. ALJ granted the Board’s motion to dismiss this matter as moot.

Noting that there was clearly a reasonable potential for recurrence of the alleged improper assignment, the Commissioner reversed the ALJ’s initial decision dismissing the matter as moot. Commissioner remanded matter to the OAL for a determination on petitioner’s underlying claim that the Board’s assignment of her to an in-class support instructor position was improper.

AUGUST 9, 1999

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The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner requested and was granted an extension of time within which to file exceptions to the Administrative Law Judge’s (ALJ) decision. Such exceptions and the Board’s reply thereto were submitted in accordance with the modified schedule.

Petitioner’s exceptions aver that, although the ALJ correctly recounted the law with respect to mootness, he, nonetheless, misapplied it to the within matter. (Petitioner’s Exceptions at p. 3) In this regard, she claims that the ALJ failed to recognize that because the Board maintains that it has the right to assign petitioner to the in-class support position in the future if it so chooses, “we have a situation that is likely of repetition, a reason relied upon by the courts in determining that an issue is not moot.” (*Id.*) Petitioner cites a number of New Jersey Supreme Court and Appellate Division cases which were dismissed for mootness for the proposition that central to each of them was the court’s determination that the particular situation

challenged was not likely to recur. (*Id.* at p. 4) Such is not the case here, she argues, since “the Superintendent of Schools clearly testified at the hearing that he would reassign the Petitioner to the in-class support position at any time he deemed it necessary,” and, therefore, by the Board’s own admission, the situation is capable of repetition. (*Id.* at pp. 5-6) Petitioner further buttresses her argument that the instant matter is not moot by observing that, considering the customary time lag in the adjudication of administrative matters, “a challenge to any assignment of a year’s duration would always be rendered moot simply by the passage of time, allowing repeated assignment of Petitioner outside the scope of her certificate and endorsements, so long as each assignment was of no more than one year’s duration.” (*Id.* at p. 3) Petitioner, therefore, urges that the initial decision be reversed and this matter returned to the OAL for hearing.

In reply the Board attempts to discount petitioner’s argument and her cases cited for the proposition that a finding by the court that an action is not capable of repetition is a prerequisite to a finding that an issue is moot, asserting that none of the cases identified *specifically* so states. (emphasis added) (Board’s Reply Exceptions at p. 5) As an example, it points to *Gayder v. Spiotta*, 206 N.J. Super. 556 (App. Div. 1985) where it posits “the memorandum being challenged **could** have been re-adopted, but the court found there was ‘nothing to suggest that the substance of that memorandum [was] *likely* to be adopted.’” (emphasis in text) (*Id.*) The Board further urges that even if the Commissioner were to agree with petitioner and accept such a finding as a requisite for mootness, affirmance of the ALJ’s decision is still mandated here. It argues, “[d]espite Petitioner’s attempt to overstate the testimony of Dr. Travlos, there is absolutely no foundation in the record on which to base a finding that the situation involved is one that *is* likely of repetition. This is pure surmise and speculation by Petitioner and cannot serve as the basis for rejecting the ALJ’s Initial Decision.”

(emphasis in text) (Board's Reply Exceptions at p. 7) Moreover, it advances, just because the Board contends that it has the right to reassign petitioner to this position in the future does not create a current controversy. Clearly, it advances, if such an assignment were to occur in the future, and petitioner continued to believe it was inappropriate, it could be addressed at that time. (*Id.* at pp. 7-8) The Board, therefore, urges adoption of the initial decision.

Upon careful and independent review of the record in this matter, the Commissioner determines to reverse the initial decision of the ALJ, finding, instead, that petitioner's reassignment does not render moot her action challenging the Board's assignment of her to an in-class support instructor position since this alleged improper action, under the circumstances here, is one capable of repetition yet evading review. *Cain v. New Jersey State Parole Board*, 78 N.J. 253, 255 (1978), citing *State v. Allen*, 73 N.J. 132, 138-139 (1977). The Commissioner's review persuades him that requisite to a finding of mootness in this matter must be a conclusion that there is no reasonable expectation that the act complained of will be repeated. See *Galloway Township Board of Education v. Galloway Township Education Association*, 78 N.J. 25 (1978). Such is not the case here. Notwithstanding the attestations of the Board with respect to the remoteness of the possibility, nothing in the record of this matter provides any assurance that the specific action of the Board complained about will not be repeated in the future. To the contrary, because of the existence of a continuing relationship between the parties and the specific admission of the Superintendent that he would not hesitate to assign petitioner to the in-class support position anytime he deemed it necessary, the Commissioner is persuaded that there is clearly a reasonable potential for recurrence of the alleged improper assignment.

Accordingly, the initial decision of the OAL dismissing this case as moot is reversed and this matter is remanded to the OAL for a determination on petitioner's underlying claim that the Board's assignment of her to an in-class support instructor position was improper.\*

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

AUGUST 9, 1999

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\* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A. 18A:6-27 et seq.* and *N.J.A.C. 6:2-1.1 et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.