

EDU #5877-02
C # 646-03
SB # 1-04

KATHLEEN DONVITO, :
 :
 PETITIONER-RESPONDENT, :
 :
 V. :
 :
 BOARD OF EDUCATION OF THE : STATE BOARD OF EDUCATION
 NORTHERN VALLEY REGIONAL :
 HIGH SCHOOL DISTRICT, BERGEN : DECISION
 COUNTY, :
 :
 RESPONDENT-APPELLANT, :
 :
 AND :
 :
 LOUISE RYAN, :
 :
 INTERVENOR. :
 _____ :

Decided by the Commissioner of Education, December 4, 2003

Decision on motion by the Commissioner of Education, February 4, 2004

Decided by the State Board of Education, March 3, 2004

Decision on motion by the State Board of Education, April 7, 2004

Decision on motion by the State Board of Education, May 5, 2004

For the Petitioner-Respondent, Bucceri and Pincus (Louis P. Bucceri,
Esq., of Counsel)

For the Respondent-Appellant, Sills, Cummis, Radin, Tischman, Epstein
and Gross (Cherie L. Adams, Esq., of Counsel)

For the Intervenor, Springstead & Maurice (Harold N. Springstead, Esq.,
of Counsel)

For the Amicus Curiae Somerset County Educational Services
Commission, Schwartz, Simon, Edelstein, Celso & Kessler, L.L.P.
(Nicholas Celso, III, Esq., of Counsel)

Kathleen Donvito (hereinafter “petitioner”) filed a petition with the Commissioner alleging that the Northern Valley Regional High School Board of Education (hereinafter “Board”) had violated her tenure and/or seniority rights when, following her service as a full-time Special Education Teacher in the 2000-01 and 2001-02 school years, it did not renew her employment for the 2002-03 school year. The Board countered that the petitioner had not achieved tenure in the district. As stipulated by the parties, the petitioner had served as a Home Instructor for five months during the 1996-1997 academic year and for nine months during the 1997-1998 academic year. During the 1998-1999 academic year, she served as a Home Instructor and HSPT/SRA Tutor, and during the 1999-2000 academic year, she served as a Home Instructor, 2/5 Special Education Teacher, and SRA Tutor. The parties stipulated that:

Home Instructors are paid on an hourly wage basis, without contract and without benefits. Duties included providing instruction for those students who were unable to attend classes in school because of physical illness or other reasons. Home Instructors taught course content based upon the program requirements for graduation. Home instructors work at times that varies depending upon the number of students needing services. Since a student's absence is usually unpredictable home instruction assignments are usually made with minimal advance notice....

Stipulation of Facts, at 2.

It was further stipulated that the Board had employed full-time non-tenured teachers in assignments within the scope of the petitioner’s certification for the 2002-03 school year. Louise Ryan, the intervenor herein, was one of those non-tenured teachers.

The parties filed cross-motions for summary decision. Resolution of the matter turned on whether the petitioner's service as a Home Instructor counted towards the acquisition of tenure.

On July 22, 2003, an administrative law judge ("ALJ") recommended granting summary decision to the Board and the intervenor and dismissing the petition. Citing Hyman et al. v. Board of Education of the Township of Teaneck, decided by the Commissioner of Education, 1983 S.L.D. 699, rev'd on other grounds by the State Board of Education, 1985 S.L.D. 1940, aff'd, Docket #A-3508-84T7 (App. Div. 1986), certif. denied, 104 N.J. 469 (1986), in which the Commissioner determined that Home Instructors were not teaching staff members eligible for tenure, the ALJ concluded that the petitioner's employment as a Home Instructor could not be counted towards the accrual of tenure. As a result, the petitioner had not achieved tenure in the district.

On December 4, 2003, the Commissioner rejected the ALJ's recommended decision. Finding that there were no genuine issues of material fact, the Commissioner concluded that the petitioner was entitled to prevail as a matter of law. The Commissioner concluded that, in light of the New Jersey Supreme Court's decision in Spiewak v. Rutherford Bd. of Ed., 90 N.J. 63 (1982), as well as the subsequent decisions in Sayreville Educ. Ass'n v. Board of Educ., Etc., 193 N.J. Super. 424 (App. Div. 1984) and Lammers v. Bd. of Educ., 134 N.J. 264, the only applicable exception to the Tenure Act relating to tenure accrual by teachers, N.J.S.A. 18A:16-1.1,¹ did not

¹ N.J.S.A. 18A:16-1.1 provides:

In each district the board of education may designate some person to act in place of any officer or employee during the absence, disability or disqualification of any such officer or employee subject to the provisions of section 18A:17-13.

apply to teachers serving as Home Instructors. Stressing that he lacked the authority to create exceptions to the tenure law, the Commissioner found the petitioner's service as a Home Instructor to be tenure-eligible. In so doing, the Commissioner observed that the petitioner held instructional certification and that Home Instructor was a position requiring valid certification. N.J.A.C. 6A:16-9.2(b)2; N.J.A.C. 6A:14-4.9(a)(4). Thus, the Commissioner concluded that the petitioner had achieved tenure, pursuant to N.J.S.A. 18A:28-5(c), by virtue of her service in the district for the equivalent of more than three academic years within four consecutive academic years. Since the Board had employed 22 non-tenured teaching staff members in the 2002-03 school year in positions within the scope of petitioner's certification, the Commissioner concluded that the Board had violated the petitioner's tenure rights when it failed to appoint her to one of the positions held by a non-tenured individual. Accordingly, he granted the petitioner's motion for summary decision and directed the Board to reinstate her with back pay and benefits to a full-time position held by any non-tenured or less senior teacher employed within the scope of the petitioner's certification.

On December 31, 2003, the Board filed the instant appeal to the State Board, contending that the Commissioner erred in concluding that Home Instructors are eligible for tenure. On January 14, 2004, the intervenor filed a notice of appeal joining in the appeal filed by the Board. On February 4, 2004, the Commissioner denied the Board's motion for a stay of his decision. On March 3, 2004, the State Board dismissed the

The act of any person so designated shall in all cases be legal and binding as if done and performed by the officer or employee for whom such designated person is acting but no person so acting shall acquire tenure in the office or employment in which he acts pursuant to this section when so acting.

intervenor's appeal for failure to file notice thereof within the statutory time limit. On April 7, 2004, the State Board denied the Board's motion for a stay of the Commissioner's decision, and on May 5, 2004, the State Board granted a motion for leave to appear as amicus curiae filed by the Somerset County Educational Services Commission.

After a thorough review of the record, including the papers filed on appeal, we reverse the decision of the Commissioner.

In Spiewak, supra, the Court held that a Title 1 teacher was eligible for tenure unless he or she came within the explicit exceptions of N.J.S.A. 18A:28-5 or related statutes such as N.J.S.A. 18A:16-1.1. As previously noted, N.J.S.A. 18A:16-1.1 provides that an individual acting in the place of an officer or employee during the absence, disability or disqualification of such officer or employee shall not acquire tenure in the office or employment in which he or she so acts. In Hyman, supra, which was decided after Spiewak, the Commissioner determined that Home Instructors are not teaching staff members and, consequently, that employment in such capacity does not accrue towards the acquisition of tenure.²

As did the Commissioner in Hyman, we find that service as a Home Instructor does not accrue towards the acquisition of tenure. While employment as a Home Instructor is such that an individual must possess appropriate certification in order to serve in that capacity, a Home Instructor is acting in the place of a student's regular classroom teacher when he or she provides instruction in a student's home as a result of the student's absence from school. Since Home Instructors are acting in the place of

² We note that, although Hyman was appealed to the State Board and the Appellate Division, the issue of the tenure eligibility of Home Instructors was not argued on appeal or addressed in the decisions.

classroom teachers, they fall within the exception set forth in N.J.S.A. 18A:16-1.1 and cannot acquire tenure on the basis of such employment notwithstanding that it is of such character as to require possession of appropriate certification.

This determination is consistent with sound educational policy. Home Instructors are not regularly employed and, in contrast to classroom teachers, provide instruction to students on a one-to-one basis, often for only a few hours a day. They are not evaluated, and conferring tenure on the basis of such service would deprive boards of education of the ability to evaluate such employees so as to ensure the educational quality of the instructional services to be provided.

Moreover, Home Instructors are not steadily employed, serving instead on an “as needed” basis. Their employment is temporary, intermittent and sporadic, rather than continuous and consecutive as contemplated by N.J.S.A. 18A:28-5.

Accordingly, for the reasons expressed herein, we conclude that Home Instructors fall within the statutory exception created by N.J.S.A. 18A:16-1.1, and, consequently, that the petitioner’s employment as a Home Instructor did not count towards the accrual of tenure. Thus, she did not achieve tenure in the district. We therefore reverse the decision of the Commissioner and dismiss the petition.

Margaret F. Bartlett, Arnold G. Hyndman, Maud Dahme, Kathleen Dietz, Anne S. Dillman, John A. Griffith, and Edward M. Taylor join in the opinion of the State Board.

Attorney exceptions are noted.³

June 1, 2005

Date of mailing _____

³ We note that we considered all of the exceptions filed in response to the report of our Legal Committee in reviewing this matter.

Debra Casha, Ronald K. Butcher, and Josephine E. Figueras dissenting:

Although we acknowledge the concerns of our colleagues on the State Board with respect to the policy implications of finding home instructors to be eligible for tenure, we respectfully dissent from the State Board's decision. We believe that, under the statutory scheme and applicable case law, we have no choice but to conclude that home instructors are teaching staff members who are eligible for tenure under N.J.S.A. 18A:28-5. As a result, we agree with the Commissioner for the reasons expressed in his decision that the petitioner in this case achieved tenure in the district as a result of her service as a home instructor, and we would affirm the Commissioner's decision directing the Northern Valley Regional Board to reinstate her.

The language of N.J.S.A. 18A:28-5 is clear and unambiguous in granting tenure to teaching staff members who satisfy the precise statutory conditions. In Spiewak v. Rutherford Bd. of Ed., 90 N.J. 63 (1982), the New Jersey Supreme Court held that all teaching staff members who are employed in positions for which a certificate is required, who hold valid certificates, and who have worked for the requisite period of time, are eligible for tenure unless they come within the explicit exceptions in N.J.S.A. 18A:28-5 or related statutes such as N.J.S.A. 18A:16-1.1. 18A:16-1.1 provides that any person acting in place of an employee during the absence, disability or disqualification of that employee shall not acquire tenure in the employment in which he is acting. Since the remedial and supplemental teachers in Spiewak fell within the express terms of N.J.S.A. 18A:28-5, the Court found that they were eligible for tenure unless a statutory exception applied. Finding no relevant exception, the Court found no evidence of legislative intent to exclude remedial and supplemental teachers from the express language of N.J.S.A. 18A:28-5, and it concluded that they were eligible for tenure. In so

doing, the Court specifically rejected the Appellate Division's holding in Point Pleasant Beach Teachers' Ass'n v. Callam, 173 N.J. Super. 11 (App. Div. 1980), certif. den., 84 N.J. 469 (1980), in which the Court concluded that teachers who accepted employment on a temporary or as-needed basis were not teaching staff members who were protected by the tenure provisions of N.J.S.A. 18A:28-5.

Pursuant to our regulations, teachers who provide home instruction are required to hold appropriate certification in the subject area or grade level in which the instruction is provided. N.J.A.C. 6A:16-9.2. Thus, like the remedial and supplemental instructors in Spiewak, home instructors serve in a position of such character as to require possession of an appropriate certificate and are eligible for tenure under N.J.S.A. 18A:28-5. The only question, therefore, is whether the exception found in N.J.S.A. 18A:16-1.1 excludes home instructors from achieving tenure. Like the Commissioner, we find that it does not.

N.J.S.A. 18A:16-1.1 expressly excludes from the protection of N.J.S.A. 18A:28-5 only those individuals who act in place of another employee during the absence, disability or disqualification of that employee. Home instructors do not act in the place of a teacher who is absent, disabled or disqualified, as required by the statute. Rather, as mandated by our regulations, they provide home or other out-of-school instruction to students who are excluded from school for the reasons specified in N.J.A.C. 6A:16-9.1.

As the Commissioner recognized in his decision:

the statutory exception to tenure accrual set forth in N.J.S.A. 18A:16-1.1 is limited to situations where a person is serving in the place of an absent employee who is expected to return to work. That is not the case herein where the classroom teachers were present and teaching any students in attendance. As specifically stipulated by the parties, petitioner "was not working in a position that was previously

held by a teacher who left it on a leave of absence or by a teacher who was otherwise absent from the position but expected to return," but, instead, was serving in the individual position of a home instructor.

Commissioner's Decision, slip op. at 27.

As a result, the Commissioner rejected the argument that the position of home instructor was akin to that of a substitute, stressing that the petitioner was not serving in the place of an absent employee who was expected to return and, thus, could not be excluded from achieving tenure under the exception set forth in N.J.S.A. 18A:16-1.1. He observed, in addition, that the Court in Spiewak had expressly rejected the notion that the courts – and by extension the Office of Administrative Law and the Commissioner – could create exceptions to the clear language of N.J.S.A. 18A:28-5. The Court in Spiewak also specifically rejected the notion that the intent of boards to employ teachers on a temporary or “as needed” basis could deprive those teachers of tenure. Thus, the fact that home instructors may be employed on an “as needed” basis, a fact relied upon by the majority, does not provide an exception to a teacher's statutory right to tenure if he or she satisfies the precise conditions set forth in the statute.

Given the clear language of the statutes at issue and the applicable court decisions, we conclude that the petitioner has satisfied the statutory conditions for the achievement of tenure, and we would affirm the decision of the Commissioner directing the Northern Valley Regional Board to reinstate her. Therefore, we respectfully dissent from the State Board's decision.

June 1, 2005

Date of mailing _____