

FILED
AND
ENTERED
ON Sept. 20, 2011
WESTCHESTER
COUNTY CLERK

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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In the Matter of the Application of
GREGORIA FELICIANO,
Petitioner,

DECISION & ORDER

Index No. 11/03621

For a Judgment Pursuant to Article 78
of the Civil Practice Law and Rules,

-against-

BOARD OF EDUCATION OF THE CITY SCHOOL
DISTRICT OF THE CITY OF NEW ROCHELLE,
and RICHARD ORGANISCIAK, Superintendent of
Schools,

Respondents,

-and-

ELLEN GARCIA,

Necessary Party.

-----X
ZAMBELLI, A.J.S.C.

The following papers numbered 1-10 read on this hybrid CPLR Article 78
proceeding and action for declaratory relief:

PAPERS NUMBERED

Notice of Petition, Verified Petition, Feliciano Affidavit with Exhibits A-C, Petitioner's Memorandum of Law	1-5
Verified Answer, Organisciak Affidavit, Massimo Affidavit & Exhibits 1-4	6-9
Petitioner's Reply Memorandum of Law	10 ¹

¹ Respondents submitted a letter dated May 10, 2011 in sur-reply to petitioner's reply, and petitioner submitted a responding letter dated May 11, 2011. However, as there is no provision for sur-replies in the CPLR, the Court did not consider these submissions in rendering the decision herein.

Upon the foregoing papers it is ordered that this petition is disposed of as follows:

In 2004, petitioner Gregoria Feliciano ("Feliciano" or "petitioner") was employed by the respondent Board of Education for the City School District of the City of New Rochelle (hereinafter "District") in the position of "Manger of 21st Century Grants". Petitioner received administrative tenure in July, 2007. In approximately July of 2008, as part of a district-wide reorganization, petitioner was promoted to the position of Coordinator of Funded Programs, which position involved oversight of most federal, state and private grants in the district, including, as is relevant herein, the Safe Schools / Healthy Students ("SS/HS") \$1,500,000 annual grant.

By letters dated June 8 and 10, 2010, petitioner was notified that her position as Coordinator of Funded Programs was to be abolished effective June 30, 2010 (Verified Petition, Exhibits A, B). She was also advised that, as a tenured school administrator, she would be placed on the preferred eligible list for a period of seven years, during which time she would have a right of recall based upon her seniority in the event of a vacancy in a position similar to that from which she was excessed (Verified Petition, Exhibit B). Thereafter, on or about November 1, 2010, respondents hired Necessary Party Ellen Garcia ("Garcia") to a position as the full time Administrator of the SS/HS grant.

Petitioner brings this Article 78 proceeding seeking a declaration that respondents violated Education Law §2510 by not reinstating petitioner to the position given to Garcia. She seeks an order directing respondents to reinstate her, *nunc pro tunc* to November 1, 2010, with full back pay, seniority and other benefits. Petitioner argues that she is entitled

to be reinstated because the position currently held by Garcia is sufficiently similar to petitioner's position in that Garcia performs essentially the same responsibilities in connection with the SS/HS grant that petitioner did. Because the newly created position held by Garcia only involves the SS/HS grant, petitioner submits that 100% of Garcia's duties in the new position were performed by petitioner in her position as Coordinator of Funded Programs. Thus, petitioner contends that the two positions are "similar" as a matter of law and that she is entitled to be appointed to the newly created position.

Respondents oppose the petition and argue that petitioner's position was eliminated due to economic and organizational necessity. As a result of petitioner being excessed, respondents contend that they distributed her former responsibilities among existing staff, part-time consultants and Garcia, and that none of the persons to whom those responsibilities were re-distributed performs as much as 50% of petitioner's former functions. Respondents argue that the SS/HS grant represented less than 20% of the grant funds for which petitioner was responsible, and thus it cannot be said that Garcia and petitioner's positions are similar. They therefore submit that as Garcia's position is not sufficiently similar to that of petitioner's former position, petitioner was not entitled to be appointed thereto. Respondents further argue that petitioner is not entitled to reappointment to Garcia's position because that position, unlike petitioner's former position, is not tenure bearing. Respondents also take issue with the quality of petitioner's performance as Coordinator of Funded Programs and allege that while petitioner was in the position, there were complaints and several problems with her performance. Respondents also allege that upon petitioner being advised that her position was

exceeded, petitioner contacted the U.S. Department of Education to report deficiencies with the District's administration of the SS/HS grant, and as a result thereof, respondents learned of further, previously unknown, problems with the District's administration of that grant which almost placed them in default and required significant efforts on their behalf to avoid that result. Respondents argue that, as petitioner was responsible for the administration of the SS/HS grant, these deficiencies must be read against petitioner's claim that she spent most of her time working on that grant. Lastly, respondents argue that should the petition be granted, it would undo the reorganization that they undertook to improve the District's grant administration function, and note that petitioner's responsibilities for grants other than SS/HS have been redistributed to other personnel. Therefore, respondents submit that since the Education Law requires any reinstatement to be "without reduction in salary or increment", the District would have to pay materially more money for material less work in already tough economic times².

In reply, petitioner argues that there are no triable issues of fact in this case because the parties are in agreement as to the relevant facts: namely, that Garcia was hired for the sole purpose of administering the SS/HS grant, and that the administering of such grant was part of petitioner's duties in her former position as Coordinator of Funded Programs. Petitioner argues that respondent misconstrues the applicable test to determine whether positions are similar and that applying the proper test, it is clear as a matter of law that the

²Petitioner's salary for the 2009-2010 year was \$117,576; as per the collective bargaining agreement in effect, her salary would have increased by 2.5% effective January 1, 2011 (Organisciak Affidavit, ¶11). Garcia's salary as Administrator for the SS / HS grant for the 2010-2011 year was \$67,000 (*Id.* at ¶20).

positions are similar. Petitioner further submits that the fact that Garcia's position is not tenure bearing does not affect petitioner's recall rights, as such a construction of the recall statute would undo the legislative purpose behind granting tenure. As to respondents' allegations regarding petitioner's performance in her prior position, petitioner posits that such arguments are of no legal significance in this proceeding and to the extent that respondents had legitimate concerns regarding petitioner's performance of her duties, they were obligated to act pursuant to Education Law §3020-a to terminate her services as opposed to engaging in a subterfuge to eliminate her position, which petitioner submits constitutes bad faith³.

Education Law §2510, entitled "Abolition of office or position", provides in relevant part that:

(1) If the board of education abolishes an office or position and creates another office or position for the performance of duties similar to those performed in the office or position abolished, the person filling such office or position at the time of its abolishment shall be appointed to the office or position thus created without reduction of salary or increment, provided the record of such person has been one of faithful, competent service in the office or position he has filled.

* * * * *

(3)(a) If an office or position is abolished or if it is consolidated with another position without creating a new position, the person filling such position at the time of its abolishment or consolidation shall be placed upon a preferred eligible list of candidates for appointment to a vacancy that then exists or that may thereafter occur in an office or position similar to the one which such

³While petitioner argues that respondents' allegations regarding her performance of her duties as Coordinator of Funded Programs constitute evidence that her position was eliminated in bad faith as opposed to reasons of economic and organizational necessity, she further submits that it is unnecessary for the Court to rule on whether respondents' actions constituted bad faith, as she contends that she has established her "clear legal entitlement" to Garcia's position (Petitioner's Reply Memorandum of Law, p. 7).

person filled without reduction of salary or increment, provided the record of such person has been one of faithful, competent service in the office or position he has filled. The persons on such preferred list shall be reinstated or appointed to such vacancies in such corresponding or similar positions in the order of their length of service in the system at any time within seven years from the date of abolition or consolidation of such office or position.

Accordingly, as conceded by the parties (Petitioner's Memorandum of Law, p.6; Respondents' Memorandum of Law, p. 7), the issue in this case is whether Garcia's position as Administrator for the SS/HS grant is "similar" to petitioner's prior position as Coordinator of Funded Programs.

The test for whether two positions are "similar" under Education Law §2510 is "whether more than 50% of the functions to be performed by the incumbent of the new position are those which were performed by the petitioner in her old position." (Greenspan v. Dutchess Co. Bd. of Coop. Educ. Svcs., 96 A.D.2d 1028, 1029 (2d Dept. 1983); see also Matter of Anderson v. Bd. of Coop. Educ. Svcs., 128 A.D.2d 614, 615 (2d Dept. 1987)). Accordingly, as applied to the case at bar, the test is whether more than 50% of the functions performed by Garcia as the Administrator of the SS/HS grant are those which were performed by petitioner as Coordinator of Funded Programs.

Applying this test, it is undisputed that Garcia was hired by respondents for the "sole purpose" of administering the SS/HS grant (Verified Answer, ¶20; Massimo Affidavit, ¶10, Exhibit 4). It is also undisputed that as Coordinator of Funded Programs, petitioner bore sole and direct responsibility for, inter alia, the SS/HS grant (Verified Answer, ¶¶8, 9; Massimo Affidavit, ¶¶7, 8, Exhibit 3). While petitioner was Coordinator of Funded programs, no one but she had any duties in regard to the SS/HS grant (Massimo Affidavit,

Exhibit 3) and now, no one other than Garcia has any duties in regard to that same grant (Id., Exhibit 4). Accordingly, the two positions are "similar" within the meaning of Education Law §2510 (see Matter of Anderson v. Bd. of Coop. Educ. Svcs., supra ("The part-time position in the respondent's program which was created through funding by a Federal grant consisted entirely of duties formerly performed by the petitioner. Thus, the new part time position and the petitioner's former position were "similar" within the meaning of Education Law §2510(3)").

While respondents cite the Greenspan case and set forth the proper test for similarity in their memorandum of law (Respondents' Memorandum of Law, p. 7), they go on to submit that as applied to this case, the test is "*whether Ellen Garcia is performing more than 50% of the tasks that Petitioner performed in the abolished position.*" (Id., p. 8, emphasis in original). They therefore argue that the positions are not similar because Garcia performs none of the functions petitioner performed as to grants other than the SS/HS grant. However, respondents' argument is a misapplication of the test set forth in Greenspan. The test makes clear that the focus is on the duties to be performed by the new hire and whether more than half of the new hire's duties were previously performed by the person in the excessed position, not, as respondents would have it, the other way around. For the same reason, respondents' argument that the SS/HS grant represented less than 20% of petitioner's responsibilities as measured by grant funding⁴ is inapposite.

As to respondents' argument that petitioner is not entitled to Garcia's position

⁴In any event, the dollar amounts of grants are irrelevant in determining whether positions are "similar" under Education Law §2510, as the test set forth in Greenspan refers to 50% of the "functions" to be performed in the relevant position.

because that position is not tenure bearing, this argument is without merit. In support of their argument, respondents rely on Appeal of Merz, 21 Ed. Dep. Rep. 449 (1982), wherein the Commissioner of Education ruled that since the right to reappointment under the provisions of Education Law §2510 is statutory and applies only to positions to which appointments on tenure may be made, Merz, who was in the non-tenured position of assistant to the superintendent, was not entitled to reappointment under the statute despite the fact that the two positions at issue were found to be similar. Merz is therefore distinguishable from the case at bar, as unlike Merz, petitioner is a tenured school administrator, and as such, she is entitled to the protection of Education Law §2510. Similarly, in Appeal of Strong, 41 Ed. Dept. Rep. 425 (2002), it was found that the petitioner was not entitled to reappointment because the petitioner failed to establish that more than half of the duties of the new position had been performed by her in the old position.⁵ Lastly, Appeal of Marisco, 50 Ed. Dept. Rep. ____ (2010), is also distinguishable from the case herein in that it involved the issue of whether that petitioner could claim seniority credit for years served in a non-tenure track position that did not require a

⁵It is also noted that the Commissioner in Appeal of Strong committed the same error as respondents herein in applying the Greenspan test, in that it was held that the new position would encompass only about one-third of the duties of the old position, as opposed to whether more than half of the duties of the new position were performed by the petitioner in the old position. Moreover, Appeal of Strong also misconstrues the holding of the Merz case, in that it included whether the positions are subject to tenure as part of the test to determine whether the positions are similar. However, in Merz, the Commissioner found that the positions at issue were in fact similar; however, the Commissioner further found, as a separate matter, that no right to reappointment applied because the petitioner therein lacked tenure and thus was not subject to the protections of the reappointment statute. Accordingly, the Strong case appears to contain errors of law. In any event, it is noted that while deference is ordinarily accorded to administrative agencies due to their expertise in their subject areas, where, as here, a Court is faced with the interpretation of statutes and pure questions of law, no deference is required to be accorded to an agency determination (see Matter of Madison-Oneida Bd. of Coop. Educ. Svcs. v. Mills, 4 N.Y.3d 51, 59 (2004)).

teaching certificate. Moreover, to the extent that Marisco relied on Merz, it supports this Court's interpretation of that ruling in that the Commissioner therein found that "only individuals in tenure-track positions have preferred eligibility rights".

As to respondents criticisms of the quality of petitioner's work, it is noted that respondents took no disciplinary action against petitioner during her employment and indeed, have indicated in this litigation that the elimination of petitioner's position "compelled by economic and organizational necessity" (Organisciak Affidavit, ¶7) and not due to petitioner's performance of her duties. As to respondents' argument that reinstating petitioner would create further financial burdens on the District at a time of increased fiscal austerity, this Court is not unsympathetic to this argument; however, Education Law §2510 does not include such financial considerations as part of the standards for reappointment and this Court is constrained to apply the law as enacted by the Legislature. The Legislature is therefore the appropriate body to address respondents' concerns.

In conclusion, this Court declares that respondents violated Education Law §2510(3) by failing to reinstate petitioner to the position of Administrator of the SS/HS grant; accordingly, the Court directs respondents to reinstate petitioner to that position *nunc pro tunc* to November 1, 2010, with full back pay, seniority and all other benefits. Settle judgment on notice by October 4, 2011.

Dated: White Plains, New York
September 20, 2011


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A.J.S.C.

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