

VIRGINIA BUSH, :
 :
 PETITIONER, :
 :
 V. : COMMISSIONER OF EDUCATION
 :
 BOARD OF EDUCATION OF THE WARREN : DECISION
 COUNTY VOCATIONAL SCHOOL DISTRICT,
 WARREN COUNTY, :
 :
 RESPONDENT. :

SYNOPSIS

Petitioner – a tenured secretary formerly employed by the Board – sought back pay and emoluments following a 2009 Commissioner decision which found that her tenure rights had been violated when she was terminated without just cause in late 2007, and ordered her reinstatement “to a secretarial position” with back pay and emoluments, less mitigation. Concurrent with the 2009 Commissioner decision, the Board offered petitioner the only secretarial position then vacant in the district – *i.e.* secretary to the child study team (“CST secretary”) – at the same salary she had previously made. The Board also advised petitioner that since she had taken no steps to mitigate her damages by seeking employment and/or applying for unemployment compensation after her 2007 termination, it would not disburse any back pay or benefits. Petitioner did not accept the position she was offered, but instead filed the instant petition, wherein she sought resolution of the issue of back pay and emoluments.

The ALJ found, *inter alia*, that: the Superior Court, not the OAL, is the proper forum to enforce the Commissioner’s order to reinstate petitioner; petitioner made no efforts to mitigate her damages by seeking other employment or applying for unemployment benefits during the period from her termination through the date of the offer of employment as CST secretary; the burden of proving that comparable employment was available rests with the Board; the Board failed to present evidence that comparable employment existed between December 15, 2007 and April 27, 2009, and petitioner is therefore entitled to back pay for this time period; comparable employment did exist as of April 28, 2009, when petitioner was offered the position of CST secretary – a sufficiently similar position for purposes of mitigation; and more facts are necessary to accurately calculate the amount of back pay owed to petitioner. Accordingly, the ALJ ordered that petitioner be awarded back pay plus interest and emoluments for the period from December 15, 2007 to April 27, 2009, and suggested that information regarding the length of petitioner’s work year be provided to the Commissioner to facilitate the calculation of a back pay award.

The Commissioner concurred with the ALJ that: respondent did not prove that petitioner could have – but did not – mitigate her damages with similar employment between December 15, 2007 and April 27, 2009; petitioner had the opportunity to mitigate damages –but did not – when she was offered the position of CST secretary on April 28, 2009, and therefore does not qualify for back wages past April 27, 2009; and there are insufficient facts in the record to calculate the back pay award. The Commissioner 1) concluded that petitioner’s refusal of the CST position terminated her tenure rights, 2) denied her request for reinstatement, and 3) remanded the case to the OAL for fact-finding and recommendations on issues related to the amount of back pay due petitioner for the period from December 15, 2007 to April 27, 2009.

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.

February 9, 2011

OAL DKT. NO. EDU 11596-09
AGENCY DKT. NO. 209-8/09

VIRGINIA BUSH, :
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 PETITIONER, :
 :
 V. : COMMISSIONER OF EDUCATION
 :
 BOARD OF EDUCATION OF THE : DECISION
 WARREN COUNTY TECHNICAL :
 SCHOOL DISTRICT, WARREN :
 COUNTY, :
 :
 RESPONDENT. :
 _____ :

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the parties' exceptions and replies thereto.¹ For the following reasons, the Initial Decision is adopted in part, modified in part, and remanded to the OAL for further fact-finding.

In November 2007, petitioner was a tenured secretary in the office of respondent's business administrator. The instant controversy arose when, on or about November 8, 2007, respondent demanded that petitioner sign a contract containing a provision that would allow the district to terminate her upon ten business days' notice. She declined to sign the contract, advising respondent that to do so would be to abdicate her tenure rights. Respondent nonetheless fired petitioner effective December 1, 2007, paid her salary until

¹ On February 2, 2011, petitioner filed a request to submit a set of exceptions to the Initial Decision of the OAL. The Commissioner rejects same. First, the deadline for the filing of exceptions has passed. Second, on November 3, 2010 petitioner submitted a reply to respondent's exceptions. The arguments in petitioner's most recent submission could have and should have been made at that time.

December 14, 2007 and paid her benefits until April 1, 2008. It is undisputed that, subsequent to her termination, petitioner neither sought employment nor applied for unemployment benefits.

On February 26, 2008, petitioner filed with the Commissioner of Education (the Commissioner) a petition requesting 1) a “declaratory ruling” that respondent had violated her tenure rights, and 2) an order reinstating her to her prior employment. During the same time period the business administrator reorganized his office to create better efficiencies, and recommended the elimination of the post which petitioner had occupied. On March 19, 2008, the respondent board of education approved the recommendation, and petitioner’s old position was abolished.

After a hearing at the OAL, an Initial Decision was issued on April 23, 2009, finding that respondent had terminated petitioner unlawfully. Referring to the fact that the petition had been submitted as a request for a declaratory ruling, the Administrative Law Judge (ALJ) ordered no relief. He did, however, correctly note that if petitioner were to be reinstated she would not necessarily be entitled to the same position that she had previously held or even a post in the same department.

The ALJ further found that petitioner had neglected her obligation to mitigate damages.² On May 27, 2009, the Commissioner issued a final decision 1) adopting the ALJ’s determination that petitioner had been improperly terminated, 2) rejecting the balance of the Initial Decision and 3) ordering respondent to reinstate petitioner “to a secretarial position” with back pay and emoluments – less mitigation. The decision further directed that a new petition be filed if the parties could not agree on an appropriate mitigation figure.

² Claims made by persons illegally dismissed by a board of education are subject to the common law rule of mitigation of damages. *Mullen v. Board of Education of Jefferson Township*, 81 N.J. Super. 151, 159 (App. Div. 1963).

Documentary evidence in the record indicates that at the time of the Commissioner's decision, the only secretarial vacancy in respondent's district was the position of secretary to the child study team (CST Secretary). This position was offered to petitioner on or before April 28, 2009 – five days after the Initial Decision and a month before the Commissioner's final decision. The record contains correspondence indicating that respondent reiterated its offer on June 3, 2009, June 22, 2009 and July 27, 2009. It is also undisputed that respondent offered petitioner a salary equal to her prior salary.

On the other hand, respondent advised petitioner that since she had taken no steps to mitigate her damages, it would disburse no back pay or benefits. It appears that petitioner ultimately did not accept the position that she was offered, but instead filed a new petition on September 8, 2009, seeking resolution of the issue of back pay and emoluments.

While the second petition did not raise the issue of reinstatement, the ALJ heard argument about it at the OAL hearing. Ultimately, however, he concluded that a determination as to whether respondent had complied with the Commissioner's May 27, 2009 order – that petitioner be reinstated to a secretarial position – constitutes an enforcement issue and must be adjudicated in Superior Court, pursuant to *R. 4:67-6(a)(2)* and *N.J.A.C. 6A:3-3.1(b)*. The Commissioner will address this conclusion below.

Turning his attention to petitioner's claim for back pay and respondent's position that absent good faith mitigation efforts petitioner is due no back pay,³ the ALJ studied the job

³ See, e.g., *Goodman v. London Metals Exchange*, 86 N.J. 19, 34 (1981):

When a wrongful discharge of an employee occurs the measure of damages is usually the employee's salary for the remainder of the employment period. [Moore v. Central Foundry Co.](#), 68 N.J.L. 14, 15 (Sup. Ct. 1902). However, since the employee has available time which may be used profitably, the employer has been permitted to reduce its damages by showing that the employee has earned wages from other employment. [Sandler v. Lawn-A-Mat Chemical & Equipment Corp.](#), 141 N.J. Super. 437, 455 (App. Div. 1976), certif. den. 71 N.J. 503 (1976); [Rogozinski v. Airstream by Angell](#), 152 N.J. Super. 133, 158 (Law Div.

descriptions for 1) petitioner's post in the business administrator's office (Petitioner's Exhibit P-2) and 2) the position of CST Secretary (Respondent's Exhibit 9, annexed to the Affidavit of Allan P. Dzwilewski, submitted with Motion for Summary Decision dated March 8, 2010), which position was offered to petitioner on April 28, 2009. He found, as a matter of fact, that the two positions were comparable, and the record would appear to support that finding. Consequently, the ALJ determined that petitioner had had the opportunity to mitigate as of April 28, 2009, but did not. He concluded that she therefore did not qualify for back wages past April 27, 2009, and the Commissioner agrees.

As to the period between December 15, 2007 and April 27, 2009, the ALJ found that respondent had not proven that petitioner could have – but did not – mitigate her damages with employment similar to that which she had held in respondent's district. Since mitigation is an affirmative defense, placing on the wrongdoer (in this case respondent) the burden of proving the appropriateness of its application, *see, e.g., Goodman v. London Metals Exchange, supra*, 86 N.J. at 40, the ALJ concluded that petitioner was entitled to full back pay for that time period. However, the ALJ concluded that he did not have before him sufficient facts to calculate the award. Nor does the Commissioner.

The ALJ's concern was that while the record indicates that petitioner's last annual salary was \$48,747.50, it was not clear whether she was a twelve-month employee. Petitioner responded to this concern in her reply exceptions, wherein she indicated that she had been a twelve-month employee. Even with this information, however, a fact-finding hearing is

[1977](#)), *mod.* [164 N.J. Super. 465 \(App. Div. 1979\)](#). The employer may also reduce the award by showing that the employee could have secured other employment by reasonable efforts, but did not. See *Roselle v. La Fera Contracting Co.*, 18 N.J. Super. 19, 28 (Ch. Div. 1952); [Goebel v. Pomeroy Brothers Co.](#), 69 N.J.L. 610, 611 (Sup. Ct. 1903); [Moore v. Central Foundry Co.](#), 68 N.J.L. at 15-16; [Larkin v. Hecksher](#), 51 N.J.L. 133, 138 (Sup. Ct. 1888). (Emphasis added)

necessary to arrive at the amount of back pay due petitioner. For example, the record does not contain sufficient information about the benefits withheld from petitioner for the period between April 1, 2008 and April 27, 2009. Nor does the record reveal whether any increments would have been due petitioner for the 2008-2009 school year.

Thus, the Commissioner directs that a fact finding hearing concerning back pay be held in the OAL. In the course of same, the ALJ shall evaluate respondent's position that petitioner could have sought substitute employment or applied for unemployment insurance, and that her failure to do so should be considered in determining a back pay amount for the period from December 15, 2007 (for salary) and April 1, 2008 (for benefits) through April 27, 2009. Further, although no demand for interest was included in either of Ms. Bush's petitions, or debated at the January 23, 2009 and July 1, 2010 hearings, the ALJ has the discretion to allow or deny argument on petitioner's belated demand for 4% pre-judgment interest.

As to the issue of reinstatement, the Commissioner concludes that the factual finding of the comparability of CST secretary with the position that petitioner had held in the business administrator's office is fatal to any claim by petitioner for reinstatement. Petitioner's refusal of the "comparable" CST position terminated her tenure rights. *See, e.g. Annette O'Toole v. Larry Forestal, Principal, Parthenia Smith, Director, Millburn School for the Hearing Handicapped a/k/a/ New Jersey Regional Day School at Millburn and Division of Field Services of the Department of Education, 211 N.J. Super. 394, 402-03 (App. Div. 1986).*

In light of the foregoing, there is no need for petitioner to institute an action in Superior Court. While actions to enforce Commissioner decisions are generally filed there, *N.J.A.C. 6A: 3-3.1(b)(1)* allows the Commissioner to take jurisdiction when enforcement adjudication requires further determinations concerning school law issues. The present case

called for a ruling on the comparability of the CST Secretary position to the position petitioner once held in the business administrator's office. That ruling having been made, the issue of reinstatement is resolved.

Accordingly, to the extent that petitioner seeks reinstatement, that request is denied. The case is hereby remanded to the OAL solely for fact finding and recommendations on any and all issues – including the issues set forth above – related to the amount of back pay for salary and benefits that is due petitioner for the period between December 15, 2007 and April 27, 2009, less any applicable mitigation.

IT IS SO ORDERED.⁴

ACTING COMMISSIONER OF EDUCATION

Date of Decision: February 9, 2011
Date of Mailing: February 10, 2011

⁴ This decision may be appealed to the Superior Court, Appellate Division, pursuant to *P.L. 2008, c. 36* (*N.J.S.A. 18A:6-9.1*).