

**New Jersey Commissioner of Education**  
**Final Decision**

Morris Lucky,

Petitioner,

v.

Board of Education of the City of Englewood,  
Bergen County,

Respondent.

**Synopsis**

The petitioner – a tenured Student Assistance Coordinator (SAC) formerly employed in the respondent Board’s school district prior to a Reduction in Force (RIF) – alleged that the Board terminated his employment pursuant to the RIF without regard to his tenure and seniority rights. Petitioner sought reinstatement and back pay. The Board contended that its actions were consistent with applicable law and regulation. The parties filed opposing motions for summary decision.

The ALJ found, *inter alia*, that: there are no material facts at issue in this case, and the matter is ripe for summary decision; petitioner holds standard certificates as both a SAC and as a School Social Worker; he has been employed by the Board since 2010 and has worked exclusively as a SAC, and never as a Social Worker; petitioner’s RIF at the end of the 2016-2017 school year came in the aftermath of a decision to eliminate the full-time SAC position in favor of a position that combined the SAC with a School Counselor; because petitioner does not hold certification as a School Counselor, the new position was given to an outside candidate with the required dual certification; petitioner contended that the SAC aspects of the new position should have been assigned to him; pursuant to *N.J.S.A. 18A:28-9*, the Board has the right to reduce the work force for reasons of economy, reorganization, or for other good cause; petitioner has the burden to prove that the Board’s action was arbitrary, capricious or in bad faith; and the Board demonstrated that there were valid educational reasons for combining the two positions. The ALJ concluded that the Board did not violate petitioner’s tenure or seniority rights; accordingly, the petition was dismissed.

Upon comprehensive review, the Commissioner concurred with the ALJ’s findings and conclusions as thoroughly set forth in the Initial Decision. Accordingly, the recommended decision of the OAL was adopted as the final decision in this matter; summary judgment was granted in favor of the Board, and the petition of appeal 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.

March 27, 2019

**New Jersey Commissioner of Education**

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v.

Board of Education of the City of Englewood,  
Bergen County,

Respondent.

The record of this matter, the Initial Decision of the Office of Administrative Law (OAL), as well as the exceptions filed by petitioner – and respondent’s reply thereto – have been reviewed and considered.<sup>1</sup> Upon review, the Commissioner is in accord with the Administrative Law Judge’s (ALJ) findings and determination of the matter.

In this matter, petitioner’s contention is that his tenure and seniority rights were violated when the Board eliminated the Student Assistance Coordinator (SAC) position by way of a reduction in force (RIF), and subsequently combined the SAC position with a School Counselor (SC) position. As petitioner does not hold a SC certificate, the new SAC/SC position was offered to a dually certified, non-tenured candidate. Although the petitioner also possesses a School Social Worker (SSW) endorsement, the record establishes that there are currently no non-tenured – or tenured but less senior – SSWs employed by the Board. The ALJ found that the Board presented valid educational reasons for combining the two positions because the Board can offer better integrated counseling services and improve efficiency in the delivery of counseling services to

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<sup>1</sup> The Commissioner received, but did not consider, petitioner’s filing dated March 8, 2019 and respondent’s filing dated March 11, 2019, as said submissions were beyond the scope of *N.J.A.C.* 1:1-18.4.

students. The ALJ further found that petitioner's tenure and seniority rights were not violated as he does not possess a SC certificate and there are currently no other positions in the District upon which he can assert such rights.

Petitioner has filed exceptions to the ALJ's determination, stating that the District's decision to combine the SAC and SC positions to defeat petitioner's tenure and seniority rights is arbitrary, capricious, and unreasonable. Petitioner argues that the Board should not be allowed to combine two separate jobs with distinguishable functions into one position as a matter of convenience, resulting in the violation of the rights of tenured teachers. Petitioner further argues that he should have been offered the "part-time" SAC position following the RIF based on his tenure rights and seniority in the SAC position. Lastly, petitioner argues that summary decision is improper because the record is inconclusive as to whether petitioner should have been recalled from the eligibility list to fill positions for which petitioner was qualified by way of his tenure and/or seniority rights.

In its reply, the Board contends that the combined SAC/SC position was not created to defeat petitioner's tenure rights; rather, it was for the benefit of the students as substantiated in the record. Respondent clarifies that there is no "part-time" SAC position because the SAC and SC roles are integrated into a single SAC/SC position, and the individual serving in that position simultaneously provides SAC and SC services to the school community. Respondent reiterates that petitioner's tenure and seniority rights were not violated as a result of the RIF and the subsequent combination of the SAC and the SC positions. Respondent further submits that there are no unresolved issues of fact in this matter with respect to petitioner's entitlement to any other position in the District.

As a preliminary matter, the Commissioner finds that there are no material facts in dispute because it has been established that petitioner possesses an educational services certificate

with the SAC and SSW endorsements, he has only served as a SAC in the District, there are currently no non-tenured – or tenured but less senior – SSWs employed by the Board, and there are no other positions in the District upon which petitioner might assert his tenure/seniority rights. Therefore, the ALJ’s disposition of this case via summary decision was proper.

With regard to petitioner’s remaining contentions, the Commissioner finds his arguments unpersuasive. The Commissioner disagrees that the two positions were combined to “defeat” petitioner’s tenure and seniority rights. The Board has clearly established – as detailed in the Initial Decision and supported by the record – that valid educational bases exist for the District’s consolidation of the two positions into a single position. The Board’s decision, therefore, was not arbitrary, capricious or unreasonable. Moreover, petitioner admittedly does not possess the requisite SC endorsement to serve in the newly created position; therefore, petitioner does not have entitlement over the SAC/SC position and it was properly filled by an individual who holds the required certification and endorsements.

Accordingly, the Initial Decision is hereby adopted as the final decision in this matter; summary judgment is granted in favor of respondent, and the petition of appeal is dismissed with prejudice.

IT IS SO ORDERED.<sup>2</sup>

COMMISSIONER OF EDUCATION

Date of Decision: March 27, 2019  
Date of Mailing: March 27, 2019

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<sup>2</sup> 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*).



**State of New Jersey**  
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**

**SUMMARY DECISION**

OAL DKT. NO. EDU 13727-17

AGENCY DKT. NO. 173-8/17

**MORRIS LUCKY,**

Petitioner,

v.

**BOARD OF EDUCATION OF THE CITY**

**OF ENGLEWOOD, BERGEN COUNTY,**

Respondent.

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**Alfred Maurice**, Esq., for petitioner (Springstead and Maurice, attorneys)

**Sandra Varano**, Esq., for respondent (Nirenberg and Varano, attorneys)

Record Closed: January 31, 2019

Decided: February 14, 2019

BEFORE **ELLEN S. BASS**, ALJ:

**STATEMENT OF THE CASE**

Morris Lucky, a tenured Student Assistance Coordinator (SAC) formerly employed by the Englewood Board of Education (the Board), alleges that the Board terminated his employment pursuant to a Reduction-in-Force (RIF) without regard to his tenure and seniority rights. He seeks reinstatement and back pay. The Board replies that its actions were consistent with applicable law and regulation.

## **PROCEDURAL HISTORY**

The petition of appeal was filed with the Commissioner of Education (the Commissioner) on August 3, 2017. The Board filed an answer on September 12, 2017. The contested case was transmitted to the Office of Administrative Law (OAL) on September 14, 2017.

After completing discovery, the parties determined that the outcome of this matter could impact the employment status of Jalesah Brooks, a school district employee. Accordingly, via letter dated February 27, 2018, she was advised of her right to intervene pursuant to N.J.A.C. 1:1-16.4. Brooks did not reply.

Via letter dated August 23, 2018, the parties jointly asked that this matter be resolved via Cross-Motions for Summary Decision. Motions were filed on or about October 26, 2018. In his brief, Lucky for the first time asserted an entitlement to the position held by School Social Worker Jerome Land. I conferred with counsel to determine if Land now needed to be invited to intervene. Further information was exchanged by the parties, and petitioner's counsel advised via letter dated November 29, 2018, that his client no longer claimed Land's position. It was agreed that Land did not need to be invited to intervene. It was further agreed that now that the issue presented was clearer to the parties, they would file supplemental briefs.

Lucky filed a supplemental brief on December 16, 2018, and the Board filed its supplemental brief on January 31, 2019, at which time the record closed.

## **ISSUE PRESENTED**

The parties agree that the only issue presented is whether the Board's action in abolishing the full-time SAC position; creating a dual SAC/School Counselor position; and appointing a nontenured staff member to fill that position, violated Lucky's tenure and seniority rights.

## **FINDINGS OF FACT**

The salient facts are not in dispute, and I **FIND**:

Lucky holds a standard New Jersey Educational Services Certificate endorsed as both a Student Assistance Coordinator and as a School Social Worker. He holds no other endorsements on his certificate. Lucky commenced his employment with the Board in September 2010; throughout, he has worked exclusively as a SAC, and never as a Social Worker. In May 2017, Lucky was advised that his employment would be terminated at the end of the 2016-2017 school year due to a staff reorganization. At the time of his RIF, Lucky was the only SAC employed by the school district. Since his RIF, the district has not employed a full-time SAC. There are currently no nontenured Social Workers employed by the school district.

Lucky's RIF came in the aftermath of a decision to eliminate the full-time SAC position in favor of a position that combined a SAC with a School Counselor. Since Lucky does not hold a certification as a School Counselor, the position was given to an outside candidate, Jalesah Brooks. Brooks holds these dual certifications. The rationale for combining the two positions was explained by the Director of Pupil Personnel Services, Jamie Ciofalo, via certification:

Under the prior system, students in need of SAC counseling would meet with a SAC and then have to meet with a different individual for academic school counseling services. By combining these positions, these students are now able to interact and develop a relationship with one counselor who provides drug, alcohol, social and/or emotional support as well as the services of academic school counseling. The decisions made with respect to school counseling, such as formulating educational and career plans, are informed by the information obtained as a result of the counseling provided as a SAC and vice versa. The further advantage of combining the positions is that the student does not have to schedule two appointments...and miss more class time.

Brooks is assigned a case load that includes students who require SAC services. Ciofalo explained that "Brooks simultaneously provides SAC and [student counseling]

services to the students and therefore she integrates the two positions. As such, her duties are not neatly split between these two roles.” The school district has developed a job description that is consistent with Ciofalo’s description of the goals of this dual position.

Lucky contends that the action of the Board in creating this dual position was inconsistent with his tenure and seniority rights, which are superior to those of Brooks, a newcomer to the school district. He thus contends that the SAC aspects of Brooks’ position should have been assigned to him.

### **CONCLUSIONS OF LAW**

The parties seek relief pursuant to N.J.A.C. 1:1-12.5, which provides that summary decision should be rendered “if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law.” Our regulation mirrors R. 4:46-2(c), which provides that “[t]he judgment or order sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law.”

A determination whether a genuine issue of material fact exists that precludes summary decision requires the judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the allegedly disputed issue in favor of the non-moving party. Our courts have long held that “if the opposing party [in a summary judgment motion] offers . . . only facts which are immaterial or of an insubstantial nature, a mere scintilla, ‘[f]anciful, frivolous, gauzy or merely suspicious,’ he will not be heard to complain if the court grants summary judgment.” Brill v.

Guardian Life Ins. Co. of Am., 142 N.J. 520, 529 (1995) (quoting Judson v. Peoples Bank & Trust Co., 17 N.J. 67, 75 (1954)).

The “judge’s function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.” Brill, 142 N.J. at 540 (quoting Anderson v. Liberty Lobby, 477 U.S. 242, 249 (1986)). When the evidence “is so one-sided that one party must prevail as a matter of law,” the trial court should not hesitate to grant summary judgment. Liberty Lobby, 477 U.S. at 251–52.

I **CONCLUDE** that this matter is ripe for summary decision. There are no material disputed facts that require a plenary hearing, and the Board is entitled to judgment as a matter of law. Tenure is a legislative status; it is earned by operation of law, and upon meeting the precise requirements of the tenure statute. Spiewak v. Rutherford Bd. of Educ., 90 N.J. 63 (1982); Zimmerman v. Newark Bd. of Educ., 38 N.J. 65 (1962); N.J.S.A. 18A:28-5. Lucky was employed under tenure; accordingly, the RIF that resulted in his termination needed to be made according to standards established by the Commissioner and approved by the State Board. N.J.S.A. 18A:28-10; see N.J.A.C. 6A:32-5.1; Howley v. Ewing Twp. Bd. of Educ., 1982 S.L.D. 1328, 1339, aff’d, 1983 S.L.D. 1554.

Lucky asserts that the Board’s action in creating a position that included his prior duties, but incorporated qualifications that he could not meet, was inconsistent with his tenure and seniority rights and thus violative of the school laws.<sup>3</sup> The prerogative of the Board to reduce force is well-established. N.J.S.A. 18A:28-9 provides that

[n]othing in this title or any other law relating to tenure of service shall be held to limit the right of any board of education to reduce the number of teaching staff members, employed in the district

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<sup>3</sup> Because he holds a School Social Worker endorsement, Lucky might have been entitled to social work positions held by nontenured staff. He does not raise this as an issue because discovery revealed neither nontenured Social Workers, nor less senior Social Workers, are currently employed in Englewood. It is for this reason that the parties concluded that Lucky could lay no claim to the position held by Jerome Land, who is a tenured Social Worker with greater years of service in the school district.

whenever, in the judgment of the board, it is advisable to abolish any such positions for reasons of economy or because of reduction in the number of pupils or of change in the administrative or supervisory organization of the district or for other good cause upon compliance with the provisions of this article.

Pursuant to the statute, the Board may reduce its ranks and/or reorganize the delivery of services to its students. Consolidating positions, as the Board did here, is among the actions within a local board's authority. Francin v Maywood Bd. of Educ., EDU 09131-08, Initial Decision (July 6, 2009), aff'd Commissioner (August 20, 2009), <<http://njlaw.rutgers.edu/collections/oal/>>, citing Dunellen Bd. of Educ. v Dunellen Ed. Ass'n, 64 N.J. 17, 30 (1973). The burden is on Lucky to demonstrate that the action of the Board in doing so here was arbitrary, unreasonable or implemented in bad faith. Francin, Commissioner's Decision, at page 4.

Lucky cannot meet this burden. The Board has presented valid educational reasons for combining the work of a SAC with that of a student counselor; its actions in doing so promote efficiency and the delivery of better integrated counseling services. Lucky has proffered no facts to contest the Board's assertion that the consolidation of the two positions sprung from a legitimate desire to better deliver services to its students. Lucky lacks the certifications needed to fill this position, and as a result cannot lay claim to it based on his tenure and seniority rights.

Francin presents analogous facts. There, the board determined that it wished to deliver instructional services by staff certificated in both Physical Education and Health. The petitioning teacher was tenured but held an endorsement only as a Teacher of Physical Education. She unsuccessfully challenged the action of the local board in terminating her employment, while retaining nontenured staff in the dual Physical Education and Health role. In upholding the action of the board there, the Commissioner noted that in Dennery v Bd. of Educ., 131 N.J. 626, 638-39 (1993), the Court had determined that it was "unable to conclude...that the requirement of two certificates to qualify for a single education position is anomalous, arbitrary or irrational. Nor is it unlawful or invalid." See also: Martin v. South Amboy Bd. of Educ., EDU

13631-12, Initial Decision (March 28, 2014), aff'd, Commissioner (May 13, 2013), <<http://njlaw.rutgers.edu/collections/oal/>>. <sup>4</sup>

I **CONCLUDE** that the Board did not violate Lucky's tenure or seniority rights when it abolished his full-time SAC position; created a dual SAC/school counselor position; and assigned the newly created position to a dually certificated non-tenured staff member. <sup>5</sup>

### **ORDER**

Based on the foregoing, the petition of appeal is **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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<sup>4</sup> Lucky's reliance on cases such as Bednar v Westwood Bd. of Educ., 221 N.J. Super. 239 (App. Div. 1987) is misplaced. The Board rightly points out that Bednar concerned the right of a tenured teacher to a position held by a nontenured colleague, where the petitioning teacher was certificated for the position but had no seniority rights. Lucky lacks the credentials to perform the duties of the combined SAC/School Counselor position.

<sup>5</sup> Lucky's contention that the dual position of SAC/School Counselor was an unrecognized title requiring approval by the County Superintendent of Schools is a nonstarter. While N.J.A.C. 6A:9B-5.5 does require that unrecognized titles receive such approval, both SAC (N.J.A.C. 6A:9B-14.2) and School Counselor (N.J.A.C. 6A:9B-14.8) are recognized titles. The Board and Lucky both shared input from County Superintendent Joseph Zarra regarding the requirement to secure this approval, both generally and in this specific instance. These submissions were uncorroborated hearsay and entitled to no weight. See: N.J.A.C. 1:1-15.5(b).

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, P.O. Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

February 14, 2019



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DATE

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**ELLEN S. BASS, ALJ**

Date Received at Agency:

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February 14, 2019

Date Mailed to Parties:

sej