

RAYMOND RUIZ, :
PETITIONER, :
V. : COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE : DECISION
BOROUGH OF FORT LEE, :
BERGEN COUNTY, :
RESPONDENT. :

SYNOPSIS

Petitioner, whose position as a substance awareness counselor (SAC) was eliminated in a reduction in force (RIF) at the end of the 2009-2010 school year, asserts that the respondent Board improperly terminated his employment in violation of his tenure rights by failing to re-employ him in one of two school psychologist positions held by non-tenured staff members. At the time of his hire in September 2006, petitioner held a Certificate of Eligibility (CE) which allowed him to seek provisional employment as a SAC. He served for four years under that provisional certification. Petitioner had also earned an educational services certificate with a standard endorsement as a School Psychologist, but had not served in that capacity in respondent's district. The Board contends that petitioner never earned tenure in its district.

The ALJ found, *inter alia*, that: the threshold issue in this case is whether the petitioner earned tenure as a teaching staff member in accordance with *N.J.S.A. 18A:28-5*; to earn tenure, an employee must work for at least three consecutive years and hold a "proper certificate in full force and effect"; petitioner worked for more than three years as a SAC, but held only a provisional certificate, which is not a "proper certificate" for the position; petitioner's failure to earn a standard certificate as a SAC is fatal to his tenure claims; accordingly, the petitioner was not employed under tenure at the time of his reduction in force; and it is not necessary to reach petitioner's remaining argument that his rights extend to all endorsements on his educational services certificate and that he is entitled to the positions held by non-tenured school psychologists by virtue of his tenure status. The ALJ denied petitioner's appeal and dismissed the case.

Upon a thorough and independent review of the record, the Commissioner remanded the matter to the OAL for factual findings concerning whether or not petitioner satisfied the conditions of provisional certification and the requirements for standard certification. More specifically, the Commissioner found that although prior case law – *i.e.*, *Anson v. Bridgeton Bd. of Ed.*, 1972 *S.L.D.* 638 – held that service under provisional certification might count toward tenure, such tenure was contingent upon the employee's satisfaction of the conditional requirements of that provisional certification. As regards that issue, the record before the Commissioner was inconclusive.

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.

August 17, 2011

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This controversy requires an examination of whether petitioner has achieved tenure in respondent's district, which tenure would give him the right to positions held by non-tenured district employees. After review of the Initial Decision of the Office of Administrative Law (OAL) and the record,¹ the Commissioner remands the case to the OAL for further factual findings as discussed *infra*.

Petitioner possesses a standard Educational Services certificate with a School Psychologist endorsement. (Joint Exhibit J-10) Having also been issued a Certificate of Eligibility (CE) to seek employment as a Substance Awareness Coordinator (SAC), Joint Exhibit J-5,² petitioner applied for and was accepted to fill such a position in respondent's district,

¹ It was determined by the Administrative Law Judge (ALJ) and parties on January 10, 2011 that this matter was appropriate for summary decision in lieu of a plenary hearing.

² The CE states that "[t]he Provisional Certificate will be issued contingent upon evidence of employment in a district that agrees to provide an approved induction program, including required job support, performance evaluation and professional coursework." (J-5.)

effective September 1, 2006. (The credential for Substance Awareness Coordinator is also an endorsement on the educational services certificate.)³

In June of 2007, respondent and petitioner executed a New Jersey Department of Education (Department) form entitled “Substance Awareness Coordinator Residency Agreement” (Residency Agreement) wherein respondent consented to provide petitioner with supervised professional experiences and professional guidance and evaluation for six months. (Joint Exhibit J-6) In consideration of this commitment by respondent, the Department agreed, *inter alia*, to issue petitioner a provisional license valid for one year – beginning September 1, 2006. (*Ibid.*)⁴

The Commissioner assumes that the Residency Agreement was, belatedly, executed in connection with *N.J.A.C.* 6A:9-13.2(e). That regulation mandates that a district which hires an individual with a certificate of eligibility for a SAC endorsement must 1) apply for a provisional certificate for that employee and 2) see to it that he or she receives instruction, mentoring and evaluations via a State-approved training or residency program. The Commissioner notes, however, that Joint Exhibit J-6 does not contain the required “State Approval Signature.” Nor is there any evidence in the record that a provisional certificate was actually secured for petitioner during the 2006-2007 school year. Joint Exhibits J-8 and J-9 indicate that the original issue date for petitioner’s provisional certificate was August 2007 – at which time petitioner had already worked in the SAC position for a year.

Notwithstanding the absence of the signature of a Department representative on the Residency Agreement, the record suggests that respondent provided petitioner with a

³ Petitioner’s employment in the SAC position continued through the 2009-2010 school year. (Joint Exhibits J-1, J- 2, J-3 and J-4)

⁴ It would appear that the form used for Joint Exhibit J-6 may have been out-of-date. More specifically, beginning in 2004, provisional certificates were issued for two-year terms.

residency program. The individual assigned to supervise the program submitted a favorable evaluation of petitioner on October 9, 2007. The evaluation included 1) an express statement that petitioner's residency program had been completed and 2) a recommendation that petitioner be issued a license. (Joint Exhibit J-7) The Commissioner notes that the date of October 9, 2007 is less than six months after the date of the parties' signatures on the Residency Agreement (Joint Exhibit J-6), suggesting that the residency program may have begun before the date of the partially executed Residency Agreement.

It appears that the Department did not accept respondent's October 2007 recommendation for petitioner's licensure as a SAC. Joint Exhibit J-8 denotes that in December of 2009 respondent applied for a renewal of petitioner's provisional certificate, and Joint Exhibit J-9 confirms that such a renewal was issued in August 2009, with expiration in July 2011. Insofar as provisional certificates may only be renewed for one two-year term, *N.J.A.C. 6A:9-6.2*, it appears that petitioner's provisional certification in respondent's district has now expired.⁵

The instant petition was filed in the wake of respondent's April 28, 2010 notice to petitioner that due to a reduction in force he would not be rehired for the 2010-2011 school year. Petitioner asserts that in consequence of his four years of service under a provisional certificate in the SAC position he earned tenure in respondent's district. He further maintains that, pursuant to *Dennery v. Board of Education of the Passaic County Regional High School District #1*, 131 *N.J.* 626 (1993), his tenure rights extend to the standard endorsement for school psychologist that he holds on his educational services certificate. Relying on his contention that he holds such extended tenure rights, he reasons that in 2010 he was entitled to one of two school psychologist

⁵ The Commissioner takes official notice that in 2010 petitioner applied to the New Jersey State Board of Examiners for a standard SAC certificate, but was denied same due to a coursework deficit. *In the Matter of the Application of Raymond Ruiz*, State Board of Examiners (June 10, 2010).

positions in respondent's district that had been held – for one year and one and one half years, respectively – by non-tenured employees Reina Sandouk and Pamela Rothman.⁶

In its answer to the petition respondent admitted that petitioner held provisional certification as a SAC during his employment in respondent's district, Respondent's Answer, Para. 2, but maintained that petitioner did not achieve tenure because provisional certification is not "proper" for purposes of *N.J.S.A.* 18A:28-5. In its summary decision brief and reply exceptions respondent inexplicably changed its position, claiming that petitioner held provisional certification only during his fourth year of service, that during the first three years of petitioner's employment he held only a certificate of eligibility, that a certificate of eligibility is a substandard credential, and that petitioner consequently did not achieve tenure. In the alternative, respondent argued that the required amount of time served under provisional certification cannot accomplish tenure unless the employee subsequently attains standard certification in the same position. For this proposition, respondent relies on *N.J.A.C.* 6A:32-5.1(e), a regulatory provision outlining standards for seniority, which provision primarily addresses holders of emergency certificates but also states:

Upon acquisition of a standard certificate, any periods of service under a provisional certificate shall also be counted toward seniority. (Emphasis added.)

At the outset, the Commissioner reminds respondent that the responsibility for securing provisional certification for a novice professional lies with the school district that hires the staff member. The teaching staff member has some responsibility for ensuring that he is properly certificated, but he or she may not obtain provisional certification for him or herself. In this matter, it appears that the district was delinquent in its duty to apply for petitioner's

⁶ An order allowing Reina Sandouk, the holder of one of the school psychologist positions, to intervene in this matter was issued on November 23, 2010.

provisional certificate. More specifically, the district's application for same is dated June 6, 2007, requesting an effective date of September 2006. Consequently, respondent is estopped from arguing that petitioner's time teaching under a provisional certificate was less than that required by *N.J.S.A. 18A:28-5*. Petitioner is deemed to have worked under a provisional certificate for the four years during which he served respondent in the SAC position.

Second, the Commissioner cannot, without more, rely on *N.J.A.C. 6A:32-5.1(e)* – a regulatory provision outlining standards for seniority – in determining whether petitioner achieved tenure.

Third, as petitioner points out, there is language in some past decisions that suggests that the "proper certificate" which *N.J.S.A. 18A:28-5* requires a teacher to hold when claiming tenure may be either a standard certificate or a provisional certificate. *See, e.g., Breitweiser v. State Operated School Dist. of City of Jersey City, Hudson County*, 286 *N.J. Super.* 633, 639-40 (App. Div. 1996); *Anson, et al., v. Bridgeton Bd. of Ed.*, 1972 *S.L.D.* 638.⁷

Thus, the central question in this controversy is whether petitioner earned tenure in the district under his provisional certificate. The Commissioner is constrained to conclude that the answer to that question cannot be definitively ascertained from the record at hand.

Of the cases cited by the parties, only one, *Anson, et al., v. Bridgeton Board of Education, supra*, provides a holding – as opposed to *dictum* – that tenure can be achieved by service under a provisional certificate for the period of time set forth in *N.J.S.A. 18A:28-5*. In *Anson*, the Commissioner found that one of the petitioners, John L. Henderson – who had taught in the respondent's district for over three consecutive years under provisional certificates – had

⁷ Respondent urges that the holding in *Anson* should be discounted because it was issued before certain reforms to licensure requirements in the 1980's. Insofar as respondent has not identified specific changes that might be germane to the present controversy, the Commissioner declines to regard *Anson's* holding as obsolete or in any way superceded.

achieved tenure. This finding, however, was based upon the Commissioner's determination that Henderson had satisfied the conditional requirements of his provisional certificate:

The holder of a provisional teaching certificate accepts a conditional requirement of earning four academic credits per year, and the validity of a provisional certificate cannot be questioned as it relates to tenure, **so long as this requirement is met.**

Anson, supra, at 638. (Emphasis added.)

This determination is in keeping with *N.J.A.C.* 6A:9-6.1, which instructs that a standard certificate – the only permanent certificate – is issued only to candidates who have met **all requirements** for state certification. And as the Administrative Law Judge (ALJ) noted below, revision of the laws concerning provisional certification has, if anything, imposed more requirements upon novice teachers, resulting in even less certainty that a candidate with provisional certification will earn a standard SAC endorsement.

With this framework in mind, the present record leaves unresolved the question of whether petitioner satisfied all of the conditional requirements of his provisional certification. The determination of the New Jersey State Board of Examiners in *In the Matter of the Application of Raymond Ruiz, supra*, suggests that one or more requirements may not, in fact, have been met.

Further, in considering whether the record supports the conclusion that petitioner earned tenure in respondent's district, the Commissioner found the discussions in *Breitweiser v. State Operated School Dist. of City of Jersey City, supra*, and *Emily Kubas v. Board of Education of the City of Linden*, 1980 *S.L.D.* 172 (Comm'r of Ed.) to be of some value. In *Kubas v. Board of Education of the City of Linden, supra*, a cosmetology teacher was dismissed after three and one half years of service under an emergency certificate. It was not until after her dismissal that she received standard certification. In determining that three-and-one half years of

teaching under an emergency certificate did not meet the requirements for tenure, the Commissioner reasoned:

[H]olders of emergency certificates have not satisfied the educational prerequisites for standard certification, nor are they entitled to automatic renewal of the privilege to teach accorded them by the emergency certification process. Because of the uncertainty surrounding continued eligibility to teach, the protection of the tenure laws was not intended to extend to holders of substandard certificates and has not been so extended. *Id.* at 179.

In *Breitweiser v. State Operated School Dist. of City of Jersey City*, *supra*, the petitioner claimed tenure based upon years of service under a standard certificate, supplemented by time previously served under an emergency certificate. The Appellate Division ultimately rejected petitioner's tenure claim, stating:

[S]ervice under an emergency certificate may be counted towards the service needed for tenure only when that service is followed by the teacher ultimately obtaining a permanent certificate in the same field as the emergency certificate. *Id.* at 644.

The Appellate Panel's explanation for this rule was articulated as follows:

The rule we derive from *Delli Santi* and the *K'Burg* cases is quite logical. During service under an emergency certificate, there is no way to be sure that a person will be rehired the next year, let alone receive standard certification in the field. *Id.* at 645.

And further:

A district may hope that an emergency teacher proves to be qualified rather than merely legally employable. The district may even expect or bank on the likelihood that an emergency teacher will become qualified. An emergency teacher's failure to earn the standard certificate in the emergency discipline, however, indicates that the teacher never became qualified to teach in that area and that the district's hope or expectation of the teacher's progress was not fulfilled. Under such circumstances we consider it consistent with a fair-minded construction of the teacher-tenure law to

conclude that such a teacher's emergency service was not under an "appropriate certificate" for purposes of the tenure statute.

....

By contrast, [a] teacher's acquisition of a standard certificate in the field of emergency service vindicates to a large extent whatever expectation the district had about the emergency teacher's progress towards certification. *Id.* at 646-47.

The Commissioner is mindful that Breitweiser and Kubas taught under emergency certificates, as opposed to the provisional certification for which petitioner Ruiz was eligible. However, the analysis of the issues set forth in those cases is consonant with the holding in *Anson* that Henderson's tenure was conditioned not just upon his years of service under provisional certification, but also upon his timely completion of the academic and professional requirements for standard certification. In the Commissioner's view, that analysis is appropriately applied here.

While holding provisional certification, petitioner appears to have completed some of the regulatory requirements, but it is uncertain whether he satisfied all. As the Appellate Division noted in *Breitweiser*, under such circumstances there is no way to be sure that such a candidate will ultimately receive standard certification in the field. *Id.* at 645. And the ALJ, in her Initial Decision, similarly observed that

[t]he provisional certificate held by Ruiz is analogous to the emergency certificate held by Breitwieser because it has no permanency; carries with it uncertainty surrounding continued eligibility to serve in a professional capacity in a public school; and its holder has not fully satisfied current requirements for standard certification. (Initial Decision at 8.)

Indeed, in the present case it appears that petitioner never received standard SAC certification, suggesting – in concert with the above-cited Board of Examiners decision – that he

may not have undertaken all of the program elements that are required of provisional employees. Under such circumstances the Appellate Division considered it “consistent with a fair-minded construction of the teacher-tenure law” to conclude that such service should not beget tenure. *Breitweiser, supra*, at 646.

It is clear from the statutory and decisional authority discussed *supra* that the purpose of provisional certification is to provide a novice professional with a reasonable amount of time to complete the requirements for standard certification. The Commissioner cannot find, on the record before him, that petitioner utilized his provisional period to accomplish that goal. Thus, it cannot be concluded that petitioner met the standard for tenure that was set forth in *Anson*, the case most apposite to the instant matter. Until such findings and conclusions are made, the question of whether petitioner earned tenure in respondent’s district – and had rights superior to the untenured school psychologists identified in his petition – cannot be answered.

This case is therefore remanded to the OAL for factual findings concerning petitioner’s satisfaction, *vel non*, of the conditions of provisional certification and the requirements for standard certification.

IT IS SO ORDERED.⁸

ACTING COMMISSIONER OF EDUCATION

Date of Decision: August 17, 2011

Date of Mailing: August 18, 2011

⁸ This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36. (*N.J.S.A.* 18A:6-9.1)