

EDU #11371-95
C # 114-97
SB # 33-97

FRANK KARTAN, :
PETITIONER-APPELLANT, : STATE BOARD OF EDUCATION
V. :
BOARD OF EDUCATION OF THE :
BOROUGH OF NORTH ARLINGTON, :
BERGEN COUNTY, :
RESPONDENT-RESPONDENT. :

Decided by the Commissioner of Education, March 11, 1997

For the Petitioner-Appellant, Bucceri & Pincus (Gregory T. Syrek, Esq., of
Counsel)

For the Respondent-Respondent, Glenn T. Leonard, Esq.

The facts herein are not in dispute. Frank Kartan (hereinafter "petitioner"), a tenured teaching staff member, alleged that the Board of Education of the Borough of North Arlington (hereinafter "Board") had violated his tenure rights when it "transferred" him to teach one class of mathematics per day in the 1995-96 and 1996-97 school years in addition to his regular duties as a high school guidance counselor. In order to accommodate petitioner's new teaching responsibilities, the Board adjusted his schedule by reducing his counseling duties correspondingly. Consequently, petitioner's total number of working hours remained unchanged. Nor did he suffer any reduction in his compensation as the result of the Board's action. It is undisputed that

petitioner had achieved tenure as a teacher as a result of his previous employment in the district as a teacher of mathematics. It is also undisputed that petitioner had achieved tenure under his educational services certificate as a result of his subsequent service as a guidance counselor. See Ellicott v. Board of Educ., 251 N.J. Super. 342 (App. Div. 1991).

Petitioner filed a petition of appeal with the Commissioner of Education, alleging that the Board had violated the tenure rights he had achieved under his educational services certificate when it transferred him to a teaching position for one period per day without his consent. As summarized by the Administrative Law Judge (“ALJ”), the parties agreed on petitioner’s tenure status, but differed on the extent of his tenure rights: “Petitioner asserts that the Board may not transfer him to a position outside the scope of his educational-services certificate, absent his consent or a reduction in force. But the Board maintains that it retains the managerial discretion to assign him to duties within the scope of his instructional certificate.” Initial Decision, slip op. at 6.

On January 22, 1997, the ALJ recommended dismissing the petition, concluding that the Board had properly exercised its managerial prerogative when it assigned petitioner to teach one period of math per day. The ALJ found that “because [petitioner] was never ‘dismissed’ from his guidance-counselor position in any meaningful sense of the word and because he did not incur any reduction in compensation, he does not have a viable tenure claim. Instead, the Board was merely exercising its inherent managerial prerogative to utilize its existing staff most efficiently and effectively....Here the Board's decision was based on valid educational reasons,

notably curriculum needs and staffing conflicts in the district. It was not designed as a subterfuge to circumvent the tenure law....” Id. at 9.

On March 11, 1997, the Commissioner adopted with clarification the ALJ’s recommendation and dismissed the petition. The Commissioner agreed that petitioner’s tenure rights had not been violated, finding that his assignment to teach one period of math per day, while still maintaining his position as a guidance counselor, did not constitute an improper transfer from one position to another. The Commissioner noted that petitioner remained in a full-time counseling position, although his counseling duties had been “alleviated” correspondingly to accommodate his newly assigned mathematics duty, and that he had suffered no loss in status or salary. The Commissioner concluded that the Board’s action constituted nothing more than a “revision” of petitioner’s duties and was a good faith exercise of the Board’s managerial discretion.

Petitioner filed the instant appeal to the State Board.

After a careful review of the record, we reverse the decision of the Commissioner. We conclude that the Board’s action constituted an improper transfer in violation of petitioner’s tenure rights.

A district board can reassign a tenured staff member to any other assignment within the scope of his certificate, but cannot transfer him to another separately tenurable position without his consent. Howley v. Bd. of Ed. of Ewing Township, decided by the Commissioner of Education, 1982 S.L.D. 1328, aff’d by the State Board of Education, 1983 S.L.D. 1554. In a case similar to the matter now before us, Childs v. Union Twp. Bd. of Educ., Docket #A-3603-80T1, 1982 S.L.D. 1456 (App. Div. 1982),

certif. denied, 91 N.J. 550 (1982), the Court affirmed this agency's determination that a teaching staff member who had achieved tenure under her educational services certificate as a result of her employment as a guidance counselor could not be transferred without her consent to a teaching position, notwithstanding the fact that she had previously achieved tenure in the district as a teacher. The Court stressed that "it is pure sophistry to assert [that the staff member's] 'transfer' is anything less than dismissal from her clearly tenured position. Such a view would render her statutory tenure in her 'new position' meaningless." 1982 S.L.D. 1456, at 1460.

In the case now before us, the Commissioner concluded that Childs was not applicable since the petitioner herein was only assigned to teach one period per day while retaining his "full-time" guidance counselor position. We disagree. Although petitioner was only transferred in part, we conclude that such action constituted an improper diminution of the statutory tenure rights he had achieved under his educational services certificate. Petitioner did not retain his full-time guidance counselor position. Rather, the Board reduced his counseling duties to part-time so as to permit him to also serve part-time under his instructional certificate.¹ Such action constituted a partial transfer from one tenured position to another and, if permitted to stand, would "erode tenure rights 'which appear plain on the face of the statute, which we are bound to recognize and which can be removed only by the Legislature.'" Ellicott, supra, at 351, quoting Bednar v. Westwood Bd. of Ed., 221 N.J. Super. 239, 243 (App. Div. 1987), certif. denied, 110 N.J. 512 (1988). See Childs, supra.

¹ We note that the Board does not contend that its action in this case resulted from a reduction in force. Rather, the Board maintains that it acted for educational reasons and that such action constituted a proper exercise of its managerial prerogative.

The tenure laws are clear that a teaching staff member may not be dismissed from his or her tenured position except as the result of a reduction in force (“RIF”) effectuated pursuant to N.J.S.A. 18A:28-9 or for just cause after a hearing as prescribed in the Tenure Employees Hearing Law, N.J.S.A. 18A:6-10 et seq. We stress in that regard that even a partial dismissal from a tenured position constitutes a reduction in force, triggering the affected staff member’s tenure rights. Klinger v. Cranbury Tp. Bd. of Ed., 190 N.J. Super. 354 (App. Div. 1982), certif. denied, 93 N.J. 277 (1983) (a reduction in hours of employment is considered a reduction in force).

In this instance, petitioner was improperly removed in part from a position in which he had achieved tenure under his educational services certificate and transferred without his consent to another separately tenurable position under his instructional certificate. As in Childs, the fact that petitioner had previously achieved tenure under his instructional certificate is of no moment. Nor is this result altered by the fact that petitioner did not suffer any reduction in compensation, although it may affect the relief to which he is entitled.² See Carpenito v. Board of Education of the Borough of Rumson, decided by the State Board of Education, February 4, 1998; Sheffield v. New Jersey State Department of Human Services, decided by the State Board of Education, November 2, 1994; Parker and Pellegrino v. Board of Education of the Matawan-Aberdeen Regional School District, decided by the State Board of Education, May 2, 1990.

In Mirandi v. Board of Education of the Township of West Orange, decided by the State Board of Education, 1989 S.L.D. 3057, we rejected the continuing viability of

an “educationally-based reasons” standard in assessing the rights of tenured staff members affected by a reduction in force. We find no basis for a different result in the case now before us, in which petitioner was partially removed from his tenured position as the result of a transfer. Statutory tenure rights afford a teaching staff member protection from dismissal or removal and may not be disturbed except under the limited circumstances described hereinabove.

Accordingly, we conclude that the Board’s action in transferring petitioner to a teaching position for one period per day in 1995-96 and 1996-97 without his consent violated his tenure rights. We therefore reverse the decision of the Commissioner to dismiss the petition and, in the event that petitioner was again transferred to a teaching position in the 1997-98 school year, direct the Board to reinstate him to a full-time guidance counselor position.³

S. David Brandt opposed.

Attorney exceptions are noted.

May 6, 1998

Date of mailing _____

² Petitioner does not seek back pay or other emoluments as a result of the Board’s action.

³ We note that the petition herein was limited to the 1995-96 and 1996-97 school years and that the record does not indicate the current status of petitioner’s employment.