

#228-12 (OAL Decision: Not yet available online)

JUDITH A. DINAPOLI, :
 :
 PETITIONER, : COMMISSIONER OF EDUCATION
 :
 V. : DECISION
 :
 BOARD OF EDUCATION OF THE :
 TOWNSHIP OF VERONA, :
 ESSEX COUNTY, :
 :
 RESPONDENT. :

SYNOPSIS

Petitioner – a long-time employee with the school district, who served for many years in a tenured secretarial capacity – alleged that the termination of her employment in the course of a 2011 reduction in force (RIF) was in violation of her tenure and seniority rights. Respondent Board contended that petitioner lost her tenure protection when she accepted a promotion to the position of Assistant Business Administrator on July 1, 2009, and was not entitled to any secretarial or clerical position subsequent to the elimination of her Assistant Business Administrator position on March 1, 2011. The parties filed cross motions for summary decision.

The ALJ found, *inter alia*, that: there were no material facts at issue, and the matter was ripe for summary decision; petitioner had acquired tenure in her previous secretarial position with the district, pursuant to *N.J.S.A. 18A:17-2*; in the context of promotions or voluntary reassignments, the waiver of tenure protection requires that the tenured employee voluntarily relinquish his or her tenure rights; the instant record is devoid of any evidence that either petitioner or the Board intended that petitioner would give up her vested rights as a condition of employment as the Assistant Business Administrator; and petitioner was promoted in part based on her thirty-five years of loyal service, as well as her experience in prior secretarial positions. The ALJ concluded that – upon termination of her Assistant Business Administrator position – petitioner should have been returned to a clerical or secretarial position held by a non-tenured employee. Accordingly, the ALJ granted petitioner’s motion for summary decision.

Upon careful and independent review, the Commissioner concurred with the ALJ’s findings and conclusions and, accordingly, adopted the Initial Decision of the OAL granting summary decision to petitioner. The Commissioner ordered that if any secretarial positions in respondent’s district are held by non-tenured employees, petitioner must be offered those positions; if not, petitioner must be placed on a recall list; and, further, petitioner is entitled to back pay less mitigation if, at any time since the RIF, there were secretarial positions held by non-tenured employees and those positions were not offered to petitioner.

<p>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.</p>

June 7, 2012

JUDITH A. DINAPOLI, :
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Petitioner brought this action when – in consequence of a reduction in force (RIF) in respondent’s district – her employment as an assistant business administrator was terminated. The parties disagree as to whether petitioner, who had previously attained tenure in respondent’s district as a secretary, was entitled to “bumping” and/or recall rights to secretarial positions after her assistant business administrator position was eliminated. Upon review of the record, Initial Decision of the Office of Administrative Law (OAL), and exceptions thereto, the Commissioner concurs with the Administrative Law Judge (ALJ) that petitioner is entitled to those rights.

The ALJ explained that petitioner’s relinquishment of a tenured position to accept a promotion does not *ipso facto* result in a forfeiture of the tenure rights earned in the prior position. Rather, an employee must manifest an agreement to relinquish same. To illustrate this principle, the ALJ cited such cases as *Given v. E. Windsor Reg’l Sch. Dist.*, 1978 *S.L.D.* 43, *aff’d*, State Bd. of Educ., 1978 *S.L.D.* 46, *aff’d*, App. Div., 1979 *S.L.D.* 832 (tenure rights accrued in a school system in any clerical or secretarial position prior to promotion shall not be negated by such promotion and shall remain as a continuing entitlement to such employee); *Gincel v. Edison Bd. of Educ.*, 1980 *S.L.D.* 943, *aff’d*, State Bd. of Educ., 1980 *S.L.D.* 953, *aff’d*, App. Div., 1982 *S.L.D.* 1503 (tenured principal retained entitlement to position notwithstanding voluntary transfer to vice principal

position); and *DeFrehn v. Wildwood Crest Bd. of Educ.*, 94 N.J.A.R.2d (EDU) 194 (elementary-school teacher retained tenure rights notwithstanding voluntary transfer and subsequent acquisition of tenure as a learning disabilities teacher-consultant under an educational services certificate).

For its opposing contention – articulated both in its summary disposition papers and in its exceptions to the Initial Decision – that tenure protection for petitioner’s service as a secretary was no longer available to her at the time of the above mentioned RIF, respondent relied primarily upon two cases: *Lange v. Audubon Bd. of Educ.*, 26 N.J. Super. 83 (App. Div. 1953) and *Colon-Serrano v. Plainfield Bd. of Educ.*, Commissioner’s Decision No. 31-08, decided January 28, 2008, *aff’d*, State Bd. of Educ. Decision No. 10-08 (June 25, 2008). Neither case, however, is apposite to the instant controversy.

In *Lange*, the petitioner had served as a principal from 1914 to 1927, and as a supervisor from 1927 to 1944. In consequence of a 1944 RIF, she switched to a teaching position. When a vacancy subsequently occurred in the position of principal, Lange applied, asserting rights to the position by virtue of her prior service as a principal. She was not appointed to the principal position and brought an appeal, which was denied by the Commissioner.

Respondent in the instant case urges that the *Lange* decision (affirmed by the State Board of Education and the Appellate Division) controls the instant matter and necessitates the dismissal of the instant petition. *Lange*, however, is not on point. Basic tenure rights, *e.g.* protection from arbitrary firing, had been legislatively established for teaching staff members five years before Lange served as a principal. However, preferential treatment for teaching staff members based upon tenure and prior service – *e.g.* in the event of a RIF – was not added to the tenure statute until 1935 (eight years after the conclusion of Lange’s service as a principal), and the Supreme Court expressly ruled that the 1935 enactment could not be retroactively applied. *See, Downs v. Bd. of Educ. Of Hoboken*, 126 N.J.L. 11 (Sup. Ct. 1940). In other words, Lange’s claim of preference for a principalship failed because “bumping rights” did not exist when she was a principal.

The holding in *Colon-Serrano, supra*, is equally unhelpful to respondent. Colon-Serrano was denied a preference for clerical positions in the Plainfield school district because she had transferred from a tenured position to a non-tenurable position. Thus, the basis for the loss of her appeal is not germane to the present case.

In summary, petitioner earned tenure as a secretary in respondent's district, and indeed spent most of her service in the district in secretarial positions. Respondent presented no evidence that she relinquished the protections associated with her secretarial tenure when she accepted the promotion to assistant business administrator. *Given v. E. Windsor Reg'l Sch. Dist.* clearly holds "that tenure rights accrued in a school system in any clerical or secretarial position prior to promotion shall not be negated by such promotion and shall remain as a continuing entitlement to such employee." *Given, supra* at 45. *Lange v. Audubon Bd. of Educ.* does not control the present controversy because tenure preferences (as opposed to protection against arbitrary firing, etc.) were not available to teaching staff members during the period in which Lange had served as a principal. *Colon-Serrano* is inapposite because – unlike the petitioner in this case – Colon-Serrano switched to a non-tenurable position.

Finally, the Commissioner rejects respondent's contention that, in the absence of a specific legislative pronouncement to the contrary, clerical or secretarial tenure must be lost when an employee changes positions. As the ALJ observed, since the requirements for earning tenure for both secretaries and business administrators are set forth in the same statute – *N.J.S.A. 18A:17-2* – it would be anomalous to conclude that a promotion to the latter position would negate the earned protections of the former position.

Accordingly, summary disposition is granted in favor of petitioner. If any secretarial positions in respondent's district are held by non-tenured employees, those positions shall be offered to petitioner. If not, petitioner shall be placed on the recall list. Further, if at the time of the RIF or from thence forward there were secretarial positions held by non-tenured employees, and those

position(s) were not offered to petitioner, she is entitled to back pay – less mitigation – commencing on the date that such position(s) should have been offered to her.

IT IS SO ORDERED.¹

ACTING COMMISSIONER OF EDUCATION

Date of Decision: June 7, 2012

Date of Mailing: June 8, 2012

¹ 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).