

PETER J. KOWALSKY, :
PETITIONER, :
V. : COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT : DECISION
OF THE CITY OF NEWARK, ESSEX :
COUNTY, :
RESPONDENT. :

SYNOPSIS

Petitioner – formerly employed as a teaching staff member in respondent’s school district – alleged that the summary termination of his employment on August 31, 2012 was in violation of his tenure rights under *N.J.S.A. 18A:28-5(c)*. Petitioner was hired in September 2005. In November 2005, petitioner was assaulted by a student, resulting in a fracture of his hip and femur, a herniated disc, and a tendon tear in his right knee. He was placed on worker’s compensation medical leave, and did not work for the balance of the 2005-06 school year. Petitioner was cleared by his doctor to return to work in October 2006, but was again placed on a medical leave in November 2006 – which extended through the 2007-08 and 2008-09 school years. Petitioner returned to work in the 2009-10, 2010-11, and 2011-12 school years. The District contended that petitioner was not in active employment for a period sufficient to meet the statutory requirement for tenure and filed a motion for summary decision. The issue at bar is whether the petitioner attained tenure in the District despite an extended medical leave of absence.

The ALJ found, *inter alia*, that: there is no genuine issue as to material fact in this case, and the matter is ripe for summary decision; in order to obtain tenure, petitioner would have had to be employed for thirty months and one day over four academic years; petitioner’s situation is “rather unique” in that there were long periods where he was unable to perform services for the respondent District because of his work-related disability; petitioner was, however, an “employee” during three years and one day in a four year period; pension and other benefit contributions were made continuously on petitioner’s behalf by the District from September 2005 until his termination on September 1, 2012, consistent with the treatment of an employee in active service; the District had ample opportunity to evaluate petitioner’s job performance, and did perform a final, positive evaluation. Accordingly, the ALJ concluded that the petitioner had achieved tenure prior to his termination. The ALJ ordered the District to reinstate petitioner as a Health and Physical Education teacher retroactive to September 1, 2012, together with all salary, benefits and emoluments due and owing to him.

Upon a comprehensive review, the Commissioner rejected the Initial Decision of the OAL, finding that the petitioner never acquired tenure in the district because he did not satisfy the necessary statutory criteria. In so determining, the Commissioner found that it is undisputed that the petitioner did not perform services during *each* of the contract years as required pursuant to *N.J.S.A. 18A:28-5(c)*, and the circumstances in this case are distinguishable from those in *Kletzkin v. Board of Education of the Borough of Spotswood, Middlesex County*, 136 *N.J.* 275 (1994). 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.

July 29, 2013

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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 the exceptions filed pursuant to *N.J.A.C. 1:1-18.4* by the respondent, State-Operated School District of the City of Newark (District), and the petitioner's reply thereto. This matter involves a determination as to whether the petitioner, Peter J. Kowalsky, achieved tenure with the District despite an extended medical leave of absence. The Administrative Law Judge (ALJ) issued an Initial Decision in which he determined that the petitioner had acquired tenure with the District prior to the termination of his employment and, as such, petitioner was entitled to reinstatement together with all the salary, benefits and emoluments owing him.

In its exceptions, the District argues that the ALJ disregarded the requisite statutory criteria necessary to attain tenure, ignored controlling decisions, and misapplied established school law jurisprudence, leading him to the erroneous conclusion that the petitioner had acquired tenure rights with the District prior to his termination. The District maintains that the time periods during which petitioner was on medical leave do not count toward tenure

accretion because the petitioner was not in “active employment” and did not render educational services. The District contends that petitioner, consequently, did not meet the requisite statutory conditions for the acquisition of tenure, as prescribed by *N.J.S.A. 18A:28-5*. Thus, the District argues that the Initial Decision should be rejected and the Commissioner should find that the petitioner did not acquire tenure with the District.

In reply, the petitioner urges the adoption of the Initial Decision, arguing that the ALJ properly applied *N.J.S.A. 18A:28-5(c)* and the principles enunciated in *Kletzkin v. Board of Education of the Borough of Spotswood, Middlesex County*, 136 *N.J.* 275 (1994) in determining that the petitioner was tenured at the time of his termination. The petitioner maintains that a teaching staff member may acquire tenure, despite a leave of absence that prevents him from actively serving for the requisite probationary period prescribed by *N.J.S.A. 18A:28-5*, provided that 1) the teaching staff member was an “employee” during the leave of absence, and 2) the school board had sufficient opportunity to evaluate the teacher during the probationary period. The petitioner further maintains that he was “employed” by the District for seven academic years, including the time that he was on involuntary medical leave, and “had four years of recognized continuous and consecutive service employment prior to his three years of continuous and consecutive active service employment wherein he was evaluated satisfactorily.” (Petitioner’s Reply at 8) As a result, the petitioner contends that he attained tenure with the District, and that the Commissioner should adopt the Initial Decision and order the District to reinstate him with all salary, benefits and emoluments owing him.

Upon a comprehensive review of the record in this matter, the Commissioner finds that the petitioner did not acquire tenure in the District because he failed to satisfy the precise criteria for obtaining tenure pursuant to *N.J.S.A. 18A:28-5(c)*. Accordingly, the Commissioner must reject the Initial Decision.

Tenure is a statutory right, and the Tenure Act, *N.J.S.A. 18A:28-1 et seq.*, defines with specificity the conditions under which teaching staff members are entitled to the security of tenure. *Spiewak v. Rutherford Bd. of Educ.*, 90 *N.J.* 63, 72 (1982). In order to obtain tenure, the precise statutory conditions must be met. *Zimmerman v. Bd. of Educ. of Newark*, 38 *N.J.* 65, 72 (1962). Pursuant to *N.J.S.A. 18A:28-5*,

The services of all teaching staff members employed in the positions of teacher, principal, other than administrative principal, assistant principal, vice-principal, assistant superintendent ... serving in any school district or under any board of education ... shall be under tenure during good behavior and efficiency and they shall not be 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 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, to have obtained tenure, petitioner must have been “employed” by the District for a total of at least thirty months and one day within any four consecutive academic years.

In *Kletzkin v. Board of Education of the Borough of Spotswood*, *supra*, the New Jersey Supreme Court addressed the meaning of the word “employed” in the context of tenure acquisition. The *Kletzkin* Court explained that, with respect to tenure, “[a] teacher’s employment begins with the actual performance of service, not the date of hiring.” *Id.* at 279. Furthermore, “‘continuous employment’ exists notwithstanding the ‘mere occasional absence of a teacher by reason of illness or excuse.’” *Id.* And, “[a] teacher who performs services under a contract for the year is employed for the purposes of [the tenure] statute, even if he or she takes an involuntary leave.” *Id.* Accordingly, under certain circumstances, a teaching staff member

may acquire tenure by virtue of having been “employed,” despite taking a leave of absence that results in actual service short of the time requirements set forth in *N.J.S.A. 18A:28-5*. *Kletzkin, supra*; *Mendez-Azzollini v. Bd. of Educ. of the Twp. of Irvington*, Commissioner Decision No. 268-09, decided August 26, 2009; *Jarmond v. Bd. of Educ. of the City of Elizabeth*, Commissioner Decision No. 275-09, decided September 8, 2009.

The petitioner in *Kletzkin* worked in the respondent district continuously from January 1986 until November 1988, at which time she took an involuntary paid leave of absence due to a work-related injury. The Court found that Kletzkin acquired tenure in January 1989, despite the fact she was still on leave. To that end, the Court determined that Kletzkin had been “employed” by the respondent district for the requisite period of time, since: she performed services during each of the contract years; she was on a paid leave for a work-related injury; and, “the Board had ample time to assess her performance over twenty eight months during four school years.” *Kletzkin, supra*, 136 *N.J.* at 279-280. The Court, however, “recognize[d] the importance of a probationary period as a means of assessing a teacher’s performance,” and cautioned that “[i]n another case, a more extended leave of absence could lead to a different result.” *Id.* at 280-281.

The circumstances in this case are distinguishable from those in *Kletzkin*, persuading the Commissioner that a different result is warranted here. Like Kletzkin, petitioner’s medical leaves were necessitated by work-related injuries. However, unlike Kletzkin, petitioner did not perform services during *each* of the contract years. Indeed, it is undisputed that petitioner provided absolutely no services for the District during the 2007-2008 and 2008-2009 academic years. Such a protracted leave, encompassing entire academic years during which a teaching staff member performs no services for a district, cannot be deemed continuous employment for purposes of tenure acquisition. *See Kolodziej v. Board of Education*

of the Southern Regional High School District, Ocean County, Commissioner Decision No. 179-13, decided May 16, 2013.

Had petitioner performed any services for the District during the 2008-09 academic year, he would have satisfied the thirty months plus one day requirement at the conclusion of the 2011-12 academic year, and thereby achieved tenure. Unfortunately, he did not. The Commissioner is, therefore, constrained to find that petitioner did not satisfy the statutory criteria for acquisition of tenure.

Accordingly, the recommended decision of the ALJ is rejected, as set forth herein, and the within Petition of Appeal is dismissed.

IT IS SO ORDERED.¹

COMMISSIONER OF EDUCATION

Date of Decision: July 29, 2013

Date of Mailing: July 31, 2013

¹ Pursuant to *P.L. 2008, c. 36 (N.J.S.A. 18A:6-9.1)*, Commissioner decisions are appealable to the Superior Court, Appellate Division.