

**RICHARD KLINGER,**  
Petitioner,  
v.  
**BOARD OF EDUCATION OF THE  
TOWNSHIP OF CRANBURY,  
MIDDLESEX COUNTY,**  
Respondent.

Initial Decision: November 19, 1980      Final Agency Decision: January 8, 1981

Superior Court, Appellate Division Decision Appears at: 190 *N.J. Super.* 354 (1982)

SYNOPSIS

The petitioner, a tenured physical education teacher, alleged that respondent had improperly reduced two full-time teaching positions to seven-tenths positions and violated his seniority rights by retaining a non-tenured teacher in the second seven-tenths position. After a request for a hearing was made to the Commissioner of Education, the matter was assigned to an administrative law judge.

The administrative law judge found that the Board's action constituted a reduction in force. The judge determined that the Board had violated petitioner's tenure rights when it chose to maintain more than the equivalent of one full-time position in physical education. Accordingly, the judge directed that petitioner be restored to his full-time position.

Upon review, the Commissioner of Education accepted the initial decision with the modification that petitioner's restored salary be mitigated by any earnings received in addition to those of the seven-tenths position.

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**Joseph F. DeFino, Esq.**, for petitioner (Morgan & Falvo, attorneys).

**Philip H. Shore, Esq.** for respondent (Golden, Shore, Zahn & Richmond, attorneys).

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### Initial Decision

#### **ERRICKSON, ALJ:**

Petitioner, a tenured teacher of physical education who has been employed by the Cranbury Board of Education for approximately twenty-one years, alleges that the Board's action on April 11, 1979 reducing his working hours and salary to seven-tenths of a full time position was a violation of his tenure and seniority rights.

The Board, conversely, asserts that under its managerial prerogative, it properly abolished its two full-time physical education positions because of declining enrollment and established instead two part-time positions with reduced hours and salary for petitioner and its other physical education instructor.

#### *PROCEDURAL RECITATION:*

The petition of appeal was filed before the Commissioner of Education on August 10, 1979, together with a notice of motion for interim relief requesting that the Board immediately reinstate petitioner to a full-time position. After a timely answer had been filed by the Board, the Commissioner on November 21, 1979, issued an order denying the emergent relief requested. Thereafter the matter was transferred to the Office of Administrative Law on December 9, 1979, as a contested case, pursuant to *N.J.S.A.* 52:14F-1 *et seq.* A joint stipulation of facts was filed on April 9, 1980, after which a hearing was conducted at Freehold on July 16, 1980. Post hearing briefs were filed completing the record on October 10, 1980.

#### *UNCONTESTED FACTS:*

Petitioner is a physical education teacher who had been employed on a full-time basis by the Board for twenty-one years when this action was filed. The Board also employed during 1978-79 one female physical education teacher on a full-time basis. The hours and salary of both were reduced to seven-tenths of full-time basis by Board action in May 1979, effective September 1979. Thereafter, the female physical education instructor, who in May 1979 had not yet attained tenure, took a leave of absence and was replaced by a substitute on a seven-tenths time basis.

The overriding issue presented is whether petitioner, within this factual context, was entitled by reason of tenure and seniority rights to continued employment on a full-time basis.

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*TESTIMONY OF WITNESS:*

Petitioner testified that he teaches physical education classes which range in size from 14 to 34 pupils. He also testified that the Board's only other physical education teacher is a woman who shares jointly the assignment duties and responsibilities for instruction of each and every one of those same classes. That this is so was corroborated by the Board's administrative principal.

Petitioner testified further that he was first advised in February 1979 by the administrative principal that his hours of employment and salary could be reduced in the ensuing year. He testified and the principal corroborated that he was never notified by anyone of the date or time when the Board would meet to consider taking action regarding his employment status for the 1979-80 school year. He further testified that he had never been notified of his seniority status after the Board effected its reduction in force.

The principal testified that, because of declining enrollment, program reorganization, and budgetary problems, he had recommended that the Board reduce its physical education staff to seven-tenths of one full-time position. He testified that, after the 1979-80 budget was initially prepared to provide for seven-tenths time of one physical education teacher, the Board decided to more closely approximate the 1978-79 program by employing two physical education teachers on the seven-tenths time-salary basis. The principal testified that K-12 enrollment had declined in the past ten years from 414 to 249 in 1979. He also testified that a number of other part-time positions have been created because of this decline. When asked whether he believes one physical education teacher could teach a class of 34 pupils, he responded affirmatively citing former class sizes as large as 54.

*FINDINGS ON ADDITIONAL RELEVANT FACTS:*

Having considered the testimony of witnesses and the documents entered into evidence, I **FIND** that by a preponderance of credible evidence, the following facts have been established:

- 1) There was no compelling necessity arising from inflexibility of scheduling of pupils to compel the Board to hire two part time physical education teachers.
- 2) Petitioner was by training and experience qualified to teach, without assistance from a co-teacher, the classes to which he was assigned or the smaller classes which he would have had with rescheduling of the school's 249 pupils into a larger number of smaller classes. This finding is grounded on the convincing testimony of both petitioner and the principal.

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*DISCUSSION AND DETERMINATION:*

The Board unquestionably had the legal right to reduce the instructional time provided for physical education in its school. When acting to do so, however, it was obligated to act in compliance with the following applicable statutes and rules of the State Board of Education.

*N.J.S.A.* 18A:28-10. Reasons for dismissals of persons under tenure on account of reduction

Dismissals resulting from any such reduction shall not be made by reason of residence, age, sex, marriage, race, religion or political affiliation but shall be made on the basis of seniority according to standards to be established by the commissioner with the approval of the state board.

*N.J.S.A.* 18A:28-11. Seniority; board to determine; notice and advisory opinion

In the case of any such reduction the board of education shall determine the seniority of the persons affected according to such standards and shall notify each such person as to his seniority status, . . .

*N.J.S.A.* 18A:28-13. Establishment of standard of seniority by the commissioner

The Commissioner in establishing such standards shall classify insofar as practicable the fields or categories of . . . teaching or other educational services and may, in his discretion, determine seniority upon the basis of years of service and experience within such fields or categories of service as well as in the school system as a whole, or both.

*N.J.A.C.* 6:3-1.10. Standards for determining seniority

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

Petitioner's full-time employment and the full-time employment of another physical education teacher were abolished and in their stead the Board established two part-time positions to which they were then appointed. Petitioner, however, was tenured with twenty-one years of service seniority. By contrast, the other teacher was, at that time, not tenured, nor was her substitute replacement tenured.

The New Jersey Supreme Court in *Board of Education of the Town of Kearny v. Vincent P. Horan, et al.*, 11 *N.J. Misc.* 751 (1933) enunciated the principle of long standing which in the instant matter is controlling:

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. . . The opinion rendered by this court in *Seidel v. Board of Education of Ventnor City*, 110 *N.J.L.* 31; 164 *Atl. Rep.* 901, seems dispositive of the question. It was there held, . . . that a teacher in a public school, . . . who, by service for three years or more, has come under the protection of the statute providing for an indefinite period thereafter may not be dismissed for reasons of economy while other teachers not so protected, whose assignments such teacher is competent to fill, are retained under employment. . . . [T]he *Seidel* case is authority for the proposition that *movement for economy is not to be accomplished by dismissing teachers who are under the protection of the statute providing for indefinite tenure while other teachers not so protected are retained.* . . .

As was said in the *Seidel* case:

. . . [T]he protection afforded by the statute would be little more than a gesture if such local board were held entitled to make that reduction by selecting for discharge teachers exempt by law therefrom and retaining the non-exempt. If such reduction is to be made at all, and a place remains which the exempt teacher is qualified to fill, such teacher is entitled to that place as against the retention of a teacher not protected by the statutes. . . .

(*Emphasis supplied.*)

11 *N.J. Misc.* at 752-753

See also, *Marie Sheridan v. Board of Education of the Township of Ridgefield Park, Bergen County*, 1976 *S.L.D.* 995 and *Mary Ann Popovich v. Board of Education of the Borough of Wharton*, 1975 *S.L.D.* 745.

The Board's actions which resulted in fewer hours of employment and decreased salary for petitioner constituted a reduction in force as contemplated by *N.J.S.A.* 18A:28-10 *et seq.* and *N.J.A.C.* 6:3-1.10(h). Petitioner had seniority rights which exceeded any rights to continued employment of the untenured physical education teacher. Being untenured, she had no seniority rights at all. *Horan, supra; Popovich, supra.* I **CONCLUDE**, therefore, that, when the Board chose to continue to provide for more than the equivalent of one full-time instructional position in physical education effective September 1979, it was obligated to continue to employ and compensate petitioner on a full-time basis. *Popovich, supra.* I further **CONCLUDE** that the Board's action abolishing his full-time position, while it may have been an act resulting from nescience, was within this factual context improper. To hold otherwise would subvert the expressed intent of the Legislature and the State Board to insure that, when effecting a reduction in force, the more senior tenured teaching staff members will continue, without reduction in time and salary, as others with less seniority or without tenure or seniority are released.

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Petitioner is entitled to be made whole on these expressed principles of education law. To address the remaining arguments concerning the technicalities of the Board's compliance or noncompliance with notice of meetings, seniority status and the propriety of the Board's voting procedures would serve no useful purpose, since the end result would not be altered.

Based on the above stated conclusions and interpretations of law, it is **ORDERED** that the Board reinstate petitioner retroactively to his former full-time teaching position effective the beginning of the 1979-80 school year, together with all salary, emoluments and benefits to which he was entitled as a full-time teacher.

This initial decision may be affirmed, modified or rejected by the Commissioner of Education, who by law is empowered to make the final decision in this matter.

**FINAL DECISION BY COMMISSIONER OF EDUCATION:**

The Commissioner has reviewed the entire record of the matter controverted herein including the initial decision rendered by the Office of Administrative Law.

The Commissioner observes that timely exceptions and reply exceptions were filed by the parties pursuant to the provisions of *N.J.A.C.* 1:1-16.4a, b, and c.

It is observed that petitioner concurs with Judge Errickson's ultimate determination of this matter which grants the relief requested by him herein. However, petitioner does take exception to the fact that a determination with respect to the issue involving the propriety and legality of the Board's action to abolish his full-time teaching position in the first instance was not reached by Judge Errickson.

The Board in its reply to petitioner's exception rejects this contention and considers any determination with respect to said issue merely petitioner's attempt to place form over substance. The Board does, however, take issue with Judge Errickson's determination that petitioner is entitled to be restored to his full-time teaching position as of the 1979-80 school year by virtue of the facts set forth in the record of the matter controverted herein. In this regard the Board takes the position that the action complained of by petitioner fell within its discretionary authority to organize and structure its instructional programs as it deems necessary in view of educational considerations and financial constraints.

The Board argues that its actions are entitled to a presumption of correctness absent a showing of impropriety or legality. It maintains that petitioner has failed to show by a preponderance of credible evidence that such was the case herein. The Board contends that the issue raised herein with respect to petitioner's seniority is spurious inasmuch as it does not deny the fact that he is the only one of the two physical education teachers with tenure and seniority status. It does insist, however, that such facts are not pertinent in the adjudication of this matter.

Finally, the Board argues that, should petitioner prevail, the sum of money owing and due him by the Board as a full-time teaching staff member for the employment periods controverted herein should be mitigated by any sources of income he may have received from alternative employment. The Board in support of its position relies on a number of prior decisions of the Commissioner and the courts which are included in its exceptions.

Petitioner likewise relies on similar prior case law of the Commissioner and the courts in rejecting the Board's exceptions to the initial decision. (Petitioner's Reply to Exceptions)

Petitioner maintains that his seniority to a full-time position is relevant to this determination inasmuch as the Board does not deny he has legally acquired such entitlement and, further, that the facts of this matter clearly establish that only one full-time physical education teacher is necessary to provide an adequate program for the pupils in the Cranbury School District.

The Commissioner has carefully reviewed and considered the exceptions of the parties filed in this matter.

In the Commissioner's judgment it is clear that the Board has the authority to promulgate rules and regulations and take those actions it deems necessary for the efficient management and operation of its school district.

Such discretionary authority vested in local school districts by the Legislature may not, however, contravene other statutory mandates. Given the facts set forth in the record of this matter, the Commissioner may not ignore the legal citations and applicable case law set forth by Judge Errickson in support of his conclusions of law giving rise to his initial determination of the instant matter. The Commissioner affirms the findings and determinations of Judge Errickson and hereby adopts them as his own with one modification.

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The Board is directed to reinstate petitioner retroactively to his former full-time teaching position effective as of the beginning of the 1979-80 school year with all salary and other emoluments owing and due him. The amount of petitioner's full-time salary for said periods of employment is to be mitigated by those earnings already received in his less than full-time position together with those earnings, if any, he may have received from alternative employment.

Accordingly, the relief requested by petitioner is hereby granted in accordance with the terms set forth in the Commissioner's directive herein.