

ANSELMO GIRIMONTE, :
 :
 PETITIONER, : COMMISSIONER OF EDUCATION
 :
 V. : DECISION
 :
 BOARD OF EDUCATION OF THE TOWN :
 OF KEARNY, HUDSON COUNTY :
 :
 RESPONDENT. :
 _____ :

SYNOPSIS

Petitioner – a full-time teacher of Italian, employed by the district from September 2007 through June 2012 – contended that the Board violated his tenure rights when it failed to renew his employment for the 2012-2013 school year. Petitioner holds the following teaching certificates: a standard instructional certificate with an endorsement as an elementary school teacher, grades N-8, issued August 2003; a Certificate of Eligibility, Elementary School with Subject Matter Specialization: World Languages/Italian Specialization, grades 5-8, issued September 2009; Language Proficiency Certificates (Italian) from the American Council on the Teaching of Foreign Languages, issued August 2007 and July 2009; and a standard instructional certificate with endorsement for Elementary School with Subject Matter Specialization: World Language/Italian Specialization in Grades 5-8, issued September 2012. Petitioner also completed a four credit course entitled “Methods of Teaching Foreign Language” in 2009. The petitioner sought reinstatement to his tenured employment and back pay and emoluments for the period of his unlawful termination. The Board maintained that petitioner had never earned tenure in the district. The parties requested that the matter be decided by way of summary decision.

The ALJ found, *inter alia*, that: petitioner lacked the requisite certificate, and could not have been issued a Certificate of Eligibility (CE) or a standard instructional certificate with a world language endorsement during the 2007-2008 and 2008-2009 school years under *N.J.A.C.* 6A:9-11.10, because he had not completed the necessary methodology course credits – which was required within twelve months of his initial assignment; petitioner did not complete those credits until the spring of 2009, and therefore did not accrue any tenure credit during those school years under *N.J.S.A.* 18A:28-5 because he was not the holder of a proper certificate in full force and effect; petitioner never obtained a Provisional Certificate or a Standard Certificate for world languages during his employment with the Board, but rather possessed only the CE between the spring of 2009 and the Board’s decision not to renew his employment for the 2012-2013 school year; petitioner could not obtain tenure while teaching with only the CE from September 2009 through June 2012. The ALJ concluded that the petitioner did not possess tenure protection under *N.J.S.A.* 18A:28-5 and accordingly granted the Board’s motion for summary decision. The ALJ dismissed the petition with prejudice.

Upon comprehensive review, the Assistant Commissioner (to whom this matter was delegated pursuant to *N.J.S.A.* 18A:4-34) found, *inter alia*, that: *N.J.A.C.* 6A:9-9.1(a)(5) provides that teachers who – like petitioner – hold versions of endorsements issued prior to the 2004 creation of specialized elementary endorsement categories, may continue to teach in the subject areas in which they were authorized to teach under the former rules; *N.J.A.C.* 6A:9-9.2(b)(2)(iii) authorizes teachers holding an elementary endorsement to teach world languages pursuant to *N.J.A.C.* 6A:9-11.10; and petitioner therefore attained tenure in respondent’s district. Accordingly, the Initial Decision of the OAL was rejected; the Board was ordered to reinstate petitioner; and the matter was remanded to the OAL for the purpose of determining the facts necessary for calculating the amount of back pay and emoluments to which petitioner is entitled.

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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February 25, 2013

ANSELMO GIRIMONTE, :
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Before the Commissioner¹ is petitioner's challenge to respondent's decision not to renew his employment for the 2012-2013 school year. A review of the record, Initial Decision of the Office of Administrative Law (OAL) and parties' exceptions leads to the conclusion that the petition must be granted.

The record establishes that, beginning in September 2007, respondent hired petitioner to teach Italian in grades three through eight. Petitioner continued that same service in the district through the 2011-2012 school year, a period of five years. There are no allegations in the record that petitioner's teaching performance was unacceptable.

The parties agree that petitioner holds an instructional certificate with an Elementary (N-8) endorsement, which he obtained in August 2003. There is further agreement that petitioner received Language Proficiency Certificates from the American Council of the Teaching of Foreign Languages (ACTFL) on August 28, 2007, just before he began teaching in respondent's district, and on July 24, 2009. Copies of the certificates are attached to a September 26, 2012 certification submitted by petitioner (Certification). Petitioner maintains

¹ This matter has been delegated to the undersigned Assistant Commissioner, pursuant to *N.J.S.A.* 18A:4-34.

that the certificates demonstrated the linguistic competency in Italian required by *N.J.A.C. 6A:9-11.10*, and the Commissioner concurs, in light of the fact that petitioner was – in September 2012 – issued a standard elementary school teacher endorsement with subject matter specialization based, in part, upon said proficiency certificates. *See*, petitioner’s Supplemental Certification dated October 21, 2012 (Supplemental Certification) and attachment.

Finally, it is undisputed that petitioner completed a four credit college course entitled “Methods of Teaching Foreign Language” in the spring of 2009. *See*, petitioner’s Certification, Para. 12, and the transcript annexed thereto. According to petitioner’s Supplemental Certification, said college course was accepted by the New Jersey State Board of Examiners in issuing petitioner a standard Elementary School Endorsement “with Subject Matter Specialization: World Language/Italian Specialization in Grades 5-8”, in September of 2012. *See*, attachment to petitioner’s Supplemental Certification.

An employee shoulders the burden of clearly proving entitlement to tenure protection. *See, e.g. Canfield v. Pine Hills Bd. of Educ.*, 51 *N.J.* 400 (1968), *rev’d on dissent*, 97 *N.J. Super.* 483, 493 (App. Div. 1967). *N.J.S.A. 18A:28-5*, which governs the requirements for tenure directs, in pertinent part:

The services of all teaching staff members employed in the positions of teacher, . . . , and such other employees as are in positions which require them to hold appropriate certificates issued by the board of examiners, 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 . . . after employment in such district or by such board for:

- (a) Three consecutive calendar years . . . ; 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.

Accordingly, in order to gain tenure, a teaching staff member must: (1) work in a position for which a teaching certificate is required; (2) hold the appropriate certificate; and (3) serve the requisite period of time. *Spiewak v. Rutherford Bd. of Educ.*, 90 N.J. 63, 74 (1982).

At the heart of the instant controversy is the issue of whether petitioner held appropriate certification for his position. In arguing that his certification was adequate during his period of service in respondent's district, petitioner does not claim that he possessed a standard Elementary School Endorsement with Subject Matter Specialization.² Rather, he invokes certain regulatory provisions that were promulgated to clarify the position of teachers who had achieved their certification/endorsements prior to a 2004 change in the organization of elementary endorsements.

More specifically, petitioner's standard teaching certificate with Elementary (N-8) endorsement was issued just prior to the creation of more specialized elementary endorsement categories. Replacing the old N-8 or K-8 elementary endorsements were, as of 2004: 1) a Pre-school through Grade Three endorsement, 2) an elementary endorsement for grades Kindergarten through five, 3) an endorsement for elementary school teachers with subject matter specialization, and 4) an endorsement for teachers of supplementary reading and mathematics instruction in grades Kindergarten through eight. *N.J.A.C. 6A:9-9.1(a)(1)*.

N.J.A.C. 6A:9-9.1(a)(5) provides that teachers like petitioner who hold endorsement versions that were issued before January 20, 2004 may continue to teach in the subject areas in which they were authorized to teach under the former rules. This suggests that

² He was issued a standard Elementary School Endorsement with Subject Matter Specialization in September 2012.

the reorganization of elementary endorsements was not intended to force all teachers who possess earlier elementary endorsements to obtain one or more of the newer elementary endorsements.

And *N.J.A.C.* 6A:9-9.1(a)(3) imparts that:

[teachers with elementary school endorsements that are valid in grades nursery through eight – issued no later than March 1, 2008 – may teach in grades nursery through eight in any employing school district. These teachers must demonstrate to the school district that they have content knowledge appropriate to the subjects taught. [Dashes added.]

As discussed *supra*, petitioner is such a teacher with an N-8 elementary endorsement and he provided respondent with two certificates of proficiency in Italian, to prove that he possesses the content knowledge appropriate to the subject he has been teaching.

Further, as to petitioner's specific instructional subject, *N.J.A.C.* 6A:9-9.2(b)(2)(iii) authorizes teachers holding an elementary school endorsement to teach world languages pursuant to *N.J.A.C.* 6A:9-11.10. The latter regulation, in turn, specifies in section (b) that:

Elementary school teachers, preschool through grade three teachers and nursery school teachers who teach world languages more than half-time and complete the requirements in (a) above shall be authorized to teach world languages in the grade levels authorized by their endorsement. Elementary school teachers, preschool through grade three teachers and nursery school teachers who teach world languages half-time or less shall be authorized to teach world languages in the grade levels authorized by their endorsement upon demonstrating linguistic competency in the designated world language as demonstrated on a Department-approved, nationally recognized test of oral language proficiency for spoken language or receptive/expressive proficiency for American Sign Language. [Emphasis added.]

The requirements in *N.J.A.C.* 6A:9-11.10(a) are:

1. Possess linguistic competency in the designated world language as demonstrated on a Department-approved, nationally recognized test of oral language proficiency for spoken language, reading/writing

proficiency for classical languages or receptive/expressive proficiency for American Sign Language; and

2. Complete a minimum of three semester-hour credits in second language acquisition theory and related methodologies offered by a regionally accredited college or university within 12 months of initial assignment. [Emphasis added.]

Thus, the foregoing regulatory language does not require an already certificated elementary school teacher to obtain a new elementary endorsement. Rather, it requires such a teacher to meet the standards in *N.J.A.C. 6A:9-11.10(a)(1)* and (2) for the full-time teaching of world languages or, in the alternative, to demonstrate linguistic competency to teach in his or her world language on a half-time or less schedule.

Under the facts of this case, even if the Commissioner sets aside the guidance in *N.J.A.C. 6A:9-9.1(a)(3)* and uses only *N.J.A.C. 6A:9-11.10* to adjudicate the controversy, the result is a determination that petitioner achieved tenure. More specifically, during the first two years of his service in respondent's district, petitioner was properly certificated to teach Italian on a half-time schedule. The fact that respondent allowed petitioner to teach Italian on a full-time basis during that period should not deprive petitioner of tenure credit for the part-time service for which he was properly certificated.

By Summer 2009, petitioner had satisfied both parts (1) and (2) of *N.J.A.C. 6A:9-11.10(a)*, *i.e.*, he had demonstrated proficiency in Italian and completed the college course required by *N.J.A.C. 6A:9-11.10(a)(2)*. Consequently, for the next three school years he was appropriately certificated to teach Italian full-time in respondent's elementary schools. And as petitioner pointed out, *N.J.A.C. 6A:9-11.10(a)(2)* allows a grace period for completing the required course. Petitioner is therefore justified in arguing that he was appropriately certificated prior to the commencement of the 2009-2010 school year.

In summary, if one takes the above referenced grace period into consideration, petitioner was properly certificated to teach Italian full-time in respondent's elementary schools for over three years. Even without reliance on the grace period, petitioner had satisfied the elements set forth in *Spiewak, supra*, 90 *N.J.* at 74. Since part-time service in a district counts toward tenure, *see, e.g. Allison Hendershot v. Board of Education of the Township of Montague, Sussex County*, Commissioner Decision No. 70-00 (February 28, 2000), once the 2010-2011 school year had commenced, petitioner had given the amount of certificated service required to earn tenure in respondent's district: he had worked in a position for which a teaching certificate is required, he had served the requisite period of time, and he had held appropriate certification. Thus, respondent's failure to renew his contract – without the proper filing of tenure charges – was *ultra vires*.

Accordingly, the Initial Decision is rejected, the petition is granted, and respondent shall reinstate petitioner. However, the record does not appear to contain the facts necessary for calculating the amount of back pay and emoluments to which petitioner may be entitled. Consequently, the matter is remanded to the OAL for such proceedings as are necessary to accomplish same.

IT IS SO ORDERED.³

ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: February 25, 2013

Date of Mailing: February 25, 2013

³ This decision may be appealed to the Superior Court, Appellate Division, pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1).