

PETER I. DONNELLY,	:	
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PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE	:	
BOROUGH OF HASBROUCK	:	DECISION
HEIGHTS, BERGEN COUNTY,	:	
	:	
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioner alleged that he acquired tenure as a principal in the Board’s district because his service as “acting” principal should count toward his accrual of tenure. The Board argued that petitioner had not acquired tenure as a principal.

The ALJ determined that petitioner’s service as “acting” principal upon the removal of the former principal from the payroll after his retirement should count toward petitioner’s acquisition of tenure, and that petitioner’s service both as acting principal in the high school, as well as his service as acting principal in the elementary school, should be counted to determine whether he obtained tenure. Applying *N.J.S.A.* 18A:28-6(c), rather than 18A:28-6(a), as argued by the Board, the ALJ determined that petitioner was entitled to tenure as a principal because he served in the position for two academic years, and further, that he should be immediately transferred to any principal position wherein the holder thereof has no tenure or less seniority.

The Commissioner set aside the decision of the ALJ, holding that *N.J.S.A.* 18A:28-6(a) is applicable to petitioner’s claim because he is employed on a calendar year basis, not on an academic year basis. Because that statute requires service for two consecutive calendar years, the Commissioner concluded that petitioner had not acquired tenure as a principal in the Board’s district.

December 17, 2001

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.

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The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The Board’s exceptions and petitioner’s reply thereto were submitted in accordance with *N.J.A.C.* 1:1-18.4 and 18.8.¹

The Board initially excepts to the ALJ’s finding that *N.J.S.A.* 18A:28-6(c) is applicable in this matter. (Board’s Exceptions at 3) Instead, the Board maintains that subsection (a) of that statute is the operative provision since petitioner was undisputedly employed as an Acting Principal and Principal on a *calendar* year, rather than *academic* year, basis. (*Id.* at 3-4) The Board reasons that the ALJ arrived at a contrary conclusion “by finding that the usage of the phrase ‘academic’ and ‘calendar’ year refers to the passage of time during which a teaching staff member has actually been employed in the ‘new position,’ [rather than the] length of term [that] may be stated in his or her employment contract.” (*Ibid.*) However, the Board argues that both *N.J.S.A.* 18A:28-5 and *N.J.S.A.* 18A:28-6 of the tenure statutes distinguish between academic and calendar year employees, a distinction that has been recognized by the Commissioner of

¹ To the extent petitioner’s reply included evidence that was not presented before the OAL, such evidence was not considered by the Commissioner in issuing this decision. *See N.J.A.C.* 1:1-18.4(c).

Education, the State Board of Education and the New Jersey Supreme Court. (*Id.* at 4, *citing to Esther Dues v. Board of Education of the Township of Irvington*, 97 N.J.A.R.2d (EDU) 616; *Martucci v. Linden City Board of Education*, 96 N.J.A.R.2d (EDU) 109, *rev'd* State Board of Education December 4, 1996; *Picogna v. Board of Education of the Township of Cherry Hill*, 143 N.J. 391 (1996); *Zimmerman v. Board of Education of Newark*, 38 N.J. 65 (1962), *cert. denied* 371 U.S. 956 (1963)) Here, the Board asserts that since petitioner is a calendar year employee, his claim to tenure as a principal must be examined under *N.J.S.A.* 18A:28-6(a), which affirms that petitioner would acquire tenure in the new position until after “the expiration of a period of employment of two consecutive calendar years***.” However, the Board argues that although petitioner, indeed, served two calendar years as an acting principal (1996-97) and principal (1998-99), those years were not consecutive. Thus, like the petitioner in *Dues, supra*, petitioner herein did not serve two consecutive calendar years with reemployment and, therefore, did not acquire tenure as a principal. (Board’s Exceptions at 7)

The Board next contends that, even if the Commissioner finds petitioner has a viable claim to tenure under *N.J.S.A.* 18A:28-6(c), his reassignment to the position of assistant principal in October 1997, his former, separately tenurable position, severed any accrued eligibility for tenure in the principal position. (*Id.* at 9-10)

Finally, the Board excepts to the ALJ’s order that petitioner be immediately transferred to any principal position in the District that is occupied by someone without tenure, or with less seniority. (*Id.* at 11) That order, which the Board contends is beyond the scope and authority of this proceeding, will not only be destructive to the smooth operation of the District, but fails to consider the current contracts of the Board employees who are directed to be replaced; these employees are “parties in interest,” the Board suggests, who have not been

properly noticed or included in this contested matter. (*Ibid.*) Moreover, the Board reasons that since it may lawfully transfer petitioner to a position within the scope of his certificate and endorsement which is not separately tenurable, petitioner is not entitled to the position of principal in the District simply because the position may be held by someone who is not tenured. Neither, the Board continues, is petitioner entitled to be transferred to any principalship occupied by an employee with less seniority, since seniority rights, a by-product of tenure, do not come into play unless an employee's tenure rights are reduced by way of dismissal or reduction in tangible employment benefits. (*Id.* at 13-14, *citing to Carpenito v. Board. of Educ.*, 322 N.J. Super. 522, 531, 534 (App. Div. 1999) Therefore, the Board urges the Commissioner to reject the Initial Decision and find in its favor.

In reply, petitioner maintains that he acquired tenure as a principal pursuant to *N.J.S.A.* 18A:28-6(c), since he was employed in either a principal or acting principal capacity for the equivalent of more than two academic years within three consecutive academic years: 1996-97, 1997-98 and 1998-99. (Petitioner's Reply at 1-3) Moreover, petitioner contends that *Dues, supra*, is not controlling in this matter, since the ALJ therein determined that Dues did not meet the requirements set forth in any of the subsections of *N.J.S.A.* 18A:28-6 and, therefore, failed to attain tenure. (*Id.* at 3)

Additionally, for the reasons set forth in its brief before the OAL and summarized by the ALJ in the Initial Decision, petitioner underscores that the period of time in which he was employed as an acting principal should be credited to the time for attaining tenure as a principal. (*Id.* at 3-4)

Upon careful and independent review of the record in this matter, the Commissioner is compelled to set aside the Initial Decision of the ALJ, finding instead that

N.J.S.A. 18A:28-6(c) is applicable only to persons employed on the basis of an academic year. *Dues, supra*, at 617. Since there is no dispute that petitioner was employed on a *calendar* year basis, the Commissioner concurs with the Board that petitioner's tenure claim is properly examined under *N.J.S.A.* 18A:28-6(a).² Petitioner cannot satisfy the terms of that provision since it is clear from the joint stipulation of facts that he did not serve two consecutive calendar years, with reemployment, as an acting principal³ and principal.

Accordingly, the Petition of Appeal is dismissed.

IT IS SO ORDERED.⁴

COMMISSIONER OF EDUCATION

Date of Decision: December 17, 2001

Date of Mailing: December 17, 2001

²Similarly, in *Martucci, supra*, the State Board of Education considered a petitioner's claim to promotional tenure in the position of principal under *N.J.S.A.* 18A:28-6(a), finding that both that statute and *N.J.S.A.* 18A:28-5(a), which governs the acquisition of tenure in general, "apply to teaching staff members employed on a calendar year basis ***." *Martucci* slip. op. at 7.

³ In so finding, the Commissioner notes that, notwithstanding the outcome herein, he affirms the ALJ's finding that petitioner's service as an "acting" principal, upon the occasion of a true vacancy in the District, is properly credited toward acquisition of tenure as a principal.

⁴ This decision, as the Commissioner's final determination, 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.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.