

EDU # 8316-93
C # 573-97
SB # 95-97

IVEY AVERY, PERCY DARE :
AND JANICE WILLIAMS, :
 : STATE BOARD OF EDUCATION
PETITIONERS-APPELLANTS, :
V. : DECISION
BOARD OF EDUCATION OF THE CITY OF :
TRENTON, MERCER COUNTY, :
 :
RESPONDENT-RESPONDENT. :
_____ :

Decided by the Commissioner of Education, November 3, 1997

For the Petitioners-Appellants Zazzali, Fagella & Nowak (Richard A. Friedman,
Esq. of Counsel)

For the Respondent-Respondent Schwartz, Simon, Edelstein, Celso & Kessler
(Jacob Green, Esq. of Counsel)

Ivey Avery, Percy Dare and Janice Williams (hereinafter “petitioners”) were tenured teaching staff members who had been employed full-time by the Board of Education of the City of Trenton (hereinafter “Board”) as “teacher specialists,” 12-month positions requiring instructional certification.¹ Petitioner Avery, who was certified as an elementary and nursery school teacher, had been employed as a “Teacher Specialist–Office of Planning, Research and Evaluation” and as a “Teacher Specialist–Desegregation/Classified Personnel.” Avery was employed in both of these 12-month positions on a half-time basis, thereby providing him with full-time employment.

¹ Use of the unrecognized titles for the positions held by the petitioners had been approved by the County Superintendent, who determined that instructional certification was appropriate. N.J.A.C. 6:11-3.3(b).

Petitioner Dare, who held certification as a supervisor and elementary teacher, had been employed as “Community Relations Specialist and Trenton Follow Through Resource Center Manager,” which was also described as “Teacher Specialist for Community Relations/School Operations.” Petitioner Williams, who held certification as a business education teacher, had been employed as “Personnel Specialist–Substitute Office,” which was also described as “Teacher Specialist: Personnel–Substitute Office.”

After their positions were abolished by the Board effective in July 1993, the petitioners were reassigned to 10-month teaching assignments, with concomitant reductions in salary. The petitioners challenged that action in a petition of appeal filed with the Commissioner of Education, claiming that they were entitled to 12-month “teacher specialist” assignments held by other tenured teachers with less seniority. The parties subsequently filed cross-motions for summary decision.

On August 4, 1997, an administrative law judge (“ALJ”), upon review of the facts stipulated by the parties, concluded that the Board’s action in abolishing the petitioners’ positions constituted a reduction in force (“RIF”) which triggered their tenure and seniority rights. Upon review of the job descriptions, the ALJ concluded that certain assignments claimed by Avery and Dare were similar enough to their abolished positions so as to belong to the same seniority category and that several of those assignments were held by tenured teachers with less seniority than they. The ALJ found, in addition, that there were genuine issues of material facts concerning the appropriate certification required for other assignments claimed by Avery and Dare, and he denied their motion for summary decision with regard to those assignments. Upon comparison of the duties performed by Williams in her abolished position with the

responsibilities of the assignments claimed, the ALJ concluded that she had no entitlement to any of those assignments.

On November 3, 1997, the Commissioner rejected the ALJ's conclusion that the petitioners had been subjected to a reduction in force. The Commissioner found that:

Where the board has not reduced the number of staff members employed in the district either by termination of employment or by diminution of full-time positions to part-time positions...the Commissioner is not convinced that the seniority regulations, which were established to effectuate a RIF pursuant to N.J.S.A. 18A:28-9 et seq., must nevertheless attach, as petitioners so contend. To accept petitioners' argument that the abolishment of their positions, under these circumstances, compels the application of the seniority regulations, would constitute a capitulation to semantics at the expense of sound educational policy.

Commissioner's Decision, slip op. at 35.

Rather, the Commissioner concluded that the Board had acted pursuant to its managerial prerogative to transfer teaching staff members within the scope of their certificates. The Commissioner reasoned that although the petitioners' "teacher specialist" positions were abolished by the Board, they were reassigned to other teaching assignments and were not at any time dismissed from employment in the district. He noted that "[t]o the extent the language of the regulations governing seniority found at N.J.A.C. 6:6:3-5.1 et seq. appear [sic] to contradict the Commissioner's conclusion herein, it is noted that such regulations must be read to be consistent with N.J.S.A. 18A:28-9 et seq...." Id., n.5.

The Commissioner did, however, agree with the ALJ that the petitioners had been subjected to a "reduction in compensation" in violation of their tenure rights. Accordingly, he directed the Board to reinstate the petitioners to their respective salaries as of April 1993 and to reimburse them for the salary differential between what they had

actually received and what they would have received had they been properly compensated. The Commissioner noted that the Board could freeze the petitioners at their respective prior salaries until their wages were in accord with the teachers' salary guide.

The petitioners filed the instant appeal to the State Board.² This matter was subsequently placed in abeyance at the petitioners' request pending settlement negotiations. When negotiations failed to result in a settlement, the briefing schedule was reestablished.

After a thorough review of the record, we conclude that the Board's action constituted a reduction in force which triggered the petitioners' tenure rights. However, we find that the petitioners have not demonstrated their entitlement by virtue of seniority to the assignments claimed.

It is well settled that a reduction in hours of employment is considered a reduction in force. Klinger v. Board of Educ. of Cranbury, 190 N.J. Super. 354, 357 (App. Div. 1982), certif. den., 93 N.J. 277 (1983). In Klinger, the petitioning staff member was reduced from full-time to 7/10-time. Although the petitioners in the instant matter were not reduced to part-time status, their positions were abolished by the Board pursuant to N.J.S.A. 18A:28-9 (a district board is authorized to abolish positions for reasons of economy or other good cause), and the term of their employment was reduced from twelve months to ten months with a corresponding reduction in

² The petitioners expressly excluded from their appeal that portion of the Commissioner's decision in which he concluded that the Board had improperly reduced their salaries and directed that they be reimbursed for the salary differential. Hence, the issue on appeal is limited to the petitioners' claim that they had been entitled to reemployment in other "teacher specialist" positions held by other tenured teachers with less seniority.

compensation.³ We agree with the ALJ that such action, like the reduction of employment in Klinger, constituted a reduction in force which triggered the petitioners' tenure rights.

In so doing, we find that the facts herein are distinguishable from the situation in Carpenito v. Board of Educ. of Rumson, 322 N.J. Super. 522 (App. Div. 1999), in which the Court determined that the abolishment of a staff member's full-time position teaching seventh-grade social studies and his reassignment to another full-time position teaching health, basic skills and computer applications did not trigger his tenure and seniority rights. Stressing that the staff member had not suffered a "loss of employment" as a result of the district board's action, the Court concluded that "the overall theme of the Tenure laws...suggests that the triggering of the seniority regulations should occur when a tenured teaching staff member is transferred to another position and suffers a loss of tangible employment benefits, such as a loss of salary or reduction in work hours, notwithstanding the fact that the actual number of teachers employed in the district has not been reduced." Id. at 533 (emphasis in original). The Court found that "Carpenito was neither dismissed nor was his salary reduced as a result of the Board's decision to assign him to a different position; he suffered no loss of employment....His seniority relative to non-tenured or tenured employees teaching social studies is irrelevant. Carpenito is not in need of further protection." Id. at 534.

The petitioners in the matter now before us did, as acknowledged by the Commissioner, suffer a loss of salary when the Board, acting pursuant to its authority

³ As stipulated by the parties, "[t]he additional compensation for serving in a 12 month position as a teacher is 17% of the regular guide teacher's salary." Stipulation of Facts, at 8.

under N.J.S.A. 18A:28-9, abolished their 12-month unrecognized positions and reassigned them to 10-month positions with recognized titles. Thus, unlike the staff member in Carpenito, who was reassigned with no reduction in his compensation to another 10-month position with the same recognized title, the petitioners herein suffered a “loss of employment” as a result of the Board’s action and were in need of the protection afforded tenured teaching staff members by the education laws.

We turn, therefore, to the petitioners’ claim that they were entitled to reemployment in other 12-month “teacher specialist” assignments held by tenured teachers with less seniority. It is undisputed that the petitioners had been employed for a sufficient period of time in their abolished positions to achieve tenure in the district. N.J.S.A. 18A:28-5; N.J.S.A. 18A:28-6. Moreover, since the County Superintendent determined that instructional certification was appropriate for the unrecognized position titles in which the petitioners had served, their tenure was achieved in the position of teacher. Tenured teaching staff members who suffer a loss of employment as the result of a reduction in force effectuated pursuant to N.J.S.A. 18A:28-9 are entitled to be placed upon a preferred eligibility list in order of seniority for reemployment whenever a vacancy occurs in a position for which such individual is qualified. N.J.S.A. 18A:28-12.

The implementing regulations, which enumerate specific categories of employment for seniority purposes, require that “[w]henver any person’s particular employment shall be abolished in a category, he or she shall be given that employment in the same category to which he or she is entitled by seniority.” N.J.A.C. 6:3-5.1(i). “Whenever the title of any employment shall not be found in the certification rules or in these rules, the holder of the employment shall be classified as nearly as may be according to the duties performed, pursuant to the provisions of N.J.A.C. 6:11-3.3.”

N.J.A.C. 6:3-5.1(g). In the event that a district determines that the use of an unrecognized position title is desirable, N.J.A.C. 6:11-3.3(b) confers on the county superintendent the authority to approve the use of an unrecognized title on an annual basis based on the job description adopted by the district board and to determine the appropriate certification and title for the position. The county superintendent's determination concerning titles and certification required for service in unrecognized positions is binding upon future seniority determinations on a case-by-case basis.⁴

Since the instant matter involves unrecognized titles, determination of the petitioners' seniority is governed by the express terms of N.J.A.C. 6:11-3.3. The record reveals that the job descriptions for the unrecognized "teacher specialist" titles at issue were submitted to the County Superintendent for review and that, on the basis of those job descriptions, the County Superintendent approved the use of such titles and determined the appropriate certification. Each approved title was distinct, and each had its own unique job description. In approving the use of those titles, the County Superintendent emphasized that "the persons employed will accrue seniority upon the

⁴ N.J.A.C. 6:11-3.3 provides in its entirety that:

(a) District boards of education shall assign position titles to teaching staff members which are recognized in these rules.

(b) If a district board of education determines that the use of an unrecognized position title is desirable, or if a previously established unrecognized title exists, such district board of education shall submit a written request for permission to use the proposed title to the county superintendent of schools, prior to making such appointment. Such request shall include a detailed job description. The county superintendent shall exercise his or her discretion regarding approval of such request, and make a determination of the appropriate certification and title for the position. The county superintendent of schools shall review annually all previously approved unrecognized position titles, and determine whether such titles shall be continued for the next school year. Decisions rendered by county superintendents regarding titles and certificates for unrecognized positions shall be binding upon future seniority determinations on a case-by-case basis.

attainment of tenure under the respective legal titles” approved by her. Exhibits J-50 through J-58, in evidence.

Pursuant to operation of N.J.A.C. 6:11-3.3, the petitioners’ seniority for service in their unrecognized titles attached to their specific position titles. Gittelman v. Board of Education of the Township of Hamilton, decided by the State Board of Education, 94 N.J.A.R.2d (EDU) 266, aff’d with modification and remanded on other grounds, Docket #A-3659-93T5 (App. Div. 1996), certif. den., 144 N.J. 585 (1996) [subsequent history omitted]. As a result, they had no entitlement by virtue of seniority to reemployment in other unrecognized titles approved by the County Superintendent in which they had never served.

Hence, on the points of appeal before us, we concur with the Commissioner’s ultimate conclusion that the petitioners had no entitlement by virtue of seniority to reemployment in the claimed “teacher specialist” titles. However, we modify the Commissioner’s analysis and dismiss the petitioners’ claims at issue on appeal for the reasons expressed herein.⁵

Attorney exceptions are noted.

July 10, 2001

Date of mailing _____

⁵ We note that in the event that the Board ever reestablishes any of the unrecognized titles in which the petitioners had served and receives approval from the County Superintendent for the use of such titles, then the petitioner who had served in any such title would be entitled to reemployment in that assignment if he or she has superior seniority therein. N.J.A.C. 6:11-3.3(b).