219-99

ROCCO DI MAGGIO,	:	
	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioner, a teaching staff member, alleged that respondent Board violated his tenure and seniority rights when it reassigned him from a twelve-month position to a ten-month position and prorated his annual salary to reflect his ten-month work schedule as opposed to the twelve-month work schedule in his prior assignment.

The ALJ granted petitioner's motion for summary decision, concluding that if the full-time assignment to which petitioner's tenure and seniority rights entitle him is a ten-month as opposed to previous twelve-month employment, *N.J.S.A.*18A:28-9, when read in conjunction with *N.J.S.A.* 18A:28-5, prevented the Board from reducing petitioner's annual salary.

In light of the Appellate Division's recent decision in *Carpenito, supra*, the Commissioner reversed the decision of the ALJ and granted summary decision to respondent, concurring with respondent that it was permissible for the Board to reduce petitioner's salary upon abolishment of his twelve-month position and reassignment to a ten-month position as part of a bona fide reduction in force.

July 8, 1999

OAL DKT. NO. EDU 6389-97
AGENCY DKT. NO. 257-7/97

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The record and initial decision issued by the Office of Administrative Law have been reviewed. Respondent's exceptions and petitioner's reply thereto were timely filed pursuant to *N.J.A.C.* 1:1-18.4.

Respondent's exceptions essentially reiterate those arguments contained in its Brief previously considered by the Administrative Law Judge (ALJ); therefore, they shall not be repeated herein. Additionally, respondent argues that the cases primarily relied on by the ALJ to reach her determination that prorating petitioner's salary was prohibited can each be readily distinguished from the facts in the instant matter. Consequently, it is respondent's position that the ALJ misapplied relevant standards to the matter and erroneously granted petitioner's motion for summary judgment. More specifically, respondent urges that *Cinnaminson, supra, Swaluk, supra* and *Nazario, supra* support its proposition that it is appropriate to prorate an employee's salary where his or her twelve-month position is abolished in connection with a bona fide reduction in force and the employee is reassigned to a ten-month position based on his or her seniority and certification.

As to the *Piscataway* matter relied upon by the ALJ, respondent argues, *inter alia,* that:

> Significantly, the [Piscataway] board did not take the challenged action pursuant to be a bona fide reduction in force. Instead the involved board asserted that there was no material difference between the exercise of its right to cut the number of staff members pursuant to a reduction in force and its right to cut the number of months of service since both were motivated by economic concerns. The court specifically rejected the board's argument and found that the reduction of work hours (evidencing a change in the terms and conditions of employment) in the absence of a bona fide reduction of force violated the Employer-Employee Relations Act. *** Clearly, the aforementioned decision is not inconsistent with those in which the Commissioner upheld pro-rated reductions in salary where a reduction in force resulted in a twelve-month employee being assigned to a ten-month position. In the instant matter, unlike the case in *Piscataway,* the facts clearly establish that the action taken by the Board was consistent with a bona fide reduction in force. Consequently, the Board did not deviate from the Commissioner's prior decisions. Moreover, given the court's finding that the Piscataway board did not act pursuant to a bona fide reduction in force, the ruling in *Piscataway* did not in any way undermine the Commissioner's prior holdings. (Respondent's Exceptions at pp. 4-5) (citations omitted)

Respondent further avers that an examination of *Messick, supra* confirms the above conclusions. It deems it significant that in the *Messick* case, which involved the reduction of a term of employment from twelve to ten months, the action was taken in connection with a bona fide reduction in force (*Messick, supra* at 624-625), as well as through negotiations with the petitioner's bargaining unit. As to this, respondent points out that in upholding the prorating of Messick's salary and the reduction in the months of her employment, the ALJ therein concluded that the action was consistent with *N.J.S.A.* 18A: 28-9 and the Employee-Employer Relations Act. Respondent further points out that the ALJ in *Messick* questioned the decision in *Piscataway* because it appeared inconsistent with the Commissioner's prior decisions since it seemed to require negotiations prior to a reduction in salary upon reassignment of an employee to a ten-month position. Respondent goes on to state that "it is the position of the Board that the

decision in Piscataway did not require negotiation where the proportional decrease in salary resulted from a bona fide reduction in force. As such, *Messick* and *Piscataway* remain consistent with the prior decisions of the Commissioner of Education." (*Id.* at 6).

Petitioner characterizes the Board's exceptions as insubstantial and contends that the initial decision is a well-reasoned analysis which carefully balances the competing legislative purposes behind the statutes relevant herein (*N.J.S.A.* 18A:28-5 and 28-9). He also asserts, *inter alia,* that respondent's position starts with the false premise that paying him 5/6 of his current salary is not a reduction in salary and rejects the Board's claim that as long as his monthly salary is not reduced, no reduction in compensation has occurred. Petitioner further maintains that the Board's exceptions overstate and mischaracterize *Cinnaminson, supra, Swaluk, supra and Nazario, supra,* averring that the ALJ herein recognized that those cases involved the abolishment of 12-month positions and the creation of 10-month positions, a circumstance which he argues did not happen herein. Moreover, it is respondent's contention that the ALJ's analysis of *Avery, supra, Piscataway, supra, State v. Communications Workers, supra* and *Messick, supra* is sound.

Upon a thorough, comprehensive review of the record in this matter, the broad array of seemingly inconsistent decisions related to the issues presented in the instant matter and the recommended decision of the ALJ, the Commissioner declines to adopt the ALJ's recommended decision granting summary decision to petitioner for the reasons set forth below.

Initially, the Commissioner would like to emphasize that the ALJ is absolutely correct when stating that it is simply impossible to reconcile all of the many inconsistent decisions set forth in the initial decision relative to a Board's alteration of an employee's work year and the impact such action has on salary entitlements, and he commends the ALJ for her comprehensive analysis of that body of case law which spans several decades.

In determining how to apply this diverse body of case law to the dispute herein, the ALJ opted for reliance primarily on the Commissioner's decision in *Avery, supra*. In that case, the Commissioner's holding was premised upon the conclusion that the petitioners therein had *not* been subject to a reduction in force but had merely been transferred from one full-time (twelve-month) teacher position to another full-time (ten-month) teacher position. Consequently, it was determined that they had impermissibly suffered a reduction of their salary when the respondent Board, which as it happens is the same as in the instant matter, had acted to prorate their salaries for ten months of employment based on their twelve-month salaries.

The instant matter, however, as well as the Commissioner's decision in *Avery, supra,* must now be viewed in light of the Appellate Division decision issued on June 29, 1999, subsequent to the filing of the initial decision, in the matter entitled *Edward Carpenito v. Board of Education of the Borough of Rumson, Monmouth County,* decided by Commissioner August 21, 1996, *rev'd* State Board February 4, 1998, *rev'd* New Jersey Superior Court, Appellate Division, Docket No. A-3731-97T3, wherein the 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*.

Applying the court's holding to the fact pattern here, the Commissioner must conclude that petitioner was subject to a reduction in force and not, as might be concluded based upon *Avery, supra*, a transfer. Petitioner's teacher position was abolished pursuant to *N.J.S.A.* 18A:28-9 and he was reassigned to another teacher position, but, unlike the petitioner in *Carpenito,* petitioner herein *did* in fact suffer a loss of tangible employment benefit, specifically, a reduction in his work year/hours and a concomitant reduction in his annual salary.

Consequently, under the principles articulated by the court in *Carpenito,* the Board's action herein cannot be deemed to be tantamount to a transfer, but must instead be construed as a reduction in force. Indeed, the parties themselves do not dispute that petitioner's position of Job Placement Coordinator was abolished by the Board pursuant to the authority granted by *N.J.S.A.* 18A: 28-9 as part of a legitimate reduction in force for reasons of economic efficiency.

The factual circumstances in the instant matter are likewise distinguishable from those in *Williams, supra,* and *Piscataway, supra,* again, because the petitioners in those matters were not subjected to a reduction in force pursuant to *N.J.S.A.* 18A: 28-9, as has occurred herein. The petitioner in *Williams* was *transferred* by the Board therein from a twelve-month position as principal to a ten-month position as principal because of dissatisfaction with her performance, while the petitioners in *Piscataway* had their work hours reduced *in the absence of* an underlying reduction in force so that the board's action was found to have constituted an impermissible alteration of terms and conditions of employment.

As correctly argued by respondent, there is ample case law which supports the proposition that a reduction in a tenured staff member's salary/compensation and benefits is permissible when it is a result of a board's action to effectuate a reduction in force pursuant to its authority under *N.J.S.A.* 18A:28-9. Thus, it was permissible for respondent in the instant matter to reduce petitioner's annual salary, given that the position to which he was entitled based on his tenure and seniority was a ten-month position as opposed to a twelve-month one as held prior to the reduction in force effectuated by the Board, and particularly in light of the fact that the Board maintained petitioner's *rate* of salary based on his prior twelve-month position. *See Casey v. Board of Education of the Township of Cinnaminson,* 95 *N.J.A.R.*2d (EDU) 585.

Consequently, the Commissioner concurs with respondent's position that it was appropriate for it to prorate petitioner's salary upon abolishment of his twelve-month position

and reassignment to a ten-month position. Accordingly, for the reasons expressed herein, the Commissioner grants summary decision to the City of Trenton Board of Education. [1]

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

July 8, 1999

[1] This decision, as the Commissioner's final determination in the instant matter, 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*. 6:2-1.1 *et seq*., within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.