#76-15 (OAL Decision: http://njlaw.rutgers.edu/collections/oal/html/initial/edu13462-13_1.html)

KATHLEEN CAREW,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE BOROUGH OF OLD TAPPAN, BERGEN COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioner – a tenured elementary school teacher – alleged that the respondent Board violated her tenure and seniority rights when it assigned her to a part-time position for the 2013-2014 school year after she had taught a full-time schedule during the 2012-2013 school year. Petitioner was originally hired to fill a full-time teaching position for the 2009-2010 school year, and taught full-time through the 2010-2011 school year. For the 2011-2012 school year, however, the Board reduced its staff and re-assigned petitioner as a part-time (0.50 full-time equivalent, or "FTE") teacher. For the 2012-2013 school year, the Board again assigned petitioner to a half-time schedule, but added an additional assignment as a 0.50 FTE family leave replacement teacher for a colleague who had been approved for a maternity leave – thus bringing petitioner's schedule to full-time for 2012-2013. When the Board eliminated the maternity assignment for the 2013-2014 school year and once again employed petitioner on a 0.50 FTE basis, she filed the within appeal, claiming, *inter alia*, that she had been subject to a reduction in force (RIF). The parties filed cross motions for summary decision.

The ALJ found, *inter alia*, that: there are no material facts at issue herein, and the matter is ripe for summary decision; whether petitioner was subject to a RIF prior to the beginning of the 2013-2014 school year depends on what position she held when she achieved tenure on the second day of the 2012-2013 school year. The ALJ concluded that petitioner was a 0.50 FTE teacher on the day that she achieved tenure, and petitioner was not subject to a RIF since the loss of a temporary leave-replacement position does not constitute a RIF. Accordingly, the ALJ granted the Board's motion for summary decision, denied petitioner's cross motion, and dismissed the petition.

Upon comprehensive review, the Commissioner found that no RIF occurred when only petitioner's half-time tenured employment was renewed for the 2013-2014 school year, and concurred with the ALJ's determination that the petitioner's rights were not violated. Accordingly, summary decision was granted to the respondent, and the petition was dismissed.

February 25, 2015

OAL DKT. NO. EDU 13462-13
AGENCY DKT. NO. 201-8/13

KATHLEEN CAREW,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE BOROUGH OF OLD TAPPAN, BERGEN COUNTY,	:	
RESPONDENT.	:	

Before the Commissioner is petitioner's contention that her tenure rights were violated when, in June 2013, she was offered a contract to teach sixth and eighth-grade language arts on a part-time basis only. In pressing her claim, petitioner alleges that: 1) by the summer of 2013, she had earned tenure; 2) by offering her half-time instead of full-time employment for the 2013-2014 school year, respondent subjected her to a reduction in force (RIF); 3) by June 2013, she had accrued more seniority in the district as a language arts teacher than had a colleague, Virginia Walsh; 4) because she had purportedly been "RIF'd", and had allegedly earned more seniority than Walsh, she was entitled to the full-time position respondent offered to Walsh for the 2013-2014 school year; and 5) in the alternative, being "RIF'd" entitled her to claim a Kindergarten position which had been offered to an untenured teacher. Upon review of the record, Initial Decision of the Office of Administrative Law (OAL), petitioner's exceptions and the respondent's and intervenors' replies thereto, the Commissioner concurs with the OAL's determination that petitioner's rights were not violated.

The facts which are critical to the instant controversy can be found in the parties' Joint Stipulation of Facts. Briefly, that document and the exhibits annexed thereto reveal the following. Carew and Walsh were first employed by respondent in June 2009 – on the same day. During the 2009-2010 and 2010-2011 school years, they each served full-time as language arts teachers. Carew's primary assignments for both years were sixth and eighth-grade language arts. Walsh's primary assignments were fifth and seventh-grade language` e arts in the first year, and fifth-grade language arts in the second year. For their third year of teaching, *i.e.*, 2011-2012, Walsh continued full-time – teaching fifth-grade language arts, as well as the language arts component of sixth and eighth-grade cycle classes. Carew accepted a half-time assignment teaching sixth and eighth-grade language arts.

During the 2011-2012 year, Walsh requested maternity and child-rearing leave for most of the 2012-2013 school year. It is undisputed that the leave request was granted by the respondent Board. On June 25, 2012 the Board voted to renew Walsh's full-time employment and Carew's half-time employment as language arts teachers for the 2012-2013 school year. Subsequently, on July 16, 2012, the Board voted to approve an additional half-time assignment for Carew as a leave-replacement teacher for Walsh for the 2012-2013 school year. The Board minutes approving the replacement assignment for Carew stated:

> EXPLANATION: Ms. Carew was originally a .5 FTE Language Arts teacher for the 2012-2013 school year. In light of the above resolution, she will become 1.0 FTE (i.e. - .5 FTE Language Arts teacher and .5 FTE Language Arts Leave Replacement teacher for Ms. Walsh).

Contracts executed on or about September 1, 2012 reflected the above-referenced Board actions for Walsh and Carew. Walsh's contract recited that she was engaged as a full-time teacher for the 2012-2013 school year, with her salary to be prorated in keeping with her

approved family leave, which leave actually commenced on September 13, 2012 and continued for the balance of the school year. Carew's contract provided that she was hired as a .5 language arts teacher and a .5 family leave*+ replacement teacher. On August 20, 2012, the Board approved the employment of another part-time Language Arts replacement teacher, *i.e.*, Kelly Fiedler. Her contract reflects that she was hired to serve as a 40 percent teacher aide (at $15/hour) and a 60 percent leave replacement teacher.

It is undisputed that on the first day of the 2012-2013 school year, both Walsh and Carew earned tenure as language arts teachers in respondent's district. From the commencement of the school year until September 12, 2012, Walsh taught twenty fifth-grade language arts classes, the language arts component of five sixth-grade cycle classes and five eighth-grade cycle classes, and two curriculum extension classes. The record indicates that she trained Fiedler to take over her fifth-grade language arts classes. Carew's schedule included seven eighth-grade language arts classes, twenty sixth-grade language arts classes and three curriculum extension classes.

At the end of the 2012-2013 school year – on June 24, 2013 – the respondent Board approved the re-employment of approximately sixty-five tenured staff members, including Carew and Walsh. Carew was approved for a half-time assignment and Walsh was approved for a full-time assignment.[1] Walsh's weekly schedule included 30 periods of fifth-grade language arts, a period of art history and a period of curriculum extension. Carew's weekly schedule included seven periods of eighth-grade language arts, ten periods of sixth-grade language arts and a period of curriculum extension.

[1] Respondent also, on July 15, 2013, approved the hire of Angela Maida as a full-time Kindergarten teacher for the 2013-2014 school year. Maida had served as a leave replacement Kindergarten teacher during the 2012-2013 school year.

Carew filed her petition on August 28, 2013. In it she alleged that respondent's offer to her of half-time employment for the 2013-2014 school year, after she had been teaching a full-day schedule in the 2012-2013 school year, constituted a reduction in force. Based upon that supposition, petitioner reasoned that she was entitled to any positions – for which she was qualified by certification and endorsement – offered to 1) untenured teachers, or 2) teachers whose seniority was inferior to hers. Petitioner contended that Angela Maida – an untenured teacher who was offered a job teaching Kindergarten – fell into the former category, and Walsh fell into the latter category. The matter proceeded in the OAL by way of motions and a cross-motion for summary disposition. The Administrative Law Judge (ALJ) ultimately determined that no RIF had occurred in 2013, and that petitioner consequently had no claim to Walsh's or Maida's positions.

In her exceptions, petitioner contends that the ALJ erred in finding no RIF. She relies on two "facts." First, petitioner recites part of the text of a July 17, 2012 letter sent to her by respondent's superintendent after the respondent Board voted to offer her a half-time leave replacement assignment in addition to her regular half-time language arts position:

> The Old Tappan [B]oard of Education took action . . . on July 16, 2012, to approve you as an additional .5 Language Arts family leave replacement teacher (Ms. Vanessa Walsh) for the 2012-2013 school year. Therefore your position for the 2012-2013 school year will be full time. This full time position offers you health and dental benefits
> [Exhibit 15, annexed to the parties' Joint Stipulation of Facts]

Second, petitioner maintains that it was Fiedler, not herself, who served as Walsh's replacement leave teacher.

In considering the first "fact," the Commissioner finds it ironic that petitioner urges him to rely on a letter from the district superintendent (who holds no authority to define the

terms of her employment) to determine that her two assignments in 2012-2013 jointly constituted a full-time tenure track position, while at the same time urging him to disregard the language of petitioner's legally binding contract for the 2012-2013 school year, which plainly recited that the: "Board has employed and hereby does engage and employ the Employee as a .5 Part Time Teacher and .5 Family Leave Replacement Teacher in the public Schools . . . " *See*, Exhibit 16, annexed to the parties' Joint Stipulation of Facts.

In attempting to justify the discounting of terms of her employment contract, petitioner relies on language in *Platia v. Bd. of Educ. of Hamilton*, 434 *N.J. Super.* 382, 391 (App. Div. 2014), which quoted the Supreme Court in *Spiewak v. Bd. of Educ. of Rutherford*, 90 *N.J.* 63, 77 (1982): "A teacher's right to tenure 'never depends on the contractual agreement between the teachers and board of education.' '' In *Platia* the central question was whether a special education teacher's assignment during the 2009-2010 school year constituted leave replacement service or a tenure track position. The respondent Board in that case relied, for its contention that Platia's service was 'leave replacement,' on language in her contract characterizing the assignment as "long term substitute" to replace:

> an employee who is on leave of absence and who may be returning to his/her position at the expiration of this contract. This position is non-tenurial and carries no seniority eligibility. You will be assigned to the Substitute Teacher List if no position is available at the expiration of this contract.
> [*Platia*, 434 *N.J. Super.* at 385]

However, there were no actual facts which supported the proposition that Platia was acting in place of a teacher who was absent, disabled or disqualified, within the intendment of *N.J.S.A.* 18A:16-1.1, the statute which advises that temporary teaching staff members do not accrue tenure.

To the contrary, the record showed that Michele Snyder – the teacher who was supposedly on leave and whom Platia was supposedly temporarily replacing – was actually working in respondent's district as a literacy resource coach while Platia served as a special education teacher. Thus, the Appellate Division found that Snyder was not absent, disabled or disqualified; she was working in another position in the district, rendering her prior tenure track position vacant. By way of contrast, the record in the instant controversy evidences that: 1) Walsh actually was on leave for most of the 2012-2013 school year; 2) respondent created petitioner's part-time leave replacement assignment as a means to help fill the deficit caused by Walsh's family leave; and 3) petitioner was not filling a language arts teaching "vacancy" in the 2012-2013 school year.

As for the Superintendent's letter, even assuming, *arguendo,* that it could be regarded as legal authority, the Commissioner could not rely on it for guidance about tenure rights. It is clear that the term "full time" was utilized in the letter to recognize that petitioner's total number of scheduled hours would require that she be covered by health benefits. That is an issue which is independent of any tenure calculus.

Petitioner's second factual assertion, *i.e.,* that Fiedler – and not petitioner – was Walsh's replacement leave teacher, is also unsupported by the record of this case. Walsh's assigned teaching load for 2012-2013 included, as referenced above, twenty fifth-grade language arts classes, the language arts component of five sixth-grade cycle classes and five eighth-grade cycle classes, and two curriculum extension classes. It is undisputed that Fiedler only took over Walsh's twenty fifth-grade language arts classes; Walsh's ten cycle classes, two curriculum extension classes, and any other responsibilities she may have had, clearly needed to be covered by other staff. Petitioner has provided no evidence that any other language arts teachers were

hired as replacement leave employees for Walsh in 2012-2013; to the contrary, the record supports respondent's contention that the Board hired two part-time staff members (petitioner and Fiedler) as leave replacement teachers in order that Walsh's entire assignment would be covered while she was on family leave.

Nonetheless, based upon her contention that she did not cover any of Walsh's assigned classes, petitioner continues to urge that she was not actually a leave-replacement teacher, but rather a full-time tenure track employee entitled to full-time seniority credit for her service during the 2012-2013 school year. Petitioner relies, once again, on *Platia*, wherein the Appellate Division found significant the fact that during the period in which Platia was supposedly replacing Snyder she was not teaching in the school where Snyder had taught. This detail, in the *Platia* court's view, undermined the respondent Board's position that Platia was a temporary substitute for Snyder. No such circumstance is present in the instant case

During the 2012-2013 school year, petitioner was teaching the same subject – language arts – that Walsh taught, and was assigned to the same school in which Walsh taught. The fact that the schedules of other language arts teachers in the school may have been tweaked to cover the exact classes that Walsh had taught, leaving petitioner to teach grade levels with which she was familiar, does not bear upon petitioner's status as a replacement leave teacher. In *Giacomazzi v. Board of Education of the South Orange-Maplewood School District,* A-5686-07 (App. Div. September 2, 2009) (slip op.), a petitioner claimed that she should not have been regarded as a replacement leave teacher because she had not been teaching the exact courses that the person she was replacing had taught. The Commissioner of Education rejected her argument, finding that the "respondent Board of education ha[d] the discretion to modify teaching

assignments and locations [*i.e.*, rooms]. The Appellate Division agreed. *Giacomazzi, supra,* at 4.[2]

In light of the foregoing, the Commissioner finds that petitioner's 2012-2013 assignment consisted of a half-time tenure track position and a half-time leave replacement position. Consequently, no RIF occurred when only petitioner's half-time tenured employment was renewed for the 2013-2014 school year.[3] Because "an individual's entitlement to claim a position by reason of seniority remains inchoate unless and until that individual is affected by a reduction in force," *Benson v. Board of Education of Rockaway*, 92 *N.J.A.R.* 2nd (EDU) 15, 21, no discussion about petitioner's seniority *vis a vis* Walsh or other employees is necessary or warranted for the resolution of this case.

Accordingly, summary disposition is granted in favor of respondent and the intervenors, petitioner's cross-motion for summary disposition is denied, and the petition is dismissed.

IT IS SO ORDERED.[4]

COMMISSIONER OF EDUCATION

Date of Decision: _____

Date of Mailing:

[2] The Commissioner disagrees with the ALJ's finding of tension between *Giacomazzi* and *Platia*. The appellate division's conclusion that Platia did not act in place of Snyder was based both on the fact that Snyder was not on leave – as contemplated by *N.J.S.A.* 18A:16-1.1 – and by the fact that Platia and Snyder worked in different schools. This does not conflict with the holding in *Giacomazzi* that a replacement leave teacher's assignment may be modified at the Board's discretion and need not be identical to the replaced teacher's duties.

[3] Because the need for a replacement teacher for Walsh no longer existed, petitioner was not offered another additional half-time leave replacement assignment.

[4] 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).