

EILEEN KELLY, :
PETITIONER, :
V. : COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE : DECISION
MIDDLESEX COUNTY VOCATIONAL
TECHNICAL SCHOOL DISTRICT, :
RESPONDENT. :

SYNOPSIS

Petitioner – a teacher of practical nursing (PN) – contends that at the time of a reduction in force (RIF), she had more seniority than the teacher retained by the District. Respondent asserts that in so contending, petitioner erroneously relies on her service as a PN instructor during the Fall of 1992. Respondent argues that during that time period, petitioner had no contract to teach same, and neither emergency nor provisional certification in the PN category. Consequently, she could not accrue tenure or seniority.

The ALJ found, *inter alia*, that: respondent knowingly moved petitioner from a properly credentialed position as an instructor of NA into one where she was legally not permitted to perform as a teacher in the absence of proper credentials; petitioner’s credential deficits were the result of respondent’s actions, and therefore the equities require that petitioner’s seniority accrue from the time petitioner began to teach in the PN program full-time, i.e. mid-October 1992. The ALJ concluded that petitioner’s seniority is superior to that of the teacher retained during the RIF and, accordingly, petitioner should be compensated with any back pay – less mitigation – and emoluments from the time of her improper termination in May 2001 up to January 2003.

Upon careful and independent review of the record, the Commissioner rejected the Initial Decision, finding, *inter alia*, that: respondent did not act inequitably toward petitioner in 1992, but rather changed petitioner’s employment status for the benefit of petitioner; petitioner did not acquire seniority for her two months of teaching PN classes in 1992, as she was teaching under a substitute credential and held neither standard certification, nor provisional or emergency certification; petitioner lost additional days of seniority when she took unpaid leave in 1999; and petitioner forfeited her tenure by declining a recall position in November 2002. The Commissioner determined that petitioner did not show that her seniority as a PN teacher was greater than the teacher retained by the district during the RIF, and that, assuming *arguendo* that the Commissioner has authority to venture outside established rules concerning seniority, it is not warranted in this case.

<p>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.</p>

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The petitioner contends that, at the time of a legitimate reduction in force (RIF) in respondent's district (the District), she had more seniority as a teacher of practical nursing than the teacher who was retained by the District. Thus, petitioner maintains that she was improperly RIFed in violation of *N.J.S.A.* 18A:28-10. The Office of Administrative Law (OAL) found in petitioner's favor. After independently reviewing the record,¹ and for the reasons that follow, the Commissioner is constrained to reject the Initial Decision (ID) in this matter.

FACTS AND PROCEDURAL HISTORY

It is undisputed that petitioner was hired by respondent in January 1992 to teach adult nursing assistant (NA) students in Perth Amboy for the remainder of the school year, in a federally funded Job Training Partnership program (JTP) administered by respondent. The record shows that in March 1992 petitioner received emergency certification to qualify her for the position

¹ The Initial Decision was mailed to the parties on June 16, 2006. An extension to July 20, 2006, was granted for the filing of exceptions. Exceptions filed on July 13, 2006, and a reply filed on July 27, 2006, were reviewed by the Commissioner. Exceptions filed by petitioner on July 31, 2006, were out of time, pursuant to *N.J.A.C.* 1:1-18.4, and were not considered. Respondent's August 2, 2006, reply to petitioner's reply exceptions was not considered, as there is no provision in the regulation for same.

(P-1).² In April 1992 petitioner was reappointed to teach NA students at the Perth Amboy site of the JTP program for the 1992-1993 school year (2T16; P-1), and her emergency certification for that job was renewed for the 1992-1993 school year. (P-1)

During the summer of 1992, petitioner was allowed – on a temporary basis – to teach students in the Practical Nursing (PN) program, substituting for regular PN instructors who did not wish to teach in July and August. (2T15)³ Petitioner herself conceded – on cross examination during the April 6, 2005 hearing in this matter – that during those summer months, her status was that of a substitute teacher. (2T68)

It is undisputed that in September 1992, petitioner reported to the Perth Amboy site of the JTP program to begin her contract as an instructor to the 43 NA students. (2T16; R-4) However, as the ALJ found, respondent learned in September 1992 that – as a result of new regulations – petitioner lacked sufficient experience in the area of geriatrics to meet the requirements of NA instructor in the JTP program. (2T66; ID4) Instead of terminating her employment,⁴ respondent allowed her to serve as a temporary teacher in the PN program with the specific purpose of allowing her to gain experience she needed in geriatrics, which included clinical long-term health care. (2T18-21; 2T71-72).

Thus, the Commissioner agrees with the ALJ's finding that respondent's relocation of petitioner – in October, November and December of 1992 – to its New Brunswick site to teach classes to PN students was intended to be a temporary measure to allow petitioner to gain experience in geriatrics and return to her contractual position of teacher of NA classes, and that petitioner understood that at the time. (ID9-10) Petitioner conceded that she may have, in fact,

² P designates petitioner's exhibits and R designates respondent's exhibits.

³ 1T = Transcript of hearing on March 1, 2005; 2T = Transcript of hearing on April 6, 2005.

⁴ Exhibit R-3 suggests that respondent's employment contract contained clauses allowing either party to terminate the contract upon 60 days' notice.

gotten such experience in the Fall of 1992 before she was ultimately switched out of the NA program. (2T72)

As regards the petitioner's status during the Fall of 1992, the Commissioner agrees with the ALJ that petitioner was not a "permanent substitute" during those months. (ID10) Further, it is undisputed that there was no vacant position for Teacher of PN at the time, and no appointment of petitioner by the board of education to a PN teaching position. Petitioner had neither a provisional nor an emergency certificate to teach PN; rather, she was teaching under a substitute teacher K-12/nurse credential for that time period (P-2).⁵

Petitioner had applied for that substitute certificate on October 14, 1992 (R-6), which was on or before she began instructing PN students in the second half of October 1992. (P-12; 2T62; 2T97) The certificate was actually issued on October 30, 1992. (P-2) At that time there were no vacant PN teaching positions in respondent's district (2T19-21), and petitioner was consequently ineligible for emergency PN certification. Nor did she have provisional certification as a teacher of PN. She was still employed by respondent under her contract as a NA instructor (2T19), and was teaching PN classes under the previously mentioned substitute credential. (2T20)⁶

In November 1992, one of the permanent PN teachers unexpectedly resigned and petitioner applied for the position by way of a letter dated November 11, 1992. (P-3) Respondent's assistant superintendent recommended petitioner for the position via memorandum dated December 8, 1992 (R-2), and respondent accepted the recommendation. The parties entered into a

⁵ The Commissioner concludes that petitioner continued teaching PN from December 14, 1992, through May 1993 without provisional or emergency certification, as there is no evidence to the contrary in the record.

⁶ Petitioner testified at the hearing (1T34) that both respondent's assistant superintendent and director of health occupations told her that her credentials were adequate for the temporary position of PN instructor. The Commissioner agrees with the ALJ's finding on ID10 that "any assurance that petitioner may have received from respondent's administrative staff to the effect that her credentials or certifications were satisfactory to allow her to teach as an instructor in the LPN program were with reference to petitioner's K-12/nurse substitute certificate, as opposed to petitioner's emergency . . . certificate with an NA teacher endorsement."

contract dated December 10, 1992, which effectuated petitioner's transfer to the position of PN instructor as of December 14, 1992. (R-3; R-5; R-8)⁷ It is undisputed that respondent took simultaneous action to appoint another individual, Rosemary Sestito Simmons (Simmons), to a PN teaching position, memorializing the appointment in a contract dated December 10, 1992, with an effective date of December 1, 1992.

Petitioner received her standard certification as NA instructor in March 1993 (P-4), and standard certification as a PN teacher in May 1993. (P-5) It is undisputed that Simmons received her standard PA certification at a later date. Both women continued to teach in the PN program through May 2001, but petitioner took unpaid leave in 1999, amounting to between 38.5 and 43.5 days. *See* Letter Ruling and Order of ALJ Steven C. Reback (Ruling/Order) dated December 30, 2003, pages 3-4.

In April 1996, respondent's assistant superintendent, Dr. Karen McCloud-Hjازه, distributed data sheets for the purpose of updating the district's seniority list, and asked the staff – via memoranda – for their input and corrections. (P-6) On petitioner's data sheet were the notations that she began her NA teaching assignment on January 2, 1992, and that she began her PN teaching assignment on December 14, 1992. (*Ibid.*) Although petitioner wrote back to McCloud-Hjازه advising that she had a B.S., not a B.A., in nursing, and that she had a “regular” certificate to teach NA courses, she did not contradict the information on P-6 identifying December 14, 1992 as the date she had begun her PN teaching assignment. (R-1)

As the ALJ found (ID7), petitioner received a notice of reduction in force (RIF) and her position was abolished on May 9, 2001. Rosemary Sestito Simmons was retained. It was

⁷ Using the calendar in R-10, the Commissioner notes that petitioner appears to have worked thirty consecutive days as a substitute PN teacher. This is contrary to *N.J.A.C. 6A:9-6.5(b)* (formerly *N.J.A.C. 6:11-4.5(c)*), which sets a period of twenty consecutive days as the maximum that a substitute may teach in the same position. The ALJ made note of this on page 13 of the Initial Decision.

determined that Simmons had more seniority based both upon the fact that her contractual effective date was December 1, 1992 – as opposed to petitioner’s contractual effective date of December 14, 1992 (*Ibid.*) – and upon the fact that in 1999 (and March of 2000) petitioner took a total of 43.5 days of unpaid leave. *See* Ruling/Order, pp. 3-4, *supra*.

In her June 2001 petition, petitioner alleged that her tenure and seniority rights had been violated. She further alleged that at the time her employment was terminated, respondent “retained teaching staff members that [were] less senior than she, as a consequence of which petitioner [was] entitled to said position(s).” The relief she demanded was an order:

- A. Directing Respondent to recognize her tenure and seniority rights to a full time position under one or all of his [sic] endorsements, or areas of eligibility effective July 1, 2001;
- B. Directing Respondent to reinstate her to a full time position effective July 1, 2001, under one or all of her endorsements, or areas of eligibility together with all back pay, benefits, and all other emoluments denied as a result of its improper failure to assign or employ Petitioner . . . in or to such position;
- C. Directing Respondent to assure that Petitioner . . . received properly pension credits for all periods of its improper failure to assign or employ Petitioner . . . to employment under one or all of his [sic] endorsements;
- D. Attaching interest, both pre and post decision, to any back pay awarded; and
- E. For such other relief as the Commissioner deems just and appropriate.

To mitigate her damages, petitioner accepted other employment. It is undisputed that in November 2002, respondent gave petitioner notice that she was being recalled to her employment in respondent’s district. Petitioner was employed at the time as a full-time nursing instructor with the University of Medicine and Dentistry of New Jersey (UMDNJ) under a one-year contract. She chose to stay with UMDNJ and turned down the recall position with respondent.

On February 25, 2003, ALJ Reback conducted a prehearing conference. The parties subsequently filed cross motions for summary judgment, and ALJ Reback issued the above referenced Ruling/Order thereon. In the Ruling, ALJ Reback found that the record created by the summary judgment papers was insufficient to serve as a basis for calculating petitioner's seniority status, thereby precluding summary judgment on that issue. He did, however, determine that by declining the recall position offered by respondent, petitioner had forfeited her tenure (and therefore her seniority). Petitioner has not challenged this determination and, in any event, the Commissioner concurs with it and adopts it for the reasons set forth in the Ruling/Order.

Testimony on the remaining issue of seniority was taken on March 1 and April 6, 2005 before ALJ Richard F. Wells; post hearing memoranda were submitted by July 6, 2005; and the Initial Decision was issued on June 14, 2006.

DISCUSSION

Seniority is a mechanism for ranking all tenured teaching staff members so that reductions in force can be effected in an equitable fashion and in accord with sound educational policies. *Lichtman v. Ridgewood Bd. of Educ.*, 93 N.J. 362, 368, n. 4 (1983); *Ellicott v. Frankford Bd. of Educ.*, 251 N.J. Super. 342, 349 (App. Div. 1991). Dismissal of tenured staff resulting from a reduction in force "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:28-10. State regulations prescribe that "seniority . . . shall be determined according to the number of academic or calendar years of employment . . . in the school district in specific categories. . . ." N.J.A.C. 6A:32-5.1(b). Essentially, the categories used for determining seniority are whatever the Commissioner has said they should be. *Howley v. Ewing Bd. of Educ.*, 6 N.J.A.R. 509, 524 (Comm'r 1982). In order to earn seniority, a staff member must have actual experience in the particular subject area or field.

Ressler v. Saddle Brook Bd. of Educ., OAL Dkt. Nos. EDU 0705-92 & EDU 5018-92 (May 13, 1994), adopted (Comm'r June 27, 1994).

Because from late October to December 14, 1992, petitioner was teaching PN under a substitute credential, she was ineligible to accrue time toward tenure or toward seniority in the PN category. *Jeanne Sasse v. Board of Education of the Borough of Point Pleasant, Ocean County*, 92 N.J.A.R.2d (EDU) 339, n.1. [Emphasis added]

More specifically, accrual of tenure requires time served as a “teaching staff member.” *N.J.S.A. 18A:28-5*:

The services of all teaching staff members employed in the positions of teacher, . . . serving in any school district or under any board of education, excepting those who are not the holders of proper certificates in full force and effect, shall be under tenure during good behavior and efficiency and they shall not be dismissed or reduced in compensation except for inefficiency, incapacity, or conduct unbecoming such a teaching staff member or other just cause and then only in the manner prescribed by subarticle B of article 2 of chapter 6 of this Title, after employment in such district or by such board for:

- (a) Three consecutive calendar years, or any shorter period which may be fixed by the employing board for such purpose; or
- (b) Three consecutive academic years, together with employment at the beginning of the next succeeding academic year; or
- (c) The equivalent of more than three academic years within a period of any four consecutive academic years.

[Emphasis added.]

No teaching staff member shall be appointed, except by a recorded roll call majority vote of the full membership of the board of education appointing him. *N.J.S.A. 18A:27-1*. Until mid- December, petitioner had not been “appointed” as a teacher of PN. Thus, while she was teaching PN classes without an appointment and under the substitute credential, rather than a standard certification,

petitioner was not eligible for tenure credit.⁸ And absent tenure, an individual may assert no seniority claim. *Charles Mills v. Board of Education of the Township of Piscataway*, 92 N.J.A.R. 2d (EDU) 372.⁹

There is a regulation, N.J.A.C. 6A:32-5.1(e), discussed in the Initial Decision at p.11, that allows accrual of seniority in circumstances where the employee has yet to obtain a standard certificate, but this regulation applies only to employees who later achieve standard certification in the same field as the emergency certificate under which they were serving, or acquire a standard certificate after serving under a provisional certificate. N.J.A.C. 6A:32-5.1(e) states:

The holder of an emergency certificate shall not be entitled to seniority rights but, when he or she becomes the holder of a standard certificate, the years of employment under the emergency certificate shall count toward seniority under the standard certificate. Upon acquisition of a standard certificate, any periods of service under a provisional certificate shall also be counted toward seniority.

Since petitioner had no emergency or provisional certification in teaching PN, she was not eligible to tack the two months of teaching in the Fall of 1992 onto her seniority as a PN teacher.¹⁰

Nor could petitioner's emergency NA certification allow petitioner to tack those two months onto her seniority as a PN teacher. As the ALJ found, teacher of NA and teacher of PN are two separate endorsements. Possession of one does not qualify the holder to teach the subject matter of the other, and seniority is not interchangeable between the two. *Holloway v. Board of*

⁸ The Commissioner agrees with the ALJ that *Benson v. Board of Education of the Borough of Rockaway*, 92 N.J.A.R.2d (EDU) 15, is not apposite to the circumstances of this case. The petitioner in *Benson* had been 'RIFed' from a full-time position to a part-time position, and was on the preferred eligibility list, pursuant to N.J.S.A. 18A:28-12, when a vacancy for a full-time position opened. The intervenor teacher, although she had worked longer in the district, had not been RIFed and was not on the preferred eligibility list. The State Board of Education ruled that notwithstanding the intervenor teacher's greater general seniority in the district, the petitioner was entitled to the vacant position by virtue of her place on the preferred eligibility list.

⁹ The substitute credential's restrictions are printed on the face of the substitute nurse credential that petitioner received in October 1992. (P-2)

¹⁰ Respondent could not apply for emergency certification in the PN category because there was no PN teaching vacancy at the time. See, e.g., N.J.A.C. 6:11-4.3 (now 6A:9-6.3), and P-1. It is not clear from the record whether petitioner qualified for provisional certification to teach PN at the time in question.

Education of the Borough of Saddle River, Bergen County, EDU 7411-98, page 4 of Initial Decision (June 8, 2000), *aff'd* Comm'r (July 27, 2000) (Seniority accrues in specific "categories" of certification that are designated by regulation. It is measured by the years an employee works in specific job categories); *see also*, *N.J.S.A.* 18A:28-10 and 12; *N.J.A.C.* 6A:32-5.1. (ID11)

In sum, had petitioner accepted a position teaching NA classes in December 1992 instead of PN classes, when she later received her standard NA instructional certificate she would have been able to add the period of time that she had taught NA classes under her emergency certification to her seniority as an NA teacher. However, petitioner pursued the position teaching PN, for which she had not previously held emergency or provisional certification. Consequently, *N.J.A.C.* 6A:32-5.1(e) was inapplicable.

Hence, respondent was not in error in concluding that petitioner's two months of teaching PN classes (from mid-October to mid-December 1992) under a substitute credential did not count toward tenure or toward seniority as a PN teacher. The proper certification is a condition of accruing tenure and seniority. *Joanne McAneny v. Board of Education of the School District of the Chathams, Morris County*, 1991 *S.L.D.* 794, 799-801, 810 (1991).

In considering the conclusions in the Initial Decision to the contrary, the Commissioner notes the following:

First, the Commissioner agrees with the ALJ that petitioner was not properly certificated to teach PN until she received her standard certificate in May 1993, five months after the effective date of her contract with respondent to teach PN. However, despite her lack of proper certification, respondent nonetheless credited her with seniority beginning December 14, 1992. Thus, the only 'harm' petitioner can claim is that respondent declined to credit her the thirty days of

seniority between October 22 and December 14, 1992, during which – according to the record – she taught PN classes.

Second, the Commissioner agrees that *N.J.S.A.* 18A:26-2 and *N.J.A.C.* 6A:9-5.2(b) admonish school administrators not to hire uncertified teachers, but disagrees that respondent acted inequitably in 1992 as regards petitioner. When respondent had petitioner apply for county substitute certification in October 1992, it was with the expectation that petitioner would be teaching PN classes temporarily so that she could gain the experience in geriatrics/long-term care that she needed to qualify for the JTP position for which she had been hired. Under those circumstances, a substitute certificate was not inappropriate.¹¹ Clearly, the alternative was to terminate petitioner’s employment.¹²

Third, the Commissioner disagrees that respondent’s designation of different effective dates for petitioner’s and Simmons’ contracts can be characterized as arbitrary and capricious. There is nothing in the record to prove that there were not valid reasons for the two different dates. As the ALJ correctly stated (ID15), petitioner had the burden to offer evidence to support alleged arbitrary and capricious acts. Moreover, even if petitioner’s and Simmons’ effective dates had been the same, the record shows that petitioner lost more than fourteen days of seniority when she took unpaid leave in 1999.

Fourth, the Commissioner disagrees with the ALJ’s view that “the Findings of Fact clearly support petitioner’s belief that she was senior to Simmons/Sestito.” (ID16) As discussed *supra*, the mere fact that individuals have been employed in a district does not give them seniority. Nor does the fact that petitioner was teaching PN classes “full-time” have any bearing on seniority

¹¹ The Commissioner does note that it appears that the petitioner was allowed to teach for about thirty consecutive days without a contract, under the substitute certification, when twenty days is the amount allowed.

¹² R-3 indicates that respondent’s employment contracts contained provisions whereby either party could terminate the contract upon 60-days notice.

status. “Full-time” simply refers to the amount of hours per pay period that an employee works. And the fact that petitioner had acquired tenure earlier than Simmons, in and of itself, does not signify that petitioner’s seniority was greater in 2001. If Simmons held emergency certification in PN when she was hired by respondent, her seniority would have exceeded petitioner’s in 2001, when the RIF occurred.¹³

Finally, the Commissioner disagrees that the equities dictate that petitioner be credited with seniority for the days that she taught between mid-October and mid-December 1992. While it was the respondent that switched petitioner from teaching NA classes in the JTP program to teaching PN classes, it was clearly for the benefit of petitioner. She was not qualified to teach in the position for which she was hired. Respondent could have terminated her employment (with 60 days notice) and hired someone qualified for the job, but chose, instead, to give her the opportunity to obtain the experience she lacked.

Neither respondent nor petitioner could have applied for emergency certification in PN for petitioner in the Fall of 1992 because a precondition to the granting of emergency certification by the Department of Education (DOE) is an assurance by a district that there is a vacant position for which it cannot find properly certified instructors. The respondent district had PN teachers to fill its positions in the Fall of 1992, and consequently could offer the DOE no such assurance. Thus, the ALJ’s suggestion that respondent was remiss in not procuring emergency PN certification for petitioner, is unfounded.

Finally, it is misleading to ascribe to respondent the full responsibility for taking petitioner out of a position in which she was adequately certificated and placing her into a position for which she had no credential, other than a county substitute certificate. If she had, after gaining

¹³ The burden of proof to show that Simmons’ was not certificated when she took her position with respondent as a PN teacher was on petitioner. Petitioner provided nothing to support such a proposition.

geriatric experience (which she conceded she did acquire in the Autumn of 1992) returned to teaching NA courses – pursuant to her contract for the 1992-1993 year – she would have been adequately certificated. This is what respondent had anticipated. But petitioner admittedly wished to teach PN courses and urged respondent to allow her to fill an unexpected vacancy, notwithstanding that she had no PN certification.¹⁴

In summary, the petitioner has not shown that her seniority as a PN teacher was greater than Simmons’ seniority in 2001, and has not proven that equities compel the Commissioner to venture outside the established rules regarding seniority. Accordingly, the petition is dismissed.

IT IS SO ORDERED.¹⁵

COMMISSIONER OF EDUCATION

Date of Decision: November 9, 2006

Date of Mailing: November 9, 2006

¹⁴ *McGavin v. Board of Education of the City of Hoboken, Hudson County*, EDU 9836-97 (Commissioner’s Decision October 26, 1998) is inapposite. In *McGavin* the respondent board of education let McGavin’s emergency certification lapse by failing to reapply for it. The Commissioner consequently allowed the period of the lapse to be included in petitioner’s seniority calculation. Here, only seniority for the two months of mid-October through mid December is at issue. During that period of time, respondent could not apply for emergency certification for petitioner because it had PN teachers for its PN positions.

¹⁵ This 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.6A:4-1.1 et seq.*