

AURELIA ZITMAN,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY	:	
OF HACKENSACK, BERGEN	:	DECISION
COUNTY,	:	
	:	
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioner challenged the Board’s determination to transfer her from her position of elementary school teacher of the handicapped to middle school teacher of the handicapped after a reduction in force (RIF) of elementary teachers of the handicapped. Petitioner argued that her tenure and seniority rights were violated by the transfer because there were nontenured or less senior teachers retained as elementary school teachers of the handicapped after the RIF. The Board argued that its actions were a proper exercise of its managerial prerogative because petitioner suffered no reduction in salary or other employment benefits.

The ALJ, relying on the Appellate Division decision in *Carpenito*, determined that the transfer of petitioner was based on a valid RIF and did not violate her tenure or seniority rights. The ALJ thus recommended dismissal of the petition.

The Commissioner affirmed the decision of the ALJ. Because there was a valid RIF, and petitioner did not suffer a reduction in compensation or any tangible employment benefit, the Commissioner concluded that the Board’s transfer of petitioner was within its managerial prerogative and petitioner’s tenure and seniority rights were not violated.

July 2, 2001

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The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner’s exceptions and the Board’s reply thereto were submitted in accordance with *N.J.A.C.* 1:1-18.4, and were considered by the Commissioner in reaching his decision.¹

Upon careful and independent review of the record in this matter, the Commissioner affirms the Initial Decision of the Administrative Law Judge (ALJ). In so doing, like the ALJ, the Commissioner finds the Appellate Division’s decision in *Carpenito, supra*, to be controlling.

In *Carpenito*, petitioner’s tenured position as a seventh grade social studies teacher was eliminated due to declining enrollment. As a result, although he was initially assigned to teach computer applications to seventh and eighth grade students, along with health and basic skills courses, Carpenito was subsequently assigned to teach computer applications to grades four through eight, as well as a basic skills course. *Carpenito* at 525-526. However, he

¹ Both the exceptions and reply essentially reiterate arguments that were presented in papers previously considered by the ALJ.

“suffered no loss of salary or reduction of tangible employment benefits as a result of the transfer.” *Id.* at 526. When the board subsequently reinstated the seventh grade position, it chose to fill the position with a nontenured teacher. *Ibid.* Carpenito appealed, claiming that his tenure and seniority rights had been violated by the board’s failure to assign him to the reinstated social studies position. *Ibid.* Additionally, like the petitioner herein, Carpenito claimed that the abolishment of his social studies position, which, for seniority purposes, was in a secondary category, resulted in his inappropriate assignment to an elementary category; *Carpenito v. Rumson Borough Board of Education*, 96 N.J.A.R.2d (EDU) 958 (1996) at 960-961. Although he argued that he was not properly certified to teach the computer applications course to the elementary grades, both the Commissioner and the Court found otherwise. *See, Carpenito*, 322 N.J. Super. at 531.

In the instant matter, there appears to be no dispute that “the number of Elementary Special Education teachers was reduced by two after the 1999-2000 school year.” (Petitioner’s Brief in Opposition to Respondent’s Motion to Dismiss the Petition at 4) Subsequent to this reduction, petitioner was reassigned to teach English as a Second Language at the Middle School, thereby resulting in a change in category (from elementary to secondary). *Significantly, like Carpenito, petitioner did not suffer a reduction in compensation or a loss in any tangible employment benefit.* As the Commissioner has observed:

[T]he [*Carpenito*] court’s determination refined the concepts of transfer and reduction in force to hold that when a board of education acts to abolish a teaching staff member’s position pursuant to N.J.S.A. 18A:28-9 and reassigns that individual to another position with no loss of tangible employment benefit, that action does *not* constitute a reduction in force, but is instead tantamount to a *transfer*. (emphasis in text) *Di Maggio v. Board of Education of the City of Trenton, Mercer County*, Commissioner’s Decision, July 8, 1999, slip. op. at 19.

See, also, William Buckley v. Board of Education of the City of Trenton, Mercer County, Commissioner's Decision, July 30, 1999.

Therefore, in accordance with the paradigm applied by the Court in *Carpenito*, because ***petitioner's tenure rights were not reduced*** as a result of the Board's action, there is no "triggering event"; "***the triggering event for preference based on seniority is either a dismissal or transfer coupled with a loss of a tangible employment benefit." *Carpenito, supra*, 322 *N.J. Super.* at 533. Consequently, like the ALJ, the Commissioner finds that petitioner was not entitled to assert her preference, under these circumstances, as against less senior or nontenured employees.

Accordingly, the Initial Decision of the ALJ is adopted for the reasons expressed therein, and amplified above. The Petition of Appeal is dismissed.

IT IS SO ORDERED.²

COMMISSIONER OF EDUCATION

Date of Decision: July 2, 2001

Date of Mailing: July 3, 2001

² This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.