



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW
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**A copy of the administrative law
judge's decision is enclosed.**

**This decision was mailed to the parties
on SEP 1 2016**



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDU 18014-15

AGENCY DKT. NO. 296-9/15

CLARA BRITO HERRERA,

Petitioner,

v.

**BOARD EDUCATION OF THE TOWN
OF WEST NEW YORK, AND MONICA M. TONE,
INTERIM EXECUTIVE COUNTY
SUPERINTENDENT FOR HUDSON COUNTY.**

Respondent.

Andrew Babiak, Esq., for petitioner (Andrew Babiak, Attorneys at Law, attorneys)

Jenna A. Rottenberg, Esq., for respondent, Board of Education (Florio, Perrucci, Steinhardt & Fader, attorneys)

Caroline Jones, Deputy Attorney General for respondent Interim Executive County Superintendent, Monica M. Tone (Christopher S. Porrino, Attorney General of New Jersey, attorneys)

Record Closed: July 18, 2016

Decided: August 30, 2016

BEFORE **LELAND S. MCGEE, ALJ:**

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This matter arises out of the respondent Interim Executive County Superintendent (ECS) Monica Tone's (Tone) decision not to approve an employment contract for petitioner Clara Herrera (Herrera) in excess of \$177,500, the "maximum salary amount" for a superintendent in respondent Board of Education of the Town of West New York's (the Board) school district. Before being appointed to Superintendent of Schools for the Board, Herrera had tenure as an Assistant Superintendent and earned a salary of \$190,587.

On September 24, 2015, Herrera filed a Petition for Declaratory Relief seeking a new employment contract, retroactive to July 1, 2015, with an annual salary of \$190,587. The Commissioner of Education (the Commissioner) converted the Petition to a Petition of Appeal and on November 10, 2015, transmitted the matter to the Office of Administrative Law as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

A pre-hearing conference was held on December 29, 2015, at which time a schedule for the completion of discovery was established as well as a schedule for filing of dispositive motions. On or about June 29, 2016, the parties filed simultaneous motions for summary decision. On or about July 5, 2016, the parties filed a Joint Stipulation of Facts and on or about July 15, 2016, the parties filed their respective replies to the cross-motions for summary decision. Oral argument was scheduled for September 8, 2016, however the parties agreed that the matter should be decided on the papers and the record closed on July 18, 2016.

FINDINGS OF FACT

The parties executed a Joint Stipulation of Facts on May 24, 2016, and May 26, 2016, respectively and as such the **FACTS** of this case are not in dispute. I **FIND** the following to be the **FACTS** of this case:

1. Since February 1, 1981, Petitioner, Clara Brito Herrera (hereinafter Petitioner), has been continuously employed by the Respondent, Board of Education of the Town of West New York (hereinafter referred to as the Board) as a teaching staff member.
2. For the period from February 1, 1981, through June 30, 1997, Petitioner worked for the Board as a Bilingual/ESL Teacher.
3. For the period from July 1, 1997, through June 30, 1999, Petitioner worked for the Board as a Gifted & Talented Teacher.
4. Beginning July 1, 1999, Petitioner was promoted by the Board and began employment as a Supervisor, and served as a Supervisor until June 30, 2002.
5. Beginning July 1, 2002, Petitioner was promoted by the Board and began employment as a Principal. Petitioner served as the Principal of P.S. #3 from July 1, 2002, through June 30, 2004.
6. From July 1, 2004, through June 30, 2006, Petitioner served as the Principal of P.S. #5.
7. For the period from July 1, 2006, through June 30, 2007, Petitioner worked for the Board as the Director of Elementary Education.
8. From July 1, 2007, through August 31, 2007, Petitioner served as the Principal of the Harry L. Bain Elementary School.
9. From September 1, 2007, through November 15, 2011, Petitioner served as the Principal of P.S. #1.

10. Beginning November 16, 2011, Petitioner was appointed by the Board and undertook the duties of Acting Assistant Superintendent. Petitioner served as the Acting Assistant Superintendent from November 16, 2011, through December 15, 2011.
11. Beginning December 16, 2011, Petitioner was promoted by the Board and began employment as Assistant Superintendent. Petitioner served as the Assistant Superintendent from December 16, 2011, through June 30, 2015.
12. Beginning July 1, 2015, Petitioner was appointed by the Board to the position of Superintendent of Schools.
13. Petitioner holds a standard Instructional Certificate and holds a standard Administrative Certificate with Supervisor, Principal, and School Administrator endorsements.
14. Petitioner holds lifetime tenure with the Board in the positions of Teacher, Supervisor, Principal, and Assistant Superintendent.
15. For the period from November 16, 2011, through June 30, 2012, Petitioner was paid an annual pro-rated salary of \$185,000.
16. For the period from July 1, 2012, through June 30, 2013, Petitioner was paid an annual pro-rated salary of \$188,700.
17. For the period from July 1, 2013, through June 30, 2014, Petitioner was paid an annual pro-rated salary of \$188,700.
18. For the period from July 1, 2014, through June 30, 2015, Petitioner was paid an annual pro-rated salary of \$190,587.

19. Since January 11, 2011, through the present, Respondent, Monica M. Tone, has served as the Interim Executive County Superintendent for Hudson County (hereinafter referred to as the ECS).
20. In June 2015, after receiving the proposed employment contract from the Board for the position of Superintendent of Schools, Petitioner spoke with the ECS. Petitioner questioned whether she could receive the salary she was receiving in her position of Assistant Superintendent. The ECS referred Petitioner to the Question and Answer document. The ECS told Petitioner that she would research the issue of her salary amount. The ECS subsequently followed up with Petitioner and informed Petitioner that the salary of a superintendent could not be higher than the maximum salary amount for a district of that enrollment size.
21. The Board's reported student enrollment for the 2013-2014 school year was 8,269 students and for the 2014-2015 school year the reported student enrollment was 8,372 students.
22. According to N.J.A.C. 6A:23A-1.2 and -3.1(e)(2), the "maximum salary amount" for a Superintendent of Schools in the Board's school district was \$177,500, which amount includes a "high school salary increment" of \$2,500.
23. By letter dated June 29, 2015, the ECS approved the Employment Contract.
24. On or about July 15, 2015, the Board approved the Employment Contract.
25. The Employment Contract grants Petitioner an annual salary of \$177,500 and Petitioner has been paid that salary since her appointment as Superintendent of Schools.

LEGAL ANALYSIS AND CONCLUSIONS

A. Summary Decision Standard

Under N.J.A.C. 1:1-12.5(b) a “motion for summary decision shall be served with briefs and with or without supporting affidavits.” N.J.A.C. 1:1-12.5(b). A summary decision may 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.” Ibid.

A court should grant summary judgment when the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 528-529 (1995). The Supreme Court of New Jersey has adopted a standard that requires judges to “engage in an analytical process to decide whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.” Id. at 533.

“When a motion for summary decision is made, an adverse party in order to prevail must by responding affidavit set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding” N.J.A.C. 1:1-12.5(b). A court should deny a motion for summary decision when the party opposing the motion has produced evidence that creates a genuine issue as to any material fact challenged. Brill, supra, 142 N.J. at 528-29. When making a summary decision, the “judge’s function is not himself [or herself] to weigh the evidence.” Id. at 540.

B. Whether Herrera's reduction in compensation as a superintendent violated her tenure rights.

No person under tenure in the New Jersey public school system can be dismissed or reduced in compensation "except for inefficiency, incapacity, unbecoming conduct, or other just cause, and then only after a hearing" is conducted. N.J.S.A. 18A:6-10. Tenure in the public school system Jersey can be achieved by any staff member "in the positions of teacher, principal, other than administrative principal, assistant principal, vice-principal, assistant superintendent, and all school nurses." N.J.S.A. 18A:28-5.

The regulations governing employment contracts for superintendents state that the ECS shall review and approve a superintendent's new employment contract, including contracts that replace expired contracts for existing tenured and non-tenured employees. N.J.A.C. 6A:23A-3.1(a)(1). "No contract for a superintendent . . . or person otherwise serving as superintendent . . . shall include an annual salary in excess of the maximum salary amount plus, if applicable, additional district salary increment(s) and/or a high school salary increment." N.J.A.C. 6A:23A-3.1(e)(2).

The "maximum salary amount" for superintendents means \$125,000 for any district or districts with a total enrollment of 250 or less based on the enrollment figures in the Application for State School Aid (ASSA) filed by the district(s) on the prior October 15; \$135,000 for any district or districts with a total enrollment of 750 or less but greater than 250 based on the enrollment figures in the ASSA filed by the district(s) on the prior October 15; \$145,000 for any district or districts with a total enrollment of 1,500 or less but greater than 750 based on the enrollment figures in the ASSA filed by the district(s) on the prior October 15; \$155,000 for any district or districts with a total enrollment of 3,000 or less but greater than 1,500 based on the enrollment figures in the ASSA filed by the district(s) on the prior October 15; \$165,000 for any district or districts with a total enrollment of 6,500 or less but greater than 3,000 based on the enrollment figures in the ASSA filed by the district(s) on the prior October 15; and \$175,000 for any district or districts with a total enrollment greater than 6,500 based on the enrollment figures in the ASSA filed by the district(s) on

the prior October 15. The Commissioner, upon written application by the board(s) of education and on a case-by-case basis, may approve a waiver of the maximum salary amount for any district or districts with a total enrollment of 10,000 or more based on the enrollment figures in the ASSA filed by the district(s) on the prior October 15.

[N.J.A.C. 6A:23A-1.2.]

"Judicial review of agency regulations begins with a presumption that the regulations are both valid and reasonable." New Jersey Ass'n of Sch. Adm'rs v. Schundler, 211 N.J. 535, 548 (2012); see New Jersey Soc. for Prevention of Cruelty to Animals v. New Jersey Dep't of Agric., 196 N.J. 366, 385 (2008). "As a result, the party challenging a regulation has the burden of proving that the agency's action was arbitrary, capricious or unreasonable." Schundler, 211 N.J. at 548.

That inquiry focuses on three things: (1) whether the agency's action violates the enabling act's express or implied legislative policies; (2) whether there is substantial evidence in the record to support the findings on which the agency based its action; and (3) whether in applying the legislative policies to the facts the agency clearly erred by reaching a conclusion that could not reasonably have been made upon a showing of the relevant factors.

[ibid.]

"Courts afford an agency great deference in reviewing its 'interpretation of statutes within its scope of authority and its adoption of rules implementing' the laws for which it is responsible." Id. at 549 (citing In re Freshwater Wetlands Prot. Act Rules, 180 N.J. 478, 489 (2004)). "To decide whether a particular agency action is authorized, a court may look beyond the specific terms of the enabling act to the statutory policy sought to be achieved by examining the entire statute in light of its surroundings and objectives." Ibid. "[A] court's obligation is to determine and give effect to the Legislature's intent" and the court "must invalidate a regulation that is inconsistent with the statute it purports to interpret." Ibid.

In July of 2006, "the Legislature adopted a concurrent resolution that declared 'this State's high property taxes are a matter of great concern to the people of New

Jersey.” Schundler, 211 N.J. at 540 (citing Assemb. Con. Res. 3, 212th Leg. (2006), <http://www.njleg.state.nj.us/2006/bills/acr/3_11.pdf>). “The resolution created four legislative committees on school funding, government consolidation and shared services, public employee benefits, and constitutional reform.” Schundler, 211 N.J. at 540.

In its final report, the Committee on Government Consolidation and Shared Services found that “inflated salaries and lucrative benefits for superintendents, assistant superintendents, and business administrators have cost New Jersey taxpayers millions of dollars.” Id. at 540-41.

The Committee proposed the addition of the position of ECS to provide enhanced oversight of local administrative spending. Ibid. The ECS has the authority to “approve or disapprove the hiring, compensation, and benefit plans of local school superintendents, among other things.” Ibid. The Legislature adopted this recommendation in 2007. Id. at 542.

The Legislature required the new ECS’s to “review and approve, according to standards adopted by the commissioner, all employment contracts for superintendents of schools, assistant superintendents of schools, and school business administrators in school districts within the county, prior to the execution of those contracts.” Ibid. (quoting N.J.S.A. 18A:7-8(j)): The Commissioner of Education issued regulations on July 1, 2008, titled “Fiscal Accountability, Efficiency and Budgeting Procedures,” N.J.A.C. 6A:23A, which “set standards that executive county superintendents must use in their review of new employment contracts for superintendents, assistant superintendents, and school business administrators.” Ibid.

The Legislature can “modify the terms and conditions of public service by enacting new laws that reflect new policies—unless the State Constitution says otherwise.” Schundler, 211 N.J. at 560; see Spina v. Consolidated Police and Firemen’s Pension Fund Commission, 41 N.J. 391 (1964) (the general approach in our State is that the terms and conditions of public service in office or employment rest in

legislative policy rather than contractual obligation, and hence may be changed except of course insofar as the State Constitution provides otherwise); see also New Jersey Ass'n of Sch. Bus. Officials v. Davy, 409 N.J. Super. 467, 490 (App. Div. 2009) (our courts have long recognized that absent constitutional restriction, the Legislature may modify terms and conditions of public service).

Thus, the Legislature may provide "specific direction to the Commissioner to adopt regulations that would curtail abuses and cut administrative costs" and the new regulations may apply prospectively to future contracts. Schundler, 211 N.J. at 560. The Commissioner, under direction of the Legislature, may set future terms and conditions of public employment so long as they do not present constitutional concerns. Ibid. Additionally, "[t]enured assistant superintendents cannot claim a constitutionally protected property right under state law to future contract terms." Ibid.

The Legislature expressly authorized the Commissioner of Education to adopt standards by which an ECS will review and approve a superintendent's contract. N.J.S.A. 18A:7-8(j) (each ECS shall "review and approve, according to the standards adopted by the commissioner, all employment contracts for superintendents[.]"). When setting the standards for reviewing a superintendent's contract, the Commissioner added "a cap on maximum salary determined by the size of the district's enrollment." New Jersey Ass'n of Sch. Adm'rs v. Cerf, 428 N.J. Super. 588, 599 (App. Div. 2012). "In responding to comments objecting to the proposed caps and their impact on superintendents and quality education, the Commissioner explained that the caps were needed because of the districts' continued failure to control administrative costs" and explained that "the caps were sufficiently high to attract high quality and "talented candidates" because the range of possible salaries "was more than twice the average earned by an individual living in New Jersey, and higher than the median salary for superintendents in Pennsylvania, Delaware and New York." Id. at 599-600; see 43 N.J.R. 284(a). This cap on salary based on enrollment is "wholly consistent with and furthers the Legislature's goal of controlling excessive spending on administration to facilitate thorough and efficient public education." Cerf, supra, 428 N.J. Super. at 601.

"[T]he Legislature, not th[e] salary cap amendment, limited a board's authority to pay [superintendents] as much as it wishes . . . by mandating review and approval of 'all employment contracts for superintendents' for compliance with standards set by the Commissioner." Id. at 602 (quoting N.J.S.A. 18A:7-8(j)). "Thus, the question in this case involves the interplay of two or more statutes, which we must seek to harmonize under the assumption that the Legislature was aware of its actions and intended for the related laws to work together." Cerf, supra, 428 N.J. Super. at 602; see Schundler, supra, 211 N.J. at 555. "In Schundler, [supra,] the Court considered tenure laws and . . . the same statutory amendments implicated here, authorizing regulations that altered specified benefits for some tenured officials[,] . . . and concluded that those statutes and the implementing regulations could and should be read together, harmonized and given 'their intended effect.'" Cerf, supra, 428 N.J. Super. at 602-03 (quoting Schundler, supra, 211 N.J. at 540-42).

Here, Herrera claims that reducing her salary to the maximum salary amount for superintendents in West New York School District violated her tenure rights that she accrued as an Assistant Superintendent. Herrera argues that N.J.A.C. 6A:23A-3.1(e)(2), the regulation implementing the maximum salary cap, is in conflict with the tenure statutes, N.J.S.A. 18A:6-10, and N.J.S.A. 18A:28-5, prohibiting a reduction in compensation "except for inefficiency, incapacity, unbecoming conduct, or other just cause, and then only after a hearing" is conducted.

However, the Board did not reduce Herrera's compensation as an Assistant Superintendent. Instead, Herrera's compensation was reduced when she took the job as Superintendent. The salary of a superintendent is governed by the standards set by the Commissioner, which include the maximum salary cap.

The New Jersey Legislature authorized the Commissioner to adopt these standards under N.J.S.A. 18A:7-8(j). The Legislature's purpose was to reign in administrative spending and allow the Commissioner to adopt standards to curb the "inflated salaries and lucrative benefits for superintendents" that have cost New Jersey taxpayers millions of dollars. The Legislature also created Tone's position of ECS to

review and approve the employment contracts of superintendent's within her County according to the standards adopted by the Commissioner.

As in Schundler, *supra*, the tenure statutes and the regulation imposing the maximum salary cap for superintendents can be harmonized and given their intended effect. Herrera's tenure rights that she accrued as an Assistant Superintendent are not affected by N.J.A.C. 6A:23A-3.1(e)(2), which governs the maximum salary for superintendents. The Legislature limited the salary of superintendents when it mandated "review and approval of all employment contracts for superintendents for compliance with standards set by the Commissioner." Cerf, *supra*, 428 N.J. Super. at 602. Thus, N.J.A.C. 6A:23A-3.1(e)(2) is not in conflict with the tenure statutes and Herrera's tenure rights were not violated when her salary was reduced to \$177,500, the maximum allowed for a superintendent in West New York School District under N.J.A.C. 6A:23A-3.1(e)(2).

Petitioner also claims that the regulation implementing a maximum salary cap for superintendents, N.J.A.C. 6A:23A-3.1(e)(2), is in conflict with N.J.S.A. 18A:17-20.4, which states: "[a] superintendent of schools promoted from within a district shall retain all tenure rights accrued in any position which was previously held by the superintendent in the district."

However, N.J.S.A. 18A:17-20.4 is not implicated here because the Board did not violate any of the tenure rights that Herrera accrued as an Assistant Superintendent. N.J.S.A. 18A:17-20.4. Tenure in administrative or supervisory positions accrues only by employment in that administrative or supervisory position and "[t]enure so accrued shall not extend to any other administrative or supervisory position." N.J.S.A. 18A:28-5. Thus, Herrera's tenure rights as Assistant Superintendent do not extend to her position as Superintendent. If she were to return to that position, should be entitled to all tenure rights attendant to that position.

For the foregoing reasons I **CONCLUDE** that Herrera's rights under the tenure statutes, N.J.S.A. 18A:6-10 and N.J.S.A. 18A:28-5, were not violated because N.J.A.C.

6A:23A-3.1(e)(2) does not affect Herrera's tenure rights as an Assistant Superintendent. Further, the regulation is consistent with the Legislature's intent to curb excessive superintendent salaries in New Jersey. Thus, the Board's Motion for Summary Decision should be granted.

ORDER

It is hereby **ORDERED** that the motion for summary decision by Respondent Board of Education, and by Respondent Monica M. Tone is hereby **GRANTED**. It is further **ORDERED** that the motion for summary decision by Petitioner Herrera is hereby **DENIED**.

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.

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.

August 30, 2016
DATE


LELAND S. MCGEE, ALJ

Date Received at Agency:

August 30, 2016


Date Mailed to Parties:

SEP 1 2016

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

LSM/lr