

NICHOLAS DUVA, :  
 :  
 PETITIONER, :  
 :  
 V. : COMMISSIONER OF EDUCATION  
 :  
 STATE-OPERATED SCHOOL : DECISION  
 DISTRICT OF THE CITY OF :  
 JERSEY CITY, HUDSON COUNTY, :  
 :  
 RESPONDENT. :  
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SYNOPSIS

Petitioner alleged that the District violated his tenure and seniority rights when it abolished his position as Director of Research, Planning and Evaluation and employed him as a school psychologist. Petitioner asserted entitlement to a supervisory position.

ALJ found that petitioner was tenured in the separately tenurable position of director and that he never served in the position of supervisor. Consequently, based upon the applicable law, the ALJ concluded that the tenure rights he accrued in the position of director could not be transferred to the separately tenurable position of supervisor. ALJ determined that petitioner did not obtain tenure in the position of supervisor absent experience and time served in that position. Moreover, a comparison of the job descriptions for the director position held by petitioner and those of the supervisor positions held by intervenors did not show similarities. Accordingly, the ALJ concluded that petitioner was not entitled to the supervisor positions held by the intervenors. (*Nelson* New Jersey Supreme Court decision; *Howley*; and *Brenner*) Petition was dismissed.

Commissioner agreed with and adopted as his own the recommendation of the ALJ to dismiss the petition essentially for the reasons set forth in the Initial Decision.

OAL DKT. NO. EDU 9801-98  
AGENCY DKT. NO. 431-9/98

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The record and Initial Decision issued by the Office of Administrative Law have been reviewed. Petitioner’s exceptions and respondent’s reply exceptions, in which Intervenors Bartley and Mays-Stokes join, were timely filed pursuant to *N.J.A.C.* 1:1-18.4.

Petitioner’s exceptions urge that the Administrative Law Judge’s (ALJ) finding that, as a matter of law, service in the title of director restricts the tenure rights of an individual to other positions with the title of “director” is contrary to the plain language of *N.J.S.A.* 18A:28-5 and all prior decisions. In support of this assertion, petitioner essentially reiterates at length the arguments he advanced before the ALJ as part of his Brief in Support of Cross-Motion for Summary Judgment and Reply Brief which shall not be repeated herein. Additionally, he excepts to the ALJ’s reliance on *Brenner, supra*, averring that the legal conclusion in that matter is totally irrelevant to his claim because he is claiming a job as supervisor, not one as principal. As to this point, he emphasizes that the title of supervisor is not listed in *N.J.S.A.* 18A:28-5 and argues, *inter alia*, that “[b]oth the title ‘supervisor’ and the title ‘director’ were removed from the

amendments to N.J.S.A. 18A:28-5 by the legislature before passage of L. 1996, c. 58, §2. *Lisa v. Bd. of Ed., Washington Twp.*, 97 N.J.A.R. 2d (EDU) 478, 484, fn. 3. Their removal means those titles are not the ones as to which tenure must separately accrue.” (emphasis in text) (Petitioner’s Exceptions at p. 2)

Petitioner’s exceptions also argue that:

Since neither the title of director nor the title of supervisor are listed in N.J.S.A. 18A:28-5 achieving tenure in one such title allows a tenure claim to any of the others, in the absence of additional certification requirements for which particular duties are required.\*\*\*

The fact that a position claimed might have a different scope, in terms of grades or subjects, is irrelevant.\*\*\*

Since petitioner has all of the certificates required for the position of Supervisor, Special Education (Exhibit K), there is no need to even analyze the extra certificates specified in the job descriptions for Mathematics/BSIP Supervisor (Exhibit L), or Bilingual/ESL/World Languages Supervisor (Exhibit M). However, in both cases petitioner notes that instructional certificates are specified in addition to the supervisor certificate. However, since no instructional duties are listed in the job descriptions, petitioner would have a right to those two jobs as well. [*Galbraith v. Lenape Regional High School District*, 96 N.J.A.R. 2d (EDU) 396, *aff’d* N. J. Superior Court 97 N.J.A.R. 2d (EDU) 558 (App. Div.)] (*Id.* at p. 7)

Petitioner concludes his exceptions with the following statement:

Since the petitioner held an endorsement as both a School Administrator (N.J.A.C. 6:11-9.3(a)) and a Supervisor (N.J.A.C. 6:11-9.3(c)) while employed for the time required by N.J.S.A. 18A:28-5, it does not matter which endorsement was the legally correct form of licensure. The jobs as supervisor claimed by petitioner would be properly performed under either endorsement and tenure achieved under one such endorsement would extend to the other as long as the positions claimed were not specifically enumerated in N.J.S.A. 18A:28-5. Since no position as supervisor is enumerated in the statute, petitioner’s claim to one of the positions of supervisor held by non-tenured employees must be

upheld. The decision of the Administrative Law Judge must be reversed. (*Id.* at p. 8)

Respondent's reply exceptions urge affirmance of the ALJ's decision, emphasizing, *inter alia*, that petitioner never actually served in any position as supervisor; thus, the ALJ ruled that the tenure rights he accrued in the position of director could not be transferred to the separate position of supervisor. Pointing to the fact that the ALJ found that the job descriptions for the two positions petitioner is seeking showed no similarities in duties and that state code prescribes different endorsements for the positions of supervisor and director, respondent argues:

In this case, petitioner acquired tenure in the position of Director, Planning/Evaluation/Grants, a position involving the conduct of studies, gathering of data and writing of proposals for funding, but entailing no evaluation or guidance of staff engaged in the delivery of educational services to students (See Job Description, Exhibit F). He never served a day in any position of supervisor for any of the educational programs of the District (such as, special education, mathematics, bilingual education, etc.) which do involve ongoing direction and evaluation of staff (See Job Descriptions, Exhibits K, L & M). Not only is the position of Director a "recognized title," it is recognized in State Code (*N.J.A.C.* 6:11-9.3(a) & (b)) as separate and distinct from the position of Supervisor (*N.J.A.C.* 6:11-9.3(c)), requiring a different endorsement (either school administrator or principal), and not the endorsement of supervisor. Therefore, since the petitioner never served in any position of Supervisor, he had no rights to such a position, as the ALJ correctly held \*\*\*. (Reply Exceptions at p. 3)

Upon careful and independent review of the record in this matter, the Commissioner agrees with and adopts as his own the recommendation of the ALJ to dismiss the petition essentially for the reasons set forth in the Initial Decision. As correctly recognized by the ALJ, the endorsement required to serve as a director is that of school administrator or principal, *N.J.A.C.* 6:11-9.3(a) and (b). The supervisor endorsement, *N.J.A.C.* 6:11-9.3(c), does

not authorize service as director. Moreover, petitioner never served in the position of supervisor. Consequently, in keeping with the principles articulated in *Nelson, supra*, along with the aforementioned regulations specifying the authorization for service under the endorsements of supervisor, school administrator and principal, it is found and determined that the positions of supervisor and director must be deemed to be separately tenurable, notwithstanding the fact that the Legislature removed those positions from proposed legislation prior to its enactment as *L. 1996, c. 58, §2*.

*L. 1996, c. 58* was introduced on June 10, 1996 and signed into law on June 28, 1996. Introduction of this legislation was specifically undertaken to remedy the April 29, 1996 Appellate Division interpretation of *N.J.S.A. 18A:28-5* in *Nelson*, which construed the language of the statute to allow, contrary to longstanding case law, supervisors who held a principal endorsement and who were subject to a reduction in force to bump into a principal position, notwithstanding that they never served in, nor acquired tenure in, a principal position. The sole purpose of the proposed legislation, which was introduced and enacted within 60 days of the court's decision, was immediate restoration of the *status quo* of prior decisional law, *i.e.* "to continue the traditional practice of providing that tenure is acquired in one of the specifically enumerated positions only if the individual has served for the requisite statutorily required period of time in that position." *L. 1996, c. 58, § 1*.

The fact that the Legislature chose at this juncture not to add "supervisor" and "director" to the list of specifically enumerated positions does not have the import petitioner suggests, that is, a deliberate legislative exclusion of these two positions from the universe of positions which are to be held separately tenurable. To the contrary, the enactment's history suggests instead a recognition that the bill as initially drafted would have added a new element to

the statute, which was neither necessary to address the issue created by the *Nelson* decision nor appropriate for legislation designed to express the intent of the Legislature with regard to an existing law so as to restore the *status quo* to its interpretation as quickly and efficiently as possible. As stated by the New Jersey Supreme Court in *Schmoll v. Creecy*, 54 N.J. 194, 203 (1969), “inaction can mean only that the Legislature did not act.” See also *Donaldson v. Bd. of Ed. of No. Wildwood*, 65 N.J. 236, 240-241 (1974).

Given the above, the Commissioner is in full agreement with the ALJ’s conclusion on page 13 of the Initial Decision that reads:

[s]ince petitioner is tenured in the separately tenurable position of director, he is not entitled to any of the supervisor positions currently held by the intervenors. While he possesses a supervisor endorsement, he has never served in the position of supervisor. The tenure rights he accrued in the position of director cannot be transferred to the separately tenurable position of supervisor. See *Nelson, supra*, 148 N.J. at 367-68. Absent experience and time served in the position of supervisor, tenure is not obtained.

Lastly, the Commissioner agrees with the ALJ that a comparison of the job descriptions for the director job held by petitioner and those of the supervisor positions at issue herein do not show similarities.

Accordingly, for the reasons well-expressed by the ALJ in the Initial Decision and as clarified herein, the Petition of Appeal is dismissed.\*

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

December 3, 1999

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\* This decision, as the Commissioner’s final determination in the instant matter, 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.