

New Jersey Commissioner of Education
Final Decision

John Moylan,

Petitioner,

v.

Board of Education of the Borough of
Saddle River, Bergen County,

Respondent.

Synopsis

Petitioner has worked for the respondent Board as a Teacher of Music since 2005, during which time the Board has implemented several reductions in force (RIF), and petitioner’s position has fluctuated between full and part time. At present, petitioner is a part time employee, teaching 60% of a full time schedule. Petitioner alleged that the Board is improperly employing a non-tenured teacher in a full-time position for which petitioner is qualified, in violation of petitioner’s tenure rights. Petitioner argued that he was the subject of a RIF in 2019 which activated his tenure and seniority rights. The Board filed a motion for summary decision, which was opposed by the petitioner.

The ALJ found, *inter alia*, that: there are no material facts at issue here, and the matter is ripe for summary decision; petitioner is a tenured teacher in respondent’s school district; petitioner’s employment in the district has been solely as a music teacher; and he cannot claim seniority rights to a position he has never held; accordingly, petitioner is not entitled to the position he claims. The ALJ granted summary decision to the Board and dismissed the petition.

The Commissioner found, *inter alia*, that: a RIF did not occur in 2019 as the Board rescinded its vote to reduce petitioner’s hours, and while a RIF did occur in 2017, petitioner did not at that time hold any endorsement other than the Teacher of Music endorsement; petitioner retains his tenure right to reemployment for a greater number of hours should a vacancy arise in the district within the scope of his Teacher of Music endorsement, but he has no right to reemployment for any position requiring another endorsement. Accordingly, the Commissioner granted the Board’s motion for summary decision and dismissed the petition. In so doing, the Commissioner noted that the ALJ’s analysis regarding seniority does not apply in this case – where petitioner is a tenured teacher and the teacher holding the position which petitioner is seeking is not tenured – because seniority only becomes an issue when ranking two or more tenured teachers for the same position.

This synopsis is not part of the Commissioner’s decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

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OAL Dkt. No. EDU 08416-20

Agency Dkt. No. 168-8/20

New Jersey Commissioner of Education

Final Decision

John Moylan,

Petitioner,

v.

Board of Education of the Borough of
Saddle River, Bergen County,

Respondent.

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

Petitioner has been employed by the Board as a music teacher since 2005. Throughout that time, the Board implemented several reductions in force (RIF), and petitioner's employment fluctuated between part-time and full-time. Petitioner is currently a part-time employee teaching 60 percent of a full-time schedule, and he alleges that the Board is improperly employing a non-tenured teacher in a full-time position for which petitioner is qualified, in violation of petitioner's tenure rights. Specifically, a teacher who was assigned to teach physical education and health for 60 percent of a full time schedule was also assigned to teach Response to Intervention (RTI) – a type of basic skills course – for 40 percent of a full-time schedule, bringing that teacher's schedule to full-time. Petitioner asserts that he should have been assigned to teach the RTI courses so that he would be a full-time employee. The Administrative Law Judge (ALJ) found that petitioner was

asserting seniority rights to a position that he had never held, and therefore petitioner was not entitled to that position.¹

In his exceptions, petitioner argues that he was subject to a RIF in April 2019 that activated his tenure and seniority rights. Petitioner argues that his tenure right does not require him to have previously provided RTI instruction, as his tenure rights encompass all the endorsements to his instructional certificate that he held at the time of the April 2019 RIF. Petitioner notes that in April 2019, he held an instructional certificate with endorsements as a Teacher of Music, Elementary School Teacher K-6, and Teacher of Supplemental Instruction: Reading and Mathematics K-8. According to petitioner, he had tenure rights to all positions within the scope of any of those endorsements, including the RTI courses, and it was improper for the Board to assign a non-tenured teacher to the RTI courses rather than petitioner.

In reply, the Board argues that the April 2019 RIF was rescinded by the Board in June 2019, such that petitioner was employed for the same number of hours for the 2019-2020 school year as he had been in 2018-2019, and therefore there was no RIF to trigger petitioner's tenure rights. The Board notes that, at the time of the previous RIF in the spring of 2017, petitioner only had a Teacher of Music endorsement, which does not entitle him to tenure rights to a position other than a music position.

Upon review, the Commissioner finds that a RIF did not occur in April 2019. While the Board voted to reduce petitioner's hours, it rescinded that vote and petitioner suffered no reduction in hours. In order to be eligible for reemployment following a RIF, the teacher must have

¹ The Commissioner notes that a tenured teacher seeking reemployment to a position for which he holds the appropriate endorsement is entitled to preference in a RIF over a non-tenured teacher, even if the tenured teacher has no experience in the position he is seeking. *Capodilupo v. Bd. of Educ.*, 218 N.J. Super. 510 (App. Div. 1987). Seniority becomes an issue when ranking two or more tenured teachers for the same position. For this reason, the ALJ's analysis is inapplicable to this matter, in which petitioner is a tenured teacher and the teacher holding the position which petitioner is seeking is not tenured. However, for the reasons explained herein, petitioner does not have any right to the position held by the non-tenured teacher.

been dismissed. *N.J.S.A. 18:28-12*. The same principle applies when a teacher's hours are reduced following a RIF – the teacher's hours must have actually been reduced. No reduction occurred here, as petitioner served as a 0.6 full-time equivalent employee in the school year before the RIF and the school years after. As no RIF occurred in April 2019, petitioner's tenure right to reemployment was not triggered at that time.

It is undisputed that, at the time of the previous RIF in spring 2017, petitioner did not possess an Elementary School or Supplemental Instruction endorsement, and only possessed a Teacher of Music endorsement. Accordingly, while petitioner retains his tenure right to reemployment for a greater number of hours should a vacancy arise in the district within the scope of his Teacher of Music endorsement, he has no right to reemployment for any position requiring another endorsement. See *Francey v. Bd. of Educ. of City of Salem, Salem Cty.*, 286 N.J. Super. 354 (App. Div. 1996) (holding that reemployment rights are based on the certificates and endorsements held at the time of the RIF and that endorsements acquired after the date of the RIF do not give rise to reemployment rights); *Lobello v. Bd. of Educ. of Warren Hills Regional School Dist. Warren Cty.*, Commissioner Decision No. 161-11 (Apr. 27, 2011).

Accordingly, the Board's motion for summary decision is granted, and the petition of appeal is hereby dismissed.

IT IS SO ORDERED.²


ANGELICA ALLEN McMILLAN, J.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: April 14, 2022
Date of Mailing: April 14, 2022

² This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A. 18A:6-9.1*. Under *N.J.Ct.R. 2:4-1(b)*, a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDU 08416-20

AGENCY DKT. NO. 168-8/20

JOHN MOYLAN,
Petitioner,

vs.

**BOARD OF EDUCATION OF THE
BOROUGH OF SADDLE RIVER,
BERGEN COUNTY,**
Respondent.

Kathleen Naprstek Cerisano, Esq., for Petitioner (Zazzali, Gazelle, Nowak,
Kleinbaum and Friedman, P.C., attorneys)

Mark A. Wenczel, Esq., for Respondent (Cleary, Giacobbe, Alfieri & Jacobs,
LLC, attorneys)

Record Closed: February 3, 2022

Decided: February 28, 2022

BEFORE: THOMAS R. BETANCOURT, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner filed a petition with the Commissioner of the New Jersey Department of Education alleging a violation of his tenure rights. The matter was transferred to the Office of Administrative Law (OAL) as a contested matter September 4, 2020.

A prehearing conference was held on October 1, 2020, and a Prehearing Order was entered by the undersigned on the same date.

Respondent filed a Motion for Summary Decision dated September 17, 2021. Petitioner filed his responsive brief, dated November 8, 2021. Respondent filed its reply brief, dated December 8, 2021.

Oral argument was held on the motion on February 3, 2022.

FACTUAL DISCUSSION

Petitioner began his employment with the Respondent Board in the 2005/2006 school year as a .6 full time equivalent (FTE) music teacher and a .4 FTE computer teacher. Petitioner continued in that employment for the 2006/2007 school year.

During the 2007/2008 and 2008/2009 school years Petitioner was employed as a .8 FTE music teacher.

From October 28, 2009 through the 2011/2012 school year Petitioner was employed as a full-time 1.0 FTE music teacher.

During the 2012/2013 and 2013/2014 school years Petitioner was employed as a .8 FTE music teacher due to a reduction in force (RIF).

During the 2014/2015 school year Petitioner was employed as a full-time 1.0 FTE music teacher.

During the 2015/2016 school year Petitioner was employed as a .8 FTE music teacher due to a RIF.

Petitioner continued as a .8 FTE music teacher during the 2016/2017 school year.

During the 2017/2018 school year Petitioner was employed as a .6 FTE music teacher due to a RIF.

During the 2018/2019 school year Petitioner was offered and accepted employment as a .6 FTE vocal music/basic skills instructor.

When the Board made its employment assignments on May 31, 2018, Petitioner did not possess an Elementary School Teacher K-6 endorsement.

At the time of his initial hire, Petitioner possessed an instructional certificate with an endorsement as a Teacher of Music, issued the New Jersey Department of Education. On or about June 14, 2018, Petitioner received an endorsement as an Elementary School teacher K-6 to his instructional certificate. By memo dated September 12, 2018, Petitioner advised Dr. Cinotti, the Board Superintendent to advise her that he held endorsements to his instruction certificate for Teacher of Music, Elementary School Teacher K-6, and Teacher of Supplemental Instruction: Reading and Mathematics K-8. In November 2018 Petitioner was issued a certificate of eligibility as a Teacher of Preschool through Grade 3.

Dr. Gina Cinotti began as Superintendent on July 1, 2018. Petitioner's assignment for the 2018/2019 school year was changed from .6 FTE vocal music/basic skills instructor to .6 FTE employment as Vocal Music and Instrument, which Petitioner accepted. This assignment consisted of .4 FTE music teacher and .2 FTE music instrumental instruction.

The Board had intended to reduce Petitioner's position to a .4 FTE position due to a RIF. After Petitioner advised of his intention to exercise bumping rights, Petitioner

was offered continued employment as a .6 FTE music teacher, which Petitioner accepted.

During the 2019/2020, 2020/2021 and 2021/2022 school years the District has offered, and Petitioner has accepted, employment as a .6 FTE music teacher.

During his employment with the Respondent Board, Petitioner only worked as a music teacher, other than the 2005/2006 and 2006/2007 school years, when he was employed as a .6 FTE music teacher and .4 FTE computer teacher.

The Respondent Board eliminated the Basic Skills Program at the end of the 2018/2019 school year. It was replaced by a Response to Intervention (RTI) program so as to comply with New Jersey Quality Single Accountability Continuum (NJQSAC) requirements of the New Jersey Department of Education.

Petitioner has provided music instruction in Vocal Music, Recorders, and Music Infusion since the 2019/2020 school year. Another teacher in the classroom is responsible for instruction in other areas. During this school year Petitioner was assigned to Linda Garage's classroom on Tuesday and Wednesday to provide music infusion into the classroom. During his time in Ms. Garage's classroom, Petitioner assisted with non music instruction. This assistance with non music instruction was not what he was employed to do. This non music instruction was undertaken without the knowledge or approval of Respondent.

When Ms. Garage retired Respondent employed Anthony Verdi, who holds a provisional certificate as a Teacher of Health and Physical Education issued in January 2020, and a certificate of eligibility as an Elementary School Teacher K-6, for the 2020/2021 school year to a full-time position, which included RTI instruction.

LEGAL ANALYSIS AND CONCLUSION

Summary Decision

A motion for summary decision may be granted if the papers and discovery presented, as well as any affidavits which may have been filed with the application, show that there is no genuine issue of material fact and the moving party is entitled to prevail as a matter of law. N.J.A.C. 1:1-12.5(b). If the motion is sufficiently supported, the non-moving party must demonstrate by affidavit that there is a genuine issue of fact which can only be determined in an evidentiary proceeding, in order to prevail in such an application. Ibid. These provisions mirror the summary judgment language of R. 4:46-2(c) of the New Jersey Court Rules.

The motion judge must “consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party . . . , are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party.” Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 523 (1995). And even if the non-moving party comes forward with some evidence, this forum must grant summary decision if the evidence is “so one-sided that [the moving party] must prevail as a matter of law.” Id. At 536 (citation omitted).

A careful reading of the certifications submitted both in support of, and opposition to, the motion for summary decision demonstrates that there are no material relevant facts in dispute.

Petitioner claims as disputed fact his assignment to teach music infusion during his 2019/2020 school year, presumably on the basis of his claim in his certification that he, in fact, assisted Ms. Garage with non music instruction. While this may well be true, Petitioner was not employed to teach non music instruction. Accordingly, he could not obtain tenure or seniority rights for choosing to assist Ms. Garage outside the scope of his employment. This may be a fact. It is not a material fact as Petitioner assisting Ms. Garage does not give rise to a claim of tenure or seniority.

Based on the foregoing, I **CONCLUDE** that there are no relevant material facts in dispute and the matter is ripe for summary decision.

Tenure Rights

The tenure of teaching staff is authorized by the Tenure Act, N.J.S.A. 18A:28-1, et seq. A teaching staff member must hold a valid certificate to “teach, administer, direct or supervise the teaching, instruction, or educational guidance of . . . pupils in such public schools and of such other certificate, if any, as may be required by law.” N.J.S.A. 18A:26-2. In order to attain tenure, a teaching staff member must hold the appropriate certificate for his or her position. N.J.S.A. 18A:28-4. In addition to certification, the teaching staff member must also be employed by the school district or board for: “(a) [t]hree consecutive calendar years, or any shorter period which may be fixed by the employing board for such purpose; or (b) [t]hree consecutive academic years, together with employment at the beginning of the next succeeding academic year; or (c) [t]he equivalent of more than three academic years within a period of any four consecutive academic years.” N.J.S.A. 18A:28-5.

There are three types of educational certificates issued by the Board of Examiners: (1) instructional; (2) administrative and supervisory; and (3) educational services. N.J.A.C. 6:11-2.3. The Board of Examiners may also issue special “endorsements” under the appropriate certificates. Ibid. A teaching staff member must have the appropriate certificate and endorsement for his or her position. For example, an art teacher would be required to hold an instructional certificate with an art endorsement, which “authorizes the holder to teach art in all public schools.” N.J.A.C. 6:11-6.2(a)(2). A teaching staff member may possess multiple endorsements under a certificate, qualifying him or her to fill any position covered by the corresponding endorsement. For example, an art teacher holding an instructional certificate with an art endorsement and an english as a second language endorsement is authorized to teach both art and English as a second language in all public schools. N.J.A.C. 6:11-6.2(a)(2), (a)(8).

Seniority is determined in accordance with N.J.A.C. 6A:32-5.1(b), as follows:

Seniority, pursuant to N.J.S.A. 18A:28-13 et seq., shall be determined according to the number or fraction of academic or calendar years of employment in the school district in specific categories as hereinafter provided. The periods of unpaid absences not exceeding 30 calendar days aggregate in one academic or calendar year, leaves of absence at full or partial pay, and unpaid absences granted for study or research, except for leaves of absence or suspension resulting from confirmed discipline, shall be credited toward seniority. All other unpaid absences or leaves of absence shall not receive seniority credit.

N.J.A.C. 6A:32-5.1(l)18ii states:

Any person employed at the elementary level in a position requiring an educational services certificate or an instructional endorsement shall acquire seniority only in the elementary category and only for the period of actual service under such educational services certificate or instructional endorsement.

Petitioner asserts seniority to a position he never held. He cannot claim seniority for a position which he did not hold, notwithstanding his claim to the contrary in his certification. What he, and Ms. Garage, chose to do in her classroom beyond the scope of his employment contract does not give rise to a claim of seniority.

Nothing set forth in the Certification of Petitioner and the Certification of Ms. Garage give rise to Petitioner's assertion that he is entitled to seniority rights. He never held the position to which he claims seniority. His employment was that of a music teacher.

Based upon the foregoing, I **CONCLUDE** that Respondent must prevail as a matter of law.

ORDER

It is hereby **ORDERED** that Petitioner's Complaint is **DISMISSED**, with prejudice.

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 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, PO Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

February 28, 2020
DATE

Date Received at Agency:

Date Mailed to Parties:


THOMAS R. BETANCOURT, ALJ
February 28, 2020
February 28, 2020

db

APPENDIX

List of Moving Papers

For Respondent:

Motion for Summary Decision

Certification of Dr. Gina Cinotti., with Exhibits A through L

Brief in Support of Motion for Summary Decision

Reply Brief in Support of Motion for Summary Decision

For Petitioner:

Brief in opposition

Certification of John Moylan, Petitioner, with Exhibits A through S

Certification of Linda Garage