

WILLIAM BUCKLEY, :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE CITY : DECISION

OF TRENTON, MERCER COUNTY, :

RESPONDENT. :

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SYNOPSIS

Petitioner, a teaching staff member, alleged that respondent Board violated his tenure and seniority rights when it reassigned him from a 12-month position to a 10-month position and prorated his annual salary to reflect his 10-month work schedule as opposed to the 12-month work schedule in his prior assignment.

The ALJ granted petitioner’s motion for summary decision, following the rationale of her initial decision in *Rocco DiMaggio v. Board of Education of the City of Trenton, Mercer County*, issued prior to the Appellate Division’s recent decision in *Edward Carpenito v. Board of Education of the Borough of Rumson, Monmouth County*.

In light of *Carpenito, supra*, the Commissioner reversed the initial decision of the ALJ which granted petitioner’s motion for summary decision, finding that, as in *DiMaggio*, it was permissible for the Board to reduce petitioner’s salary upon abolishment of his 12-month position and reassignment to a 10-month position as part of a bona fide reduction in force. Matter was remanded to the OAL for further proceedings strictly limited to any remaining issues in the record which have not been decided by way of the instant decision.

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The record and initial decision issued by the Office of Administrative Law have been reviewed. Respondent's exceptions and petitioner's reply thereto were timely filed pursuant to *N.J.A.C.* 1:1-18.4.

Respondent's exceptions and petitioner's reply essentially reiterate those arguments previously considered by the Administrative Law Judge (ALJ) in the instant matter and also in *DiMaggio, supra*, the initial decision which the ALJ incorporates as part of the present initial decision; therefore, they shall not be repeated herein. Additionally, petitioner's reply raises the argument that the recent Appellate Division decision in the matter entitled *Edward Carpenito v. Board of Education of the Borough of Rumson, Monmouth County*, decided by the Commissioner August 21, 1996, *rev'd* State Board February 4, 1998, *rev'd* New Jersey Superior Court, Appellate Division, Docket No. A-3731-97T3,<sup>1</sup> supports the correctness of the ALJ's recommended decisions in this matter and in *DiMaggio*.

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<sup>1</sup> The Appellate Division decision in *Carpenito, supra*, was issued on June 29, 1999, subsequent to the filing of the initial decisions in *DiMaggio, supra*, and the instant matter. Consequently, the ALJ who issued the initial decision in both these matters did not have the court's decision in *Carpenito* before her for consideration.

Petitioner's reply exceptions aver that:

In *Carpenito*, the Appellate Division reiterates the principles stated in *Avery*, *DiMaggio*, and this matter, that “[a] tenured teacher may be involuntarily transferred to another position within his or her Certification where no loss of salary or other reduction in employment is suffered and the teacher is not singled out for the transfer on a prohibited basis.” (Opinion, p. 8.) In its opinion, the Appellate Division cited *Williams v. Plainfield Board of Ed.*, 1979 *S.L.D.* 220, reversed State Board of Ed. 1980 *S.L.D.* 1552, affirmed 176 *N.J. Super.* 154 (App. Div. 1980), as did [the ALJ], holding that the transfer of a high school principal to the position of elementary principal without any reduction in compensation or a reduction in rank did not violate the principal's tenure rights. (Petitioner's Reply Exceptions at p. 5)

Upon thorough review of the record of the present matter, the initial decision and the parties' exceptions, the Commissioner declines to adopt the recommended decision of the ALJ granting summary decision to petitioner for the following reasons. Subsequent to the filing of the initial decision in this matter, the Commissioner issued his final decision in *DiMaggio*, *supra*, on July 8, 1999. In that decision, the Commissioner noted that the ALJ, in determining how to apply the diverse and inconsistent body of case law spanning several decades to the dispute therein, had opted to rely primarily on the Commissioner's decision in *Avery*, *supra*. The same has occurred in the instant matter as well. However, as noted by the Commissioner in *DiMaggio*, the Commissioner's holding in *Avery* was premised upon the conclusion that the petitioners therein had *not* been subject to a *reduction in force* but had been merely *transferred* from one full-time (12-month) teacher position to another full-time (10-month) teacher position. Consequently, it was determined that petitioners had impermissibly suffered a reduction in their salary when the Board acted to prorate their salaries for 10 months of employment based on their previously held 12-month positions.

Significantly, however, the Commissioner's decision in *DiMaggio* held that both that matter and *Avery* now had to be viewed in light of the Appellate Division decision in

*Carpenito*, wherein the court's determination refined the concepts of transfer and reduction in force to hold that when a board of education acts to abolish a teaching staff member's position pursuant to *N.J.S.A. 18A:28-9* and reassigns that individual to another position with no loss of tangible employment benefit, that action does *not* constitute a reduction in force, but is instead tantamount to a *transfer*.

The petitioner in *DiMaggio* was found to have suffered a tangible loss of employment benefit in the form of a reduction in work year/hours and a concomitant reduction in annual salary as a result of the Board's actions taken pursuant to *N.J.S.A. 18A:28-9*. Therefore, in view of the court's decision in *Carpenito*, the Commissioner held that DiMaggio had been the subject of a reduction in force, *not a transfer*. Moreover, because the factual circumstances were thus distinguishable from prior court rulings involving transfers, such as *Williams, supra*, and *Piscataway, supra*, the Commissioner further concluded that

it was permissible for respondent \*\*\* to reduce [DiMaggio]'s annual salary, given that the position to which he was entitled based on his tenure and seniority was a ten-month position as opposed to a twelve-month one as held prior to the reduction in force effectuated by the Board, and particularly in light of the fact that the Board maintained petitioner's *rate* of salary based on his prior twelve-month position. *See Casey v. Board of Education of the Township of Cinnaminson, 95 N.J.A.R.2d (EDU) 585. (DiMaggio, supra, at p. 20)*

In the instant matter, petitioner has suffered the same loss of tangible employment benefit as occurred in *DiMaggio, i.e.*, a reduction in work year/hours and a concomitant reduction in annual salary. Consequently, the Commissioner finds and determines that under the factual circumstances presented herein, petitioner was the subject of a reduction in force, not a transfer as the Board avers. Moreover, consistent with his holding in *DiMaggio*, the Commissioner finds and concludes that because the Board acted pursuant to *N.J.S.A. 18A:28-9* to abolish petitioner's 12-month position and reassigned him to a 10-month position in

accordance with his tenure and seniority entitlements, its action to reduce petitioner's annual salary is permissible, particularly because his 10-month salary is prorated based upon the salary for his prior 12-month position and his *rate* of salary has been maintained (*Casey*).

Accordingly, for the reasons expressed herein, the Commissioner reverses the initial decision issued by the ALJ which grants summary decision to petitioner and, because there are remaining issues in the record which have not as yet been heard by the ALJ, the Commissioner remands the matter to the OAL for further proceedings strictly limited to those issues specified in the record which have not been decided by way of the instant decision.<sup>2</sup>

IT IS SO ORDERED.

ACTING COMMISSIONER

SEPTEMBER 16, 1999

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<sup>2</sup> This decision, as the Commissioner's final determination with respect to those issues set forth in petitioner's motion for summary decision, may be appealed to the State Board of Education pursuant to *N.J.S.A. 18A:6-27 et seq.* and *N.J.A.C. 6:2-1.1 et seq.* Commissioner decisions are deemed filed three days after the date of mailing to the parties.