

EDU #705-92 and #5018-92 (consolidated)
C #174-94
SB # 35-94

DARREN RESSLER, :

PETITIONER-APPELLANT, :

V. :

BOARD OF EDUCATION OF THE TOWN- :
SHIP OF SADDLE BROOK, BERGEN :
COUNTY, :

RESPONDENT-RESPONDENT, :

AND :

MARIO ALIA AND HELEN HYMANSON, :

INTERVENORS, :

STATE BOARD OF EDUCATION

AND :

DECISION

DARREN RESSLER, :

PETITIONER-APPELLANT, :

V. :

BOARD OF EDUCATION OF THE TOWN- :
SHIP OF SADDLE BROOK, BERGEN :
COUNTY, :

RESPONDENT-RESPONDENT, :

AND :

MARIO ALIA AND HOWARD SCHUMAN, :

INTERVENORS. :

Decided by the Commissioner of Education, June 27, 1994

For the Petitioner-Appellant, Bucceri & Pincus (Louis Bucceri, Esq., of Counsel)

For the Respondent-Respondent, Anthony N. Gallina, Esq.

For Intervenor Mario Alia, Balk, Oxfeld, Mandell & Cohen (Randi Doner, Esq., of Counsel)

For Intervenor Helen Hymanson, Springstead & Maurice (Harold N. Springstead, Esq., of Counsel)

For Intervenor Howard Schuman, Zazzali, Zazzali, Fagella & Nowak (Robert A. Fagella, Esq., of Counsel)

Darren Ressler (hereinafter "petitioner"), a tenured teaching staff member, filed a petition with the Commissioner of Education alleging that the Board of Education of the Township of Saddle Brook (hereinafter "Board") had violated his tenure and seniority rights when it reduced his employment to part-time during the 1991-92 school year. He subsequently filed a second petition challenging the Board's action abolishing his part-time position at the end of that school year. Those petitions were later consolidated in the Office of Administrative Law.

Petitioner, who held an instructional certification in health and physical education, commenced his employment in the district in 1976 as a full-time physical education teacher in grades nine through twelve. In 1989-90, his assignment was expanded to encompass grades six through twelve. In 1990-91, petitioner resumed his prior assignment in grades nine through twelve, and in 1991-92, he was assigned to teach physical education in grades four through ten.

Intervenor Mario Alia, who also held a teaching certification in health and physical education, had been employed in the district as a teacher since 1958 and also had served as athletic director since 1970. In 1991-92, Alia had performed his responsibilities as athletic director during the seventh and eighth periods of each school day. On October 2, 1991, Alia submitted his resignation as athletic director, effective December 1, 1991, which the Board accepted on October 9, 1991.

On December 5, 1991, petitioner was notified that Alia was being assigned his seventh-period physical education class for ninth graders and his eighth-period class for tenth graders. Thereafter, on December 11, the Board took formal action to reduce petitioner's employment to a .6 position effective February 12, 1992. Then, on April 7, 1992, the Board abolished petitioner's part-time position effective June 30, 1992. In June, prior to the effective date of that reduction in force ("RIF"), petitioner obtained an instructional certification in elementary education.

The issues in this case, as identified by the Administrative Law Judge ("ALJ"), were: 1) whether Intervenor Alia, who had voluntarily resigned from his position as athletic director, had preference over petitioner to a full-time teaching position, 2) whether petitioner had greater seniority than two other tenured teachers, Intervenor Helen Hymanson and Howard Schuman, to an assignment teaching elementary physical education, and 3) whether petitioner had any additional tenure rights by virtue of the elementary education certification he acquired after the Board had acted to reduce its staff.

The ALJ rejected petitioner's contention that the Board had violated his tenure rights when it assigned Intervenor Alia to teach two of his classes during the 1991-92

school year and reduced petitioner to part-time. Stressing that there had been a “reduction in the total number of person-hours now that Alia has been relieved of his extra duties,” initial decision, slip op. at 9, the ALJ found that when the time devoted by Alia to his duties as athletic director had become available for teaching, “the district no longer needed as many full-time teaching positions and someone on staff had to bear the loss of hours.” Id. The ALJ concluded that, confronted with this “business necessity,” the Board had properly reduced the hours of petitioner, who had the least seniority of all physical education teachers at the secondary level.

However, finding that petitioner had also accrued seniority as a teacher of elementary physical education as the result of his service at that level in 1989-90 and 1991-92, the ALJ concluded that the Board had violated petitioner’s rights by failing to recognize his seniority in that particular category. Thus, the ALJ found that following petitioner’s RIF during 1991-92, in which he was reduced to part-time status, he had entitlement to the physical education assignment in grades four, five and six held by Intervenor Hymanson, and that following the abolishment of petitioner’s position at the end of the 1991-92 school year, he was entitled to the assignment in those grades given to Schuman in 1992-93. Neither Hymanson nor Schuman had previously taught physical education at the elementary level.

The ALJ also noted that, while it could be argued that grades seven and eight in this district were not departmentalized—which would bring them within the scope of petitioner’s seniority as a teacher of elementary physical education—petitioner had not “press[ed] such claim.” Id., n.8, slip op. at 12. The ALJ found that “[a]cceptance of such an argument would also be grossly unfair to Helen Hymanson, who justifiably relied on

the original stipulation [exhibit J-8, in evidence] that ‘Grades 7 and 8 in respondent’s district are departmentalized.’”¹ Id.

Finally, the ALJ rejected petitioner’s contention that he was entitled to reinstatement as an elementary school teacher as against nontenured teachers by virtue of the elementary education endorsement issued to him after the Board had acted to abolish his position. Citing Francey v. Board of Education of the City of Salem, decided by the Commissioner, 92 N.J.A.R.2d (EDU) 449, aff’d with modif. by the State Board, August 3, 1994, aff’d, Docket #A-0625-94T2 (App. Div. 1996) and Johnstone v. Board of Education of the Township of Cinnaminson, decided by the Commissioner, 92 N.J.A.R.2d (EDU) 506, aff’d with modif. by the State Board, October 5, 1994, aff’d, Docket #A-1271-94T2 (App. Div. 1996), the ALJ stressed that staff members had tenure entitlement only to those positions for which they held the appropriate certification on the date the district board acted to reduce its staff. Consequently, the ALJ concluded that petitioner had not gained any additional rights when he obtained an elementary education certification after the Board had acted to abolish his position.

The Commissioner adopted the findings and conclusions of the ALJ, and directed the Board to compensate petitioner for his back pay and other benefits arising from its failure to offer him the fourth-, fifth- and sixth-grade physical education classes assigned to Intervenor Hymanson during the 1991-92 school year and to Intervenor Schuman in 1992-93.

¹ We note that a subsequent stipulation between the parties, exhibit 2J-11, in evidence, indicated that certain elementary grades in the district were “modified departmentalized.”

Petitioner filed the instant appeal to the State Board, contending that the Board had violated his tenure rights in assigning Intervenor Alia to teach two of his physical education classes in 1991-92 and reducing him to part-time status; that his seniority in elementary physical education included grades seven and eight; and that he was entitled to reassignment as an elementary school teacher as against non-tenured individuals by virtue of the elementary education endorsement he obtained in June 1992.

After an exhaustive examination of the record, we affirm in part and reverse in part the decision of the Commissioner on the points of appeal before us.

Initially, we reverse the Commissioner's determination that petitioner's tenure rights were not violated when the Board reassigned two of his physical education classes to Intervenor Alia during the 1991-92 school year and reduced petitioner to part-time status.²

The authority to effectuate a reduction in force is provided to district boards by N.J.S.A. 18A:28-9, which provides that:

Nothing in this title or any other law relating to tenure of service shall be held to limit the right of any board of education to reduce the number of teaching staff members, employed in the district whenever, in the judgment of the board, it is advisable to abolish any such positions for reasons of economy or because of reduction in the number of pupils or of change in the administrative or supervisory organization of the district or for other good cause upon compliance with the provisions of this article.

² A reduction in hours of employment is considered a reduction in force. Klinger v. Board of Educ. of Cranbury, 190 N.J. Super. 354, 357 (App. Div. 1982).

This is not a case in which the Board acted under its authority pursuant to N.J.S.A. 18A:28-9 to reduce its staff by abolishing the athletic director's position.³ Rather, the reduction in Alia's employment resulted from his voluntary relinquishment of that position, and we reject the Board's contention that such action by Alia effectuated a reduction in force which entitled the Board to apply the appropriate seniority standards. The RIF in this instance was not the reduction in Alia's hours of employment caused by his resignation as athletic director, but the resultant action taken by the Board to reduce petitioner's position. Since Alia was not subject to a reduction in force under N.J.S.A. 18A:28-9, his tenure rights were not triggered so as to provide him with an entitlement to a portion of petitioner's assignment by virtue of his superior seniority teaching physical education at the secondary level.

We note that it is not contended that the Board reduced petitioner's employment for reasons of economy or because of a decline in the number of students. Indeed, there was no reduction in the number of physical education classes being taught in the district. Nor is there any indication that the Board altered its physical education program or was acting pursuant to a change in the administrative or supervisory organization of the district. The Board simply provided Alia with a full-time teaching position following his resignation as athletic director at the expense of petitioner. Under these circumstances, we conclude that the Board's action did not constitute a proper exercise of its authority under N.J.S.A. 18A:28-9, and that such action violated petitioner's tenure rights.

³ We note that, although the Board did abolish the title of "athletic director" and replace it with the title "supervisor of athletics," it took such action only after Alia had submitted his resignation from that

We also reverse the Commissioner's determination to limit petitioner's seniority entitlement as a teacher of elementary physical education to grades six and below. There is no dispute on appeal that petitioner had greater seniority than both Hymanson and Schuman in the applicable category. Hence, the only issues before us are whether petitioner made a sufficient claim to the seventh- and eighth-grade physical education assignments held by Hymanson and Schuman in 1991-92 and 1992-93, respectively, and, if so, whether seventh and eighth grade were departmentalized in this district so as to bring them within the scope of petitioner's seniority. See N.J.A.C. 6:3-5.1(l)(18) ("The word 'elementary' shall include kindergarten, grades one through six and grades seven and eight without departmental instruction").

In his petition of appeal to the Commissioner, the petitioner expressly claimed entitlement to elementary physical education assignments held by teachers with less seniority than he. His claim was not limited to K-6. Although petitioner subsequently stipulated that grades seven and eight were departmentalized, Stipulation of Facts dated December 5, 1992, exhibit J-8, in evidence, or "modified departmentalized," Stipulation of Facts dated March 1, 1993, exhibit 2J-11, in evidence, he later moved to reopen the record so as to include a transcript of the June 2, 1993 testimony of Dr. Edward Price, the Board's superintendent of schools, in Hayden v. Board of Education of the Township of Saddle Brook, OAL Dkt. No. EDU 3390-92. Petitioner explained in his motion that he had entered into the stipulation in reliance upon Dr. Price's representation that grades seven and eight were "modified departmentalized," but that

position, and, as pointed out by the ALJ, there is no indication in the record that the nature or responsibilities of the position changed.

Price had subsequently recanted such representation in Hayden and testified that the district's elementary schools, K-8, were not departmentalized.

On September 27, 1993, the ALJ granted petitioner's motion, finding that Dr. Price's testimony in Hayden "amplifies the stipulated facts" in this matter. In so doing, the ALJ also offered all parties to this matter the opportunity to present further testimony on this issue.

Under these circumstances, we reject the ALJ's finding, adopted by the Commissioner, that petitioner had failed to "press [a] claim" that grades seven and eight were not departmentalized. Nor do we find that consideration of such an argument would be "grossly unfair" to Intervenor Hymanson, who, like the other parties to this matter, was offered the opportunity to present additional evidence regarding the departmentalization of grades seven and eight.

Upon review of Dr. Price's testimony in Hayden, we find that he did confirm that the district's elementary schools, which included grades seven and eight, were not departmentalized. Exhibit P-1, in evidence, at 12-13, 16, 55. Moreover, he conceded that he had been "under a misconception" when he had represented in the instant matter that grades seven and eight were "modified departmentalized." Id. at 31.

In view of Dr. Price's testimony and the fact that "elementary" is defined in our regulations as including grades seven and eight without departmental instruction, N.J.A.C. 6:3-5.1(l)(18), we conclude that petitioner's seniority as a teacher of elementary physical education also encompassed those grade levels. We note, however, that in light of our determination that the Board's action in reducing petitioner to part-time status during the 1991-92 school year was improper, petitioner's tenure

rights were not triggered at that time and he cannot make a seniority claim to the elementary physical education assignment held by Intervenor Hymanson in 1991-92. However, following the abolishment of petitioner's position at the end of the 1991-92 school year, he was entitled to the elementary physical education assignment, including grades seven and eight, given to Intervenor Schuman in 1992-93. Again, we stress that it is not disputed on appeal that petitioner had superior seniority as a teacher of elementary physical education than Schuman, whose previous experience had been limited to grades nine through twelve.

Finally, we affirm the Commissioner's determination that petitioner had no entitlement to reinstatement as an elementary school teacher as a result of the endorsement he acquired in June 1992. The scope of petitioner's tenured position was determined in April 1992, when the Board acted under N.J.S.A. 18A:28-9 to reduce its staff, thereby triggering petitioner's tenure rights, and his subsequent acquisition of an elementary education endorsement did not operate to enlarge the tenure rights he had achieved pursuant to the Tenure Act during and as a result of his employment in the district. Francey, supra. Nor is it of any moment that petitioner obtained his elementary endorsement prior to the effective date of that RIF. Johnstone, supra.

Accordingly, for the reasons stated herein, we affirm in part and reverse in part the decision of the Commissioner on the points of appeal currently before us. In summary, we find that the Board violated petitioner's tenure rights when it reassigned two of his physical education classes to Intervenor Alia during the 1991-92 school year and reduced petitioner to part-time status, and that petitioner's seniority rights to the elementary physical education assignment held by Intervenor Schuman in 1992-93

included grades seven and eight.⁴ We therefore direct the Board to compensate petitioner for his back pay and other emoluments, less mitigation, in accordance with the terms of our decision.

Attorney exceptions are noted.

October 1, 1997

Date of mailing _____

⁴ An appeal filed by petitioner claiming violation of his tenure rights in school years subsequent to 1992-93 is currently pending before the State Board.