

EDU #8576-95
C # 362-96
SB # 63-96

EDWARD CARPENITO, :
PETITIONER-APPELLANT, :
V. : STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE : DECISION
BOROUGH OF RUMSON, MONMOUTH :
COUNTY, :
RESPONDENT-RESPONDENT. :

Decided by the Commissioner of Education, August 21, 1996

For the Petitioner-Appellant, Chamlin, Rosen, Cavanagh & Uliano
(Thomas W. Cavanagh, Jr., Esq., of Counsel)

For the Respondent-Respondent, McOmber & McOmber (J. Peter Sokol,
Esq., of Counsel)

Edward Carpenito (hereinafter "petitioner"), a tenured teaching staff member, had been employed by the Board of Education of the Borough of Rumson (hereinafter "Board") as a teacher of seventh-grade social studies when the Board acted pursuant to its authority under N.J.S.A. 18A:28-9 to reduce the number of teachers in the district by eliminating one social studies position prior to the commencement of the 1993-94 school year.¹ Petitioner was serving in the position so abolished. The Board

¹ N.J.S.A. 18A:28-9 provides:

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

thereupon employed petitioner on a full-time basis as a teacher of health, basic skills and computer applications. In May 1995, the Board appointed a non-tenured individual to a newly-established position teaching seventh-grade social studies.

Petitioner filed the instant petition of appeal with the Commissioner of Education alleging that the Board had violated his tenure and seniority rights in failing to reinstate him to that newly-created position. Petitioner also claimed that the Board had violated his rights in assigning a non-tenured teacher to teach eighth-grade social studies in 1994-95.² During proceedings in the Office of Administrative Law, the parties filed cross-motions for summary decision.

On April 19, 1996, an Administrative Law Judge (“ALJ”) recommended granting petitioner’s motion for summary decision. The ALJ concluded that the Board’s action in abolishing petitioner’s position had acted as a reduction in force (“RIF”). He found that “[t]he Board’s subsequent action to transfer and assign petitioner to another employment position...was clearly within the authority and discretion of the Board. [Citation omitted.] Given the facts in this matter, however, the transfer of petitioner to another position acted as an accommodation [sic] to a tenured staff member, for the advantage of the Board, to fill an available position.” Initial Decision, slip op. at 12-13. The ALJ noted that although petitioner had not been dismissed from the Board’s employ, he had been “dismissed from a position to which he had acquired a tenure status and transferred to another position.” Id. at 13. Consequently, the ALJ

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 We note that petitioner did not pursue his claim to the eighth-grade social studies assignment.

concluded that petitioner was entitled to the newly-created position teaching seventh-grade social studies as against a non-tenured teacher.

On August 21, 1996, the Commissioner rejected the ALJ's recommendation and dismissed the petition. The Commissioner was not persuaded that petitioner had been subject to a RIF, noting that although the record supported the conclusion that petitioner's position had been abolished, there had been no consequences to petitioner of such action since his employment had not been terminated and he had not suffered a reduction in his salary. Instead, the Commissioner found that the Board had acted pursuant to its managerial prerogative to transfer teaching staff members, and that petitioner had failed to establish that such transfer was improper.

Petitioner filed the instant appeal to the State Board.

On October 15, 1997, our Legal Committee issued its initial report in this matter, in which it recommended reversing the Commissioner's determination that petitioner had not been subject to a reduction in force but affirming his ultimate determination to dismiss the petition. Upon further reflection in light of exceptions filed to that report by the parties, the Legal Committee found it necessary to issue a revised report on December 17, 1997. After a careful review of the record, including the exceptions filed in response to the revised report of the Legal Committee, we reverse the decision of the Commissioner.

Initially, we find that, as the ALJ correctly determined, petitioner was affected by a reduction in force when the Board acted to abolish his position teaching seventh-grade social studies prior to the 1993-94 school year. This is not a case in which the Board, as it now urges, simply "transferred [petitioner] from one teaching

position to another teaching position.” Answer brief, at 4. Rather, the Board acted to eliminate one social studies teacher pursuant to the authority granted it by N.J.S.A. 18A:28-9 prior to the commencement of that school year. The fact that petitioner’s employment was ultimately continued in another full-time assignment without any reduction in his compensation does not nullify such action, although it may affect the relief to which he is entitled. Sheffield v. New Jersey State Department of Human Services, decided by the State Board of Education, November 2, 1994; Parker and Pellegrino v. Board of Education of the Matawan-Aberdeen Regional School District, decided by the State Board of Education, May 2, 1990.³

We note, moreover, that although the specific reason for the elimination of petitioner’s position is not established in the record, petitioner has not challenged its validity. In addition, we agree with petitioner that this case is analogous to Fallis v. Board of Education of the Borough of Plainfield, decided by the Commissioner, 1985 S.L.D. 264, aff’d by the State Board, 1985 S.L.D. 281, in which a tenured assistant principal serving at the high school level was reassigned to a middle school assistant principalship with no reduction in compensation after his high school position was abolished. The Commissioner stressed in that case that the assistant principal’s seniority rights were triggered “irrespective of the fact he was neither dismissed nor reduced in salary.” Fallis, supra, at 279. Thus, notwithstanding the Commissioner’s

³ We clarify the Commissioner’s characterization of the Board’s action after the abolishment of petitioner’s position as constituting a “transfer from one teaching position to another....” Commissioner’s Decision, slip op. at 19. Tenure is achieved in a “position,” and “teacher” is a separately tenurable “position” under N.J.S.A. 18A:28-5. Nelson v. Board of Educ. of Old Bridge, 148 N.J. 358 (1997); Capodilupo v. West Orange Bd. of Ed., 218 N.J. Super. 510 (App. Div. 1987), certif. denied, 109 N.J. 514 (1987). Hence, a teacher who has achieved tenure status may be reassigned to another assignment within the scope of his instructional certificate, but may not be transferred to another separately tenurable “position” without his consent.

concern that recognizing petitioner's tenure and seniority rights in this case would "unnecessarily restrict the Board in the exercise of its broad powers to govern and manage its schools," Commissioner's decision, slip op. at 19, the law is clear that petitioner was subject to a reduction in force when the Board eliminated his social studies position prior to the 1993-94 school year.

We turn, therefore, to consideration of petitioner's claim that, as a result of such RIF, he was entitled by virtue of his tenure status to the seventh-grade social studies position when it was reestablished by the Board in 1995. N.J.S.A. 18A:28-12 requires that a tenured teaching staff member affected by a reduction in force "shall be and remain upon a preferred eligible list in the order of seniority for reemployment whenever a vacancy occurs in a position for which such person shall be qualified and he shall be reemployed by the body causing dismissal, if and when such vacancy occurs...." N.J.A.C. 6:3-5.1(i) provides that:

(i) Whenever any person's particular employment shall be abolished in a category, he or she shall be given that employment in the same category to which he or she is entitled by seniority. If he or she shall have insufficient seniority for employment in the same category, he or she shall revert to the category in which he or she held employment prior to his or her employment in the same category and shall be placed and remain upon the preferred eligible list of the category from which he or she reverted until a vacancy shall occur in such category to which his or her seniority entitles him or her.

Moreover, it is now well established that a staff member dismissed as the result of a reduction in force has tenure protection in all assignments within the scope of his certificate as against a non-tenured individual. Bednar v. Westwood Bd. of Ed., 221 N.J. Super. 239 (App. Div. 1987), certif. denied, 110 N.J. 512 (1988).

In this instance, petitioner, who had achieved tenure under his instructional certificate, was employed in another full-time teaching assignment with no reduction in compensation after his position teaching social studies was abolished prior to the 1993-94 school year. Thereafter, in May 1995, the Board appointed a non-tenured individual to a vacancy in a newly-established position teaching seventh-grade social studies. The Board could not appoint a tenured teacher to that position who had less seniority than petitioner in the applicable category. Fallis, supra. Nor could the Board dilute petitioner's tenure rights by affording a non-tenured teacher "seniority" in that position. Bednar, supra. Consequently, we conclude that petitioner was entitled to the newly-created seventh-grade social studies position as against a non-tenured individual.

We therefore reverse the decision of the Commissioner and direct the Board to reassign petitioner to the position teaching seventh-grade social studies.⁴

Attorney exceptions are noted.

February 4, 1998

Date of mailing _____

⁴ We note that our decision herein does not alter the ability of a district board to exercise its prerogative to reassign its teaching staff members within the scope of their instructional certificates. See supra note 3. We note, in addition, that the transfer of employees between work sites is not mandatorily negotiable and that "no employer shall transfer an employee for disciplinary reasons." N.J.S.A. 34:13A-25. See Ridgefield Park Ed. Assn. V. Ridgefield Park Bd. of Ed., 78 N.J. 144 (1978).