

#173-11 (OAL Decision: Not yet available online)

CATHERINE JACOBS, :
PETITIONER, :
V. : COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE : DECISION
TOWNSHIP OF HAMILTON, :
MERCER COUNTY, :
RESPONDENT. :

SYNOPSIS

Petitioner challenged her non-renewal as a teacher of English, claiming that her non-renewal was a violation of her tenure and seniority rights. Petitioner had been employed as a long term substitute for the 2005-2006 school year and had been under contract as an English teacher for each school year from 2006-2007 to 2009-2010; petitioner, however, did not teach at all during the 2008-2009 school year, when she was on a combination of 12 days of paid leave at the beginning of the year and unpaid leave for the remainder of the school year. She was additionally absent on a combination of paid and unpaid leave from March 26 to May 31, 2007. Petitioner argued that her active teaching time between September 2005 and June 2010 provided respondent with sufficient opportunity to evaluate her performance, and tenure should be granted. Respondent Board asserts that petitioner had not acquired tenure in her employment with the Hamilton Township school district, and filed a motion for summary decision.

The ALJ found that: petitioner was employed as a long term substitute during the 2005-2006 school year, and therefore falls under the tenure calculation exception of *N.J.S.A. 18A:16-1.1*; a brief period of sick leave, such as petitioner's leave of absence for the nine weeks in 2007, does not deprive a Board of Education of the opportunity to evaluate a teacher's performance; and petitioner's paid and unpaid leave of absence for the entire 2008-2009 academic year precludes application of that year towards tenure as petitioner provided no services to respondent during this period. The ALJ concluded that petitioner had not completed three consecutive calendar years, nor three consecutive academic years, nor the equivalent of more than three academic years within a period of any four consecutive academic years – any one of which is necessary under *N.J.S.A. 18A:28-5* for the acquisition of tenure; accordingly, the ALJ ordered the petition dismissed.

Upon a thorough and independent review of the record, the Acting Deputy Commissioner – to whom this matter has been delegated pursuant to *N.J.S.A. 18A:4-33* – found that summary decision is appropriately granted to the respondent Board, as she agreed with the ALJ's conclusion that the petitioner had not acquired tenure pursuant to *N.J.S.A. 18A:28-5*. Accordingly, the Initial Decision of the OAL was adopted as the final decision and the petition was dismissed.

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.

May 6, 2011

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The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed by the Acting Deputy Commissioner to whom this matter has been delegated pursuant to *N.J.S.A.* 18A:4-33. Petitioner’s exceptions – filed in accordance with the directives of *N.J.A.C.* 1:1-18.4 – were fully considered by the Acting Deputy Commissioner in reaching her determination herein. The Board did not file reply exceptions.¹

On exception, petitioner maintains that the Administrative Law Judge (ALJ) erred in determining that she was not entitled to receive tenure acquisition credit for the 2008-09 school year. Citing *Kletzkin v. Board of Education of the Borough of Spotswood, Middlesex County*, 136 *N.J.* 275 (1994), she points out that the tenure statute is remedial in nature and should be liberally construed. Petitioner claims that the purpose of the probationary period a teacher must serve prior to the acquisition of tenure pursuant to *N.J. S.A.* 18A:28-5 is to

¹ It is noted that on April 27, 2011, counsel for the Board sent a fax – addressed to Judge Schuster but transmitted to the agency’s fax machine – requesting an extension to file a response. Counsel’s request was not submitted until 23 days after the agency’s receipt of petitioner’s exceptions, way in excess of the regulatory deadline – pursuant to *N.J.A.C.* 1:1-18.4 – for the filing of reply exceptions; provided no reason for the untimely request; and did not indicate the length of additional time sought. Given the fact that the Commissioner’s decision in this matter is due on or before May 6, 2011, counsel’s request was denied.

allow a board of education adequate time to observe, assess, and evaluate the teacher's performance. Here, she avers:

during five sequential contracts of employment, Petitioner provided Respondent with 27 months and 25 days of "active duty".... Her performance during that time resulted in Respondent's offering yet another sequential contract of employment for the 2010-2011 school year. Thus, this case presents a long-time employee who has provided service to the Respondent of sufficient extent to ensure adequate – and positive – assessment who now, by virtue of a Board-approved maternity leave is left with no more seniority or security than a new teacher on her first day. Remedial legislation should not be interpreted in a way which effectuates such an inequitable result. (Petitioner's Exceptions at 3)

Moreover, in denying petitioner tenure credit for the 2008-09 school year, notwithstanding that she had a contract of employment for this year, petitioner contends that the ALJ failed to recognize that, pursuant to such contract, she was entitled to twelve sick and personal days which she utilized prior to being placed on an unpaid leave for the remainder of the year. Although recognizing that an extensive unpaid leave may not be credited for tenure purposes, petitioner contends that she is entitled to credit for any time during which she was contractually entitled to be paid. A holding which finds that the use of collectively bargained-for contractual sick days is excluded from tenure calculation, she charges, contravenes the Court's finding in *Kletzkin, supra*, that continuous employment exists notwithstanding the mere occasional absence of a teacher by reason of illness or excuse. As such, petitioner maintains that she should be credited with twelve days of tenure acquisition credit during the 2008-09 school year and, therefore, deemed to have acquired tenure pursuant to *N.J.S.A. 18A:28-5(c)*. (*Id.* at 4)

Upon full review and consideration, the Acting Deputy Commissioner finds that summary decision is appropriately granted to the Board as she agrees with the ALJ's conclusion that petitioner has not acquired tenure pursuant to *N.J.S.A. 18A:28-5*. In so determining, the

Acting Deputy Commissioner is cognizant that tenure is a statutory right² specifically conditioned on a teacher's full satisfaction of precise conditions articulated in *N.J.S.A.* 18A:28-5, which – in pertinent part – specifies:

The services of all teaching staff members employed in the positions of teacher...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... 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 years³, 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)

There is no assertion or evidence in the record that petitioner claims entitlement to tenure based on (a) above. In order to satisfy (b) petitioner would have to have been employed for three *consecutive* academic years. As the Acting Deputy Commissioner concurs with the ALJ that petitioner's service as a long term substitute during the 2005-06 school year is clearly precluded from the calculation of tenure pursuant to *N.J.S.A.* 18A:16-1.1, and further agrees with the ALJ's rejection – for the reasons presented on pages 3-4 of his decision – of petitioner's attempt to categorize this service year as anything other than “substitute” service, petitioner cannot claim tenure entitlement pursuant to this subsection. In order to satisfy (c) – the final alternative to

² As elucidated by the N.J. Supreme Court in *Spiewak v. Rutherford Bd. Of Educ.*, 90 *N.J.* 63, 81 (1982) pursuant to *N.J.S.A.* 18A:28-5, “all teaching staff members who work in positions for which a certificate is required, who hold valid certificates and who have worked the requisite number of years, are eligible for tenure unless they come within the explicit exceptions in *N.J.S.A.* 18A:28-5 or related statutes such as *N.J.S.A.* 18A:16-1.1.”

³ An academic year runs for ten months between September 1 and June 30 of a school year. *Kletzkin. supra.* Also see *N.J.S.A.* 18A:1-1 which defines an academic year as the period between the time school opens after summer vacation until the next succeeding summer vacation.

obtain tenure – petitioner would have to be “employed” for thirty months and one day over four consecutive academic years. *See Kletzkin, supra*, at 277. Even assuming, *arguendo*, a service history most favorable to petitioner, as correctly recognized by the ALJ on page 5 of his decision, petitioner did not satisfy the *minimum* service requirement of this provision so as to allow acquisition of tenure. In so finding, the Acting Deputy Commissioner is compelled to reject out of hand petitioner’s exception argument that the twelve days of paid sick and personal leave time she utilized in the 2008-09 academic year prior to her unpaid leave for the remainder of the year should be counted for tenure acquisition. As was made clear by the Court in *Kletzkin, supra*, “[a] teacher who performs services under a contract for the year is employed for purposes of the statute.” (at 279) As recognized by the ALJ, petitioner “provided no services to respondent” during this academic year. (Initial Decision at 4) Consequently, the Acting Deputy Commissioner finds and concludes that because petitioner has failed to satisfy any of the alternative statutory requisites for the acquisition of tenure, she has not acquired tenure status pursuant to *N.J.S.A. 18A:28-5*.

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

IT IS SO ORDERED.⁴

ACTING DEPUTY COMMISSIONER OF EDUCATION

Date of Decision: May 6, 2011

Date of Mailing: May 6, 2011

⁴ 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*).