342-18

JAMAYLA SCOTT,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ENGLEWOOD, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

The petitioner – a school social worker employed in the respondent Board's school district prior to a Reduction in Force (RIF) – contended that the Board acted improperly and in violation of her tenure and seniority rights when it failed to recall petitioner to employment following the resignation of another social worker. Petitioner sought reinstatement and back pay. The Board contended that there was no vacancy resulting from the resignation as it had exercised its managerial prerogative to maintain the remaining number of social worker positions following the resignation. The parties filed cross motions for summary decision.

The ALJ found, *inter alia*, that: there are no material facts at issue here, and the matter is ripe for summary decision; the issue presented in this case is whether a Board may reduce its ranks via attrition without formalizing that reduction through a Board resolution; after the RIF in June 2017, the district reduced its social workers further by attrition, from seven social workers to six; the District has not hired any additional social workers since the resignation in October 2017, and all social workers currently employed by the District are more senior than petitioner; the actions of the Board in this matter were compliant with the statutes and regulations governing reductions in force; *N.J.S.A.* 18A:28-9 clearly sets forth that it is the prerogative of the Board to effectuate economies via a reduction in force; the statute also allows for a Board to select not to replace a resigning employee, thus reducing its ranks by attrition; despite the fact that there was a "vacancy", the Board was within its rights in deciding not to fill the position; further, the petitioner would not be entitled to the position even if the Board failed to formally abolish the position because the Board – by not seeking or intending to fill the vacancy – essentially abolished the additional social worker position. The ALJ concluded that the petitioner's arguments were without merit, and dismissed the petition.

Upon comprehensive review, the Commissioner concurred with the ALJ's findings and conclusions as thoroughly set forth in the Initial Decision. Accordingly, the recommended decision of the OAL was adopted as the final decision in this matter, and the petition of appeal was dismissed with prejudice.

November 2, 2018

OAL DKT. NO. EDU 14057-17
AGENCY DKT. NO. 177-8/17

JAMAYLA SCOTT,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ENGLEWOOD, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter, along with the Initial Decision of the Office of Administrative Law ("OAL"), have been reviewed. Petitioner's exceptions, and respondent's reply thereto, were also reviewed by the Commissioner. This dispute concerns whether petitioner's tenure rights were violated when the Board did not recall petitioner to employment in a school social worker position following another social worker's resignation from said position. Petitioner, who was subject to a reduction in force (RIF) and placed on a recall list pursuant to *N.J.S.A.* 18A:28-9 and *N.J.S.A.* 18A:28-11, argues that the Board violated her tenure rights when it did not recall her to employment as a social worker because said resignation left a vacancy. The Board contends that there was no vacancy resulting from the resignation because it exercised its managerial prerogative by maintaining the remaining number of social worker positions following the resignation.

The Administrative Law Judge ("ALJ") determined that a board of education may choose not to replace a resigning employee and thus reduce its workforce through attrition. The ALJ found that while there was a "vacancy," the Board was within its rights in deciding not to fill the position, noting that petitioner would not be entitled to the positon even if the Board failed to formally abolish the position because the Board – by not seeking or intending to fill the vacancy – essentially abolished the additional social worker position.

While reflecting her obvious disagreement with the findings and conclusions contained within the Initial Decision, petitioner's "exceptions" are unpersuasive. Petitioner filed correspondence with the Commissioner stating in relevant part that "the ALJ incorrectly concluded that [r]espondent did not violate [petitioner's] recall rights when it failed to recall her to employment in the school social worker position left vacant by the resignation. . . ." In support of her argument, petitioner attached copies of briefs submitted to the OAL during the proceedings below, which arguments were thoroughly addressed in the Initial Decision. In reply, respondent argues that petitioner failed to comply with requirements of *N.J.A.C.* 1:1-18.4, and for this reason alone the Initial Decision should be adopted. Respondent further argues that the ALJ accurately described the issues presented, and appropriately interpreted and applied the tenure statutes.

Upon comprehensive review, the Commissioner is in accord with the ALJ's determinations as thoroughly set forth in the Initial Decision. The facts in this matter, the evidence in support thereof, and the relevant law establish that the Board's managerial prerogative allows it to reassign and transfer actively employed staff members following an employee's resignation; more importantly, the Board is not obligated to recall a RIF'ed employee – nor is that employee entitled – to a vacant position that the Board has no intention of filling nor has taken any action to fill or otherwise abolish.

Accordingly, the recommended decision of the OAL is hereby adopted as the final decision in this matter, and the petition of appeal is hereby dismissed with prejudice.

IT IS SO ORDERED.[1]

COMMISSIONER OF EDUCATION

Date of Decision: November 2, 2018
Date of Mailing: November 2, 2018

[1] Pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1), Commissioner decisions are appealable to the Superior Court, Appellate Division.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 14057-17
AGENCY DKT. NO. 177-8/17

JAMAYLA SCOTT,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF ENGLEWOOD, BERGEN COUNTY,
Respondent.

Kathleen Naprstek Cerisano, Esq., for petitioner (Zazzali, Fagella, Nowak, Kleinbaum and Friedman, attorneys)

Sandra Varano, Esq., for respondent (Nirenberg and Varano, attorneys)

Gail Oxfeld Kanef, Esq., for intervenor Jerome Land (Oxfeld Cohen, attorneys)

Record Closed: August 7, 2018 Decided: September 20, 2018

BEFORE **ELLEN S. BASS**, ALJ:

STATEMENT OF THE CASE

Jamayla Scott (Scott), a school social worker formerly employed by respondent, the Englewood Board of Education (the Board), contends that her employment was

terminated in violation of her tenure and seniority rights. She seeks reinstatement and back pay. The Board replies that its actions were consistent with applicable law and regulation.

PROCEDURAL HISTORY

The petition of appeal was filed with the Commissioner of Education (the Commissioner) on August 7, 2017. The Board filed an answer on September 18, 2017. The contested case was transmitted to the Office of Administrative Law (OAL) on September 20, 2017. The matter was initially assigned to Judge Joan Bedrin-Murray, and was reassigned to me on December 15, 2017, after her elevation to the Tax Court.

Via motion filed on April 4, 2018, Scott sought leave to amend her petition. Via letter dated April 25, 2018, the Board indicated that it did not oppose the motion. Via letter order dated April 25, 2018, Scott was granted leave to amend. An answer to the amended petition was filed on May 14, 2018.

During pre-hearing discussions with counsel, the question of whether notice should be given to potential intervenors was discussed at length. It was agreed that the position sought by Scott remained unfilled; accordingly, a ruling in her favor by the Commissioner would not displace another school-district employee. The parties agreed to proceed on stipulated facts and cross-motions for summary decision.[2] Scott filed her brief and motion on May 25, 2018.

On June 8, 2018, I received a letter from Gail Oxfeld Kanef, Esq., on behalf of Jerome Land, a social worker currently employed by the Board. Ms. Kanef asked that Land be permitted to enter this proceeding as an intervenor. Unbeknownst to me, the Board attorney had notified Land about this proceeding. I conferred with counsel on June 18, 2018, and was advised that upon receiving Scott's brief, the Board attorney now felt that Land's position might be in jeopardy. Hearing no objection to Ms. Kanef's request, via order dated June 20, 2018, I granted Land permission to intervene.

[2] Notwithstanding that agreement, the Board supplemented the record with the certification of its superintendent of schools.

The Board cross-moved for summary decision via brief and certification filed on July 24, 2018. Via letter of counsel dated July 24, 2018, Land joined in the arguments of the Board. Scott replied to the Board's submission on August 7, 2018, and the record closed.

ISSUE PRESENTED

The petition had initially averred that the Board did not honor Scott's right to continued employment because it believed that she did not hold the proper certificate to perform her job duties, and was thus not protected by tenure. But after completing discovery, the parties agreed that this dispute raised an entirely different issue. The Board concedes that Scott was employed under tenure at the time of the reduction in force (RIF). And Scott agrees that no less senior social workers are currently employed by the Board. Scott thus no longer claims that the Board violated her rights when it acted to reduce force effective June 30, 2017. Rather, she contends that on October 27, 2017, a social worker resigned, and the Board failed to honor her rights when it did not then reappoint her. Scott so asserts even though the Board has left the controverted position unfilled, to date.

The issue presented is thus whether the Board may reduce its ranks via attrition without formalizing that reduction via resolution. And if obliged to take formal action, did the Board's failure to do so here give rise to a remedy for Scott?

FINDINGS OF FACT

The Board submitted the certification of Robert L. Kravitz; the facts that he related are uncontroverted. I **FIND**:

During the 2016–17 school year, the Board employed eleven social workers. Two were employed at Dwight Morrow High School's Eagle Initiative, an Alternative High School Program, including Scott. Several district school buildings were staffed with multiple social workers. In or about February 2017, a newly hired acting director of

Guidance introduced a staffing model that would place a Child Study Team at each school; the Team social worker would be the only one assigned at that school. This plan was discussed at an April 27, 2017, budget hearing; the elimination of the Eagle Initiative program was also discussed.

On May 11, 2017, the Board abolished the Eagle Initiative program together with all positions associated with it, to include the two social-worker positions. Additionally, to reduce the complement of social workers at each school building, two additional social workers were RIFfed. All were RIFfed based on seniority, including Scott and three less senior social workers, two of whom were nontenured. Prior to June 2017, there had been three social workers assigned to McCloud Elementary School: Linda Ruder, Jerome Land, and Risory Caraballo. Caraballo was non-tenured and was RIFfed in June; only two social workers were assigned to McCloud at the start of the 2017–18 school year. As will be more fully set forth in the stipulated facts, after a staff member resigned in October 2017, Land would be transferred, leaving only one social worker at McCloud. Land's transfer was formally approved by the Board.

The parties agreed to the underlying facts via joint stipulation dated March 7, 2018, and I **FIND**:

1. On or about September 11, 2008, Scott began her employment with the Board as a full-time social worker at the Eagle Initiative.

2. At the time of her initial employment with the Board, Scott held a standard New Jersey Educational Services Certificate with an endorsement as a school social worker.

3. Scott had been employed continuously by resolution of the Board in the position of social worker during the 2008–09, 2009–10, 2010–11, 2011–12, 2012–13, 2013–14, 2014–15, 2015–16, and 2016–17 school years.

4. Scott acquired tenure on September 12, 2011, as a school social worker under her Educational Services Certificate, which carried a school social worker endorsement.

5. On or about May 12, 2017, Scott was informed by the Board that she would not be offered employment for 2017–18 school year.

6. As of June 30, 2017, Scott had 8.71 years of seniority credit as the result of her service under her Educational Services Certificate with an endorsement as a school social worker.

7. On or about August 3, 2017, Scott filed a petition of appeal seeking to enforce her seniority and recall rights.

8. At the beginning of the 2017–18 school year, respondent employed a total of seven social workers as follows:

a. Grace Haughton—Janis E. Dismus Middle School
b. Toni Foster and Pamela Humphrey—Greico Elementary School
c. Glenda James—Donald A. Quarles Elementary School
d. Linda Ruder and Jerome Land—McCloud Elementary School
e. Dennis Sullivan—Dwight Morrow High School

9. Each of these individuals held tenure as a school social worker under their Educational Services Certificate.

10. As of June 30, 2017, Grace Haughton had 16.74 years of seniority credit as the result of her service under her Educational Services Certificate with an endorsement as a school social worker.

11. As of June 30, 2017, Toni Foster had 13.17 years of seniority credit as the result of her service under her Educational Services Certificate with an endorsement as a school social worker.

12. As of June 30, 2017, Glenda James had 12.74 years of seniority credit as the result of her service under her Educational Services Certificate with an endorsement as a school social worker.

13. As of June 30, 2017, Linda Ruder had 12.74 years of seniority credit as the result of her service under her Educational Services Certificate with an endorsement as a school social worker.

14. As of June 30, 2017, Pamela Humphrey had 10.74 years of seniority credit as the result of her service under her Educational Services Certificate with an endorsement as a school social worker.

15. As of June 30, 2017, Dennis Sullivan had 10.74 years of seniority credit as the result of his service under his Educational Services Certificate with an endorsement as a school social worker.

16. As of June 30, 2017, Jerome Land had 9.74 years of seniority credit as the result of his service under his Educational Services Certificate with an endorsement as a school social worker.

17. Glenda James resigned from employment with the Board effective October 27, 2017, leaving a vacancy.

18. On November 16, 2017, the Board transferred Jerome Land from his position at McCloud Elementary to Ms. James' vacated position at Quarles Elementary.

19. To date, respondent has not formally abolished Mr. Land's social worker position at McCloud Elementary.

20. Following Mr. Land's transfer to Quarles Elementary, the Board continued to employ a total of six social workers as follows:

a. Toni Foster and Pamela Humphrey—Greico Elementary School
b. Grace Haughton—Janis E. Dismus Middle School
c. Linda Ruder—McCloud Elementary School
d. Dennis Sullivan—Dwight Morrow High School
e. Jerome Land—Donald A. Quarles Elementary School

I **FIND** that after the RIF in June 2017, the district reduced its social workers further by attrition, from seven social workers to six. The district does not have social-worker positions assigned to specific schools; rather, social workers are assigned at Kravitz's discretion. There continue to be two social workers working at Greico Elementary School. The goal is to reduce the number of social workers further through attrition, and ultimately have only one social worker serve there as well.

I **FIND** that the district has not hired any additional social workers since October 2017 when James resigned. All social workers currently employed by the district are more senior than Scott.

CONCLUSIONS OF LAW

The parties seek relief pursuant to N.J.A.C. 1:1-12.5, which provides that summary decision should be rendered "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." Our regulation mirrors R. 4:46-2(c), which provides that "[t]he judgment or order sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, 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 a judgment or order as a matter of law."

A determination whether a genuine issue of material fact exists that precludes summary decision requires the judge to 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 allegedly disputed issue in favor of the non-moving party. Our courts have long held that "if the opposing party [in a summary judgment motion] offers . . . only facts which are immaterial or of an insubstantial nature, a mere scintilla, '[f]anciful, frivolous, gauzy or merely suspicious,' he will not be heard to complain if the court grants summary judgment." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 529 (1995) (quoting Judson v. Peoples Bank & Trust Co., 17 N.J. 67, 75 (1954)).

The "judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Brill, 142 N.J. at 540 (quoting Anderson v. Liberty Lobby, 477 U.S. 242, 249 (1986)). When the evidence "is so one-sided that one party must prevail as a matter of law," the trial court should not hesitate to grant summary judgment. Liberty Lobby, 477 U.S. at 251–52.

I **CONCLUDE** that this matter is ripe for summary decision. There are no material disputed facts that require a plenary hearing, and the Board is entitled to judgment as a matter of law. Tenure is a legislative status; it is earned by operation of law, and upon meeting the precise requirements of the tenure statute. Spiewak v. Rutherford Bd. of Educ., 90 N.J. 63 (1982); Zimmerman v. Newark Bd. of Educ., 38 N.J. 65 (1962); N.J.S.A. 18A:28-5. Scott was employed under tenure; accordingly, the reduction in force that resulted in her termination needed to be made on the basis of seniority, and according to standards established by the Commissioner and approved by the State Board. N.J.S.A. 18A:28-10; see N.J.A.C. 6A:32-5.1; Howley v. Ewing Twp. Bd. of Educ., 1982 S.L.D. 1328, 1339, aff'd, 1983 S.L.D. 1554.

The facts reveal that effective with the 2017–18 school year, the Board reduced its school social workers by four. The facts further reveal that Scott was among those with the fewest years of seniority. Accordingly, I **CONCLUDE** that the action of the Board was compliant with the statutes and regulations that govern reductions in force. But Scott urges that she is nonetheless entitled to reinstatement. She asserts that subsequent to her RIF, a colleague resigned; a "vacancy" was thus created at McCloud Elementary School; that position remains unfilled; and it has not been formally

abolished by the Board. The Board replies that it was unnecessary to abolish the controverted social-work position because it had the discretion to simply leave it unfilled.

The prerogative of the Board to effectuate economies via a reduction in force is as set forth in N.J.S.A. 18A:28-9, which 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 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.

The Board urges that Scott's argument strains the intent of the tenure and seniority laws. I agree. The statute clearly grants the Board the right to "reduce the number of teaching staff members," when doing so is advisable for fiscal or educational reasons. Indeed, the "meaning of a statute is first derived by an examination of its plain language." Carpenito v. Rumson Bd. of Educ., 322 N.J. Super. 522, 531 (App. Div. 1999) (citing Chase Manhattan Bank v. Josephson, 135 N.J. 209 (1994)). As the Carpenito court noted, "[t]he reduction-of-force statute on its face contemplates a reduction in the number of teaching staff members employed in the district." Id. at 532. I **CONCLUDE** that in accordance with N.J.S.A. 18A:28-9, the Board may choose not to replace a resigning employee and thus reduce its ranks via attrition. Our tenure laws "are an 'important expression of legislative policy' and should be given 'liberal support, consistent, however, with legitimate demands for governmental economy.'" Id. at 528 (quoting Viemeister v. Prospect Park Bd. of Educ., 5 N.J. Super. 215, 218 (App. Div. 1949)).

Pursuant to N.J.S.A. 18A:28-12, a teaching staff member who has been RIFfed must remain on a preferred eligibility list, and be reemployed "whenever a vacancy occurs in a position for which such person shall be qualified." Scott relies on Lammers v. Board of Education, 134 N.J. 264, 268 (1993), and its holding that "[a] vacancy exists when the teacher leaves the position permanently, as in the case of a resignation or a

retirement." Once James resigned, Scott contends, a "vacancy" thus was created. But in Lammers, the RIFfed teacher was aggrieved because a position available due to a maternity leave was not offered to her on recall, rather, it was filled by a nontenured long-term substitute.[3] Scott thus ignores the fundamental difference between this case and Lammers. Here, there was a "vacancy," but it was offered to and filled by no one. While the Board could not ignore Scott's rights if it chose to replace James, it was well within its rights to leave the position unfilled. A contrary conclusion would entirely frustrate the Board's right to staff its schools in a fiscally sound manner.[4]

And even assuming, for argument's sake, that the Board should have abolished the position left vacant by James, I **CONCLUDE** that this error would not entitle Scott to the relief she seeks. In Madison Township Board of Education v. Madison Township Education Association, 1974 S.L.D. 488, the board RIFed two coordinators of pupil personnel services, citing economies, but it did not formally act to abolish their positions. The Commissioner held that, "[i]n [his] judgement, the Board should have taken formal action pursuant to N.J.S.A. 18A:28-9, setting forth in clear language that it was abolishing . . . positions for reasons of economy." Id. at 497. But while terming the board's action there an "error of procedure," the Commissioner emphasized that "the substance of a situation and not its shape must control." Madison, 1974 S.L.D. at 496 (citing Union Beach Bd. of Educ. v. N.J. Educ. Ass'n, 53 N.J. 29 (1968)). Notwithstanding the absence of a formal resolution to that effect, the Commissioner held that the board "did, in fact, abolish the two positions." Madison, 1974 S.L.D. at 497.

Madison rightly recognizes that reinstating a RIFed employee due to an error of procedure would frustrate the intent of the statute, which is to allow local boards broad discretion to reduce staff when in the best interest of the school district and its students.

[3] The Court in Lammers determined that a leave of absence does not create a "vacancy" giving rise to a right to reemployment, and thus denied Lammers' claim.

[4] Scott also appears to suggest that the Board somehow violated her rights when it transferred Land to the vacancy created by James' resignation. But the Board's prerogative to transfer staff members is likewise well established. N.J.S.A. 18A:25-1; Carpenito, 322 N.J. Super. at 528. Scott's argument ignores the Board's broad right to determine how to deploy its staff.

I am thus compelled to reject Scott's argument that the Board's failure to formally abolish the vacant social-work position at McCloud Elementary gives rise to a remedy. I **CONCLUDE** that by not filling the vacancy created by James' retirement, the Board has taken action that is tantamount to abolishing one additional social-work position.

Scott's argument that her rights should be governed by the holding in Guerra v. Hudson County Vo-Tech Board of Education, 1990 S.L.D. 340, is unavailing. In Guerra, a tenured coordinator was transferred to a teaching position in the aftermath of a RIF. But the board took no formal action to abolish the coordinator position until a year after the transfer. The Commissioner held that the transfer "was ultra vires, absent formal action under N.J.S.A. 18A:28-9 to abolish the coordinator position." Id. at 352. The rationale behind the holding in Guerra is clear: to protect tenured staff from demotions under the ruse of a reduction in force. To hold otherwise would allow local boards to evade the protections of N.J.S.A. 18A:28-5. The power of a local board to transfer staff is quite broad, but it is limited to the extent provided by the tenure laws. See Williams v. Plainfield Bd. of Educ., 176 N.J. Super. 154 (App. Div. 1980); see also Howley v. Ewing Bd. of Educ., 1982 S.L.D. at 1339–40.

Scott's case is readily distinguishable. Here, the Board did not demote or transfer Scott under the ruse of a reduction in force. It reduced the number of district social workers, both via a reduction in force and via attrition. Even if I were to accept the view that a reduction via attrition must be formalized by the Board, I concur with the Commissioner's holding in Madison that the substance of the matter and not its shape must prevail. This is particularly true under the facts presented here. To hold otherwise would ask the taxpayers of Englewood to fund an unneeded position, and is an outcome inconsistent with the school laws.

I **CONCLUDE** that Scott's arguments are without merit, and that the petition of appeal must be dismissed.

ORDER

Based on the foregoing, the petition of appeal 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 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 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

September 20, 2018

DATE

ELLEN S. BASS, ALJ

Date Received at Agency: September 20, 2018

Date Mailed to Parties:

sej