

SYLVIA LUSTBERG, :
 :
 PETITIONER, :
 :
 V. :
 : COMMISSIONER OF EDUCATION
 BOARD OF EDUCATION OF THE BOROUGH :
 OF TENAFLY, BERGEN COUNTY, : DECISION
 :
 RESPONDENT. :
 _____ :

SYNOPSIS

Petitioner alleged that the Board’s failure to reemploy her for the 2003-04 school year as a full-time teacher was a violation of her tenure and seniority rights pursuant to *N.J.S.A.* 18A:28-5. Petitioner contended that her time spent as a long-term substitute teacher from March through June 2000 in place of third grade teacher, Ms. Lituchy, should have been counted toward the acquisition of tenure.

The ALJ found that Ms. Lituchy’s position did not become vacant until the end of the 1999-2000 academic year and petitioner remained a long-term substitute during the period from March 6, 2000 through June 30, 2000, the date when Ms. Lituchy’s resignation became effective. Thus, the ALJ concluded that petitioner’s service as a long-term substitute could not be counted toward her tenure since the position she filled did not become vacant until June 30, 2000. The ALJ, therefore concluded that the Board could release petitioner following three years of service because she had not acquired tenure pursuant to *N.J.S.A.* 18A:28-5(c). (*Spiewak; Lammers; Sayerville; and Driscoll*)

The Commissioner concurred with the ALJ, noting that petitioner was not entitled to accrue time toward tenure acquisition while serving in an “acting” position in that Ms. Lituchy’s resignation did not become effective until June 30, 2000. Since petitioner’s service during the 1999-2000 school year could not be counted toward tenure, the Commissioner found that petitioner did not achieve tenure by the end of the 2002-03 school year. The Commissioner also found that the Board did not act in bad faith toward petitioner in that it did appoint petitioner to teaching positions for the next three consecutive school years. Therefore, it was within the Board’s discretion to inform petitioner, a nontenured teacher, that her contract would not be renewed for the 2003-04 school year.

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.

April 12, 2004

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The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner’s exceptions and respondent’s reply thereto were submitted in accordance with *N.J.A.C.* 1:1-18.4 and were considered by the Commissioner in reaching his decision.

Initially, petitioner takes exception to the statement in the Initial Decision that “[t]he issue of her performance was not contested,” asserting that no finding can be made on that topic because there was no evidence submitted, and moreover, whether or not petitioner contested her nonrenewal is irrelevant to the determination of her tenure rights.¹ (Petitioner’s Exceptions at 2, quoting Initial Decision at 8) Petitioner also takes issue, *inter alia*, with the conclusion in the Initial Decision that *Driscoll, supra*, is analogous to this matter, arguing that, in the instant matter the Board had complete control over Ms. Lituchy’s employment, wherein the Board in *Driscoll* did not have control over the actions of Voss, the teacher being replaced in that matter. (*Id.* at 3) In support thereof, petitioner avers that Voes “engaged in a series of

¹ Petitioner claims that she “did dispute the reasons for her nonrenewal but did not litigate them because in the absence of tenure, she could not successfully dispute reasons which do not qualify as arbitrary or capricious.” (Petitioner’s Exceptions at 2)

contradictory decisions about returning to work and not doing so” and did not submit a resignation until “*after* the service time Driscoll sought to include for tenure.” (emphasis in text) (*Ibid.*) Thus, petitioner submits, the Board in *Driscoll* could not deem Voss as having abandoned her position because it had no knowledge as to whether or not she would return. (*Ibid.*) Petitioner concludes, therefore, that whether the Board had control over the employment of the teacher being replaced is a critical difference that was ignored in the Initial Decision. (*Ibid.*)

Moreover, petitioner points out that Ms. Lituchy’s resignation letter does not specify the effective date of her resignation, but simply states that she is resigning. (*Id.* at 4) Petitioner submits that it is clear that the Board’s vote to accept Ms. Lituchy’s resignation on March 6, 2000 made such resignation binding and non-rescindable. (*Ibid.*) Petitioner, therefore, contends that, on March 6, 2000, the Board thus had the certainty that did not exist in *Driscoll*, *supra*, and that payroll records listing Ms. Lituchy as terminated as early as May 15, 2000 prove this contention. (*Ibid.*) In pointing out that she only needs one day of service in 1999-2000 to achieve tenure, petitioner claims that the wording of the Board’s March 6, 2000 resolution accepting Ms. Lituchy’s resignation effective June 30, 2000 was simply the Board’s choice and is the only basis for denying her tenure in that the wording of that resolution was not necessitated by Ms. Lituchy’s resignation letter or required by any payroll obligation to her. (*Id.* at 4-5)

Additionally, petitioner argues that on May 8, 2000 she was appointed to teach the next year, which shows that even before June 30, 2000 the Board had hired her to continue in her position because it knew that Ms. Lituchy was not returning. (*Id.* at 5) Pointing to *Spiewak*, *supra*, and *citing Lammers, supra*, at 272, petitioner contends that “the demarcation between true substitute service (excluded from tenure accrual by *N.J.S.A.* 18A:16-1.1) and tenure-eligible replacement service must be the *knowledge* on the part of the board as to the status of the absent person.” (emphasis in text) (*Id.* at 5-6) The time served by a replacement person must

therefore, petitioner concludes, count towards tenure once a board knows with certainty that the individual being replaced is not returning. (*Id.* at 6) Accordingly, petitioner contends that her service from February 23, 2000 onward was in a vacant position and should be counted as time toward tenure because the Board in the instant matter knew precisely at that point that the incumbent did not intend to return.² (*Ibid.*) In further support thereof, petitioner points to *Jannarone v. Bd. of Ed. of Asbury Park et al.*, 1976 S.L.D. 526 and *Puryear v. Bd. of Ed. of East Orange*, 1987 S.L.D. 2412, averring that “these cases stand for the proposition that a board cannot unilaterally turn a vacant job into one which is temporarily unoccupied by labeling the job as an ‘acting’ position.” (*Id.* at 7)

Moreover, petitioner submits that *Ward v. Westfield Bd. of Ed.*, 1988 S.L.D. 386, *aff’d* with modification 1988 S.L.D. 395 (Comm. of Ed.), *aff’d* 1988 S.L.D. 400 (St. Bd. of Ed.) lends further support for her position. (*Ibid.*) In *Ward*, a teacher who had suffered a heart attack did not resign, but, instead, by letter of May 15, 1985 advised the board that he was permanently disabled and requested a one-year leave so he could qualify for a veteran’s retirement rather than a disability pension. (*Id.* at 8) Notwithstanding that the teacher did not submit a binding resignation, nor did the board act to approve a resignation, retirement or vacancy, petitioner contends, the State Board found that the May 15 letter created a vacant position so that Ms. Ward’s service after that point was tenure eligible. (*Id.* at 9) Thus, petitioner concludes, in that the Board knew with certainty on February 23, 2000 that Ms. Lituchy was not returning, petitioner’s service from that date must count toward tenure. (*Ibid.*)

In reply, the Board takes issue with petitioner’s assertion that Ms. Lituchy’s position became vacant when the Board knew that she would not be returning for the next school

² According to the Joint Stipulation of Facts, the Board received Ms. Lituchy’s resignation letter on or about February 23, 2000, stating that she would not return in September 2000. (Stipulation of Facts, No. 9 at 3)

year, averring that, from the Joint Stipulation of Facts “it is clear that Ms. Lituchy was on a leave of absence until June 30, 2000 and that her resignation effective June 30, 2000 was directed towards her desire not to return for the 2000-2001 school year.” (Board’s Reply Exceptions at 1) With respect to petitioner’s contention that the Administrative Law Judge’s (ALJ) decision might have turned on her statement that the issue of petitioner’s performance was not contested, the Board states that it is difficult to understand how petitioner could have reached this conclusion in that the finding merely reflected the Board’s action and evaluative comment and that the matter was not at issue in this litigation. (*Id.* at 2)

Turning to whether *Driscoll, supra*, applies, the Board argues that it does apply, because on the one important issue raised, the cases are analogous; that is, the Board in *Driscoll* did not have control over a teacher who did not return to work and the Board herein did not have control over Ms. Lituchy’s resignation. (*Ibid.*) In support thereof, the Board submits that: 1) Ms. Lituchy was granted a leave of absence for the entire 1999-2000 school year and was expected to return; 2) the Board requested Ms. Lituchy to indicate whether she would be returning to teach in 2000-2001 in order to prepare for the next school year; and 3) Ms. Lituchy advised the Board she would not be returning the next year and submitted her letter of resignation. (*Ibid.*) The Board claims that Ms. Lituchy’s letter, clearly stating that her resignation was to be effective the next school year, was in direct response to its specific inquiry regarding the next school year, and in that her letter does not offer her immediate resignation, the Board had no choice but to accept her resignation effective at the conclusion of her leave. (*Id.* at 2-3) The Board concludes, therefore, that it had no more control over petitioner’s resignation than the board in *Driscoll* did. (*Id.* at 3)

Moreover, the Board claims that petitioner is correct that Ms. Lituchy could not rescind her resignation once it was approved by the Board, but asserts that what she could not

rescind was that she would not have an employment relationship after June 30, 2000. (*Ibid.*) The Board reiterates its position that Ms. Lituchy's resignation was not an immediate severance of her employment relationship and that the position was, therefore, not vacant on March 7, 2000 after the Board accepted her resignation, but, instead, was vacant after the effective date of the resignation on June 30, 2000. (*Id.* at 3-4) Petitioner further claims that "[t]he payroll record (J-23-24), relied on by Petitioner, does not reflect the Board action and can only be considered a payroll clerk's mistake." (*Id.* at 4)

The Board acknowledges that *Jannarone, supra*, stands for the proposition that if you do all the duties of a position, you are entitled to accrue tenure in that position even if it is an "acting" position, but reasons that the *Jannarone* decision defies logic when examining the clear language in the statute, *N.J.S.A.* 18A:16-1.1, which states:

In each district the board of education may designate some person to act in place of any officer or employee during the absence, disability or disqualification of any such officer or employee...*The act of any person shall in all cases be legal and binding as if done and performed by the officer or employee for whom such designated person is acting, but no person so acting shall acquire tenure in the office or employment in which he acts pursuant to this section when so acting.* (emphasis in text) (*Ibid.*)

It is thus clear from the statute, the Board argues, that the substitute will act exactly as a teacher, but that such time served does not accrue towards tenure acquisition. (*Ibid.*)

With respect to *Ward, supra*, the Board contends that *Ward* is distinguishable from the instant matter because, in *Ward*, the teacher's letter stating that she was permanently disabled and not able to return to work was the only notice received from the teacher and provided the only certainty on which the board could rely; whereas, in this matter, Ms. Lituchy's letter provided a certainty that she was resigning effective June 30, 2000. (*Id.* at 5) The Board avers that *Williams v. Board of Educ. of the City of Orange*, 1987 *S.L.D.* 997, 1000, *aff'd* State Board of Educ. 1988 *S.L.D.* 2534 is the only case that it has identified that deals with the issue of

a letter of resignation with a future effective resignation date. (*Ibid.*) In *Williams*, the Board received a letter on or about March 28, 1983 from an ill teacher, resigning/retiring effective May 15, 1983. (*Ibid.*) The Commissioner in *Williams* found that “the teacher on leave maintained an employment relationship with the District *until the effective date of his resignation* and retirement, not when the letter of resignation was provided to the District.” (emphasis in text) (*Ibid.*) The Board avers that the same principle applies herein and that petitioner accrued time towards tenure by working three school years for the Board, but did not work the one day in the fourth school year that would entitle her to tenure pursuant to *N.J.S.A.* 18A:28-5(b), nor did she attain tenure under *N.J.S.A.* 18A:28-5(a) or (c). The Board concludes, therefore, that it was within its rights not to renew petitioner’s contract for the 2003-04 school year since petitioner had not achieved tenure. (*Id.* at 6)

Upon careful and independent review of the record, the Initial Decision, petitioner’s exceptions and the Board’s reply thereto, the Commissioner determines to adopt the findings and conclusions expressed in the Initial Decision, finding that petitioner’s service as a long-term substitute for the 1999-00 school year cannot be counted toward tenure. Accordingly, the Board could release petitioner following her three years of service because she had not achieved tenure pursuant to *N.J.S.A.* 18A:28-5(c). In so determining, the Commissioner emphasizes in response to the concern expressed in petitioner’s exceptions that this ultimate conclusion does not rest on whether or not petitioner contested her nonrenewal as that issue is not before him and is irrelevant to the determination of petitioner’s tenure rights.

The Commissioner reiterates that it is undisputed that Ms. Lituchy was granted a one-year leave of absence for the 1999-00 school year. (Exhibit J-1, in evidence) In *Lammers, supra* at 267, the Court found that “an entitlement to a position arises only when a vacancy exists” and that “a one-year leave of absence does not create a vacancy or temporary vacancy

under *N.J.S.A.* 18A:28-12.” Ms. Lituchy’s position was, therefore, not vacant during her one-year leave of absence that ended June 30, 2000. In response to a February 4, 2000 letter from the Board inquiring as to whether she would return to her position the next school year, 2000-2001, Ms. Lituchy responded:

It is with mixed feelings that I write this letter to inform you of my resignation from my teaching position in the Tenafly School District. While I have greatly enjoyed my teaching position at Mackay School, I wish to spend the next several years as a full-time, stay-at-home mother to my two sons.

Taking care of young children is a full-time, demanding job, and I do not feel I could be a fine teacher while fulfilling the responsibilities I have at home. *I am enclosing the letter I recently received from Terry Collins stating that I will not return in September 2000.*

Thank you.
(emphasis supplied) (Exhibit J-8, in evidence)

Thus, Ms. Lituchy’s response, provided in answer to the Board’s specific inquiry as to whether she planned to return for the 2000-01 school year, does not offer her immediate resignation or specify an effective date of her resignation that revokes her leave of absence, but instead, informs the Board that she will not be returning in September 2000. The Commissioner notes that, in accepting Ms. Lituchy’s resignation on March 6, 2000, the Board did not rescind the one-year leave of absence granted her in accord with its prior commitment, but made Ms. Lituchy’s resignation effective June 30, 2000, the end of her approved leave. As observed by the ALJ, “pursuant to *N.J.S.A.* 18A:28-5, the Board could not terminate Lituchy, a tenured teacher, at an earlier time since it had no just cause to do so.” (Initial Decision at 7) Notwithstanding petitioner’s arguments that the ALJ misapplied *Driscoll, supra, Spiewak, supra and Lammers, supra*, in this matter and that petitioner’s service from February 23, 2000 onward should be counted towards her tenure service because the Board knew with certainty on that date that Ms. Lituchy was not returning, the Commissioner concurs with the ALJ that Ms. Lituchy’s

resignation was not effective until June 30, 2000 and, thus, her position was not vacant until that date. For the reasons fully explicated in the Initial Decision, the Commissioner finds this conclusion entirely consistent with *Spiewak, supra*; *Lammers, supra*; *Sayreville, supra*; and *Driscoll, supra*.

Additionally, the Commissioner rejects petitioner's reliance on *Ward, supra*. Unlike *Ward*, wherein the retiring teacher notified the board that his health status prohibited his return to teaching and requested that "the Board consider granting him retirement 'one year hence as a veteran at half-pay rather than as a disabled teacher this year at a significantly lower rate,'" *Ward, supra* at 397,³ Ms. Lituchy was on an *approved* one-year leave of absence that expired June 30, 2000, and she submitted a letter that specifically stated that she was not returning in September. Absent Ms. Lituchy's request to terminate her leave of absence prior to June 30 or the provision of an effective date for her resignation that differed from June 30, 2000, there was no basis for the Board in this matter to adjust her resignation date.

With respect to *Jannarone, supra*, the Commissioner notes that this decision was not reviewed by the State Board or the Courts. Since the 1976 *Jannarone* decision, however, by decisions in *Spiewak, supra*, *Sayreville, supra*, and *Lammers, supra*, the courts have interpreted and clarified the exception to the Tenure Act relating to the tenure accrual exception set forth in *N.J.S.A.* 18A:16-1.1 as a statute that denies tenure accrual during the time served to temporary employees who act in place of another employee who is absent, disabled or disqualified and who is ultimately expected to return to the position. Thus, the Commissioner concludes that petitioner, while acting as a teacher for Ms. Lituchy during her leave of absence, is not entitled to accrue time toward tenure acquisition while serving in such "acting" position.

³ It is unclear whether the Board in this matter granted this request.

Moreover, the Commissioner cannot find that the Board acted in bad faith toward petitioner in that it appointed petitioner to teaching positions for the next three consecutive school years. However, since petitioner's service as a long-term substitute for Ms. Lituchy for the 1999-00 school year cannot be counted toward tenure, the Commissioner finds petitioner had not achieved tenure at the end of the 2002-03 school year. It was, therefore, within the Board's discretion to inform petitioner, a nontenured teacher, that her contract would not be renewed for the 2003-04 school year.

Accordingly, the Commissioner adopts the Initial Decision in this matter for the reasons expressed therein.

IT IS SO ORDERED.⁴

COMMISSIONER OF EDUCATION

Date of Decision: April 12, 2004

Date of Mailing: April 14, 2004

⁴ 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.*