

320-01

THERESA ALFIERI, :
AND :
THERESE MEZAK, :
PETITIONERS, :
V. : COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE : DECISION
TOWNSHIP OF SADDLE BROOK,
BERGEN COUNTY, :
RESPONDENT. :

SYNOPSIS

In consolidated matters, petitioners, two tenured, part-time, hourly, supplemental teachers, alleged the Board violated their tenure and seniority rights by reducing their employment and compensation in the 1998-99 school year while retaining full-time nontenured teachers. Petitioners sought: 1) employment as full-time elementary teachers; 2) an award of back pay representing the difference between the salary they actually earned in their part-time positions and the amount they would have earned as full-time teachers; 3) pre- and post-judgment interest; and 4) retroactive full-time seniority credit beginning with the 1998-99 school year.

The ALJ determined that neither tenure nor seniority rights were implicated since there was simply no reduction in force. The ALJ concluded that a reallocation of hours of work and numbers of students among part-time teachers does not constitute a reduction in force, and noted that the number of part-time teachers was not reduced, nor were positions abolished or transfers to other positions effectuated.

The Commissioner affirmed the decision of the ALJ with clarification. After noting that acquisition of tenure does not differ based on full-time or part-time status, the Commissioner agreed that petitioners were not subjected to a reduction in force or adverse employment action that would trigger petitioners' tenure and seniority rights. The Commissioner rejected the notion that a reduction in hours of a part-time employee automatically triggers tenure and seniority rights, and noted that petitioners accepted employment that did not guarantee a minimum number of hours of work. Petitions were dismissed.

September 17, 2001

OAL DKT. NOS. EDU 11677-98 AND 1161-99 (CONSOLIDATED)
AGENCY DKT. NOS. 485-10/98 AND 516-11/98

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The record and Initial Decision issued by the Office of Administrative Law (OAL) in this consolidated matter have been reviewed. Petitioners' exception and the Board's reply thereto were timely filed pursuant to the requirements of *N.J.A.C. 1:1-18.4*.

Initially, petitioners argue that the Initial Decision contains a series of legal conclusions without any supporting citations to case law, statute or regulation, a factor they believe is significant because it is their contention that the decision is contrary to existing law. More specifically, petitioners aver that the following conclusions are without basis:

1. The conclusion that the reduction in petitioners' hours and compensation "from close to 20 to less than that is legally insignificant." (Initial Decision at 9.)
2. The statement, without analysis or explanation, that "None of the cases cited by petitioners compel a different result." (Initial Decision at 9.)

3. The resurrection of a distinction between part-time remedial and full-time tenure for teachers. (Initial Decision at 9.)

4. The conclusion that an administrative decision “establishing a minimum number of students per group,” which results in a reduction in hours and compensation, does not constitute a reduction in force. (Initial Decision at 9.)

5. The assertion that “Tenured part-time remedial instructors like Alfieri and Mezak do not have statutory entitlement to full-time positions.” (Initial Decision at 9) (Petitioners’ Exceptions at 1-2)

Petitioners next reiterate their position and legal arguments that the reduction in their work hours and compensation, while the Board employed nontenured teachers in positions within the scope of their certifications and endorsements, invoked their tenure rights. In support of their position petitioners cite *Klinger v. Cranbury Tp. Bd. of Ed.*, 190 N.J. Super. 354, 357 (App. Div. 1982), *certif. den.* 93 N.J. 277 (1983); *Avery et al. v. Board of Education of the City of Trenton, Mercer County*, decided by the State Board of Education July 10, 2001; *Ackerman et al. v. Board of Education of the Borough of Oakland, Bergen County*, 1986 S.L.D. 2191; *Von Schalscha v. Board of Education of the Borough of Tenafly, Bergen County*, decided by the Commissioner September 2, 1983; *Laufenberg v. Board of Education of Ramapo Indian Hills Regional High School District*, 1991 S.L.D. 2447; *Lichtman, supra*.

Petitioners also argue that, contrary to the Initial Decision, a part-time teacher whose rights are violated may claim a full-time position, citing in support *Lichtman, supra*; *Ackerman, supra*; *Gainer v. Wayne Township Board of Education*, 94 N.J.A.R.2d (EDU) 222 (State Board of Education); *Greiner v. Board of Education of the Township of Shamong, Burlington County*, decided by the State Board of Education September 5, 1984.

Petitioners further aver that that fact that there may have been an administrative justification for the reduction in their hours is irrelevant and that “administrative efficiency and flexibility do not trump tenure rights.” (Petitioners’ Exceptions at 6) Of this, petitioners state:

The argument put forward by the respondent and accepted in the Initial Decision is a throwback to the argument that, at one time, was used to deny tenure status to part-time remedial teachers. In *Point Pleasant Beach Teachers’ Ass’n v. Callam*, 173 N.J. Super. 11 (App. Div. 1979), *certif. den.*, 84 N.J. (1980), the court held that such teachers were not teaching staff members in the meaning of N.J.S.A. 18A:1:1 and under N.J.S.A. 18A:28-5, in part, because the program in which they were employed required “flexibility in operation which would be impeded if its instructors were granted tenure.” *Point Pleasant Beach*, supra at 18, citing *Capella v. Camden County Voc. Tech. Sch. Bd. of Ed.*, 145 N.J. Super. 209, 214-215 (App. Div. 1976). *Point Pleasant Beach*, supra, was expressly overruled by the Supreme Court in [*Spiewak*, supra]. Issues of flexibility and administrative convenience have no place in determining whether tenure is acquired. If the terms of N.J.S.A. 18A:1-1 and N.J.S.A. 18A:28-5 are met, tenure, and all of its protections, exists. *Spiewak*, supra. (*Id.* at 7)

Lastly, petitioners argue that, in light of the Board’s violation of the petitioners’ tenure status, a complete remedy must issue, including back pay; pre-and post-judgment interest; seniority credit; assignment to a full-time elementary position; restoration of other benefits and emoluments; and referral to the county superintendent’s office for oversight.

The Board’s exceptions reiterate its position that petitioners’ tenure rights were not invoked because it did not effectuate a reduction in force for the 1998-1999 academic year; *i.e.*, the Board did not reduce the number of part-time hourly teaching staff members; it did not abolish any of those positions or dismiss any of them; and it did not transfer any petitioner to other positions. Rather, the only change that occurred was an administrative directive requiring the part-time hourly staff to teach students in groups of at least three, absent permission for an exception. In support of its position, the Board cites *Carpenito v. Board of Education of the*

Borough of Rumson, Monmouth County, decided by the Commissioner August 21, 1996, *rev'd* State Board February 4, 1998, *rev'd* New Jersey Superior Court, 322 *N.J. Super.* 522 (App. Div. 1999).

The Board also argues that petitioners' reliance upon *Avery, supra*, is misplaced because the holding in that matter is distinguishable from the instant matter since the petitioners' positions in *Avery* were abolished and their terms of employment reduced from 12 months to 10 months. Moreover, the Board urges that the other cases cited by petitioners herein, including *Von Scalscha, supra*, and *Laufenberg, supra*, are distinguishable as well, because no reduction in force occurred in the instant matter. As such, the Board urges that the Administrative Law Judge (ALJ) correctly held that absent a reduction in force, petitioners' tenure and seniority rights are not implicated and that tenured, part-time, remedial instructors like petitioners do not have statutory entitlement to full-time positions, absent a reduction in force that affects their positions or employment. Lastly, the Board avers that the Initial Decision is not based upon administrative efficiency but on a finding that a reduction in force did not take place and the additional remedies sought by petitioners are not warranted by the evidence.

Upon review of the record, including the exceptions and reply exceptions submitted by the parties, the Commissioner agrees with the ALJ's recommended decision to dismiss the Petitions of Appeal with the following clarification. Initially, the Commissioner emphasizes that as determined by the New Jersey Supreme Court in *Spiewak, supra*, tenure acquisition is not in any way distinguished or differentiated by one's employment on a part-time versus a full-time basis; *i.e.*, once an individual fulfills the statutory requirements for tenure acquisition, that individual is tenured in the position of teacher, irrespective of the fact that the position filled may be part-time, as opposed to full-time. Moreover, "a tenured part-time

teaching staff member with proper certification can claim, as against a nontenured applicant, seniority rights in seeking appointment to a full-time position that is within the specific categories covered by the certification and that has responsibilities identical to those of the part-time position in which employment was actually held.***” *Lichtman, supra*, 93 N.J. at 364.

Notwithstanding such holdings by the Court, the Commissioner is in agreement with the ALJ that the cases cited by petitioners in support of their claims in the instant matter do not compel a result granting the relief they seek because, upon review of the factual circumstances herein, the Commissioner concurs with the ALJ’s determination that petitioners were not subject to a reduction in force or other adverse employment action which would trigger their tenure and seniority rights. It is undisputed that petitioners knowingly entered into employment with the Board in positions having fluid hours, not to exceed 19 or 19.5 hours per week, based on the needs of its students for remedial instruction. (J-7, J-16, J-18, J-27, J-31) Further, petitioners’ employment hours fluctuated from year to year, even pay period to pay period, based on those needs. (J-33 to J-36) Consequently, the Commissioner agrees with the Board that, given the structure of the programs in which petitioners were employed and the terms of their employment agreements, they never had any tenure entitlement to a minimum number of hours worked per year. Therefore, while petitioners’ hours of employment were fewer in the 1998-1999 school year than in the previous year, tenure and seniority protections were not triggered because their employment from its inception was intended to be flexible in terms of the precise number of hours to be worked. To accept petitioners’ position would mean that if *at any point* their schedule required fewer hours than in the previous year, or portion of a year, then they would be able to invoke their tenure and seniority rights. In this regard, the Commissioner fully concurs with the Board when it states:

In the 1997-1998 school year, which is the immediate year preceding the year which is the subject of the petitions, Alfieri's gross monthly compensation decreased in consecutive months 5 times during the academic year. (R-4a). Likewise, Mezak's gross monthly compensation decreased in consecutive months 6 times during the academic year. (R-4a).

Given the structure of the programs in which the part time hourly staff were employed, these teachers never had a "tenure entitlement" to a minimum number of hours worked per year. The administrative directive implemented during the 1998-1999 school year did not abolish a part time hourly position such that there were less number of part time hourly teachers employed in the district, nor did the directive "transfer" any of the part time hourly staff as a result of declining enrollment or for reasons of economy. All the administrative directive attempted to do is to give the administration greater control over the development of the schedules for the part time hourly staff.¹***

Under petitioners' theory of the case, upon attaining tenure, the moment their monthly or annual gross compensation would decline, or they would work less hours [than] the month before, they would suffer a "reduction" in employment so as to trigger their tenure and seniority rights and thereby enable them to "bump" a full time nontenured teacher. This would occur without a formal reduction in force by the Board. The nature of petitioners' positions is such that their hours would fluctuate from month-to-month and from year-to-year. Petitioners' contractual hourly rate of pay was never reduced by the Board.

Petitioners were not "reduced" in employment because they were employed in positions that did not require a fixed number of hours of instruction from year-to-year. Their positions do not involve a fixed teaching schedule, and compensation, which could only be reduced as a result of a reduction in force if enrollment declines but rather, involves positions which require a teaching schedule (and therefore teacher contact time), and compensation, to vary from year-to-year. A reduction in force with respect to the part time hourly staff would be seen in the reduction of the number of part time hourly positions or the transfer of staff and/or combining of schedules and a resulting loss of hours and reduction in

¹ The Commissioner notes that prior to the 1998-1999 school year, part-time hourly teachers were allowed to develop their own schedules.

compensation. None of that took place during the 1998-1999 school year. (Board's Memorandum of Law at 17-18)

Finally, the Commissioner concludes that the cases cited by petitioners, and which the ALJ found inapposite in the instant matter, do not have a fact pattern such as is present herein, where each year petitioners knowingly accepted employment which did not guarantee a minimum number of hours of work. Therefore, it is determined that petitioners did not suffer an adverse employment action within the meaning of a reduction in force expressed by the Court in *Carpenito, supra*.

Accordingly, the petitions are hereby dismissed for the reasons set forth in the Initial Decision as clarified herein.

IT IS SO ORDERED.²

COMMISSIONER OF EDUCATION

Date of Decision: 9/17/01

Date of Mailing: 9/21/01

² 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.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.