SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0414-21

MONIKA VAKULCHIK,

Petitioner-Respondent,

v.

BOARD OF EDUCATION OF
THE BOROUGH OF DUNELLEN,
MIDDLESEX COUNTY,

Respondent-Appellant.

Argued March 28, 2022 – Decided April 29, 2022

Before Judges Mayer, Natali, and Bishop-Thompson.

On appeal from the New Jersey Commissioner of Education, Docket No. 159-7/20.

Marc H. Zitomer argued the cause for appellant (Schenck, Price, Smith & King, LLP, attorneys; Marc H. Zitomer, of counsel and on the briefs; Christopher J. Sedefian, on the briefs).

Craig A. Long argued the cause for respondent Monika Vakulchik (Zazzali, Fagella, Nowak, Kleinbaum & Friedman, PC, attorneys; Richard A. Friedman and Craig A. Long, of counsel and on the brief).

Joshua P. Bohn, Deputy Attorney General, argued the cause for respondent Commissioner of Education (Matthew J. Platkin, Acting Attorney General, attorney; Donna Arons, Assistant Attorney General, of counsel; Laurie Fichera, Deputy Attorney General, on the brief).

PER CURIAM

Respondent Board of Education of the Borough of Dunellen (the Board) appeals a final agency decision by the New Jersey Commissioner of Education (Commissioner) that ordered the Board to reinstate petitioner Monika Vakulchik to her former position as a speech pathologist. In doing so, the Commissioner rejected the decision of an Administrative Law Judge (ALJ) and instead concluded petitioner's reinstatement was required as the Board failed to provide her with proper notice of non-renewal under N.J.S.A. 18A:27-10. Before us, the Board contends the Commissioner improperly interpreted the statute in a restrictive manner and it substantially complied with N.J.S.A. 18A:22-10's notice requirements. We disagree and affirm the Commissioner's decision.

I.

We briefly recount the relevant facts as developed before the ALJ. Petitioner began her employment with the Board in October 2016, where she worked as a speech and language pathologist for elementary aged children. In her annual performance review for the 2019-2020 school year, petitioner

received an average score of 3.33 over six domains, each with a possible score of 4.0. In her performance reviews from school years 2016-2017, 2017-2018, and 2018-2019, petitioner received scores of 3.33, 3.33, and 3.5, respectively.

On May 1, 2020, she was provided with her evaluation related to the 2019-2020 school year. The evaluation recommended "[d]ismissal/[n]on-renewal" because petitioner "failed to make progress on a Corrective Action Plan, or . . . consistently perform[ed] below the established standards, or in a manner that is inconsistent with the school's mission and goal." Amanda Lamoglia, petitioner's supervisor and the Director of Special Services for Dunellen Schools, signed the evaluation and left the section titled "areas noted for improvement" blank.

On May 1, 2020, petitioner met with Lamoglia, the principal of her elementary school, together with a union representative, to discuss her evaluation. On that date, petitioner also formally responded and disputed the criticisms in the evaluation report.

On May 4, 2020, petitioner emailed Eugene Mosley, Superintendent of Dunellen Public Schools, copying members of the Board, and stated she had been notified on May 1, 2020 of "non-reemployment for the 2020-2021 school year – [despite her] . . . four summative evaluations of 3.33 – 3.5." In that email,

she specifically requested a written statement of reasons supporting the non-renewal decision.

On May 5, 2020, the Board voted on the Superintendent's recommendations for staff renewals for the following school year. Petitioner's name was excluded from the list of personnel to be renewed for the 2020-2021 school year.

On May 18, 2020, petitioner emailed all members of the Board and Superintendent Mosley and stated:

> Insofar as I have not received notice from the chief school administrator in accordance with N.J.S.A. 18A:27-10; 27-11 that employment for the succeeding school year will not be offered, I hereby accept your offer of employment.

Superintendent Mosley responded to petitioner's email that same day and disputed her claim that the Board renewed her employment. He stated that petitioner's communication evidenced her notice of nonrenewal and noted "this was well before the May 15, 2020 date set forth in the statute[s] . . . cited." He stressed that petitioner did "not have a contract for the 2020-2021 school year [based on the fact that her] name did not appear on the May 7, 2020 Board of Education meeting agenda renewal motions."

On May 28, 2020, Superintendent Mosley responded further to petitioner's May 4, 2020 email by providing a statement of reasons for her nonrenewal. He stated his decision to terminate her employment was based upon "ongoing concerns about [her] professionalism which were shared with [petitioner] by . . . Lamoglia." He further explained that he was "exercising [his] right to seek a superior candidate for the position." Mosley also informed petitioner that she had a right to a Donaldson[1] hearing, which petitioner subsequently requested.

At the conclusion of that hearing, which consisted of only eight Board members, rather than the full nine due to a vacancy, four members voted in favor of renewing petitioner's employment and three opposed with one member abstaining. As a result, the Board informed petitioner that her non-renewal for the 2020-2021 school year "stands" and that her employment with Dunellen public schools would "end on June 30, 2020."

Petitioner thereafter filed a two-count petition of appeal with the Commissioner. In the first count, she alleged that the Board's non-compliance with notice requirements under N.J.S.A. 18A:27-10 should have resulted in the renewal of her employment contract for the 2020-2021 school year. In support,

[1] Donaldson v. Bd. of Educ., 65 N.J. 236, 246 (1974).

she contended that her May 1, 2020 evaluation was signed by Lamoglia, the Director of Special Services, and not by Superintendent Mosley, and that the evaluation merely contained a "recommendation for non-renewal," which did not constitute written notice of non-renewal under N.J.S.A. 18A:27-10. She also alleged that the vote at the Donaldson hearing constituted binding action in favor of her re-employment because the abstention was the equivalent of an affirmative vote.[2]

The matter was then transmitted to the Office of Administrative Law as a contested case. The parties filed a joint stipulation of facts and cross-motions for summary decision pursuant to N.J.A.C. 1:1-12.5, which resulted in the ALJ entering summary decision for the Board.

In his written decision, the ALJ concluded petitioner was "unambiguously aware that she was being recommended for non-renewal to the Board." He acknowledged, however, that a plain language interpretation suggested that the requirements of N.J.S.A. 18A:27-10 had not been met, as petitioner received the May 1, 2020 evaluation, signed only by her supervisor, not the chief school

[2] Petitioner also filed a separate action against the Board in the Superior Court. In her complaint, petitioner alleged workplace discrimination, hostile work environment, and retaliation in violation of the New Jersey Conscientious Employee Protection Act, N.J.S.A. 34:19-1 to -14, based primarily upon the same underlying facts at issue here.

administrator, and the written notice from Superintendent Mosley came on May 18, 2020, three days after the May 15, 2020 statutory deadline.

Despite the Board's failure to meet the technical notice requirements, the ALJ relied on Bernstein v. Board of Trustees of the Teachers' Pension and Annuity Fund, 151 N.J. Super. 71, 76 (App. Div. 1977) and concluded the Board substantially complied with N.J.S.A. 18A:27-10. He explained petitioner did not suffer any prejudice, and the Board "was in general compliance with the purpose of the statute." Further, the ALJ found petitioner's May 4, 2020 email established that she understood her contract would not be renewed and this amounted to sufficient notice under Nissman v. Board of Education, 272 N.J. Super. 373, 379 (App. Div. 1994).

As to the Board's vote, the judge concluded that N.J.S.A. 18A:27-2.1(b) clearly required a roll call majority vote of the full membership of the Board for renewal of employment contracts. Even though the statute allows the employee a right to an "informal appearance before the board" to "convince the members of the board to offer reemployment," he concluded such an opportunity did not indicate a Legislative intent "that anything less than a majority vote by the full membership would be sufficient" for reemployment.

As noted, the Commissioner rejected the ALJ's decision, and in a September 16, 2021 final determination granted summary decision in favor of petitioner. The Commissioner found that the summative report and accompanying meeting with petitioner did not comply with the statutory demands of N.J.S.A. 18A:27-10, as that statute clearly requires "written notice from the superintendent," which the Board did not provide. The Commissioner therefore did not reach the issue of whether the Board's vote following petitioner's Donaldson hearing was effective and directed the Board to "reinstate petitioner to her position and to pay to petitioner the salary to which she would have been entitled during the 2020-2021 school year."

The Commissioner also disagreed with the ALJ's finding that the Board substantially complied with the requirements of N.J.S.A. 18A:27-10, because it did not provide a "reasonable explanation why there was not a strict compliance with the statute." Rather, the Commissioner explained that the Board only provided a "conclusory assertion in its reply to petitioner's exceptions that it would be 'illogical' to provide written notice to petitioner when she already was apparently aware of the non-renewal." The Commissioner rejected the ALJ's reasoning on this point explaining that the Board was "not permitted to introduce new evidence in its reply to petitioner's exceptions [that is] unsupported by any

documentation, testimony, certification or affidavit." The Commissioner concluded that "petitioner's [own] characterization of the recommendation in her evaluation as a notice of non-renewal is not the determining factor for whether that notice was sufficient."

After the Board appealed, it requested that the Commissioner stay his decision, which the Commissioner denied, after concluding the Board had not satisfied the four-prong test enumerated in Crowe v. DeGioia, 90 N.J. 126 (1982). The Board appealed the Commissioner's denial and we granted the Board's application "on the condition that [petitioner] continue to be paid her usual salary," and further ordered that this appeal be accelerated.

Before us, the Board raises two primary points. It first contends the Commissioner erred in restrictively interpreting N.J.S.A. 18A:27-10, effectively "plac[ing] form over substance." Second, the Board argues the Commissioner mistakenly determined it failed to substantially comply with that statute's notice requirements. The Board also stresses that unless the Commissioner's decision is reversed, it may be required to retain petitioner, who will wrongfully acquire tenure status as a result.

II.

Turning to the Board's first point, we discern no error in the Commissioner's determination that the Board failed to comply with the notice requirements of N.J.S.A. 18A:27-10. In doing so, we reject the Board's argument that petitioner's apparent belief she would not be renewed somehow relieved the Superintendent of providing petitioner with timely notice of her non-renewal.

"Our review of administrative agency action is limited[,]" Russo v. Board of Trustees, Police & Firemen's Retirement System, 206 N.J. 14, 27 (2011), but "we cannot be relegated to a mere rubber-stamp of agency action." Williams v. Dep't of Corr., 330 N.J. Super. 197, 204 (App. Div. 2000). Rather, we engage in a careful and principled examination of the agency's findings. Ibid.

A reviewing "court ordinarily should not disturb an administrative agency's determinations or findings unless there is a clear showing that (1) the agency did not follow the law; (2) the decision was arbitrary, capricious, or unreasonable; or (3) the decision was not supported by substantial evidence." In re Virtua-West Jersey Hosp. Voorhees for a Certificate of Need, 194 N.J. 413, 422 (2008). "The burden of demonstrating that the agency's action was arbitrary, capricious or unreasonable rests upon the [party] challenging the

administrative action." In re Arenas, 385 N.J. Super. 440, 443-44 (App. Div. 2006).

"Where the issue is one of law, the Commissioner's . . . decision do[es] not carry a presumption of validity and it is for this court to decide whether those decisions are in accord with the law." Parsippany-Troy Hills Educ. Ass'n v. Bd. of Educ., 188 N.J. Super. 161, 165 (App. Div. 1983). Nevertheless, in doing so "[c]ourts 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." N.J. Ass'n of Sch. Adm'rs v. Schundler, 211 N.J. 535, 549 (2012) (quoting N.J. Soc'y for Prevention of Cruelty to Animals v. N.J. Dep't of Agric., 196 N.J. 366, 385 (2008)). "That approach reflects the specialized expertise agencies possess to enact technical regulations and evaluate issues that rulemaking invites." Ibid.

Thus, we will reverse an agency's determination only if it is "plainly unreasonable and violates express or implied legislative direction[,]" that is, if it "gives 'a statute any greater effect than is permitted by the statutory language[,] . . . alter[s] the terms of a legislative enactment[,] . . . frustrate[s] the policy embodied in the statute . . . [or] is plainly at odds with the statute."

Patel v. N.J. Motor Vehicle Comm'n, 200 N.J. 413, 420 (2009) (quoting T.H. v. Div. of Developmental Disabilities, 189 N.J. 478, 491 (2007)).

Finally, when considering mixed questions of law and fact, we defer to the agency's supported factual findings, but review de novo the application of any legal rules to such factual findings. See Campbell v. N.J. Racing Comm'n, 169 N.J. 579, 588 (2001) ("When resolution of a legal question turns on factual issues within the special province of an administrative agency, those mixed questions of law and fact are to be resolved based on the agency's fact finding."). Based on the aforementioned authority, we have reviewed the Commissioner's final decision, including its application of facts to the law, under the de novo standard of review and conclude its decision was entirely consistent with applicable law.

New Jersey boards of education are vested with understandably broad authority to appoint, transfer or remove an employee "upon the recommendation of the chief school administrator and by a recorded roll call majority vote of the full membership of the board." N.J.S.A. 18A:27-4.1(a). The statute also provides that "[a] nontenured officer or employee who is not recommended for renewal by the chief school administrator shall be deemed nonrenewed," and requires the chief school administrator to first notify the board of his or her

recommendation and reasoning before notifying the employee. N.J.S.A. 18A:27-4.1(b).

With respect to removal, N.J.S.A. 18A:27-10 establishes a May 15th deadline by which boards of education must offer written contracts of employment to certain non-tenured teaching staff or provide them with notice they will not be rehired. The statute provides:

> On or before May 15 in each year, each nontenured teaching staff member continuously employed by a board of education since the preceding September 30 shall receive either
>
> a. A written offer of a contract for employment from the board of education for the next succeeding year providing for at least the same terms and conditions of employment but with such increases in salary as may be required by law or policies of the board of education, or
>
> b. A written notice from the chief school administrator that such employment will not be offered.[3]
>
> [N.J.S.A. 18A:27-10.]

Any employee who receives notice of nonrenewal may request, within fifteen days, a written statement of reasons for this decision. N.J.S.A. 18A:27-

[3] Under N.J.A.C. 6A:10-1.2, "chief school administrator" is defined as "the superintendent of schools or the administrative principal if there is no superintendent."

3.2. The statement of reasons is due to the non-renewed employee within thirty days of the request. Ibid. The employee also has the right to an informal appearance before the board, where he or she may argue that the board should offer reemployment. N.J.S.A. 18A:27-4.1(b).

Under N.J.S.A. 18A:27-11, where a school board fails to give a nontenured employee timely notice of termination, as occurred here, that board "shall be deemed to have offered to that teaching staff member continued employment for the next succeeding school year upon the same terms and conditions but with such increases in salary as may be required by law or policies of the board of education." N.J.S.A. 18A:27-11.

The Commissioner's decision was entirely consistent with the statutory scheme regarding the renewal of a teacher's employment. First, it is not disputed that the chief school administrator—here, Superintendent Mosley—did not provide petitioner with formal written notice by May 15th. Instead, petitioner received notice from the Superintendent on May 18th, three days after the statutory deadline.

Second, we find no error in the Commissioner's decision that the Board failed to comply with its clear and simple notice obligation by sending a teacher a performance evaluation conducted by her superior and not signed by the

Superintendent. Such an interpretation of N.J.S.A. 18A:27-10 by the Commissioner certainly does not "[provide] greater effect than . . . permitted by the statutory language," alter its terms, "frustrate[] the policy embodied in the statute," nor is it otherwise "at odds with the statute." Patel, 200 N.J. at 420 (quoting T.H., 189 N.J. at 491). Rather, the Commissioner's decision is consistent with the text and purpose of N.J.S.A. 18A:27-10, which requires timely notice of the important renewal decision by the chief school administrator, not a subordinate, so that an affected employee can make informed decisions regarding future employment, including the ability to request a hearing under N.J.S.A. 18A:27-4.1.

III.

In its second point, the Board maintains it substantially complied with the underlying purpose of N.J.S.A. 18A:27-10, despite its failure to "strictly comply with the technical language of the statute." The Board argues petitioner received "timely and adequate notice" that her contract would not be renewed for the following school year when she received the adverse recommendation in her summative report. It further contends her understanding of the nonrenewal was evident from her email to the Board and subsequent request for a statement of reasons. We disagree and conclude the Commissioner correctly rejected the

ALJ's determination that the Board substantially complied with N.J.S.A. 18A:27-10.

Substantial compliance is an equitable doctrine "utilized to avoid the harsh consequences that flow from technically inadequate actions that nonetheless meet a statute's underlying purpose." Cnty. of Hudson v. State, Dept. of Corr., 208 N.J. 1, 21 (2011) (quoting Galik v. Clara Maass Med. Cent., 167 N.J. 341, 352 (2001)). A party seeking to apply the substantial-compliance doctrine must demonstrate they took "a series of steps . . . to comply with the statute involved," Galik, 167 N.J. at 353 (quoting Bernstein, 151 N.J. Super. at 76-77 (App. Div. 1977)), and "those steps achieved the statute's purpose, as for example, providing notice," County of Hudson, 208 N.J. at 22. Substantial compliance applies only if the other party is not prejudiced, ibid., and there is "a reasonable explanation why there was not a strict compliance with the statute," Bernstein, 151 N.J. Super. at 77.

The record amply supports the Commissioner's determination that the Board failed to establish that it took any steps to comply with N.J.S.A. 18A:27-10. In reaching this conclusion, the Commissioner rejected the Board's argument, which it reprises before us, that its non-renewal recommendation as contained in petitioner's evaluation and communicated to petitioner at the

subsequent meeting, constituted sufficient steps to comply with the statute. We therefore find no error in the Commissioner's decision that when interpreting N.J.S.A. 18A:27-10, such comments in a summative evaluation or email do not comply with the statute's notice requirements as they are unrelated to the statute's purpose, which requires written notification of non-renewal to be made by the Superintendent and not other Board employees in the context of a yearly evaluation.

In addition, we discern no error in the Commissioner's finding that the Board failed to provide a reasonable explanation regarding its non-compliance with the statute. As the Commissioner noted, it was not until the Board filed its reply to petitioner's exceptions before the ALJ that it even addressed the issue and did so with a conclusory explanation that it failed to act before May 15th because it would have been "illogical" to do so as petitioner was already aware of her non-renewal.

We agree that the record is devoid of any competent proofs that the Board took any action before the May 15, 2020 statutory deadline or that it failed to do so because it believed compliance was excused based on petitioner's belief that her contract would not be renewed. As the record reflects, the Board neglected to provide any formal notice after petitioner wrote to Superintendent Mosley

eleven days prior to the May 15th deadline and although Superintendent Mosley's May 18th and 28th communications provided petitioner with clear notice that her contract would terminate on June 30, 2020, both emails came after the May 15, 2020 deadline. Moreover, as noted, the fact that petitioner's supervisor recommended her non-renewal is simply not what is required under the statue. As the Commissioner stated, there would have been nothing "'illogical' for the Board to follow [petitioner's] evaluation with a formal notification that provided definitive information and was compliant with the statute."

Nor are we satisfied that the record supports the Board's argument that its actions evidenced compliance with the statute's purpose. To allow notice only by way of a recommendation from an employee's supervisor subverts the additional statutory requirement that notice be provided from the "chief school administrator." In this regard, by its terms, N.J.S.A. 18A:27-4.1(b) provides, inter alia, that a board may renew an employee's contract "only" if the chief school administrator so recommends. Jackson Twp. Bd. of Educ. v. Jackson Educ. Ass'n ex rel. Scelba, 334 N.J. Super. 162, 171-172 (App. Div. 2000).

As to the Board's obligation to provide petitioner with reasonable notice of her rights and any prejudice that may have visited upon her, we note again

that the Board conceded before the ALJ it did not technically comply with the notice provisions of N.J.S.A. 18A:27-10. As the Commissioner explained "there is no comparable case history, nor anything in the notice statute, that suggests that petitioner's knowledge is in any way relevant to whether the Board has met its burden of providing notice."

Although petitioner ultimately learned of her non-renewal and was afforded a Donaldson hearing, her employment status was made unclear, albeit for a short period, by the failure to provide timely notice. In any event, even if we were to conclude that petitioner was not prejudiced by the Board's dilatory actions, we find no error in the Commissioner's decision that the Board failed to substantially comply with N.J.S.A. 18A:27-10 based on the reasoning contained in the final decision.

In support of many of its arguments, the Board has relied upon a series of unpublished opinions that we deem unpersuasive for two reasons. First, those cases are non-binding and of no precedential value. See R. 1:36-3. Second, all the cases cited are factually distinguishable. By way of example only, one of the cases relied upon by the Board addressed the interpretation of N.J.A.C. 6A:10A-2.3, which relates to a board's requirement to provide notice regarding the retention of private pre-school providers. In that matter, unlike here, the

board provided timely notice but failed to provide the reasons for the non-renewal.

We also reject defendant's reliance on Nissman, 272 N.J. Super. at 379, for the proposition that a "petitioner [who] knew or should have known that she was not going to be offered a new contract for the following academic year" was provided sufficient notice under N.J.S.A. 18A:27-10. That case involved a tenure dispute and the effect of a State Board of Education regulation, N.J.A.C. 6:24-1.2(c), which barred challenges to a local board's order unless the challenge was filed within ninety days of receipt of the order.

The central issue in Nissman was whether a communication from the board constituted a "final action," triggering the ninety-day notice requirement. In that context, we concluded that a specific resolution constituted the board's final action for purposes of any challenge and stated petitioner "knew or should have known that she was not going to be offered a new contract for the following academic year." Ibid. There was no dispute in Nissman whether the notice requirements of N.J.S.A. 18A:27-10 had been met.

Here, there is no issue regarding the finality of the Board's action and, as we have discussed, the Superintendent indisputably did not provide timely notice, nor did the Board substantially comply with N.J.S.A. 18A:27-10, and to

the extent the Board contends Nissman imposed a constructive knowledge standard with respect to the notice requirement of N.J.S.A. 18A:27-10, we reject it as contrary to the clear and specific language of that statute.

Finally, as the Commissioner did not address any issue related to petitioner's tenure status, that issue is not before us, and we accordingly do not address it. To the extent we have not specifically addressed any point properly raised by the parties, it is because we have concluded any such argument was of insufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(D).

Affirmed.