

#161-11 (OAL Decision: Not yet available online)

KIMBERLY LOBELLO, :
PETITIONER, :
V. : COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE : DECISION
WARREN HILLS REGIONAL SCHOOL :
DISTRICT, WARREN COUNTY, :
RESPONDENT. :

SYNOPSIS

Petitioner's position as a Teacher of Psychology was eliminated in a reduction in force (RIF) at the end of the 2009-2010 school year. Petitioner contended that her tenure rights were violated when her position was abolished and the Board retained non-tenured chemistry teachers despite petitioner's claim to those positions. On the date that petitioner's position was abolished by the Board – May 11, 2010 – petitioner held a standard instructional certificate with an endorsement as a Teacher of Psychology. On May 26, 2010, petitioner was issued an instructional certificate with an endorsement as a Teacher of Chemistry.

The ALJ found that: the controlling case on this issue is *Francey v. Board of Educ. of the City of Salem*, 286 N.J. Super. 354 (App. Div.1996), in which the court found that a tenured teacher's right to re-employment may not be expanded by teaching certificates or additional instructional endorsements acquired after the date that the teacher's position was abolished through a RIF; pursuant to the findings in *Francey*, tenure rights are fixed on the date the Board passes its resolution effectuating a RIF; petitioner's position was abolished by the Board on May 11, 2010, which preceded – by approximately two weeks – the date of issuance of petitioner's second certificate to teach chemistry; accordingly, petitioner's after-acquired certificate affords her no rights to the chemistry positions presently held by non-tenured teachers in the district. The ALJ granted the Board's motion for summary decision and dismissed the petition with prejudice.

Upon a thorough and independent review of the record, the Commissioner concurred with the ALJ that *Francey* is the controlling case, and found that the petitioner's tenure rights became fixed on May 11, 2010, and the endorsement in chemistry acquired after that date is not afforded any tenure protections. Accordingly, the petition was dismissed.

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.
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April 27, 2011

OAL DKT. NO. EDU 8788-10
AGENCY DKT. NO. 155-7/10

KIMBERLY LOBELLO, :
PETITIONER, :
V. : COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE : DECISION
WARREN HILLS REGIONAL SCHOOL :
DISTRICT, WARREN COUNTY, :
RESPONDENT. :

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

In her exceptions, the petitioner argues that the Administrative Law Judge (ALJ) wrongfully found that her tenure status at the time of the Board's May 11, 2010 decision to abolish her position did not extend to the Teacher of Chemistry endorsement that the petitioner applied for on April 27, 2010.¹ The petitioner recognizes that generally teachers may not count after acquired endorsements within the scope of tenure protections; however, she argues that this rule is not absolute. In her exceptions, the petitioner points out that the Commissioner has found that tenure protections can apply to endorsements issued after a notice of a reduction in force (RIF) if the process to obtain the new endorsement was initiated prior to the RIF. *See, Albert v. Board of Education of the Scotch Plains-Fanwood Regional School District, Union County, 1997 S.L.D. (August 6, 1997)*. The petitioner further argues that the facts in this case are similar to those in *Albert*, and as such the analysis of *Albert* controls. Based on *Albert*, the petitioner

¹ It is undisputed that the petitioner had obtained tenure as a teacher in psychology, and that on May 11, 2010 the Board abolished her position pursuant to a valid reduction in force.

contends that her tenure status includes the Teacher of Chemistry endorsement – which she applied for on April 27, 2010 prior to the Board’s May 11, 2010 resolution approving the RIF – despite the fact that the endorsement was not issued until May 26, 2010.

In reply, the Board reiterates the positions advanced in its submission at the OAL, urging the Commissioner to adopt the ALJ’s determination that the petitioner’s after-acquired certificate to teach chemistry did not afford her any tenure rights. The Board argues that the petitioner’s tenure rights were fixed when the Board approved the RIF, and at that time petitioner did not hold an endorsement in chemistry. The Board also contends that the petitioner’s reliance on *Albert* is misguided, and that the ALJ properly distinguished *Albert* from the present case. The Board further argues that *Albert* was decided on very specific facts, was based on equitable considerations, and is not binding on this case. The Board maintains that the seminal case on this issue is *Francey v. Board of Educ. of the City of Salem*, 286 N.J. Super. 354 (App. Div. 1996). Under *Francey*, a tenured teacher’s rights to reemployment may not be expanded by teaching certificates or additional endorsements acquired after the date the teacher’s position was abolished through a reduction in force.

Upon review, the Commissioner concurs with the Administrative Law Judge that the Board is entitled to summary decision. On the date that the Board passed the resolution abolishing petitioner’s position, the petitioner did not hold a Teacher of Chemistry endorsement, and as a result the Commissioner finds that she did not have any tenure rights with respect to teaching positions in chemistry.

Notwithstanding the existence of *Albert*, the Commissioner further finds that *Francey* is the controlling case on this issue. In *Francey*, the court found that only the endorsements held by the teacher at the time of the Board’s decision to implement the RIF are

afforded tenure protections. *Francey, supra*, 286 N.J. Super. at 357, 361. Further, tenure rights are fixed as of the date of the RIF decision; therefore, any subsequent endorsements obtained by a teacher are not afforded any tenure protections. *Id.* at 358.

In this case, it is undisputed that when the Board voted to abolish petitioner's position on May 11, 2010, the petitioner did not hold a Teacher of Chemistry endorsement. As a result, the petitioner's tenure rights became fixed on May 11, 2010, and the endorsement in chemistry acquired after that date is not afforded any tenure protections. Finally, it is not necessary to analyze this case in conjunction with *Albert* because the bright line rule established by the Appellate Division is controlling.² Accordingly, the petition of appeal is dismissed.

IT IS SO ORDERED.³

ACTING COMMISSIONER OF EDUCATION

Date of Decision: April 27, 2011

Date of Mailing: April 28, 2011

² Although consistency in administrative rulings is generally preferred, an administrative agency is not irrevocably committed to its own precedents. The adherence to precedents in administrative proceedings is "subject to the basic notion that experience is a teacher and not a jailer." *In re Masiello*, 25 N.J. 590, 598-599 (1958) (citations omitted).

³ 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.