

JEAN JARMOND, :
PETITIONER, : COMMISSIONER OF EDUCATION
V. : DECISION
BOARD OF EDUCATION OF THE CITY :
OF ELIZABETH, UNION COUNTY, :
RESPONDENT. :
_____ :

SYNOPSIS

Petitioner was employed by the Board pursuant to her instructional certificate with an endorsement as a teacher of the handicapped from May 2, 2005 through May 9, 2008, when she received a letter notifying her that the Board had non-renewed her contract. Petitioner was asked to leave work that day, but received her full pay for the 2007-2008 school year. She contends that she was terminated in violation of her tenure rights. The Board maintains that petitioner had not been employed for the requisite thirty months and one day necessary to acquire tenure at the time of its May 2008 notice of non-renewal because of a forty-three day approved, unpaid medical leave of absence from December 20, 2005 through January 31, 2006. The parties filed cross motions for summary decision.

The ALJ found that: there is no genuine issue of material fact in question, and the matter is ripe for summary judgment; petitioner was continuously employed under her endorsement as a teacher of the handicapped; petitioner achieved sufficient time under her endorsement to be tenured, notwithstanding an approved unpaid medical leave of absence; the Board was not deprived by such leave of its opportunity to evaluate petitioner; and clear and consistent precedent supports these findings, notably *Dorothy Kletzkin v. Board of Education of the Borough of Spotswood, Middlesex County*, 136 N.J. 275 (1994). Accordingly, the ALJ ordered that petitioner's motion for summary decision be granted, and that the Board recognize petitioner's right to tenure effective May 3, 2008 and reinstate her with back pay, benefits and emoluments retroactive to May 9, 2008.

The Commissioner adopted the Initial Decision of the OAL as the final decision in this matter for the reasons expressed therein, and directed the Board to reinstate petitioner to employment forthwith.

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.

September 8, 2009

OAL DKT. NO. EDU 9107-08
AGENCY DKT. NO. 171-6/08

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The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have exceptions filed by the Board of Education (Board) pursuant to *N.J.A.C.* 1:1-18.4 and 1:1-18.8 and petitioner’s reply thereto.

In its exceptions, the Board first contends that the case law discussed in the Initial Decision is inapposite to the facts of the present matter, where petitioner’s absences were neither less than 30 days nor due to a work-related injury. The Board then asserts that the conclusion reached by the Administrative Law Judge (ALJ) creates a “dichotomy” between seniority and tenure – since leaves greater than 30 days do not count toward acquisition of seniority pursuant to *N.J.A.C.* 6A:32-5.1, but would, under the ALJ’s decision, count toward acquisition of tenure – and precludes “accountability” by allowing tenure to be acquired notwithstanding that the employing board of education has not had the full opportunity contemplated by statute – that is, 30 months and one day – to evaluate an employee’s work performance before such employee effectively attains lifetime job security. According to the Board, if the Initial Decision is allowed to stand, “Pandora’s Box” will be opened, since the decision establishes no parameters – theoretically permitting tenurable leaves of several months

and allowing holidays and school breaks to be considered as factors in assessing the effect of a leave – and places boards of education in the position of having to litigate what lengths of absence, up to a year, must still be considered “employment” for tenure acquisition purposes. The Board “submits that the Commissioner must, if the accountability regulations are to have any meaning, find that actual service is the basis for attaining tenure, not simply dates on a calendar signifying a beginning and ending date of an employment contract.” (Board’s Exceptions at 1-2, quotation at 2)

In reply, petitioner substantially reiterates the arguments of her OAL brief (Point II, at 9-16) and asserts that the Board’s position fails to take account of several other pertinent decisions – such as those cited by the ALJ – which apply approved leave time toward acquisition of tenure. (Board’s Reply at 1-7)

Upon careful review and consideration, the Commissioner is unpersuaded by the Board’s exceptions and adopts the Initial Decision of the OAL.

On exception as throughout proceedings in this matter, the Board, in effect, asks the Commissioner to ignore the holding of the New Jersey Supreme Court – in *Dorothy Kletzkin v. Board of Education of the Borough of Spotswood, Middlesex County*, 136 N.J. 275 (1994), affirming decision of the Superior Court, Appellate Division, at 261 N.J. Super. 549 (1993), affirming State Board of Education decision dated February 5, 1992 – that “employment” in the context of tenure acquisition refers to contractual employment. The Commissioner, however, is not at liberty to disregard the Court’s majority holding and instead adopt the stance advocated by the Board that “employment” as used in N.J.S.A. 18A:28-5 refers to “actual service” so as to preclude the counting of *any* period of leave taken by an employee toward the 30 months and one day necessary to satisfy the probationary period of the statute.

Rather, the Commissioner finds that the ALJ in this matter conducted the appropriate analysis of petitioner's claim in light of the facts and controlling law, correctly concluding that petitioner had acquired tenure because: 1) sequential contracts of employment were in place for sufficient time under *N.J.S.A. 18A:28-5(c)* (employment in the district for the equivalent of more than three academic years within a period of any four consecutive academic years); 2) petitioner performed services under each of these contracts during the years in question (2004-05 through 2007-08); and 3) the duration and placement of petitioner's leave – a single period of 43 calendar days encompassing not more than 20 school days – was such that the Board was not deprived of an adequate opportunity to evaluate her performance before she acquired tenure.¹ Similarly, the ALJ was correct in finding, for the reasons stated, that: 1) *Kletzkin* was not rendered inapplicable because petitioner's absences did not arise pursuant to *N.J.S.A. 18A:30-2.1* as the result of a work related injury; and 2) the Family and Medical Leave Act – although not applicable to the facts herein – would not in any event support the Board's position that leave time may not be considered "continuous employment" for purposes of tenure acquisition.²

Finally, in response to the Board's exception with respect to a "dichotomy" between seniority and tenure, the Commissioner observes that the rule referenced by the Board – which provides that seniority credit does not accrue for unpaid absences exceeding 30 calendar days aggregate in one academic or calendar year³ – is part of the regulatory framework adopted

¹ In this regard, the Commissioner notes that the Board did not claim, nor proffer facts to support a contention, that the leave in question deprived the Board of a specific or necessary opportunity to evaluate petitioner; rather, the Board's position throughout this proceeding has been that unbroken service of anything less than 30 months and one day is unacceptable, as a matter of law, for purposes of tenure acquisition.

² With respect to the latter, see also *Belinda Mendez-Azzolini v. Board of Education of the Township of Irvington, Essex County*, Commissioner's Decision No. XXX-09, decided August 27, 2009.

³ *N.J.A.C. 6A:32-5.1(b)*, reads in pertinent part: "The periods of unpaid absences not exceeding 30 calendar days aggregate in one academic or calendar year, leaves of absence at full or partial pay and unpaid absences granted for

under authority of *N.J.S.A.* 18A:28-10 to address the very different purpose of establishing the order of dismissals among a district's tenured staff in the event of a reduction in force, and, as such, has no bearing on – and cannot act to alter or limit – the conditions for acquisition of tenure established by *N.J.S.A.* 18A:28-5.

Accordingly, for the reasons expressed therein, the Initial Decision of the OAL – granting petitioner's motion for summary decision – is adopted as the final decision in this matter. The Board of Education of the City of Elizabeth is directed to reinstate petitioner to employment forthwith – or to place her on a preferred eligibility list if no position within the scope of her tenure rights is presently vacant or held by a nontenured or less senior staff member – retroactive to the date of her termination, together with all salary, benefits and emoluments due her, less mitigation as applicable.

IT IS SO ORDERED.⁴

COMMISSIONER OF EDUCATION

Date of Decision: September 8, 2009

Date of Mailing: September 8, 2009

study or research shall be credited toward seniority. All other unpaid absences or leaves of absence shall not receive seniority credit.”

⁴ Pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1), decisions of the Commissioner are appealable to the Appellate Division of the Superior Court.