

#181-13 (OAL Decision: Not yet available online)

EL RIKR VALENTINO, :
PETITIONER, : COMMISSIONER OF EDUCATION
V. : DECISION
BOARD OF EDUCATION OF THE CITY :
OF CAMDEN, CAMDEN COUNTY :
_____ :

SYNOPSIS

Petitioner filed an appeal of the Board’s determination to demote him from principal to vice principal, contending that he was tenured in his principal position and that the demotion was improper. The petitioner sought reinstatement to the position of principal. The Board asserted that petitioner had not yet earned tenure in the principal position because of a period of suspension which did not count toward petitioner’s tenure service calculation. The petitioner was suspended in March 2010 based on allegations which were later determined to be unfounded in a Division of Youth and Family Services (DYFS) report. The Board reappointed the petitioner in April 2010, during his suspension, to the position of principal for the 2010-2011 school year. The parties jointly stipulated to the facts and filed motions for summary decision.

The ALJ found, *inter alia*, that: petitioner was a calendar year employee who actively served in the position of principal from September 1, 2008 until his paid suspension in March 2010; after the imposition of that suspension, petitioner was reappointed by the Board – in April 2010 – to the position of principal for the 2010-2011 school year; in the normal course of events, petitioner would have accrued tenure in the position of principal, pursuant to *N.J.S.A. 18A:28-6(a)*, on September 2, 2010; whether a teaching staff member may acquire tenure despite a suspension depends on whether he was an “employee” during the suspension and whether, despite the suspension, the Board had enough time to evaluate him during his probationary period; case law supports the conclusion that a teacher on a leave of absence remains an “employee” for the purposes of *N.J.S.A. 18A:28-5*; there is an absence of case law on the issue of whether a teaching staff member may accrue tenure during a suspension, but court decisions in other contexts support a finding that a suspended teacher, like a teacher on leave, remains an employee; the record shows that the petitioner was formally evaluated during the period he held the principal position, in June 2009 and in December 2009; neither of those evaluations showed serious concerns over petitioner’s performance; documents submitted by the Board purportedly relating to petitioner’s job performance as principal in 2011 – after his return from suspension – are not relevant to a determination of whether petitioner attained tenure on September 2, 2010; if the Board had terminated petitioner’s contract as principal at the end of the 2009-2010 school year and demoted him to vice principal, there would be no argument that petitioner would not have met the time requirements for tenure as a principal; instead, however, the Board renewed petitioner’s contract even after his suspension; accordingly, on the presumptive date of his tenure – September 2, 2010 – petitioner had been retained as a principal for the 2010-2011 school year and the Board had taken no action to demote or remove him by that date. The ALJ concluded that the petitioner had acquired tenure in the position of principal, and granted petitioner’s motion for summary decision.

Upon comprehensive review, the Commissioner agreed with the ALJ that under the circumstances of this case, the period of petitioner’s suspension may be counted toward the accrual of tenure. Accordingly, the Commissioner granted petitioner’s motion for summary decision and ordered the Board to restore petitioner to the position of principal with back pay and emoluments.

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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Before the Commissioner is a case of first impression, addressing whether the duration of an employee’s suspension with pay should be counted, *vel non*, in determining whether the employee has achieved tenure in a position. Upon review of the record, the Initial Decision of the Office of Administrative Law (OAL) and the parties’ exceptions and replies thereto, the Commissioner concludes that – under the circumstances of this case and for the reasons articulated by the Administrative Law Judge (ALJ) – the time during which petitioner was suspended with pay should count toward his tenure as a principal in respondent’s district.

In the Initial Decision, the ALJ discussed precedential cases in which the Supreme Court and the Commissioner of Education have held that a teaching staff member may acquire tenure even if – due to a leave of absence – he or she does not actively serve for the requisite statutory period.¹ *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*,

¹ The applicable period in this case is two years plus one day because petitioner had already achieved tenure in respondent’s district as a vice principal and was working toward tenure in the position of Principal – to which he had been promoted. *See, N.J.S.A. 18A:28-6(c)*.

Commissioner Decision No. 275-09, decided September 8, 2009. Thus, acquisition of tenure may be based upon a period of employment as opposed to active service. *See, Mendez-Azzollini, supra*, at 6.

But while a teaching staff member who performs services under a contract for the year is ‘employed’ for the purposes of the tenure statute, even if he or she takes involuntary leave, *see, Kletzkin, supra*, at 279, the cases instruct that tenure will not be achieved if the periods of leave deprive the school board of an adequate opportunity to evaluate the staff member. *See, e.g. Jarmond, supra*, at 3.

Respondent excepts to the Initial Decision on two fronts. First, it challenges the ALJ’s determination that petitioner’s suspensions did not prevent it from properly evaluating petitioner’s performance. Second, it contends that the principles articulated in *Kletzkin et al.* apply only where medical, family, or personal leaves of absence are taken. In support of its position it points out that the Commissioner has never applied those principles to cases where an employee’s absence was due to a paid suspension pending an investigation of alleged wrongdoing.

As to the first of respondent’s arguments, the Commissioner finds that the record supports the ALJ’s determination that petitioner’s suspensions did not interfere with respondent’s ability to evaluate him. More specifically, respondent had had almost nineteen months to evaluate petitioner before the onset of the first suspension. It executed one out of three of the recommended evaluations for petitioner’s first probationary year (2008-2009), which evaluation was positive.² It reappointed petitioner as Principal for the 2009-2010 school year and completed another evaluation of petitioner in December of 2009, which was positive. Four

² Respondent’s failure to carry out the recommended three evaluations could create the inference that it did not have pressing concerns about petitioner’s performance.

months after the second positive evaluation, respondent decided to re-appoint petitioner as Principal for a third year – notwithstanding that petitioner had been suspended a month prior to the reappointment. And when petitioner’s first suspension ended, he was returned to the position of Principal.

In light of the foregoing, the Commissioner finds no reason in the record to reject the ALJ’s conclusion that respondent had conducted the number of evaluations which it had deemed necessary to assess whether petitioner should be retained as a principal. Further, respondent’s current claim that it had insufficient opportunity to evaluate petitioner is incongruous with its two reappointments of petitioner to the position of principal.

It remains, then, to address respondent’s contention that the *Kletzkin* principles cannot apply in assessing the tenure eligibility of an employee whose active service was interrupted by a suspension. To this end, the Commissioner finds the ALJ’s analysis to be apt:

While there is an absence of case law contemplating whether a teaching staff member may accrue tenure during a suspension, the same factors critical to the conclusions in *Kletzkin*, *Mendez-Azzollini*, and *Jarmond* regarding leaves of absence may be applied to suspensions. Thus, whether a teaching staff member may acquire tenure despite a suspension depends on whether he or she was an “employee” during the suspension and whether, despite the suspension, the school board had enough time to evaluate the teaching staff member during the probationary period.

The conclusion that a teacher remains an employee during a suspension is supported by the Court’s employment analysis in *Kletzkin* and by court decisions in other contexts. First, in concluding that a teacher remains an “employee” during a leave of absence, the Court in *Kletzkin* relied in part on the plain meaning of “employment” under the tenure laws and [in part] on the language of the statute under which *Kletzkin* took leave. As the Court in *Kletzkin* explained, under a plain understanding of “employment” under the tenure laws, “[a] teacher’s employment begins with the actual performance of service,” [136 *N.J.* at 279,] continuous employment exists despite 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.” [*Ibid.*] (Initial Decision at 8-9)

A leave of absence is different from a suspension in certain respects - a leave of absence may be voluntary or involuntary and may be taken for any number of non-disciplinary reasons, while a suspension is disciplinary in nature. However, during both a leave of absence and a suspension a person temporarily ceases performance of the duties for which he or she was hired, but still may receive a salary, and the expectation is that a person will resume duties at the conclusion of the leave or suspension. In addition, a leave of absence and a suspension can last for short, intermediate, or long periods. Thus, it is not unreasonable to conclude that, under the plain meaning of “employment” as set forth in *Kletzkin*, a teacher remains employed during the period of suspension if he or she performed services under a contract for the year in which suspended. (Initial Decision at 9)

[In addition,] several education law provisions governing suspensions indicate that a suspended teacher remains an employee while on suspension.⁽⁶⁾ Under the Tenure Employees Hearing Law, a teacher against whom a tenure charge is dismissed but who remains on suspension during an appeal, is entitled to full pay during the length of the appeal less “any sums received by such employee” from substitute employment during the suspension. *N.J.S.A.* 18A:6-14 (Emphasis added). (*Ibid.*)

⁽⁶⁾ The provision under which Valentino was presumably suspended, *N.J.S.A.* 18A:25-6, does not provide insight into this question.

But respondent attempts to differentiate suspensions by characterizing them as indefinite absences pending investigations into alleged misconduct – without any expectations that the suspended employees will ultimately resume their duties. Respondent urges that school boards must not be required to make decisions about contract renewals and tenure until such investigations are completed and suspensions are lifted. To that end, argues respondent, periods of suspension must not count toward tenure. (Respondent’s Exceptions at 3) Respondent further posits that suspensions are distinguishable from leaves of absence because 1) suspensions, unlike leaves, are due to employees’ own actions and 2) disciplinary suspensions are not part of the ordinary employment relationship contemplated by the tenure statute. (*Ibid.*)

In addressing this aspect of respondent’s exceptions the Commissioner reiterates that his determinations in the instant controversy are based upon the application of appropriate

legal principles to the facts particular to this case. That being said, the Commissioner must reject respondent's second category of exceptions.

First, the Commissioner is not persuaded by respondent's suggestion that suspensions do not generate any expectations that suspended employees will ultimately resume their duties. Such a notion is inconsistent with the societal values of fairness and due process. A suspension is neither a finding of liability nor a conviction. It is thus misguided to distinguish between suspensions and leaves by asserting that no expectation exists that the issues underlying a suspension will resolve in favor of the employee – resulting in his or her resumption of active service. Indeed, in the instant controversy petitioner did not admit to the charges against him; the municipal charges were dismissed with prejudice; the Division of Youth and Family Services investigation did not support a finding of abuse; and petitioner was returned to his duties as a principal. Whatever may or may not have happened between petitioner and the student who complained about him, there is no support in the record for the Commissioner to penalize petitioner by disallowing his suspension as time accrued toward tenure.

Second, respondent's general argument – that since school districts need to be able to consider the results of investigations before reappointing suspended employees, the period of suspension should not be counted toward tenure – has no applicability to the present case. Respondent knew on April 27, 2010 that petitioner was suspended, but renewed petitioner's contract nonetheless. If respondent had had serious concerns about petitioner's fitness to be a principal, it could have delayed the (principal) tenure decision by appointing petitioner to a vice principal position – since petitioner was already a tenured vice principal in respondent's district.

Respondent's other contentions have little merit. The notion that suspensions are distinguishable from leaves because they flow from employees' own actions ignores the fact that while some leaves of absence flow from injury or illness, others are the result of choices made by employees. And respondent offers no authority for its assertion that suspensions pending investigations of alleged misconduct are not part of the ordinary employment relationship contemplated by the tenure statute.

In summary, the Commissioner agrees with the ALJ that under the circumstances of the present case, the period of petitioner's suspension may be counted toward the accrual of tenure. Thus, petitioner's motion for summary disposition is granted. Petitioner shall be restored to the position of principal with back pay and emoluments.

IT IS SO ORDERED.³

COMMISSIONER OF EDUCATION

Date of Decision: May 16, 2013

Date of Mailing: May 17, 2013

³ 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*).