

646-03

KATHLEEN DONVITO, :
 :
 PETITIONER, :
 :
 V. :
 :
 BOARD OF EDUCATION OF THE : COMMISSIONER OF EDUCATION
 NORTHERN VALLEY REGIONAL :
 HIGH SCHOOL DISTRICT, BERGEN : EDUCATION
 COUNTY, :
 :
 RESPONDENT, :
 :
 AND :
 :
 LOUISE RYAN, :
 :
 INTERVENOR. :
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SYNOPSIS

Petitioning Home Instructor/ HSPT/SRA Tutor alleged the Board violated her tenure and seniority rights in deciding not to reemploy her for the 2002-03 school year.

In light of *Hyman, Spiewak* and *N.J.S.A. 18A:16-1.1*, the ALJ concluded that petitioner failed to attain tenure through any of the positions that she held within the District. The ALJ found that home instructors are akin to substitutes for purposes of tenure and, thus, the temporary employee exception to tenure acquisition applies herein. Moreover, the ALJ determined that petitioner's tutor position fell into the category of an extra-classroom assignment that was not subject to tenure. The ALJ ordered that the Board's and Intervenor's Motion for Summary Decision be granted.

Citing Spiewak, and the subsequent court decisions in *Sayreville* and *Lammers*, the Commissioner concluded that the only applicable exception to the Tenure Act relating to tenure accrual by teachers, *N.J.S.A. 18A:16-1.1*, does not apply to teachers serving in the position of home instructors since they are not serving in the place of absent employees who are expected to return. Also, the Commissioner lacks the authority to create exceptions to the tenure law; therefore, petitioner's years of service as a home instructor are found to be tenure eligible. In addition, petitioner's assignment as an HSPT/SRA Tutor was an instructional assignment necessitated by the regulations dealing with graduation requirements and, thus, akin to an assignment as a remedial teacher, basic skills teacher or supplemental teacher. In that petitioner held valid certificates and endorsements issued by the State Board of Examiners and served in positions requiring certification during the entire period of employment at issue, the Commissioner set aside the order of the ALJ and granted summary decision to petitioner. The Commissioner ordered petitioner's reinstatement to a full-time position held by any nontenured teacher within petitioner's area of certification of the Board's choice, with full back salary and benefits, less mitigating income.

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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December 4, 2003

OAL DKT. NO. EDU 5877-00
AGENCY DKT. NO. 162-5/02

KATHLEEN DONVITO, :
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 PETITIONER, :
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 V. :
 :
 BOARD OF EDUCATION OF THE : COMMISSIONER OF EDUCATION
 NORTHERN VALLEY REGIONAL :
 HIGH SCHOOL DISTRICT, BERGEN : DECISION
 COUNTY, :
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The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. Petitioner’s exceptions and the Board’s reply thereto were submitted in accordance with *N.J.A.C.* 1:1-18.4 and were duly considered by the Commissioner in reaching his determination herein.

In her exceptions, petitioner objects to the analysis in the Initial Decision which applied both *Hyman, supra*, and *N.J.S.A.* 18A:16-1.1 to the instant matter, submitting that “both instances represent a clear violation of the holding of the Supreme Court in *Spiewak et al. v. Rutherford Bd. of Ed.*, 90 *N.J.* 63 (1982).” (Petitioner’s Exceptions at 2) Petitioner avers that, in *Hyman* the issue of tenure accrual for Home Instruction Teachers was not raised on appeal of the Commissioner’s decision. (*Id.* at 1) Petitioner further argues that the fact that “substitute” employment is not defined in statute or regulation is not important because the only issue is

whether *N.J.S.A.* 18A:16-1.1 applies so as to prohibit home instruction teachers from achieving tenure. (*Id.* at 2)

Pointing to *Spiewak, supra* at 77, petitioner posits that the Supreme Court expressly interpreted *N.J.S.A.* 18A:16-1.1 to apply only to those taking the place of an absent teacher and clearly held that no court or agency can create exceptions to the tenure law. (*Ibid.*) Thus, petitioner asserts, there is no authority for the creation of a Home Instructor or HSPT/SRA Tutor exception. (*Ibid.*) Petitioner further asserts that the fact that home instructors do not know how much work they will be doing is no more relevant in this matter than it was in *Point Pleasant Beach, supra*, which was rejected in *Spiewak, supra*. (*Id.* at 3) Petitioner submits that the fact that a home instructor will not know how many students she or he will have does nothing to affect the accrual of tenure. In the instant matter, petitioner avers, the facts demonstrate that petitioner was continuously working as a home instructor from January 1997 through her years as a contracted classroom teacher until her termination in June 2002. (*Ibid.*) The time must count toward tenure, petitioner argues, because it is service requiring certification, is not temporary and does not fit within the exception set forth in *N.J.S.A.* 18A:16-1.1, and, therefore, no statutory exception applies pursuant to *Spiewak, supra*. (*Ibid.*)

Additionally, petitioner advances the argument that the ALJ's reliance on *Boney, supra*, as a basis for denying the tenurable nature of the work of an HSPT/SRA Tutor is in error because *Boney*, rendered eleven years prior to *Spiewak*, involved an assignment to a position which had no certification requirement. (*Ibid.*) In this instance, petitioner submits, preparing students for the HSPT/SRA was instructional work mandated by regulations dealing with graduation requirements. (*Ibid.*) Finally, petitioner points to *Lichtman v. Ridgewood Bd. of Ed.*, 93 *N.J.* 362 (1983), in averring that part-time service in a position requiring certification is tenure eligible. (*Ibid.*)

In its reply, the Board relies on *Hyman, supra*, at 709 in asserting that petitioner's claim that she earned tenure based, in part, on her service as a home instructor should be rejected because, as the ALJ in *Hyman* determined, and the Commissioner affirmed, "home instruction is 'intermittent, temporary, and unscheduled employment' akin to the work of a substitute." (Board's Reply at 2) Accordingly to *Hyman*, therefore, the Board asserts, petitioner is excluded from the acquisition of tenure pursuant to *N.J.S.A.* 18A:16-1.1. (*Id.* at 3) Therefore, in reaching her conclusions in the instant matter, the Board argues, the ALJ properly followed the sound reasoning underlying and supporting the conclusions in the *Hyman* decision. (*Id.* at 3)

Moreover, the Board asserts that petitioner's reliance on *Spiewak, supra*, is misplaced because the Court in *Spiewak* determined: 1) that remedial and supplemental teachers who were required to hold certificates and who provided instruction to educationally disabled children were entitled to tenure if they met the criteria set forth in *N.J.S.A.* 18A:28-5, and 2) that temporary employees and substitutes are not entitled to tenure. (*Id.* at 4, citing *Spiewak, supra*, at 84 and 74) The Board points out that the ALJ and the Commissioner in *Hyman, supra*, were aware of the *Spiewak* decision and recognized that, unlike supplemental instruction, home instruction is temporary, intermittent and unscheduled and, as such, the position of home instructor is "akin to that of a substitute, a non-tenure-eligible position." (*Ibid.*) The Board also avers that it would be impossible to calculate tenure rights for a home instructor given the unfixed and constantly changing schedule, as in this case, where petitioner worked from one to seven hours a day for certain days and weeks and sometimes did not work at all. (*Ibid.*)

Finally, the Board argues that petitioner's service as an HSPT/SRA tutor was an unrecognized, auxiliary assignment, was a part of her home instruction work, and was performed in a sporadic manner on random hours on various days. (*Id.* at 5) Thus, the Board concludes, petitioner's HSPT/SRA assignment would not count towards tenure. (*Ibid.*)

Upon careful and independent review of the record, the Initial Decision, the exceptions and the reply thereto filed in this matter, the Commissioner has determined to reject the ALJ's recommended decision in this matter and to grant summary decision to petitioner for the reasons set forth below.

Initially, the Commissioner notes that, pursuant to *N.J.A.C. 1:1-12.5(b)* and *Contini v. Bd. of Educ. of Newark*, 286 *N.J. Super.* 106, 121-122 (App. Div. 1995) (*citing Brill v. Guardian Life Ins. Co.*, 142 *N.J.* 520 (1995)), summary decision may be granted in an administrative proceeding if there is no genuine issue of material fact in dispute and the moving party is entitled to prevail as a matter of law. In the instant matter, the parties filed cross-motions for summary decision, submitted joint exhibits, and a joint stipulation of facts.¹ Based on a review of the stipulated facts, the joint exhibits, and the motion papers and briefs submitted by the parties, the Commissioner finds that a grant of summary decision is appropriate in this instance in that there is no genuine issue of material fact and petitioner is entitled to prevail as a matter of law.

The Education Tenure Act, *N.J.S.A. 18A:28-1* to *-18*, grants tenure to teaching staff members who meet precise statutory conditions. *N.J.S.A. 18A:28-5* 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, and all school nurses including school nurse supervisors, head school nurses, chief school nurses, school nurse coordinators, and any other nurse performing school nursing services, school athletic trainer and such other employees as are in positions which require them to hold appropriate certificates issued by the board of

¹ To the Joint Stipulation of Facts, the parties attached a "Statement of Disputed Factual Issue," stating that, although there is a dispute as to whether petitioner was offered and rejected a two-fifths (2/5) teaching position to commence in September 1999, "[t]he parties agree that for purposes of this motion for summary judgment, the Judge may assume that such a position was offered and declined as proffered by respondent. In the event that the Judge determines that such an offer would be the basis for denying petitioner's claim, the parties request that judgment be reserved pending a hearing limited to the facts surrounding the alleged job offer." (Exhibit J-1, in evidence)

examiners, serving in any school district or under any board of education, excepting those who are not the holders of proper certificates in full force and effect and school business administrators shared by two or more school districts, shall be under tenure during good behavior and efficiency and they shall not be dismissed or reduced in compensation except for inefficiency, incapacity, or conduct unbecoming such a teaching staff member or other just cause and then only in the manner prescribed by subarticle B of article 2 of chapter 6 of this title, 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.

In *Spiewak, supra*, at 81, the Supreme Court held that “all teaching staff members who work in positions for which a certificate is required, who hold valid certificates, and who have worked the requisite number of years, 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.”

The Court in *Spiewak* also addressed the only applicable exception to the Tenure Act relating to tenure accrual by teachers, *N.J.S.A.* 18A:16-1.1,² finding that, “although this statute denies tenure to temporary employees, it extends only to those who ‘act in place of’ another employee who is absent or disabled.” *Id.* at 74. The Court further concludes that “[t]he courts are not free to expand that exception by judicial fiat.” *Id.* at 77.

² *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.

The act of any person so designated shall in all cases be legally 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.

The ALJ in *Hyman, supra*, found that “home instructors are not teaching staff members pursuant to *N.J.S.A.* 18A:28-5 and their time is not tenurable***. Home instructors have no specific expectation of employment duration; they have full knowledge of the variability of the assignments and hourly rate of payment.” *Hyman* at 709. Although the ALJ’s finding in *Hyman* that home instructors were not tenure eligible was specifically upheld by the Commissioner, the petitioners in *Hyman* were all found to be tenured based on time served as supplemental teachers and entitled to full salary and, thus, did not appeal the Commissioner’s decision. The Board appealed solely on the salary issue to the State Board and prevailed and the State Board’s decision was subsequently appealed to the Appellate Division. The issue of whether home instruction is tenure eligible was not addressed by either the State Board or the Appellate Division as the parties did not raise it in those appeals.

Since the 1982-83 *Spiewak, supra*, and *Hyman, supra*, decisions, however, the courts have interpreted and clarified the exception to the Tenure Act relating to the tenure accrual exception set forth in *N.J.S.A.* 18A:16-1.1. In *Sayreville Educ. Ass’n v. Board of Educ., Etc.*, 193 *N.J. Super.* 424, 428 (App. Div. 1984), the court interpreted *N.J.S.A.* 18A:16-1.1, as follows:

We construe the authorization of this provision as applying when the services of a substitute teacher are required because of the temporary absence, even if protracted, of a regular teacher whose return to duty is contemplated. We do not construe it as authorizing the use of a substitute to fill a vacant position on a long-term basis. This interpretation, in our view, accords with the plain meaning of the statutory provision. The phrase, “to act in place of any officer or employee during the absence, disability or disqualification of any such officer or employee,” clearly implies a temporary arrangement. That is, the “place” which is the intended subject of the statute is the place of another which that other will reclaim when his period of absence is over. The substitute is appointed to act for the other during that period. If that other employee has, however, terminated his employment, then the place which the appointee is filling is not the place of the other but rather a vacant place, and the statute ordinarily does not apply. This interpretation is, moreover, in accord with the observation in

Spiewak v. Rutherford Bd. of Ed., *supra*, 90 N.J. at 77, that the exception to the tenure statute which N.J.S.A. 18A:16-1.1 constitutes “is limited to employees hired to take the place of an absent teacher.” Again the implication is clear that the place for which the temporary substitute teacher was hired is not vacant but only temporarily unoccupied by its incumbent.

Moreover, the Supreme Court in *Lammers v. Bd. of Educ.*, 134 N.J. 264, *citing Sayreville*, *supra*, noted that: “[t]he implication drawn by the Appellate Division in *Sayreville* between a vacancy and an absence is unmistakable. An absence exists when the missing teacher is scheduled ultimately to return to the position. A vacancy exists when the teacher leaves the position permanently, as in the case of a resignation or a retirement.” *Id.* at 268.

The decisions in *Sayreville* and *Lammers* issued subsequent to *Spiewak and Hyman*, thus clarify that 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.” (Exhibit J-1, #14, in evidence), but, instead, was serving in the individual position of a home instructor. Accordingly, the Commissioner rejects the argument that petitioner’s position of home instructor is akin to that of a substitute in that petitioner is not serving in the place of an *absent employee* who is expected to return and, thus, cannot be excluded from tenure accrual under the exception set forth in N.J.S.A. 18A:16-1.1.

Moreover, as expressly found in *Spiewak*, *supra*, at 80, the courts, and by extension the OAL and the Commissioner, cannot create exceptions to the tenure law:

To summarize, neither *Schulz* [*Schulz v. State Bd. of Ed.*, 132 N.J.L. 345 (E. & A. 1945)] nor *Biancardi* [*Biancardi v. Waldwick Bd. of Ed.*, 139 N.J. Super. 175 (App. Div. 1976), *aff’d o.b.*, 73 N.J. 37 (1977)] nor *Capella* [*Capella v. Bd. of Ed. of*

Camden County Voc. Tech. Sch., 145 *N.J. Super.* 209 (App. Div. 1976)] holds that courts may themselves define exceptions to *N.J.S.A.* 18A:28-5. To the extent those decisions imply that the right to tenure derives from contract rather than statute, they are wrong. To the extent they suggest that courts may create exceptions to the clear language of *N.J.S.A.* 18A:28-5 based on policy considerations, they are disapproved.”

In that the Commissioner concludes, in light of *Spiewak* and the subsequent court decisions in *Sayreville* and *Lammers*, that the only applicable exception to the Tenure Act relating to tenure accrual by teachers, *N.J.S.A.* 18A:16-1.1, does not apply to teachers serving in the position of home instructor, and in that the Commissioner lacks the authority to create exceptions to the tenure law, petitioner’s years of service as a home instructor are found to be tenure eligible. Moreover, the Commissioner agrees with petitioner that *Boney, supra*, does not apply so as to exclude petitioner’s service as an HSPT/SRA Tutor from tenure eligibility, as, unlike the *Boney* decision, which dealt with the assignment to a job which had no certification requirement, petitioner’s assignment herein as an HSPT/SRA Tutor was an instructional assignment necessitated by the regulations dealing with graduation requirements set forth in *N.J.A.C.* 6A:8-1.1 *et seq.*, and thus akin to an assignment as a remedial teacher, basic skills teacher or supplemental teacher.

During the period at issue, petitioner was a teaching staff member in the Northern Valley Regional High School District, pursuant to *N.J.A.C.* 18A:1-1,³ and tenure eligible, pursuant to *N.J.S.A.* 18A:28-5, holding valid certificates and endorsements issued by the State Board of Examiners as an Elementary School Teacher, Teacher of English, Nursery School Teacher, Learning Disabilities Teacher Consultant, and Teacher of the Handicapped and assigned to teaching positions requiring valid certification, *i.e.*, home instructor (*see*

³ *N.J.A.C.* 18A:1-1 defines a “teaching staff member” as “a member of the professional staff of any district or regional board of education, or any board of education of a county vocational school, holding office, position or employment of such character that the qualifications, for such office, position or employment, require him to hold a valid and effective standard, provisional or emergency certificate, appropriate to his office, position or employment, issued by the State Board of Examiners and includes a school nurse and a school athletic trainer.”

N.J.A.C. 6A:16-9.2(b)2; *N.J.A.C.* 6A:14-4.8(a)(4); *N.J.A.C.* 6A:14-4.9(a)(4); and J-3, in evidence), a Special Education Teacher, and an HSPT/SRA Tutor. Although petitioner served in part-time teaching positions during this time period, it is well-established that a part-time position requiring certification is tenure eligible. *See Lichtman, supra*, and *Dudzinski v. Borough of Franklin*, 97 *N.J.A.R.* 2d (EDU) 531.

Moreover, the parties stipulated that petitioner was assigned the following teaching responsibilities and provided such service during the 1996-1997 through 1999-2000 school years:

<u>School Year</u>	<u>Service Dates</u>	<u>Position</u>	<u>Academic Months</u>
1996-1997	1/13/97-6/18/97 (J-3)	Home Instructor ⁴	5
1997-1998	9/18/97-6/26/98 (J-4)	Home Instructor ⁵	9
1998-1999	10/21/98-6/30/99 (J-5) 9/4/98-4/5/99 (J-9)	Home Instructor ⁶ HSPT/SRA Tutor	10
1999-2000	9/15/99-6/19/00 (J-6) 2/18/00-6/30/00 (J-13) 1/14/00-3/10/00 (J-10)	Home Instructor ⁷ 2/5 Special Ed. Teacher SRA Tutor	<u>9.5</u>
TOTAL			33.5 months

⁴ Petitioner earned \$19,150 during her five months as Home Instructor. (Exhibit J-3, in evidence)

⁵ Petitioner earned \$13,987.50 during her nine months as Home Instructor. (Exhibit J-4, in evidence)

⁶ Petitioner earned \$12,700 as a Home Instructor and \$3,825 as an HSPT/SRA Tutor during her ten months of service. (Exhibits J-5 and J-9, in evidence)

⁷ Petitioner earned \$26,250 as a Home Instructor, \$23,103.60 as a 2/5 Special Education Teacher and \$1,650 as an SRA Tutor during her 9½ months of service. (Exhibits J-6, J-13 and J-10, in evidence) Notwithstanding the Board's claim that petitioner resigned her position when she was offered and rejected a 2/5 teaching position to commence in September 1999 and petitioner's denial that such position was offered to begin in September 1999, as noted above, the parties have stipulated that, for purposes of the summary decision motions, that such a position was offered and declined by respondent. Even assuming, *arguendo*, that a 2/5 teaching September 1999 teaching position was offered to petitioner and she declined the offer, the Commissioner cannot conclude that petitioner resigned from her position with the Board as the record reflects that petitioner continued to be employed as a home instructor for the Board, earning \$14,450 in the period from 9/15/99 through 2/18/00 when she accepted a 2/5 teaching position.

Thus, petitioner achieved tenure, pursuant to *N.J.S.A.* 18A:28-5(c), by her service as a teacher in the District for the equivalent of more than three academic years (30 months) within four consecutive academic years. The Commissioner also observes that petitioner worked for the Board as a full-time Special Education Teacher in the 2000-2001 school year⁸ and as a 4/5 Special Education Teacher in the 2001-2002 school year.⁹ The Board did not renew petitioner's contract for the 2002-2003 school year. In the 2002-2003 school year, the Board employed 22 nontenured teaching staff members within the areas of petitioner's certification.¹⁰ (Initial Decision at 2) The Commissioner, therefore, finds that the Board violated petitioner's tenure rights in deciding not to appoint petitioner to one of the positions held by nontenured individuals.

Accordingly, for the reasons set forth above, the Commissioner grants summary decision to petitioner and orders petitioner's reinstatement to a full-time position held by any nontenured or less senior teacher within petitioner's area of certification of the Board's choice, with full back salary and benefits, less mitigating income.

IT IS SO ORDERED.¹¹

COMMISSIONER OF EDUCATION

Date of Decision: December 4, 2003

Date of Mailing: December 5, 2003

⁸ Petitioner earned \$58,914 as a full-time Special Education Instructor. (Exhibit, J-14, in evidence)

⁹ Petitioner earned \$50,282.40 as a 4/5 Special Education Instructor. (Exhibit J-1, #10, in evidence)

¹⁰ These staff members were advised of their right to intervene, but only Louise Ryan chose to do so.

¹¹ 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.*