

#179-13 (OAL Decision: Not yet available online)

DARCY KOLODZIEJ, :  
PETITIONER, :  
V. : COMMISSIONER OF EDUCATION  
BOARD OF EDUCATION OF THE : DECISION  
SOUTHERN REGIONAL HIGH SCHOOL :  
DISTRICT, OCEAN COUNTY, :  
RESPONDENT. :

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SYNOPSIS

Petitioner – formerly employed as a teaching staff member in respondent Board’s school district – alleged that the failure of the Board to employ her for the 2007-2008 school year violated her tenure and seniority rights. The petitioner was employed as a teacher in the school district for the 2002-2003, 2003-2004, and 2004-2005 academic years, before taking a Board-approved maternity leave for the 2005-2006 school year. Petitioner then returned to work for the 2006-2007 school year. The petitioner sought reinstatement to her tenured position, together with back pay and emoluments. The Board contended that the petitioner had not acquired tenure pursuant to *N.J.S.A. 18A:28-5* because of a break in service following the end of the 2004-2005 academic year, and that its April 2007 determination not to continue her employment as part of a reduction in force (RIF) was proper.

The ALJ found, *inter alia*, that: the petitioner attained tenure when the Board approved her unpaid maternity leave from September 1, 2005 through June 30, 2006; by granting petitioner a leave of absence after her employment for three consecutive academic years, petitioner was “employed” at the beginning of the next academic year and thus attained tenure under the provisions of *N.J.S.A. 18A:28-5(b)*; the Board therefore violated petitioner’s tenure rights when it notified her that it would not renew her contract for the 2007-2008 school year. Accordingly, the ALJ ordered that the Board reinstate petitioner to her former position as a physical education teacher, together with back pay less unemployment benefits, in the amount of \$137,212; the ALJ further ordered that petitioner be awarded seniority credits for the period of her unlawful dismissal.

Upon a comprehensive independent review, the Commissioner rejected the Initial Decision of the OAL, finding that the petitioner never acquired tenure in the district because she did not satisfy the criteria for obtaining tenure pursuant to *N.J.S.A. 18A:28-5*. In so determining, the Commissioner found that the petitioner was on a voluntary unpaid leave for the entire 2005-2006 school year; did not perform any services for the district during her leave of absence; and had been informed on more than one occasion that she had to work one day during the 2005-2006 school year in order to achieve tenure under *N.J.S.A. 18A:28-5*, but failed to do so. Under the circumstances existing in this case, the Commissioner determined that a relaxation of the service requirements of *N.J.S.A. 18A:28-5* is not warranted. Accordingly, the Commissioner concluded that petitioner did not have any tenure rights with the respondent Board’s district at the time of her non-renewal in 2007 and it is therefore unnecessary to explore the issues of seniority and back pay in this case. 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.
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May 16, 2013

OAL DKT. NO. EDU 6491-07  
AGENCY DKT. NO. 188-7/07

DARCY KOLODZIEJ, :  
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 V. : COMMISSIONER OF EDUCATION  
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 BOARD OF EDUCATION OF THE : DECISION  
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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 Board of Education (Board) and the petitioner's reply thereto. This matter involves a determination as to whether the petitioner, Darcy Kolodziej, achieved tenure with the Southern Regional High School District (District). The Administrative Law Judge (ALJ) issued a series of Orders over the course of the litigation that addressed petitioner's tenure and seniority rights and her entitlement to damages, followed by an Initial Decision that confirmed the ALJ's previous findings.<sup>1</sup> The ALJ ultimately determined that the petitioner obtained tenure and seniority rights with the District and as such she was entitled to retroactive back pay in the amount of \$137,212.00.

In its exceptions the Board recasts the arguments made below maintaining that the ALJ erroneously found that the petitioner acquired tenure rights with the District. The Board

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<sup>1</sup> In the first Order dated January 15, 2009, the ALJ determined that the petitioner acquired tenure with the District. The Board did not seek interlocutory review of the January 15, 2009 Order with the Commissioner. Instead after the ALJ issued another Order dated July 15, 2010, directing the Board to put petitioner back to work, the Board sought interlocutory review with the Commissioner of the July 15, 2010 Order as well as the January 15, 2009 Order. Interlocutory review was denied by the Commissioner because there were still outstanding issues that needed to be decided at the OAL. The Board also sought review in the Appellate Division that was similarly denied. The other aspects of this protracted litigation are outlined in the series of Orders issued by the ALJ.

maintains that the petitioner's unpaid maternity leave during the 2005-2006 school year was a break in employment continuity which caused her to be ineligible for tenure pursuant to *N.J.S.A. 18A:28-5*. The Board further contends that the ALJ's ruling conflicts with the explicit provisions in *N.J.S.A. 18A:28-5* that defines the conditions under which teachers are entitled to the security of tenure. The Board argues that according to *N.J.S.A. 18A:28-5* in order for the petitioner to achieve tenure she was required to establish either that she performed actual work for three consecutive years together with actual work at the beginning of the next succeeding year; or that she performed actual work for more than three consecutive academic years within four consecutive academic years. The Board points out that it is undisputed that petitioner worked as a teacher in the District for the 2002-03 academic year, the 2003-04 academic year and the 2004-05 academic year. The petitioner then went out on Board approved maternity leave for the 2005-06 academic year, and she then returned to work for the 2006-07 academic year. The Board contends that the petitioner's failure to return to work for at least one day or to provide any actual service to the District during the entire 2005-06 academic year resulted in a break in service. As a result of this break in service, the petitioner did not obtain tenure under *N.J.S.A. 18A:28-5*. The Board further maintains that since the petitioner did not obtain tenure, her non-renewal in April 2007 was valid.

Additionally, the Board takes exception to the ALJ's analysis of the term "employment," arguing that is misplaced. The board maintains that the ALJ erroneously relied upon the holding in *Dorothy Kletzkin v. Board. of Educ. of the Borough of Spotswood, Middlesex County*, 136 *N.J.* 275 (1994) which states that "continuous employment" exists notwithstanding the "mere occasional absence of a teacher by reason of illness or excuse." In its exceptions, the Board stresses that petitioner was on an unpaid maternity leave for an entire school year – which

is not a “mere occasional absence.” Additionally the Board asserts that pursuant to *N.J.S.A. 34:11B-8*, family leave is not considered “continued employment” or “continuous employment.”

The Board also argues that there is no statute or regulation which explicitly discusses or sets forth parameters for maternity leave or child care leave by a teacher in a public school and the case of *Cohen v. Emerson Bd. of Educ.*, 225 *N.J. Super.* 324 (App Div 1988) is not applicable to this case because it is misplaced, outdated and incorrect. The court in *Cohen, supra*, interpreted *N.J.A.C. 6A:32-5.1(b)* to permit up to 30 days maternity leave to count towards seniority. The Board notes that the provisions of *N.J.A.C. 6A:32-5.1(b)* are silent as to its application to maternity or child care leave and the Family and Medical Leave Act (FMLA) was not passed until 1993, five years after the decision in *Cohen, supra*. The Board argues that pursuant to 29 *U.S.C.A. §2614*, any leave of absence taken pursuant to the FMLA cannot be considered towards the accretion of tenure or seniority.

In addition, the Board states that the Collective Bargaining Agreement between the parties for the term of July 1, 2004 through June 30, 2007, which applies to the term of petitioner’s maternity leave in 2005-06, provides that “[t]ime spent on maternity leaves of absence shall not count toward salary guide placement, experience, seniority or sick leave accumulation.” Finally, the Board contends that the District’s Policy 3431.1 – which governs the treatment of family leave – clearly states: “[t]he employee’s tenure and seniority rights, if any, shall be preserved, but the employee shall accrue no additional time toward tenure or seniority for the period of leave.” The Board also reiterated its arguments below taking exception to the ALJ’s determination that the petitioner had seniority over current staff members. Therefore, the

Board 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 determined that the petitioner acquired tenure with the District, the extent of her seniority rights, and the amount of retroactive pay that she is entitled to receive from the District. The petitioner also outlined the complex procedural history of the litigation and summarized the various findings made by the ALJ. The petitioner maintains that contrary to the Board's suggestion, the reason why the petitioner was on leave and whether she was "actually working" are simply not relevant. The petitioner contends that the only relevant fact for tenure purposes is the fact that she remained employed by the Board regardless of the fact that she was on leave. Further, the petitioner argues that – given the Board's completion of the statutorily prescribed evaluations during the first three years of employment – upon her return to active service, the intervening year did not disrupt the requisite four consecutive years of service under *N.J.S.A. 18A:28-5(c)*.

In reply, the petitioner also alleges that the Board's insistence that she did not acquire tenure because she did not return to work for one day during the 2005-06 school year is absurd. The petitioner contends that this reasoning overlooks the remedial nature of the Tenure Act, which requires that it be liberally construed. Therefore, the petitioner maintains that given her status as a full-time employee with the District for the requisite number of years, she acquired tenure. The petitioner also reiterates her arguments made below arguing that the ALJ correctly concluded that she had greater seniority than several other teaching staff members at the time of the reduction in force and her reinstatement to her position as a teacher of physical education was appropriate. Moreover the petitioner contends that neither the FMLA, the Board's

family leave policy nor the parties' collective bargaining agreement preclude her from acquiring seniority while on maternity leave. As a result, the petitioner contends that the Commissioner should adopt the Initial Decision and order the Board to reimburse her \$137,212.00 in back pay.

Upon a comprehensive review of the record in this matter, the Commissioner finds that the petitioner did not acquire tenure in the District because she did not satisfy the criteria for obtaining tenure pursuant to *N.J.S.A.* 18A:28-5. The Commissioner further finds that the circumstances in this case do not warrant the relaxation of the service requirements.

The crux of the issue in this matter is whether the petitioner served the requisite period of time necessary to obtain tenure pursuant to *N.J.S.A.* 18A:28-5, which provides in pertinent part that:

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 ...

The requirements of *N.J.S.A.* 18A:28-5 are "clear and unambiguous" and as such they should be applied as written. *Kletzkin, supra*, 136 *N.J.* at 279 (citations omitted). Therefore, by the express terms of the statute, "an employee of a board of education is entitled to tenure if (1) she works in a position for which a teaching certificate is required; (2) she holds the appropriate

certificate; and (3) she has served the requisite period of time.” *Spiewak v. Summit Bd. of Educ.*, 90 *N.J.* 63, 74 (1992).

Although the language in *N.J.S.A.* 18A:28-5 is clear and unambiguous, the case law has carved out an exception under certain circumstances where a teaching staff member may acquire tenure despite taking a leave of absence that results in actual service short of the time requirements in *N.J.S.A.* 18A:28-5. *Kletzkin v. Bd. of Educ. of the Bor. of Spotswood*, 136 *N.J.* 275 (1994); *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. As the Court in *Kletzkin, supra*, explained relating to “employment” under the tenure laws, “[a] teacher’s employment begins with the actual performance of service, not the date of hiring ... ; ‘continuous employment’ exists notwithstanding the ‘mere occasional absences for illness or other excuse;’ [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.” *Kletzkin, supra*, 136 *N.J.* at 279. (citations omitted).

In *Kletzkin, supra*, the Court found that Kletzkin, who worked in the district continuously from January 1986 until November 1988 when she took an involuntary paid leave of absence due to a work-related injury, acquired tenure in January 1989 despite the fact she was still on leave. The Court recognized that it was making an exception to the thirty months plus service requirement in that case because the employee 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 circumstances in this case, however, are distinguishable from *Kletzkin, supra*, and do not warrant the relaxation of the service requirements. The petitioner was a teacher in the District for the 2002-03 academic year, the 2003-04 academic year and the 2004-05 academic year during which the Board completed all of the evaluations required of the petitioner. If the petitioner had worked as a teacher at the beginning of the 2005 academic year, it is undisputed that she would satisfied the thirty months plus a day requirement and as such she would have obtained tenure. However, the petitioner went out on board approved maternity leave for the entire 2005-06 academic year, and she did not resume active employment until the 2006-07 academic year. It is critical to recognize that although the petitioner was deemed to be an “employee” of the District, she did not perform any services during the entire 2005-06 academic year.

Unlike in *Kletzkin, supra*, the petitioner was not on paid leave as a result of a workplace injury and she did not perform any services during the 2005-06 year; rather she was out on voluntary unpaid leave for the entire academic year.<sup>2</sup> Moreover, the petitioner’s leave did not amount to “an occasional absence for illness or other excuse.” *See, Jarmond, supra*, (the petitioner achieved tenure despite being on an approved unpaid medical leave of absence that only encompassed twenty school days). Notably, the *Kletzkin* Court specifically warned that, “[i] another case, a more extended leave of absence could lead to a different result.” At 281. Therefore, under the circumstances in this case, the Commissioner is not in accord with the

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<sup>2</sup> A review of the record indicates that the petitioner was informed on more than one occasion that she had to work one day during the 2005-06 school year to achieve tenure under *N.J.S.A. 18A:28-5*. *See* affidavits of Craig Henry, Assistant Superintendent; Lorraine Airey, Principal; and Elizabeth Braun, Assistant Principal. In a letter order dated, March 18, 2008, the ALJ determined that the Board could not submit any evidence concerning the communications between the petitioner and the Board employees because it was not relevant to the determination of whether the petitioner achieved tenure. Although the evidence may not be relevant to whether the petitioner satisfied the strict timeframes in *N.J.S.A. 18A:28-5*, the Commissioner finds that those communications are relevant to a determination as to whether the requirements in *N.J.S.A. 18A:28-5* should be relaxed under the circumstances in this case. It should be noted that the Board did not seek interlocutory review of the March 18, 2008 letter order.



ALJ's determination that the Board's granting to the petitioner a leave of absence for the entire school year should be deemed a continuation of her employment.<sup>3</sup> Additionally, the Commissioner finds that the exception for the relaxation of the service requirements established by *Kletzkin, supra*, does not apply to the circumstances in this case.

Accordingly, the recommended decision of the ALJ is rejected. The petitioner did not have any tenure rights with the Southern Regional High School District at the time of her non-renewal in 2007. Therefore, it is not necessary to explore the issues of seniority and back pay.

IT IS SO ORDERED.<sup>4</sup>

ACTING COMMISSIONER OF EDUCATION

Date of Decision: May 16, 2013

Date of Mailing: May 16, 2013

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<sup>3</sup> The Commissioner is not persuaded that the case of *Billi v. Board of Educ. of the Township of Holmdel*, Commissioner Decision No. 179-08, decided April 18, 2008 – cited in the petitioner's exceptions – is controlling in this case. The circumstances in that matter involved a settlement agreement between the parties that is not present here. Moreover, the decision to make an exception to the strict requirements of *N.J.S.A. 18A:28-5* is made on a case-by-case basis.

<sup>4</sup> 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.