

New Jersey Commissioner of Education

Final Decision

South Harrison Township Education Association,

Petitioner,

v.

Board of Education of the Township of South Harrison,
Gloucester County,

Respondent.

Synopsis

Petitioner, the South Harrison Township Education Association (Association), filed a petition of appeal against the respondent Board for violations arising under the school laws pursuant to *N.J.S.A.* 18A:6-9, violation of Board policy, and arbitrary and capricious conduct for improperly withholding wages from Heidi Wagner, a former Association member who retired on January 1, 2019. The Association contended that the Board unilaterally changed the terms of Wagner’s employment to a per diem employee in violation of *N.J.S.A.* 18A:27-6 and reduced the salary of a tenured employee in violation of *N.J.S.A.* 18A:6-10. The Board maintained that the retired teacher received an appropriately pro-rated final paycheck based on the number of days she worked prior to her retirement. The parties filed cross motions for summary decision.

The ALJ found, *inter alia*, that: there is no genuine issue as to any material fact, and the matter is ripe for summary decision; the issue in this matter is whether the Board’s action in deduction \$1,146.86 from the final paycheck of a retiring teacher constituted a reduction in compensation in violation of *N.J.S.A.* 18A:6-10; *N.J.S.A.* 18A:28-5 provides that teachers who are under tenure shall not have their compensation reduced except for inefficiency, incapacity or unbecoming conduct; *N.J.S.A.* 18A:27-6(3) provides that salary payments must be made in equal semi-monthly installments; and the Board’s policy did not provide any basis for prorating Wagner’s final paycheck. The ALJ concluded that the Board’s recalculation of Wagner’s semi-monthly salary by deducting \$1,146.86 to reflect a per diem basis of pay constituted an improper reduction in compensation in violation of *N.J.S.A.* 18A:27-6(3), *N.J.S.A.* 18A:28-5, and *N.J.S.A.* 18A:6-10. Accordingly, the ALJ granted summary decision to petitioner.

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. The Commissioner ordered the Board to compensate Wagner for the difference between her full semi-monthly salary and what she received in her final paycheck.

This synopsis is not part of the Commissioner’s decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

March 17, 2020

New Jersey Commissioner of Education

Decision

South Harrison Township
Education Association,

Petitioner,

v.

Board of Education of the Township
of South Harrison, Gloucester County,

Respondent.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties did not file exceptions.

In this matter, the South Harrison Township Education Association represents the interests of its member, Heidi Wagner, who had been employed by the Board as an elementary school teacher for thirty years. In August 2018, the Board approved Wagner's notice of retirement, effective January 1, 2019. From September 2018 to the first pay period of December 2018, petitioner received her salary of \$76,594 in semi-monthly installments of \$3,829.70. For the final paycheck in the second pay period of December 2018, the Board deducted \$1,146.86 from Wagner's paycheck and indicated that her salary had been prorated based on the number of days she had actually worked, relying upon a Board policy that authorizes the withholding of salary or wages for services not provided.

Upon review, the Commissioner concurs with the ALJ's conclusion that the Board improperly reduced Wagner's salary in violation of her tenure rights. Pursuant to

N.J.S.A. 18A:27-6(3), teacher salaries, including those of tenured teachers and teachers who work less than a full year, must be calculated on the basis of monthly or semi-monthly pay periods. See *Tucker v. Bd. of Educ. of the Twp. of Montgomery, Somerset Cty.*, Commissioner Decision No. 277-05 (decided August 3, 2005). The Board is therefore precluded from adjusting the contracted salary installment for a teacher not on leave status who has worked each day during the period that teaching staff members were required to report to work. *Ibid.* The Commissioner reiterates the ALJ's statement in the Initial Decision that there is nothing discretionary or ambiguous about *N.J.S.A.* 18A:27-6(3). There is no indication in the record that Wagner failed to report to work on any day that schools were in session during the second pay period of December 2018.¹ The Board's decision to reduce her salary is therefore a violation of her protection against reduction in compensation under *N.J.S.A.* 18A:28-5.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter. The Board is directed to compensate Heidi Wagner for the \$1,146.86 difference between the salary payment she was owed for the second pay period of December 2018 and what she actually received, together with such additional pension contributions as are necessitated by this action.

IT IS SO ORDERED.²

COMMISSIONER OF EDUCATION

Date of Decision: March 17, 2020
Date of Mailing: March 17, 2020

¹ The ALJ found that, for this reason, the Board could not use its policy regarding "services not rendered" as justification for withholding earned wages. While the Commissioner bases this decision on the Board's statutory obligations, which the Board cannot abrogate through its policy, the Commissioner also concurs with the ALJ's conclusion that the policy does not provide sufficient justification for the Board's decision.

² This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1).



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDU 05378-19

AGENCY DKT. NO. 61-3/19

**SOUTH HARRISON TOWNSHIP
EDUCATION ASSOCIATION,**

Petitioner,

v.

**SOUTH HARRISON TOWNSHIP
BOARD OF EDUCATION,
GLOUCESTER COUNTY,**

Respondent.

Jeffrey P. Catalano, Esq., for petitioner (Zeller & Wieliczko, LLP, attorneys)

R. Taylor Ruilova, Esq., for respondent (Comegno Law Group, P.C., attorneys)

Record Closed: February 12, 2020

Decided: February 20, 2020

BEFORE **KATHLEEN M. CALEMMO**, ALJ:

STATEMENT OF THE CASE

Petitioner, South Harrison Township Education Association (petitioner or Association), filed a petition of appeal against the South Harrison Township Board of Education, Gloucester County (respondent or Board) for violations arising under school laws pursuant to N.J.S.A. 18A:6-9, violation of Board policy, and arbitrary and capricious

conduct for improperly withholding wages from a former Association member who retired on January 1, 2019. The Board maintained that the retired teacher received an appropriately prorated final paycheck based on the number of days she worked prior to her retirement.

PROCEDURAL HISTORY

This matter arose with the Association's March 21, 2019, filing of its petition of appeal with the Office of the Commissioner of Education. On April 10, 2019, the Board filed a notice of motion to dismiss the petition in lieu of answer or, in the alternative, to compel arbitration. The Commissioner of Education transmitted the matter to the Office of Administration Law (OAL) where it was filed on April 18, 2019.

By Order, dated August 20, 2019, I denied the Board's motion to dismiss and scheduled the matter for a telephone conference. During the telephone conference, the parties agreed that there were no material facts in dispute and the matter could be resolved summarily. On December 4, 2019, I received the Association's brief and certification in support of its motion for summary decision. On January 8, 2020, I received the Board's opposition, cross-motion for summary decision, and supporting certification. On January 27, 2020, I received the Association's letter brief in reply. On February 12, 2020, I received the Board's letter brief in reply to the Association's opposition. Thereafter, I closed the record.

ISSUES PRESENTED

The petition raises the following issues for determination:

1. Whether the Board's action in deducting \$1,146.86 from the final paycheck of a retiring tenured teacher constituted a reduction in compensation in violation of N.J.S.A. 18A:6-10?

2. Whether the Board's action was arbitrary, capricious, and unreasonable, when it prorated the final paycheck of a tenured teacher who retired on January 1, 2019, to reflect the actual number of days she worked?

STATEMENT OF FACTS

The following facts pertinent to the cross-motions for summary decision are uncontroverted, and I **FIND**:

On July 1, 2017, the Association and the Board entered into a Collective Bargaining Agreement (CBA), effective July 1, 2017 through June 30, 2020. Certification of Cosmas P. Diamantis, Esquire (CPD Cert.), Exhibit 2.

Heidi Wagner (Wagner) was employed with the South Harrison School District (District) for thirty years as an elementary school teacher and was a member of the Association. At the Board's August 20, 2018 meeting, the Board approved Wagner's notice of retirement, effective January 1, 2019. Wagner's last day of work was December 31, 2018.

The CBA, at Article 11 (B) (1), provides for teachers employed on a ten-month basis to be paid in twenty equal semi-monthly installments. (CPD Cert, Exhibit 2.) Wagner's salary for the 2018-2019 school year was \$76,594, as set forth in the CBA. *Id.* Starting in September 2018, and continuing through the first pay period in December 2018, Wagner received \$3,829.70 in semi-monthly installments. Rather than receiving her semi-monthly installment for the second pay period in December 2018, Wagner received a paycheck that was \$1,146.86 less than the \$3,829.70 she had been receiving since September 2018.

On behalf of Wagner, the Association filed a grievance requesting that the "docked" pay of \$1,146.86 be returned to Wagner. (CPD Cert., Exhibit 1 at B.)

In a letter, dated February 12, 2019, Dr. James J. Lavender, (Lavender), Superintendent of Schools, denied the Association's request to reimburse Wagner the money that had been deducted from her last paycheck. (CPD Cert., Exhibit 1 at C.) His

written response was as follows:

Mrs. Wagner was employed and provided a salary based on a complete contract year of 187 days. However, Mrs. Wagner worked 72 days during the 2018-2019 school year, constituting an early separation from her contract. Therefore, Mrs. Wagner's salary was prorated based on the number of days she actually worked. In Mrs. Wagner's case, her annual salary was \$76,595. By dividing 187 contract days into her salary, Mrs. Wagner's daily rate of pay was equal to \$409.59. To prorate her salary correctly, the payroll administrator multiplied her daily rate by the number of days she worked.

The Board calculated Wagner's entitlement based on the 72 days she worked against the 187 contract days in the school year. Public holidays and other school closures from the first full staff day of school on September 4, 2018 through December 31, 2018, were not included in the Board's prorated calculation. According to the 2018-2019 South Harrison school calendar, the teachers had 72 working days from September 4, 2018 through December 31, 2018. The school was closed to both students and staff for 13 days: November 5, 2018 through November 9, 2018; November 22 and 23, 2018; and December 24, 2018 through December 31, 2018. (CPD Cert., Exhibit 1 at A.)

In support of its decision to prorate Wagner's wages, the Board relied upon Board Policy 6510 which authorizes withholding of salary or wages for services not provided. (CPD Cert., Exhibit 1 at D.)

The Association maintains that the Board unilaterally changed the terms of Wagner's employment to a per diem employee in violation of N.J.S.A. 18A:27-6 and reduced the salary of a tenured employee in violation of N.J.S.A. 18A:6-10.

LEGAL DISCUSSION

Summary decision may be rendered in an administrative proceeding if the pleadings, discovery and affidavits "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." N.J.A.C. 1:1-12.5(b). The standard to be applied in deciding a motion pursuant to N.J.A.C. 1:1-

12.5(b) is essentially the same as that governing a motion under R. 4:46-2 for summary judgment in civil litigation. Contini v. Bd. of Educ. of Newark, 286 N.J. Super. 106, 121, (App. Div. 1995), certif. denied, 145 N.J. 372 (1996).

A court should grant summary judgment when the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 528-529 (1995). The Supreme Court of New Jersey has adopted a standard that requires judges to “engage in an analytical process to decide whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.” Id. at 533.

A court should deny a motion for summary decision when the party opposing the motion has produced evidence that creates a genuine issue as to any material fact challenged. Brill, 142 N.J. at 528-29. When making a summary decision, the “judge’s function is not to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.” Id. at 540.

Here, the parties agree that there are no material issues of fact in dispute, and both have filed cross-motions for summary decision. After careful review of the record, I am satisfied that the material facts giving rise to this matter are not in dispute and that this matter can be decided as a matter of law. Accordingly, I **CONCLUDE** that it is appropriate to decide this matter by way of summary decision.

N.J.S.A. 18A:28-1 to -18 defines the conditions under which teaching staff members are entitled to the security of tenure. Tenure is a “statutory right imposed upon a teacher’s contractual employment status.” Zimmerman v. Newark Bd. of Educ., 38 N.J. 65, 72 (1962), certif. denied, 371 U.S. 956 (1963). These statutory provisions supersede contractual terms. Spiewak v. Rutherford Bd. of Educ., 90 N.J. 63, 72 (1982). They are “designed to aid in the establishment of a competent and efficient school system by affording to principals and teachers a measure of security in the ranks they hold after years

of service.” Viemeister v. Prospect Park Bd. of Educ., 5 N.J. Super. 215, 218 (App. Div. 1949).

Wagner’s claim springs from N.J.S.A. 18A:6-10, which provides as follows:

No person shall be dismissed or reduced in compensation,

(a) if he is or shall be under tenure of office, position or employment during good behavior and efficiency in the public school system of the state, or

. . . .

except for inefficiency, incapacity, unbecoming conduct, or other just cause, and then only after a hearing held pursuant to this subarticle, by the commissioner, or a person appointed by him to act in his behalf, after a written charge or charges, of the cause or causes of complaint, shall have been preferred against such person, signed by the person or persons making the same, who may or may not be a member or members of a board of education, and filed and proceeded upon as in this subarticle provided.

Similarly, N.J.S.A. 18A:28-5 provides that teachers who are under tenure shall not have their compensation reduced except for inefficiency, incapacity, or unbecoming conduct.

Wagner was a tenured teacher with thirty years’ experience. At its August 20, 2018 meeting, the Board approved Wagner’s notice of retirement, effective January 1, 2019. At the start of the 2018-2019 school year, Wagner’s salary was \$76,594. In accordance with N.J.S.A. 18A:27-6(3), Wagner was required to be paid in equal semimonthly or monthly installments. As stated, Wagner was paid in semimonthly installments through the first installment in December 2018. Without prior notification, Wagner’s paycheck for the second installment in December 2018, was reduced by \$1,146.86.

Without addressing the requirement set forth in N.J.S.A 18A:27-6(3) that a teacher’s salary be payable in equal semimonthly installments, the Board maintained that Wagner was appropriately paid for services rendered in accordance with Board Policy, 6510,

Payroll Authorization. (CPD Cert., Exhibit 1 at C.) The Board relied on one sentence in the policy which states that “[t]he School Business Administrator/Board Secretary is authorized to withhold salary or wages for services not rendered, in accordance with Board policy.” The next sentence in the policy states that “[s]taff members shall be paid in accordance with the provision in their collective bargaining agreement and/or in accordance with a schedule provided to all employees prior to the beginning of the contract or school year.” There is nothing in the record to suggest that Wagner failed to perform teaching services on each day that school was in session from the beginning of the school year until December 31, 2018. The Board never articulated what services Wagner failed to render. The Board is attempting to use Board Policy 6510 as justification for changing the terms of Wagner’s contract of employment from a salary paid on equal installments to per diem. Without articulating which services Wagner failed to render, the Board cannot use this policy as a justification for withholding earned wages. Therefore, I **CONCLUDE** that Board Policy 6510 did not provide any basis for the Board’s action in prorating Wagner’s final paycheck.

The Board simply ignored the statutory language requiring salary payments to be paid in equal semimonthly installments. There is nothing discretionary or ambiguous about N.J.S.A. 18A:27-6(3) and its requirement. The Board did not maintain that its prior installment payments of \$3,829.70 were in error. Rather, the Board maintained that its actions were justified because of Wagner’s early termination from her contract. Yet, the Board approved Wagner’s retirement date in August 2018, and issued semimonthly installment payments based on her contract amount for the next three and one-half months. In contradiction to the Board’s argument, Wagner was paid her full salary installments for the month of November 2018, when there were only fifteen teaching days. Wagner received her full contractual pay for each month that she worked until her last payment when she was docked for the days when school was not in service.

To accept the Board’s reasoning would lead to illogical results. Would a tenured teacher who had to resign mid-year for health or personal reasons be required to pay back the money she already earned? The Board’s actions herein, interfered with Wagner’s earned contractual rights not a prospective right. Consequently, the Board’s reliance on New Jersey Ass’n of Sch Adm’rs v. Schundler, 211 N.J. 353 (2012), is unfounded. In

Schundler, the New Jersey Supreme Court reiterated a well settled principal that the Legislature and the Commissioner of Education may enact **prospective** legislation that modifies the terms and conditions of public service. Such reasoning has no bearing on the Board's actions herein. The Board's decision affected Wagner's contractual right to her earned salary. This modification to her existing salary did not stem from a policy, was not negotiated through a collective bargaining agreement, and cannot be justified under exiting law.

The Legislature made the policy decision to limit how compensation could be reduced when it enacted the tenure statutes. N.J.S.A. 18A: 28-5 provides that tenured teachers during good behavior and efficiency, shall not have their compensation reduced without just cause. Likewise, N.J.S.A. 18A:6-10 provides that a tenured teacher's compensation shall not be reduced during good behavior and efficiency.

As cited by the Association, the Commissioner of Education reviewed a similar issue in the matter of Diane M. Tucker, Petitioner, v. Board of Education of Montgomery Township, Somerset County, Respondent, 234-7/03, 2005 WL 1794528 (N.J. Adm. June 20, 2005). In Tucker, the Commissioner of Education adopted the initial decision and concurred with the ALJ that the applicable statute, N.J.S.A. 18A:28-5, required that teachers' salaries, including those of tenured teachers and teachers who work less than a full year, be calculated on the basis of monthly or semimonthly pay periods. The Board of Education of Montgomery Township had recalculated Mrs. Tucker's semi-monthly salary on a per diem basis which caused her to suffer a reduction in compensation. The issue in Tucker was not retirement but maternity leave, however, the reasoning by the ALJ and the Commissioner is illustrative. With Board approval, Ms. Tucker had structured her maternity leave so that she would return to work on April 16, 2003, the first day of the pay period and the day before spring recess. Following the school recess, Ms. Tucker returned to work on April 28, 2003, for the last three days of the pay period. Consequently, Ms. Tucker worked every single day the school was open. The ALJ concluded that the Board's recalculation of Ms. Tucker's semi-monthly salary on a per diem basis by failing to pay her for the spring recess constituted an improper reduction in compensation in violation of N.J.S.A. 18A:28-5. The Commissioner of Education agreed. The Commissioner ordered the Board to pay Ms. Tucker \$1,310.40, representing the difference

between the salary payment she was owed and what she received on a per diem basis. Further, the Commissioner stated that N.J.S.A. 18A:27-6(3) precludes a board from adjusting the contracted salary installment for a teacher who has worked each day during the period that teaching staff members were required to report to work. There is no difference between what the Board attempted to do in Tucker and what the Board is attempting to do herein. Wagner worked each day from the start of the school year until December 31, 2018, that teaching staff members were required to work and she should be compensated accordingly. The Board adjusted her salary while she was still employed so the argument that Wagner was in the process of retiring is of no import.

For the reasons expressed above, I **CONCLUDE** that the Board's recalculation of Wagner's semi-monthly salary by deducting \$1,146.86 to reflect a per diem basis of pay constituted an improper reduction in compensation in violation of N.J.S.A. 18A:28-5 and 18A:6-10. I further **CONCLUDE** that Wagner was entitled to receive her full semi-monthly salary of \$3,829.70 for the second pay period in December 2018.

The Board's actions in unilaterally converting Wagner's salary from equal semimonthly installments to a per diem rate of pay violated N.J.S.A. 18A-27-6(3) and constituted an improper reduction in compensation in violation of N.J.S.A. 18A:28-5 and 18A:6-10. In this instance, I **CONCLUDE** that the Board's actions were arbitrary and capricious. The Board acted to reduce a retiring tenured teacher's salary without any basis in law, policy, or agreement.

Based upon the foregoing, I **CONCLUDE** that the Board's recalculation of Wagner's semi-monthly salary on a per diem basis constituted an improper reduction in compensation and must be overturned.

CONCLUSION

The Association's motion for summary decision is **GRANTED** and the Board's cross-motion for summary decision is **DENIED**.

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, PO 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.



February 20, 2020

DATE

KATHLEEN M. CALEMMO, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

KMC/tat

APPENDIX

LIST OF EXHIBITS

For petitioner:

Certification of Cosmas P. Diamantis, Esq.

Exhibit 1 – Petition of Appeal with attachments: Exhibit A – 2018-2019 South Harrison School Calendar; Exhibit B – Grievance Form; Exhibit C – February 12, 2019, letter from Dr. Lavender; Exhibit D – 6510 Payroll Authorization Policy; Exhibit E – Association’s Grievance Form; and Exhibit F – February 29, 2019, Board’s response.

Exhibit 2 – CBA

For respondent:

Certification of Counsel, incorporating by reference, Exhibits to Certification of Cosmos P. Diamantis, Esq.