

JENNIFER BOYCE, :
 :
 PETITIONER, :
 :
 V. : COMMISSIONER OF EDUCATION
 :
 BOARD OF EDUCATION OF THE : DECISION
 CITY OF OCEAN CITY, CAPE :
 MAY COUNTY, AND CAPE MAY :
 COUNTY SUPERINTENDENT, :
 :
 RESPONDENTS. :
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SYNOPSIS

Petitioner – a former library media specialist in respondent’s district – contends that she attained tenure in the district, and that the Board terminated her employment in violation of the law. Respondent asserts that petitioner – who holds an instructional certificate with an elementary endorsement – was employed in the position of media specialist first as a long term substitute and then under an emergency certificate; petitioner taught Character Education, a subject for which no certificate is required, in addition to her media specialist responsibilities; and petitioner was never eligible for tenure status. Respondent claims that petitioner was terminated due to her failure to complete the requirements for standard certification for the position of library/media specialist.

The ALJ found, *inter alia*, that: petitioner was originally employed as library/media specialist to replace a staff member who was on a leave of absence, and her time spent as a replacement cannot be counted toward tenure; petitioner’s time in the Character Education program does not contribute toward tenure because the function did not require an instructional certificate; petitioner failed to present sufficient evidence that she was the teacher of record for the PACE program, and her service in that program was performed under her emergency library/media specialist certificate. The ALJ concluded that petitioner was not improperly dismissed, but the Board violated the 60 day contractual notice clause and is responsible to award petitioner any salary due under the contract. In all other respects, he recommended that the petition be dismissed.

Upon a full and independent review, the Commissioner concurs with the ALJ that petitioner did not attain tenure in respondent’s district. However, the matter is remanded to the OAL for findings and conclusions regarding 1) whether the pleadings included a claim that respondent violated the 60-day notice clause, and/or a demand that petitioner be paid for the sixty days; and 2) if such a claim and demand were made in the pleadings, the amount of pay petitioner received after respondent’s notice to her of termination.

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| <p>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.</p> |
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May 21, 2007

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The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed.¹ Neither party filed exceptions.

The Commissioner concurs with the Administrative Law Judge (ALJ) that petitioner did not meet her burden to show by a preponderance of the evidence that she had achieved tenure in respondent's district prior to her dismissal in September 2005; this matter, however, is remanded to the OAL for clarification regarding whether the issue of violation of the contractual 60 day notice requirement was addressed in amended pleadings at the OAL hearing, and if it was, whether petitioner received compensation for the sixty day period.

Initially, it is undisputed that between the onset of her employment by respondent in 2001 and her dismissal in 2005, petitioner failed to complete the academic requirements for certification as a media specialist. Thus, tenure in that position was not available to her. Furthermore, there are multiple flaws in petitioner's position that she achieved tenure by teaching two classes per day of character education for about 2.8 school years and assisting other

¹ The parties did not provide the Commissioner with a transcript of the OAL hearing.

teachers with the PACE program for about a year. For instance, tenure accrues to “teaching staff members.” *N.J.S.A.* 18A:28-5. The term “teaching staff member” is defined in *N.J.S.A.* 18A:1-1, to mean an employee whose job requires him or her to “hold a valid and effective, standard, provisional or emergency certificate appropriate to his office.” It is undisputed – and the ALJ found – that petitioner’s service as a character education instructor did not require certification. Thus, petitioner was not, by virtue of her instruction in character education, a teaching staff member and consequently could not accrue time toward tenure for that instruction. *See, also, Spiewak v. Board of Education of Rutherford*, 90 *N.J.* 63 (1982).

Moreover, although he did not include it in his formal findings of fact, the ALJ clearly accepted (Initial Decision, p.32) that petitioner began her employment in respondent’s district as a long term substitute, temporarily replacing an employee who had requested a leave of absence. Thus, the period of time prior to the date upon which the on-leave employee resigned could not be counted in calculating tenure eligibility. *See, e.g. Lustberg v. Board of Education of the Borough of Tenafly, Bergen County*, EDU 7080-03 (February 27, 2004), adopted by the Commissioner April 12, 2004. Accordingly, even if petitioner’s service as a character education instructor could be considered tenure-track service, the first year of it could not be counted.

Additionally, although the ALJ did not include the following in his formal findings of fact, he did accept that:

To the extent that petitioner participated with the school’s PACE program, it appears petitioner acted more as a reference point in her capacity as the library/media specialist, rather than having complete control of the socials [sic] studies classes. It is not disputed petitioner participated with the PACE program, however, there is no evidence that she was the sole teaching staff member in charge. (Initial Decision, p.32, emphasis added)

Thus, the ALJ determined that the assistance petitioner provided to PACE students was consistent with her responsibilities as a media specialist, and was designed to help students accomplish assignments designed by other teachers. Respondent's exhibit R-3 supports this determination. Accordingly, the ALJ concluded that petitioner did not perform independent service as an elementary classroom teacher during the year or so of her involvement in the PACE program, and could not use that aspect of her employment as a basis for tenure accrual. The Commissioner cannot disagree.

In sum, petitioner neither achieved tenure as a media specialist nor as an elementary teacher in respondent's district. Thus, respondent's termination of her employment was not a tenure violation. Accordingly, the petition is dismissed as to petitioner's allegations that her tenure rights were violated, and as to any relief requested in connection therewith.

The remaining issue in the case is the ALJ's conclusion that respondent violated the sixty-day notice clause in the employment contract between the parties, and his determination that respondent is required to pay petitioner wages for any balance due for the period between the September 22, 2005 notice of termination and November 21, 2005. The Commissioner notes that, as a general matter, she does not have jurisdiction over contract disputes. In the present controversy, however, the application of the 60-day notice clause in the parties' contract can be regarded as ancillary to the main issues in the case. Having decided the primary issues, the Commissioner would be loathe to send the parties to another forum for a determination concerning a maximum of sixty days of pay.

However, the Commissioner must remand this matter to the OAL for the following reasons. First, neither the petition nor the pre-hearing order includes an allegation that respondent violated the 60-day notice clause and/or a demand that petitioner be paid for the sixty days. Because the Commissioner was not provided with a transcript of the hearing she was

unable to determine whether the pre-hearing order was modified during the hearing to include that issue. Relief may not be granted if it was not requested in the pleadings or articulated in the pre-hearing order unless the pleadings were amended at hearing.

In addition, it is unclear from the record whether petitioner's remuneration was, in fact, paid through November 15, 2005, as found by the ALJ (Initial Decision, p.17), whether her pay was stopped on September 29, 2005, the effective date of her termination, as set forth in petitioner's exhibit P-4, or whether some other date was used as the terminus for her salary.

Accordingly, this matter is remanded to the OAL for findings and conclusions regarding 1) the existence *vel non* in the pleadings of a claim that respondent violated the 60-day notice period in the contract of employment between the parties, and a demand for relief for such violation, and 2) if such a claim and demand were made in the pleadings, the amount of pay petitioner received after respondent's notice to her of termination.

IT IS SO ORDERED.²

COMMISSIONER OF EDUCATION

Date of Decision: May 21, 2007

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² 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.*