289-20

New Jersey Commissioner of Education

Final Decision

Alicia Carsdale, Daniel Lee, Annemarie Mlinar, Christian Gonzalez, Valerie Rodriguez, Aaron Thayer, Karen Indyk, Peter Stanton, Mark Eastburn, Shannon Koch, Nancy Abascal, Johanna Hunsbedt, Paidge Hinton-Mason, Emily Spera, Kristin Hill, Amy Borgia, and the Princeton Regional Educational Association,

Petitioners,

v.

Board of Education of the Township of Princeton, Mercer County,

Respondent.

Synopsis

Petitioners, full-time tenured teachers, appealed the determination of the respondent Board to cease offering them the option to work an additional sixth teaching period each day in lieu of their scheduled duty period for the 2019-20 school year, they had done in some previous years. By this action, petitioners no longer received additional pensionable remuneration which was paid to them during the 2018-19 and previous school years in exchange for accepting the voluntary additional teaching period assignment. Petitioners asserted that this decision violated their tenure rights as it effectively resulted in an impermissible reduction in their compensation. The parties filed cross motions for summary decision.

The ALJ found, *inter alia,* that: there are no material facts at issue in this case and the matter is ripe for summary decision; several petitioners had not worked the extra teaching assignment for the statutorily-defined minimum period of time to be eligible for tenure in that position; although the remaining petitioners had worked the required number of years to meet the statutory requirement, their claims were undermined by the undisputed fact that the extra teaching assignment is subject to the identified need of the district; the extra teaching assignments were temporary and conditional, and therefore, could not be used as the basis for tenured compensation; and the Board's decision to reduce the number of teaching hours based on need was in the nature of a reduction in force (RIF), which is within the discretion of the board. Accordingly, the ALJ granted the Board's motion for summary decision, denied petitioners' cross motion, and dismissed the petition.

Upon review, the Commissioner rejected the ALJ's conclusion that petitioners could not earn tenure in the sixth period teaching position, finding, *inter alia*, that: there is a clear statutory mandate that a certificated employee serving in a position for which a certificate is required, for the requisite period of time, will achieve tenure; therefore, certain named petitioners did achieve tenure in the positions at issue, while others did not; further, the ALJ correctly determined that the Board has the discretion to implement a RIF. Accordingly the Commissioner ordered that the Board: place petitioners who had earned tenure in the sixth period positions on a preferred eligibility list for rehiring in any sixth period teaching positions for which they are qualified; conduct a seniority analysis regarding all sixth period teaching positions for the 2019-2020 and 2020-2021 school years; and compensate the tenured petitioners in the amounts they would have received if it is found that non-tenured or less senior employees improperly filled those positions for which the tenured petitioners were qualified.

December 21, 2020

OAL Dkt. No. EDU 11500-19
Agency Dkt. No. 170-7/19

New Jersey Commissioner of Education

Final Decision

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Petitioners,

v.

Board of Education of the Township of Princeton, Mercer County,

Respondent.

The record of this matter, the Initial Decision of the Office of Administrative Law (OAL), the exceptions filed by petitioners pursuant to *N.J.A.C.* 1:1-18.4, and the reply thereto by the Board have been reviewed and considered.

Petitioners in this matter are full-time tenured high school teachers; the Princeton Regional Education Association (Association) represents the majority of Board employees, including the individual petitioners in this matter. The Collective Bargaining Agreement (CBA) between the Association and the Board provides that the daily teaching load in the high school shall not exceed five teaching periods and one duty period. However, in cases of identified need, the administration and the Association may agree to a sixth teaching period in lieu of a duty period; the teachers who undertake the extra teaching assignment receive $10,000 in addition to their base salary, or a prorated amount if they teach a sixth period on a part-time basis. Petitioners had, in various years, agreed to teach a sixth period or a portion thereof, and received

additional compensation for doing so. For the 2019-20 school year, the Board did not offer petitioners the option of teaching a sixth period. Petitioners appealed, arguing that the Board had reduced their compensation in violation of their tenure rights.

The Administrative Law Judge (ALJ) granted the Board's motion for summary decision. First, the ALJ concluded that several of the petitioners had not worked the extra teaching assignment for the statutorily-defined minimum period of time to be eligible for tenure in that position.[1] Regarding the remaining petitioners, who had worked the required number of years to meet the statutory requirement, the ALJ found that their claims were undermined by the undisputed fact that the extra teaching assignment is subject to the identified need of the district. The ALJ concluded that the extra teaching assignments were temporary and conditional, and therefore, could not be used as the basis for tenured compensation. Additionally, the ALJ found that the Board's decision to reduce the number of teaching hours based on need was in the nature of a reduction in force (RIF), which is within the discretion of the board.

In their exceptions, petitioners argue that the ALJ incorrectly found that they had received payment for extra work. According to petitioners, they received pensionable income for teaching regular classes during the regular school day, making that income compensation for purposes of the Tenure Act. Petitioners assert that teaching during a sixth period of the regular school day does not equate to a separately tenurable position; therefore, the ALJ erred in dismissing the claims of the petitioners who had not taught a sixth period for the statutorily-mandated time period. Petitioners contend that the ALJ incorrectly found that the CBA controls the nature of the compensation, rather than the Tenure Act. Moreover, petitioners note that their tenure rights cannot be waived or bargained away. Petitioners assert that, if the analysis in the

[1] This conclusion applied to petitioners Gonzalez, Stanton, Eastburn, Hunsbedt, Spera, Hill, Hinton-Mason, Rodriguez, Borgia, and Abscal.

Initial Decision is extrapolated, it would permit districts to calculate all compensation on an assignment basis as long as it was codified in the CBA, eviscerating tenure law and the protections it affords. Petitioners cite to cases in which employees received stipends for work directly related to their regular duties, in which the Commissioner held that those stipends could not be eliminated because to do so would violate the employees' tenure rights. Petitioners also point to cases holding that, for purposes of the Tenure Act, compensation generally refers to annual income, rather than hourly income, such that reducing a teacher's hours implicates the Tenure Act. Petitioners argue that the Board's action should not be considered a reduction in force, because they still worked the same number of hours – a full school day. Finally, petitioners contend that if the Board's action does constitute a reduction in force, a seniority analysis would be necessary to determine who should continue teaching a sixth period.

In reply, the Board argues that petitioners are a party to the CBA, which clearly stated the parameters of the extra teaching assignment and which demonstrates that the sixth teaching period assignment was a voluntary and separate assignment and therefore not a part of the tenure position of full-time teaching staff. The Board cites to cases holding that temporary work is not covered by the Tenure Act. The Board notes that the CBA establishes the duties and work load of teaching staff during the school day – five teaching periods and one duty period – and contends that the addition of a sixth teaching period is an alteration in the terms and conditions of employment by providing for extra work beyond what is prescribed for a full-time teacher. Finally, the Board asserts its managerial prerogative to abolish positions as a reduction in force and alleges a chilling effect on the ability of boards of education to offer extra duty work to their existing staff if the sixth teaching period position is held to be tenurable.

Upon review, the Commissioner disagrees with the ALJ's conclusion that petitioners could not obtain tenure in the sixth teaching period position. The Tenure Act, *N.J.S.A.* 18A:28-1 *et seq.*, "should be liberally construed to achieve its beneficent ends." *Spiewak v. Board of Education of Rutherford*, 90 *N.J.* 63, 74 (1982). The ALJ's conclusion that the sixth teaching period positions were not tenurable was based primarily on the finding that the terms of the CBA made the position temporary. However, the New Jersey Supreme Court has made clear that "the tenure provision of *N.J.S.A.* 18A:28-5 is a mandatory contractual term that may not be waived[2] or bargained away. . . Whether teachers are entitled to tenure never depends on the contractual agreement between the teachers and the board of education." *Id.* at 76-77. "[A]ll teaching staff members who work in positions for which a certificate is required, who hold valid certificates, and who have worked the requisite number of years, are eligible for tenure" unless a specific statutory exception applies. *Id.* at 81. While *N.J.S.A.* 18A:16-1.1 provides an exception for temporary employees, who are not entitled to tenure in the positions in which they are acting, "that exception is limited to employees hired to take the place of an absent teacher." *Id.* at 77; *see also Bridgewater-Raritan Educ. Ass'n v. Bd. of Educ. of Bridgewater-Raritan*, 221 *N.J.* 349, 360 (2015). There is no indication in the record that petitioners were acting as replacements for absent teachers. Accordingly, the exception provided in *N.J.S.A.* 18A:16-1.1 does not apply, and teachers who teach a sixth period are eligible for tenure in that position.

This conclusion is consistent with the New Jersey Supreme Court's recent holding in *Melnyk v. Bd. of Educ. of the Delsea Reg'l High School Dist., Gloucester Cty.*, in which the Court cautioned against "the ability of labels to cloud an analysis." 241 *N.J.* 31, 33 (2020). In

[2] The exception to this rule is when a tenured employee rejects an offer of reemployment following a RIF that abolished their position, which has been consistently held to be a waiver of tenure rights. *O'Toole v. Forestal*, 211 *N.J. Super.* 394, 402 (1986).

Melnyk, labeling a position as "extracurricular" and finding that the position was not tenurable based on that label resulted in "short-circuiting" the analysis and improperly ignoring the statutory criteria for obtaining tenure. *Id.* at 34. Here, the Initial Decision ended the analysis by labeling the sixth teaching period position "temporary," thereby disregarding the clear statutory mandate that a certificated employee serving in a position for which a certificate is required, for the requisite period of time, achieves tenure.

The position at issue in *Melnyk* was a teaching position in an alternative education program held after school hours. Finding that the program was "part of the delivery of constitutionally required educational services that comprise the system of a thorough and efficient education," the Court concluded that it was not comparable to traditional extracurricular activities in which teachers cannot obtain tenure unless the activities require a different instructional certificate than the one the teacher holds for their regular teaching duties. *Id.* at 43, 48. In *Melnyk*, the board of education conceded that the position would be tenure eligible if it was filled by a person who was not employed in the district's regular day program. Similarly, here, there can be no question that a teaching position during the regular school day would be tenure eligible if it were filled by a new hire, rather than by an existing teaching staff member. The Commissioner does not find the differences in the timing of the teaching duties – after school in *Melnyk*, during school here – to warrant a different outcome. Indeed, the fact that the position at issue in *Melnyk* occurred after school hours was the fact relied upon by the board of education to support its argument that the position was extracurricular and therefore not tenure-eligible. The Court rejected that argument, and the Commissioner rejects it here as well. The critical factor in *Melnyk* was that the position was "curricular," and the sixth teaching periods fit even more clearly in that category than the after-school position in *Melnyk*. As in *Melnyk*, an

"instructional and tenure-eligible position did not become extracurricular and tenure ineligible simply because petitioner already held tenure in another position." *Id.* at 34. The Court in *Melnyk* concluded that tenure eligibility "must therefore be analyzed purely on the basis of *Spiewak's* dictates." *Id.* at 49-50. Following the Court's clear ruling in *Melnyk*, the Commissioner concludes that teaching staff members who teach a sixth period may obtain tenure in that position if they hold the required certificate and teach in that position for the requisite period of time.

The Commissioner does not find the Board's arguments regarding the potential chilling effect of this conclusion to be persuasive. Boards of education may continue to exercise their managerial prerogative to implement a RIF regarding extra teaching duty positions, provided that any teaching staff members tenured in those positions receive the procedural protections afforded to them by the Tenure Act. Therefore, boards of education will not, as the Board would have the Commissioner conclude, be required to pay teachers who had once performed extra teaching duty assignments the additional compensation paid for such positions even if those positions cease to exist. Nor, as the ALJ posited, would the Board be required to continue to pay the additional compensation to teaching staff members who accepted a sixth teaching period position for the requisite period of time and then later declined to continue in the position. The Commissioner has held, and the Court has confirmed, that the refusal of reemployment by a tenured employee constitutes a relinquishment of tenure and a waiver of rights to future employment. *O'Toole v. Forestal*, 211 *N.J. Super.* 394, 402 (1986).

Turning to the analysis set forth by the Court in *Spiewak* and *Melnyk*, the Commissioner concurs with the ALJ's dismissal of the claims of those petitioners who did not serve in the sixth teaching period position for the requisite period of time pursuant to *N.J.S.A.*

18A:28-5(a)(1)-(3). The Court in *Melnyk* made clear that additional instructional duties are separately tenurable, and the Commissioner finds no reason to treat the sixth teaching period positions differently than the after-school position in *Melnyk*. Both positions involved teachers performing extra teaching duties – beyond their core responsibilities – for extra compensation. Because the sixth teaching period position is separately tenurable, petitioners must serve in that position for the statutorily-mandated time period to obtain tenure. Petitioners Gonzalez, Stanton, Eastburn, Hunsbedt, Spera, Hill, Hinton-Mason, Rodriguez, Borgia, and Abscal did not meet this requirement.

As to the remaining petitioners, the Commissioner concurs with the ALJ that the Board had the discretion to implement a RIF. Pursuant to *N.J.S.A.* 18A:28-9, the Board may abolish positions for reasons of economy, reduction in the number of pupils, change in organization of the district, or for other good cause. However, following a RIF, employees must be placed on a preferred eligible list in order of seniority for reemployment whenever a vacancy occurs. *N.J.S.A.* 18A:28-12. The record is not clear whether the positions held by petitioners Carsdale, Lee, Thayer, Indyk, Koch, and Mlinar were completely abolished or whether they have been filled by non-tenured or less senior employees.

Accordingly, as to petitioners Gonzalez, Stanton, Eastburn, Hunsbedt, Spera, Hill, Hinton-Mason, Rodriguez, Borgia, and Abscal, the Initial Decision of the OAL, as modified herein, is adopted as the final decision and their claims are hereby dismissed. The Board is ordered to place petitioners Carsdale, Lee, Thayer, Indyk, Koch, and Mlinar (the tenured petitioners) on a preferred eligibility list for rehiring in any sixth teaching period positions for which they are qualified. The Board is further ordered to conduct a seniority analysis regarding all sixth period teaching positions for the 2019-2020 and 2020-2021 school years. If non-tenured

employees, or employees with less seniority than the tenured petitioners, improperly filled sixth teaching period positions for which the tenured petitioners were qualified, the Board is directed to compensate the tenured petitioners in the amounts they would have received if they had filled the positions.

IT IS SO ORDERED.[3]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: December 21, 2020
Date of Mailing: December 24, 2020

[3] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c*. 36 (*N.J.S.A.* 18A:6-9.1).

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
GRANTING MOTION FOR
SUMMARY DECISION
OAL DKT. NO. EDU 11500-19
AGENCY DKT. NO. 170-7/19

ALICIA CARSDALE, DANIEL LEE, ANNEMARIE MLINAR, CHRISTIAN GONZALEZ, VALERIE RODRIGUEZ, AARON THAYER, KAREN INDYK, PETER STANTON, MARK EASTBURN, SHANNON KOCH, NANCY ABASCAL, JOHANNA HUNSBEDT, PAIDGE HINTON MASON, EMILY SPERA, KRISTIN HILL, AMY BORGIA, AND THE PRINCETON REGIONAL EDUCATION ASSOCIATION,

Petitioners,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF PRINCETON, MERCER COUNTY,

Respondent.

Edward A. Cridge, Esq., for Petitioners (Mellk O'Neill, attorneys)

Brett E. J. Gorman, Esq., for Respondent (Parker McCay, P.A., attorneys)

Record Closed: October 16, 2020 Decided: November 4, 2020

BEFORE **DAVID M. FRITCH,** ALJ:

STATEMENT OF THE CASE

Petitioners, full-time tenured teachers, appeal the determination of their employer, Respondent, Princeton Public School Board of Education ("Board"), to not continue to offer Petitioners the option to work an additional sixth teaching period per day in lieu of their otherwise scheduled daily duty period for the 2019-20 school year in their annual contracts. In doing so, Petitioners no longer received the additional pensionable remuneration which was previously paid to them during the 2018-19 school year in exchange for accepting this voluntary additional teaching period assignment. Petitioners challenge this decision as violative of their tenure rights as an impermissible reduction in their compensation.

PROCEDURAL HISTORY

On July 16, 2020, Petitioners, through counsel, filed a verified petition with the Commissioner of Education seeking to enjoin the Board from not including the additional optional assignment and associated compensation in Petitioners' 2019-20 contracts. The matter was transmitted to the Office of Administrative Law ("OAL") as a contested matter in accordance with N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13, where it was filed on August 19, 2019. On May 14, 2020, the undersigned held a telephone status conference with the parties wherein the parties indicated that they both wished to file cross-motions for summary decision and a briefing schedule was established with the agreement of the parties. Consistent with this briefing schedule, Respondent filed its motion for summary decision on July 1, 2020. On July 9, 2020, Petitioners filed their cross-motion for summary decision and their response to Respondent's motion. Respondent filed an answering brief in response to Petitioners' cross-motion and in further support of its motion on July 31, 2020. Oral argument was

held via telephone conference on September 3, 2020. The record remained open to allow the parties to amend the factual record with respect to the school year, or years, that Petitioners received the additional assignment and associated remuneration in question beyond the 2018-19 school year. Following receipt of this additional factual information in a joint statement of supplemental facts on October 16, 2020, the record on the cross-motions closed.

STATEMENT OF FACTS

Accompanying Petitioners' motion was a joint stipulation of facts executed by counsel for both parties. These stipulated facts were further augmented by the parties' filing of a supplemental joint stipulation of facts following oral argument on the motions. Accordingly, I **FIND** the following **FACTS** have been stipulated by the parties and are not contested:

1. Petitioners are certificated teaching staff members employed by the Board.
2. The Princeton Regional Education Association (Association), is the majority representative for certain employees of the Board and is the representative of the individual Petitioners in this matter.
3. The Association and the Board are parties to a collective bargaining agreement (CBA). Paragraph 8(B)(1) of that agreement provides:

> The daily teaching load in the high school shall not exceed five (5) hours per day of pupil contact, consisting of five (5) teaching periods and one (1) duty period. In case of identified need, the administration and the Association shall mutually agree to an assigned sixth teaching period in lieu of a duty period. Teachers assigned to a sixth period five days a week for the school year shall receive $10,000.00 in pensionable salary added to their base salary for that year or portion thereof. Teachers shall be offered the option of a sixth period with the right to decline. A refusal to accept a sixth period shall not result in a reduction of contract time. There shall be a limit of three teachers within a department teaching sixth periods. The high school day shall consist of seven (7) hours and one (1) minute.

[Pet. Br. at Ex. 1.]

4. The Board has referenced paragraph 8(B)(1) of the CBA in assigning staff to a sixth period. (Pet. Br. at Ex. 2 and 3.)

5. Previously, teachers have received prorated remuneration for the sixth period coverage under the terms of the CBA, ¶ 8(B)(1), when they taught a sixth period on a less-than-full-time basis—i.e., teaching a sixth period every other day, or half-time. In such cases, the teacher would receive a prorated portion of the $10,000 provided for in the CBA, ¶ 8(B)(1).

6. Teachers who do not teach at the high school have also received additional remuneration based on the performance of additional teaching duties during the regular school day.

7. In the past, when Association members (teachers) were teaching a sixth period, full-time, this would be referred to in Board documents as a "0.2" or "1.2"—i.e., the teacher was handling 120 percent of their regular teaching load. Similarly, when a teacher was teaching a sixth period on a less-than-full-time basis, it would be referred to as a "0.1" or "1.1", i.e., the teacher was handling 110 percent of their regular teaching load.

8. In the past, where Association members (teachers) were working a "1.2" or "1.1" schedule during a certain school year have not been assigned that additional teaching duty during a subsequent school year, their overall remuneration was reduced in that subsequent school year to reflect the absence of the additional remuneration previously received for teaching that sixth teaching period. (See, e.g., Pet. Br. at Ex. 3.)

9. Prior to the commencement of the present matter, the Association has not challenged reductions in overall remuneration based upon a teacher's assignment, and subsequent non-assignment, to a "1.2" or "1.1" schedule.

10. The additional duties performed by Petitioners as reflected in a "1.1" or "1.2" contract designation are regular teaching duties performed during regular school hours.

11. Petitioner Alicia Carsdale's employment contract for the 2018-19 school year (Pet. Br. at Ex. A1) listed her status as "1.1," and her base salary as $79,809.

a. The additional "0.1" reflected Carsdale's performance of additional teaching duties during the school day.

b. Carsdale received the indicated base salary during the 2018-19 school year.

c. Carsdale also performed these additional teaching duties and received additional remuneration for these additional duties during the 2014-15, 201516, 2016-17, and 2017-18 school years. (See Joint Supp. Statement of Facts at ¶ 1.)

d. For the 2019-20 school year, Carsdale's employment contract listed her status as "1" and her base salary as $75,187. (Pet. Br. at Ex. A2.) Carsdale received this indicated base salary during the 2019-20 school year.

12. Petitioner Daniel Lee's employment contract for the 2018-19 school year (Pet. Br. at Ex. B1) listed his status as "1.1," and his base salary as $67,139.

a. The additional "0.1" reflected Lee's performance of additional teaching duties during the school day.

b. Lee received the indicated base salary during the 2018-19 school year.

c. Lee also performed these additional teaching duties and received additional remuneration for these additional duties during the 2015-16, 2016-17, and

2017-18 school years. (See Joint Supp. Statement of Facts at ¶ 2.)

d. For the 2019-20 school year, Lee's employment contract listed his status as

"1" and his base salary as $63,130. (Pet. Br. at Ex. B2.) Lee received this indicated base salary during the 2019-20 school year.

13. Petitioner Christian Gonzalez's employment contract for the 2018-19 school year (Pet. Br. at Ex. C1) listed his status as "1.2," and his base salary as $73,090.

a. The additional "0.2" reflected Gonzalez's performance of additional teaching duties during the school day.

b. Gonzalez received the indicated base salary during the 2018-19 school year.

c. Gonzalez did not perform these additional teaching duties or receive additional remuneration for these additional duties during the 2014-15, 201516, 2016-17, or 2017-18 school years. (See Joint Supp. Statement of Facts at ¶ 3.)

d. For the 2019-20 school year, Gonzalez's employment contract listed his status as "1" and his base salary as $65,380. (Pet. Br. at Ex. C2.) Gonzalez received this indicated base salary during the 2019-20 school year.

14. Petitioner Aaron Thayer's employment contract for the 2018-19 school year (Pet. Br. at Ex. D1) listed his status as "1.2," and his base salary as $89,285.

a. The additional "0.2" reflected Thayer's performance of additional teaching duties during the school day.

b. Thayer received the indicated base salary during the 2018-19 school year.

c. Thayer also performed these additional teaching duties and received additional remuneration for these additional duties during the 2014-15, 201516, 2016-17, and 2017-18 school years. (See Joint Supp. Statement of Facts at ¶ 4.)

d. For the 2019-20 school year, Thayer's employment contract listed his status as "1" and his base salary as $82,639. (Pet. Br. at Ex. D2.) Thayer received this indicated base salary during the 2019-20 school year.

15. Petitioner Karen Indyk's employment contract for the 2018-19 school year (Pet. Br. at Ex. E1) listed her status as "1.1," and her base salary as $103,180.

a. The additional "0.1" reflected Indyk's performance of additional teaching duties during the school day.

b. Indyk received the indicated base salary during the 2018-19 school year.

c. Indyk also performed these additional teaching duties and received additional remuneration for these additional duties during the 2014-15, 201516, 2016-17, and 2017-18 school years. (See Joint Supp. Statement of Facts at ¶ 5.)

d. For the 2019-20 school year, Indyk's employment contract listed her status as "1" and her base salary as $94,550. (Pet. Br. at Ex. E2.) Indyk received this indicated base salary during the 2019-20 school year.

16. Petitioner Peter Stanton's employment contract for the 2018-19 school year (Pet. Br. at Ex. F1) listed his status as "1.2," and his base salary as $93,075.

a. The additional "0.2" reflected Stanton's performance of additional teaching duties during the school day.

b. Stanton received the indicated base salary during the 2018-19 school year.

c. Stanton did not perform these additional teaching duties or receive additional remuneration for these additional duties during the 2014-15, 201516, 2016-17, or 2017-18 school years. (See Joint Supp. Statement of Facts at ¶ 6.)

d. For the 2019-20 school year, Stanton's employment contract listed his status as "1" and his base salary as $86,730. (Pet. Br. at Ex. F2.) Stanton received this indicated base salary during the 2019-20 school year.

17. Petitioner Mark Eastburn's employment contract for the 2018-19 school year (Pet. Br. at Ex. G1) listed his status as "1.2," and his base salary as $109,822.

a. The additional "0.2" reflected Eastburn's performance of additional teaching duties during the school day.

b. Eastburn received the indicated base salary during the 2018-19 school year.

c. Eastburn did not perform these additional teaching duties or receive additional remuneration for these additional duties during the 2014-15, 2015-16, 2016-17 school years. (See Joint Supp. Statement of Facts at ¶ 7.)

d. For the 2019-20 school year, Eastburn's employment contract listed his status as "1" and his base salary as $102,298. (Pet. Br. at Ex. G2.) Eastburn received this indicated base salary during the 2019-20 school year.

18. Petitioner Johanna Hunsbedt's employment contract for the 2018-19 school year (Pet. Br. at Ex. H1) listed her status as "1.2," and her base salary as $75,345.

a. The additional "0.2" reflected Hunsbedt's performance of additional teaching duties during the school day.

b. Hunsbedt received the indicated base salary during the 2018-19 school year.

c. Hunsbedt did not perform these additional teaching duties or receive additional remuneration for these additional duties during the 2014-15, 201516, or 2016-17 school years. (See Joint Supp. Statement of Facts at ¶ 8.) Hunsbedt did perform these additional teaching duties and receive additional remuneration for these additional duties during the 2017-18 school year. (Ibid.)

d. For the 2019-20 school year, Hunsbedt's employment contract listed her status as "1" and her base salary as $67,830. (Pet. Br. at Ex. H2.) Hunsbedt received this indicated base salary during the 2019-20 school year.

19. Petitioner Emily Spera's employment contract for the 2018-19 school year (Pet. Br. at Ex. I1) listed her status as "1.1," and her base salary as $63,839.

a. The additional "0.1" reflected Spera's performance of additional teaching duties during the school day.

b. Spera received the indicated base salary during the 2018-19 school year.

c. Spera did not perform these additional teaching duties or receive additional remuneration for these additional duties during the 2016-17, or 2017-18 school years. (See Joint Supp. Statement of Facts at ¶ 9.)

d. For the 2019-20 school year, Spera's employment contract listed her status as "1" and her base salary as $58,800. (Pet. Br. at Ex. I2.) Spera received this indicated base salary during the 2019-20 school year.

20. Petitioner Kristin Hill's employment contract for the 2018-19 school year (Pet. Br. at Ex. J1) listed her status as "1.1," and her base salary as $64,939.

a. The additional "0.1" reflected Hill's performance of additional teaching duties during the school day.

b. Hill received the indicated base salary during the 2018-19 school year.

c. Hill did not perform these additional teaching duties or receive additional remuneration for these additional duties during the 2016-17, or 2017-18 school years. (See Joint Supp. Statement of Facts at ¶ 10.)

d. For the 2019-20 school year, Hill's employment contract listed her status as

"1" and her base salary as $59,950. (Pet. Br. at Ex. J2.) Hill received this indicated base salary during the 2019-20 school year.

21. Petitioner Paige Hinton-Mason's employment contract for the 2018-19 school year (Pet. Br. at Ex. K1) listed her status as "1.2," and her base salary as $117,870.

a. The additional "0.2" reflected Hinton-Mason's performance of additional teaching duties during the school day.

b. Hinton-Mason received the indicated base salary during the 2018-19 school year.

c. Hinton-Mason did not perform these additional teaching duties or receive additional remuneration for these additional duties during the 2014-15, 201516, 2016-17, or 2017-18 school years. (See Joint Supp. Statement of Facts at ¶ 11.)

d. For the 2019-20 school year, Hinton-Mason's employment contract listed her status as "1" and her base salary as $108,733. (Pet. Br. at Ex. K2.)

Hinton Mason received this indicated base salary during the 2019-20 school year.

22. Petitioner Shannon Koch's employment contract for the 2018-19 school year (Pet. Br. at Ex. L1) listed her status as "1.2," and her base salary as $119,786.

a. The additional "0.2" reflected Koch's performance of additional athletic training duties during her regular work hours.

b. Koch received the indicated base salary during the 2018-19 school year.

c. Koch also performed these additional teaching duties and received additional remuneration for these additional duties during the 2014-15, 201516, 2016-17, and 2017-18 school years. (See Joint Supp. Statement of Facts at ¶ 12.)

d. For the 2019-20 school year, Koch's employment contract listed her status as "1" and her base salary as $102,298. (Pet. Br. at Ex. L2.) Koch received this indicated base salary during the 2019-20 school year.

23. Petitioner Valerie Rodriguez's employment contract for the 2018-19 school year (Pet. Br. at Ex. M1) listed her status as "1.2," and her base salary as $75,345.

a. The additional "0.2" reflected Rodriguez's performance of additional teaching duties during the school day.

b. Rodriguez received the indicated base salary during the 2018-19 school year.

c. Rodriguez did not perform these additional teaching duties or receive additional remuneration for these additional duties during the 2014-15, 201516, 2016-17, or 2017-18 school years. (See Joint Supp. Statement of Facts at ¶ 13.)

d. For the 2019-20 school year, Rodriguez's employment contract listed her status as "1" and her base salary as $67,830. (Pet. Br. at Ex. M2.) Rodriguez received this indicated base salary during the 2019-20 school year.

e. In January 2020, as a result of Rodriguez obtaining her master's degree, her salary was increased to $73,389. (Pet. Br. at Ex. M3.)

24. Petitioner Amy Borgia's employment contract for the 2018-19 school year (Pet. Br. at Ex. N1) listed her status as "1.1," and her base salary as $75,055.

a. The additional "0.1" reflected Borgia's performance of additional teaching duties during the school day.

b. Borgia received the indicated base salary during the 2018-19 school year.

c. Borgia did not perform these additional teaching duties or receive additional remuneration for these additional duties during the 2014-15, 2015-16, 2016-17, or 2017-18 school years. (See Joint Supp. Statement of Facts at ¶ 14.)

d. For the 2019-20 school year, Borgia's employment contract listed her status as "1" and her base salary as $70,738. (Pet. Br. at Ex. N2.) Borgia received this indicated base salary during the 2019-20 school year.

25. Petitioner Annemarie Mlinar's employment contract for the 2018-19 school year (Pet. Br. at Ex. O1) listed her status as "1.1," and her base salary as $69,399.

a. The additional "0.1" reflected Mlinar's performance of additional teaching duties during the school day.

b. On or about February 2019, Mlinar received her master's degree and received an amended contract for the 2018-19 school year (Pet. Br. at Ex. O2) where her base salary was raised to $75,055, prorated.

c. Mlinar received the indicated base salary during the 2018-19 school year.

d. Mlinar also performed these additional teaching duties and received additional remuneration for these additional duties during part of the 2014-15 school year and for the entirety of the 2015-16, 2016-17, and 2017-18 school years. (See Joint Supp. Statement of Facts at ¶ 15.)

e. For the 2019-20 school year, Mlinar's employment contract listed her status as "1" and her base salary as $70,738. (Pet. Br. at Ex. O3.) Mlinar received this indicated base salary during the 2019-20 school year.

26. Petitioner Nancy Abascal's employment contract for the 2018-19 school year (Pet. Br. at Ex. P1) listed her status as "1.0," and her base salary as $87,820.

a. On or about March 2019, Abascal was reassigned to the status of "1.1" and her salary was raised to $96,602.00. (Pet. Br. at Ex. P2.)

b. The additional "0.1" reflected Abascal's performance of additional teaching duties during the school day.

c. Abascal received the indicated base salary during the 2018-19 school year.

d. Abascal did not perform these additional teaching duties or receive additional remuneration for these additional duties during the 2014-15, 201516, 2016-17, or 2017-18 school years. (See Joint Supp. Statement of Facts at ¶ 16.)

e. For the 2019-20 school year, Abascal received an employment contract that erroneously listed her status as "1.1." (Pet. Br. at Ex. P3.) Abascal requested a correction of this status and received a revised contract for the 2019-20 school year which listed her status as "1" and her base salary as $91,575. (Pet. Br. at Ex. P4.) Abascal received this indicated base salary during the 2019-20 school year.

LEGAL DISCUSSION

N.J.A.C. 1:1-15.5 provides that summary decision should be granted "if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." This language is substantially similar to summary judgment under New Jersey Court Rule 4:46-2(c). Though not required to do so, the OAL uses the standards for summary judgment, as set forth by the New Jersey

Supreme Court, as our standards for summary decision. "[S]ince there are pronounced similarities in the exercise of judicial and 'quasi-judicial' powers, . . . court fashioned doctrines for the handling of litigation do in fact have some genuine utility and relevance in administrative proceedings." City of Hackensack v. Winner, 82 N.J. 1, 29 (1980). It is recognized that the OAL performs many "quasi-judicial" or adjudicative functions and that, in doing so, "[j]udicial rules of procedure and practice are transferable to [the OAL] when these are conducive to ensuring fairness, independence, integrity, and efficiency in administrative adjudications." Matter of Tenure Hearing of Onorevole, 103 N.J. 548, 554-55 (1986).

Summary decision is granted if, after considering the evidence presented in the light most favorable to the non-moving party, there exists no genuine issue of material fact. Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520, 523 (1995). The essential question is "whether the evidence presents a sufficient disagreement to require [a hearing] or whether it is so one sided that one party must prevail as a matter of law." Id. at 533. The Brill Court recognized that this necessarily involves the judge in the process of weighing the evidence presented. Id. When determining whether a genuine issue of material fact exists, "the court should be guided by the same evidentiary standard of proof . . . that would apply" at a hearing. Id. This weighing differs from the weighing the judge would perform after a hearing in that "on a motion for summary [decision] the court must grant all the favorable inferences to the non-movant." Id. at 536.

"When a motion for summary decision is made and supported, an adverse party in order to prevail must by responding affidavit set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding." N.J.A.C. 1:1-12.5(b). "If an adverse party does not so respond, a summary decision, if appropriate, shall be entered." Id. I **CONCLUDE** that, under the Brill standards, this matter is appropriate for summary disposition. The undisputed facts, as set forth by the parties in their cross-motions and joint submissions of stipulated facts, are further

supported by tangible, undisputed evidence. Accordingly, as there are no disputed material facts, the matter is ripe to be determined for summary decision.

The purpose of teaching-staff tenure laws is to "aid in the establishment of a competent and efficient school system by affording teaching staff members 'a measure of security in the ranks they hold after years of service.'" Carpenito v. Rumson Bd. of Educ., 322 N.J. Super. 522, 528-29 (App. Div. 1999) (quoting Viemeister v. Prospect Park Bd. of Educ., 5 N.J. Super. 215, 218 (App. Div. 1949)). Thus, tenured teaching staff members "shall not be dismissed or reduced in compensation except for inefficiency, incapacity, or conduct unbecoming such a teaching staff member or other just cause." N.J.S.A. 18A:6-10.

Petitioners' claim is based on N.J.S.A. 18A:6-10, which holds that persons with tenure in the public school system cannot be dismissed or reduced in compensation "during good behavior and efficiency in the public school system of the state." (See Pet. Br. at 3-4.) Compensation is defined in N.J.S.A. 18A:6-10. (Id. at 4.) Petitioners argue that the additional remuneration they received in the 2018-19 school year for teaching a sixth teaching period is "remuneration in exchange for the performance of [their] core duty," namely teaching during the school day, and is "compensation" for the purposes of N.J.S.A. 18A:6-10. (Id. at 4.) As such, Petitioners contend, "the Board did not have the authority to reduce the Petitioner[s'] remuneration—in fact N.J.S.A. 18A:6-10 compensation" and they should be entitled to "have their salaries retroactively restored to their 2018-19 levels, together with all lawful interest, benefits, and emoluments as may otherwise be necessary to make them whole." (Id. at 7.)

Respondent avers that the remuneration for this additional teaching period was payment for an "extra duty assignment" which paid "additional compensation added to [Petitioners'] base salary on the basis of providing additional work beyond which is prescribed in the CBA for a full-time teaching staff member." (Resp. Br. at 6.) The offer of this additional sixth teaching period is "subject to an identified need" of the Board and the additional teaching period is offered with "a right to decline" which gives Petitioners

"the opportunity to voluntarily accept or decline this extra duty and corresponding additional compensation." (Id. at 6.) Accordingly, Respondent contends that:

> None of the Petitioners named in this matter have been reduced in compensation from their base salary. Rather, Petitioners were offered the extra duty assignment at the time there was an identified need, and subsequently returned to their normal full-time duties, at their contractual full-time base salary when that need no longer existed, pursuant to the applicable provision of the CBA. [Id. at 6–7.]

Respondent argues that, under the undisputed facts of this matter, "Petitioners were never subject to a decrease in their base salary under the CBA, only a reduction of the extra period (and the corresponding compensation) that was no longer necessary or needed." (Id. at 7.)

The question, therefore, is whether Petitioners have tenure rights with respect to their otherwise voluntary assignment to teach a sixth daily teaching period. As Petitioners note (Pet. Br. at 4), "compensation" is defined in N.J.S.A. 18A:66-2, which defines compensation as:

> [T]he contracted salary, for services as a teacher as defined in this article, which is in accordance with established salary policies of the member's employer for all employees in the same position but shall not include individual salary adjustments which are granted primarily in anticipation of the members retirement or additional remuneration for performing temporary or extracurricular duties beyond the regular school day or the regular school year.
> N.J.S.A. 18A:66-2(d)(1).

A tenured teaching staff member's contractual salary is the primary component of their "compensation," which, absent a reduction in force or tenure charges, cannot be reduced.

N.J.S.A. 18A:6-10. See also Allen, et. al. v. Bd. of Educ. of the Twp. of Clark, Union County, EDU 1445-02, Final Decision, (April 30, 2004) http://lawlibrary.rutgers.edu/oal/search.html. In addition to salary, however, there are other payments which also constitute "compensation" such as longevity increments which increase a teacher's salary in consideration of long-term service and payments for additional education. Id. (citing Middletown Twp. Bd. of Educ., P.E.R.C. No. 99-72 (1998); Green Twp. Bd. of Educ., P.E.R.C. No. 99-73 (1999).) See also Bd. of Educ. v. Neptune Twp. Educ. Ass'n, 144 N.J. 16, 34 (1995). This incremental remuneration, like salary, once awarded becomes a component of the teacher's tenure-protected salary. Id.

In contrast, however, other negotiable benefits paid to teachers are otherwise excluded from the scope of "compensation" for the purposes of tenure protection. Id. These may include early retirement inducement payments (Fair Lawn Educ. Ass'n v. Fair Lawn Bd. of Educ., 161 N.J. Super. 67 (App. Div. 1978), aff'd 79 N.J. 574 (1979)), lumpsum end of year payments to a department chair at the end of a school year (Bishop v. Bd. of Trustees, 4 N.J.A.R. 179 (1980)), "customary" overtime (McLean v. Glen Ridge Bd. of Educ., 1977 S.L.D. 311), and payments for extra-curricular assignments (Dignan v. Bd. of Educ. of the Rumson-Fair Haven Reg'l High School, 71 S.L.D. 336). The question, therefore, is whether Petitioners possess tenure rights with respect to their agreeing to work an additional daily teaching period in lieu of their daily "duty period" and the additional remuneration paid to them for that assignment.

Petitioners argue that the additional remuneration they received was not "for services connected to extracurricular activities such as coaching sports or the school yearbook. They received this remuneration for performing additional teaching duties, during the regular school day" and it was "incorporated into Petitioners' normal, pensionable salaries." (Resp. Br. at 7.) In support of their position, Petitioners cite to Melnyk v. Bd. of Educ. of the Delsea Reg'l High Sch. Dist., 241 N.J. 31 (2020). (Resp. Br. at 6.) The teacher in Melnyk was assigned to staff a teaching position in an alternative education program designed to assist the employing school district meet their constitutionally-mandated educational services requirements. Melnyk, 241 N.J. at 43. The teacher in Melnyk provided teaching services in this program in addition to their regular teaching

assignment and received additional hourly compensation for their services in this program for numerous years until the school district assigned another, non-tenured teacher to fulfil these duties for the upcoming school year. Id. at 37.

The Melnyk Court held that, because the teacher had worked in their alternative instructional position for the requisite period of time and held the required instructional certificate to teach in that position, she was entitled to tenure protections against removal or reduction in compensation associated with that position. Id. at 50. The Melnyk Court concluded that, because the teacher had acquired tenure rights to her position with the alternate education program outside of her separate tenure rights in her capacity in the school's regular day program, the teacher's position in this alternate education program was "separately tenure eligible and her compensation for it could not be reduced without compliance with the procedural protections of the Tenure Act." Ibid.

Petitioners' argument under Melnyk is that they acquired tenure in this assignment to teaching an additional period in lieu of their duty period each day and their additional compensation for this assignment is now part of their tenured compensation. Among the requirements for tenure in a position is that the teacher has "served the requisite period of time" in a position to obtain tenure. Spiewak v. Summit Board of Education, 90 N.J. 63, 74 (1982). Pursuant to N.J.S.A. 18A:28-5a, a teacher must serve in an employed position for "[t]hree consecutive academic years, together with employment at the beginning of the next succeeding academic year" or "the equivalent of more than three academic years within a period of four consecutive academic years" to obtain tenure in that position.

On the record initially presented in the parties' cross-motions, it was clear only that Petitioners agreed to accept the additional sixth teaching period during the 2018-19 school year but were not asked to continue in this additional sixth teaching period for the 2019-20 school year. Following oral argument, the parties were given the opportunity to amend the factual record to determine if any of the named Petitioners were offered this additional teaching period and accepted that assignment and extra

remuneration in any other school year. Based on the information provided in the parties' joint supplemental statement of facts, Petitioners Gonzalez (Joint Supp. Statement of Facts at ¶ 3), Stanton (id. at ¶ 6), Eastburn (id. at ¶ 7), Hunsbedt (id. at ¶ 8), Spera (id. at ¶ 9), Hill (id. at ¶ 10), Hinton-Mason (id. at ¶ 11), Rodriguez (id. at ¶ 13), Borgia (id. at ¶ 14), and Abscal (id. at ¶ 16) did not work this extra teaching assignment and receive this additional remuneration for three consecutive years or more than three academic years within the period of four academic years. I **CONCLUDE**, therefore, that it is uncontested on the record presented, that Petitioners Gonzalez, Stanton, Eastburn, Hunsbedt, Spera, Hill, Hinton-Mason, Rodriguez, Borgia, and Abscal have not worked in this position of teaching for a sixth daily teaching period for the statutorily defined minimum period of time to meet this requirements of N.J.S.A. 18A:28-5a(1)–(3) to be eligible for tenure in that position. (See Resp. Br. at 3 (noting that the Petitioners did not "serve in the position for longer than the statutorily mandated 4 years" to obtain tenure in the additional duty assignment).)

While Petitioners Carsdale (Joint Supp. Statement of Facts at ¶ 1), Lee (id. at ¶ 2), Thayer (id. at ¶ 4), Indyk (id. at ¶ 5), Koch (id. at ¶ 12), and Milnar (id. at ¶ 15) have demonstrated that they have worked the extra teaching period assignment the minimum number of years to meet the requirements of N.J.S.A. 18A:28-5a(1)–(3), their tenure claims are undermined by the undisputed fact that the assignment to teach in this sixth period is subject to the identified need of the District and offered, along with the additional remuneration, to teachers with a right for the teacher to decline the additional assignment. (Pet. Br. at Ex. 1 at ¶ 8(B)(1).) Unlike the teacher in Melnyk, who was removed from an additional teaching assignment (and the associated additional remuneration) and replaced in that assignment by a non-tenured teacher (see Melnyk, 241 N.J. at 620), the Petitioners in the present matter were relieved of their additional duty, and associated additional remuneration, in their 2019-20 contracts after the District determined that this additional need for teaching that additional period "no longer existed." (Resp. Br. at 7.)

A similar issue was previously addressed by the Commissioner in the matter McLean v. Bd. of Educ. of Glen Ridge, 1977 S.L.D. 311. In the McLean matter, the petitioner, a

janitor, sought compensation for overtime duties which had been "customarily" assigned to him on the basis that the money he previously earned through customary overtime assignments was part of his statutorily protected "compensation." Id. at 312–13. The Commissioner disagreed with this argument, finding that "compensation" has been defined to "include contracted salary but to exclude an entitlement to add thereto payment for 'extra work'." Id. at 313. Relying on Reed and Hills v. Trenton Board of Education, 1938 S.L.D. 437, the Commissioner in McClean held that the tenure act was not designed to address "a temporary increase [in salary] given for extra work done" because, to do so, would mean that "any temporary payments to teachers for temporary work could not be made without incurring the liability of permanent indebtedness and school boards would be tempted to put all extra services upon teachers without any extra compensation whatsoever." Id. at 313 (quoting Reed, 1938 S.L.D. at 441). The Commissioner in McClean declined to extend tenure protection to these extra payments because doing so would remove a "necessary flexibility" from the school boards. Id. at 314.

Here, as in McClean, the additional remuneration at issue was given to Petitioners for an extra assignment which was offered in cases of "identified need" by the District and extended to the teachers "with the right to decline." (Pet. Br. at Ex. 1.) The District identified a need for this additional period in the 2018-19 school year, and Petitioners agreed to perform this additional assignment and receive the agreed-upon additional remuneration. The District did not identify the need to continue these additional assignments in the 2019-20 school year, and the opportunity to continue working this additional teaching period and receive the additional remuneration was not extended to Petitioners for the 2019-20 school year.

Petitioners contend that they are salaried employees who are not paid "by the hour" or "by the class." (Pet. Br. at 4.) Regardless of whether they are assigned to a sixth daily teaching period, they are "still working the same number of hours in the school building, during the school day." (Id.) Petitioners argue that allowing the Board to withdraw this additional teaching period, and its associated remuneration, would eviscerate tenure protections by permitting compensation of teachers to rely on an "assignment" or "piece-work" basis which Districts could use to reduce compensation by reducing a teacher's work assignments. (Id.) Petitioners assert that the remuneration previously received for this sixth teaching period, once granted, "cannot be reduced"

because that additional money paid for that period is now part of their statutorily protected

"compensation." (Id. at 7.)

Petitioners' argument, however, overlooks the temporary nature of the additional work performed. As the terms of the CBA clearly delineate, this additional teaching period is a voluntary assignment that is offered by the District upon the District finding an identified need for this extra work. (Pet. Br. at Ex. 1, ¶ 8(B)(1).) This additional assignment is a departure from the contractually defined responsibilities of a teacher in the District to handle a teaching load of "five (5) hours per day of pupil contact, consisting of five (5) teaching periods and one (1) duty period." (Pet. Br. at Ex. 1.) The conversion of the sixth period from a duty period to a teaching period, and a teacher's eligibility for the additional remuneration that accompanies that conversion, has two identified prerequisites—the District must identify the need for a sixth teaching period, and the teacher must agree to accept the assignment for that sixth teaching period. (Id.) Where it is mutually agreed upon that a sixth teaching period is needed and the teacher agrees to perform that duty, the teacher receives additional remuneration which is "added to their base salary for that year or portion thereof." (Ibid.) This additional language highlighting that the additional remuneration is added to a teacher's base salary only for the year or portion of the year they work the additional teaching period highlights the temporary and conditional nature of these assignments. As the Appellate Division has noted, such temporary and conditional assignments cannot be used to form the basis of tenured compensation, holding that:

> [W]here employment is offered and accepted on a temporary basis and its temporary nature is understood by both employer and employee to be one of its essential predicates, such employment cannot then be relied on by the employee as the basis of tenure.
>
> Spiewak v. Board of Education, 180 N.J. Super. 312, 318 (App.Div. 1981).

See also Point Pleasant Beach Teachers Assoc. v. Callam, 173 N.J. Super. 11, 17

(App.Div. 1980) (denying to extend tenure to teachers hired on a temporary "as needed" basis to provide remedial aid to children).

The CBA defines the daily teaching load as "five teaching periods and one duty period." (Pet. Br. at Ex. 1, ¶ 8(B)(1).) The conversion of the duty period to an additional teaching period is an optional additional assignment of teaching duties, which the teachers may decline without reduction in their contracted time. (Ibid.) In exchange for accepting this additional teaching assignment, Petitioners were given contractually agreed upon additional remuneration. (Ibid.) N.J.S.A. 18A:66-2(d)(1) explicitly excludes from tenured compensation "additional remuneration for performing temporary or extracurricular duties beyond the regular school day." See also Reed and Hills, 1938 S.L.D. at 441 ("The prohibition against reduction of salary [in the Tenure Act] applies to a permanent scheduled salary and not to a temporary increase given for extra work done"); McLean v. Bd. of Ed. of Glen Ridge, 1977 S.L.D. 311, 314 (additional payments for voluntary overtime not covered as tenure-protected compensation). Although Petitioners contend that the additional teaching period involved providing "additional teaching duties during the regular school day" (Resp. Br. at 7), it remains factually uncontested that the addition of a sixth daily teaching period to a teacher's schedule also requires the teacher to perform additional duties such as lesson preparation, review of student assignments, and grading of exams, which occur beyond the designated teaching period and, presumably, have to be conducted on time outside the defined regular school day. It is this additional work that accompanies the acceptance of the additional daily teaching period which justifies the District offering additional remuneration to teachers who voluntarily assume this additional workload when offered by the District based on the
District's identified needs.

Further supporting the conclusion that the additional remuneration received by Petitioners is not tenure-protected compensation is that it remains factually undisputed that the offering of this additional teaching period, the associated remuneration, is subject to an "identified need" by the District for this additional work (Pet. Br. at Ex. 1 at

¶ 8(B)(1)), and the District no longer has a need for this additional work. (Resp. Br. at 7.) Respondent argues that, under these circumstances, "when that need ended, so did the extra work and corresponding compensation for the employee." (Ibid.) See also Dingan v. Bd. of Ed. of Rumson Fair-Haven Reg. High Sch., 71 S.L.D. 336, 342 ("[t]he extra compensation ceases when the extra-classroom assignment is no longer performed");

Dallolio v. Bd. of Ed. of the City of Vineland, 1965 S.L.D. 18, 22 439 ("[W]hen the extra work is no longer performed the extra compensation for that purpose can no longer be claimed"). To accept Petitioners' argument on its face that, once a teacher accepts this sixth teaching period and the associated remuneration, their tenure-protected compensation is upwardly adjusted to include the additional payments for this additional voluntary work and that upwardly adjusted salary "cannot be reduced" because the additional money paid for that period is now part of their statutorily protected "compensation" (Id. at 7) would yield bizarre results. Such an interpretation would, presumably, give a teacher who previously accepted this additional teaching period in the 2018-19 school year but exercises their contractually protected option to refuse to teach that additional period in subsequent years (Pet. Br. at Ex. 1) the right to continue collecting the additional renumeration for that extra teaching period as part of their now-tenured compensation without continuing the accompanying obligation to perform the extra duties in subsequent school years. For the reasons stated above, I **CONCLUDE**, therefore, that this additional remuneration Petitioners received in the 2018-19 and other school years for this sixth teaching period is not tenure-protected compensation within the definition of N.J.S.A. 18A:66-2(d)(1).

Also weighing against Petitioners' claim in this matter is the statutory mandate that tenure laws cannot be used to limit the right of a board of education to reduce the number of teaching staff members or abolish positions for reasons of economy. N.J.S.A. 18A:28-

9. The District's determination to reduce the number of teaching periods needed and to not extend the option for the additional period to Petitioners in their 2019-20 contracts amounts to a reduction of hours and associated compensation which remains within the rights of the District under N.J.S.A. 18A:28-9 regardless of tenure provisions. As the

Appellate Division noted in Klinger v. Board of Education, 190 N.J. Super. 354, 357 (1982) (internal citations omitted):

> Whether of tenured or nontenured teachers, reduction in force is entirely within the authority of the board if done for reasons of economy. Reduction in hours of employment is considered a reduction in force.

See also Papovich v. Bd. of Ed. of Borough of Wharton, 1975 S.L.D. 737, 745 (reduction of a teacher's position from full-time employment to three days per week constitutes "a reduction of staff"). Here, the Board made its determination that the additional teaching period was no longer needed and exercised its discretion to eliminate the option for teaching that additional period. For this reason, I further **CONCLUDE** that the Board's action in this matter constitutes a reduction in staff and cannot be limited by the application of tenure laws. N.J.S.A. 19A:28-9.

CONCLUSION

In light of the above, I **CONCLUDE** that Respondent's motion for summary decision should be **GRANTED**, and Petitioners' cross-motion for summary decision should be **DISMISSED**.

ORDER

It is therefore **ORDERED** that Respondent's July 1, 2020, motion for summary decision is hereby **GRANTED**, and Petitioners' July 9, 2020, cross-motion for summary decision is hereby **DENIED** and Petitioners' petition to enjoin the Board from not including the additional optional assignment and associated compensation in Petitioners' 2019-20 school year contracts is **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF**

THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, P.O. Box 500, Trenton, New Jersey 086250500, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

November 4, 2020 DATE

DAVID M . FRITCH , ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

/dw