

SOPHIA GIACOMAZZI, :
 :
 PETITIONER, :
 :
 V. : COMMISSIONER OF EDUCATION
 :
 BOARD OF EDUCATION OF THE : DECISION
 SOUTH ORANGE-MAPLEWOOD :
 SCHOOL DISTRICT, ESSEX COUNTY :

SYNOPSIS

Petitioner was originally hired as a leave replacement teacher of English for the 2002-2003 school year, and subsequently – in June of 2003 – entered into a regular contract to teach English when a permanent position was vacated by retirement. She claims that her tenure rights were violated when her contract was not renewed in April 2006, contending that she had attained tenure in October 2005 because her assignment remained unchanged after the permanent teacher she had been replacing returned to work in October 2002. Respondent Board urges dismissal of the petition, as petitioner was not hired into a tenure track position until June 2003. Cross motions for summary decision were filed by the parties.

The ALJ found that: summary decision is appropriate in this matter, as there are no material facts in dispute; respondent Board was unable to dispute or show supporting documentation contradicting petitioner’s claims in this matter; as of October 2002 – when the teacher whom petitioner was hired to replace returned to work – there was no longer a leave replacement position available in the English department and therefore petitioner’s “Leave Replacement Employment Contract” was no longer operative; petitioner began to teach in the capacity of a full-time regular teacher as of October 2002; petitioner has proven that the terms of the Tenure Act, *N.J.S.A. 18A:28-5*, were not implemented in this matter, and that *N.J.S.A. 18A:16-1.1* does not prevent petitioner from accruing tenure credits beginning in October 2002. Accordingly, the ALJ concluded that petitioner did acquire tenure in respondent’s district, and the Board’s termination of petitioner’s employment was a violation of her tenure rights pursuant to *N.J.S.A. 18A:28-5*. The ALJ ordered respondent to reinstate petitioner to her tenured position.

Upon a thorough and independent review of the record, the Commissioner rejected the Initial Decision of the OAL, finding that: although there were teachers on temporary leave during the 2002-2003 school year, there were no actual vacancies in the English department until June 2003 and therefore no tenure-track positions to which petitioner could lay claim; respondent Board has the discretion to modify teaching assignments and locations; and petitioner’s claim that by continuing her assignment to teach the same courses in the same rooms for the remainder of the school year – after the permanent teacher she was hired to replace had returned to work – is without merit. Accordingly, the petition was dismissed.

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.

June 13, 2008

SOPHIA GIACOMAZZI, :
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The record, Initial Decision and parties’ exceptions in this case have been carefully and independently reviewed. No material facts are in dispute. For the reasons which follow, the Initial Decision granting summary decision to petitioner is rejected.

Petitioner signed a “Leave Replacement Employment Contract” (Leave Replacement Contract) with the respondent district on or about May 20, 2002. (Exhibit D to respondent’s motion for summary disposition) The contract recited that petitioner was to serve “as a **Leave Replacement 1.0 FTE¹ Teacher of English at Columbia High School . . . from September 2, 2002 to June 30, 2003** at an annual salary of \$35,000” *Ibid.* (Emphasis in original.) In the contract was a sentence that indicated that petitioner would be replacing Nelson Trias, who was on military duty, and that petitioner “acknowledge[d] that this leave replacement position [was] only for the term specified above, and that such time [could not] be counted toward tenure.” (*Ibid.*)

On or about July 22, 2002, another established teacher in the high school English department – Ms. Wessel-Dwyer – was granted family leave. Consequently, another substitute

¹ 1.0 FTE signifies 100% full-time employee. See Exhibit I to respondent’s motion for summary disposition.

teacher – Mr. Lampf – was hired for the 2002-2003 school year. It is undisputed that both Trias and Wessel-Dwyer were expected to return to the English department.

After the 2002 Fall term began, Trias returned from military leave – earlier than expected. As a result of his return, there was no need for two substitute teachers in the high school English department. Lampf, who had been hired two months after petitioner, was given notice, and – on or about November 11, 2002 – Trias took over the classes that Lampf had been teaching. (Exhibit I to respondent’s motion for summary disposition) Petitioner continued to teach the classes that had been assigned to her at the beginning of the school year.

Since at the time that Trias resumed teaching in the high school English department, respondent anticipated the return of Wessel-Dwyer, it did not post any permanent English teaching positions. Accordingly, petitioner did not apply for and was not awarded a contract for a permanent position, but rather finished the 2002-2003 school year under the Leave Replacement Contract.

At the beginning of the 2003-2004 school year, another member of the Columbia High School English department – Ms. Wastie – retired, resulting in an opening for a permanent teaching position. Petitioner’s application for the position was successful, and she entered into a regular contract with respondent – dated June 2, 2003 – to teach high school English during the 2003-2004 school year. (Exhibit J to respondent’s motion for summary disposition) That contract was followed by contracts for the 2004-2005 and 2005-2006 school years.

On April 7, 2006, respondent’s Superintendent Horoschak sent petitioner a letter advising that she would not be recommended for contract renewal. (Exhibit K to respondent’s motion for summary disposition) Subsequently, petitioner was provided with a written

explanation of reasons for the non-renewal, an informal meeting with the Superintendent and union representation, and an informal appearance before the respondent Board of Education. (Exhibits K-O to respondent's motion for summary disposition)

Petitioner urges that respondent's failure to renew her employment was a violation of tenure rights. More specifically, she maintains that she received a tenure track position as of October 21, 2002, when Trias returned to teach in the Columbia High School English Department. To support her position, petitioner relies on a number of facts included within her 21 item "Statement of Facts."

First, petitioner refers to the sentence in her Replacement Leave Contract that relates that she is substituting for Trias. Second, she points to the fact that for the 2002-2003 school year, she remained in '(Trias)' classroom' and continued to teach the same classes that she had been teaching before Trias returned to Columbia High School on October 21, 2002. Third, petitioner regards as significant the fact that, upon his return, Trias took over courses that had been previously taught by Wessel-Dwyer and substitute Lampf. Finally, petitioner refers to the fact that upon Trias' return she was not given a different leave replacement contract identifying her as a substitute for Wessel-Dwyer.

Petitioner argues that the foregoing facts bestowed a tenure track position upon her on October 21, 2002, despite the fact that there was – on that date – no open permanent position in the high school English department. She acknowledges that *N.J.S.A. 18A:16-1.1*²

² *N.J.S.A. 18A:16-1.1*:

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 *N.J.S.A.18A:17-13*. 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

precludes the acquisition of tenure by any person acting in the absence of another employee, but she maintains that by reason of Trias' return, she was no longer acting temporarily for him; rather, she was automatically transformed into a permanent employee, with the tenure clock ticking. Because she remained in 'his classroom' and continued teaching 'his classes' she reasoned that she had permanently acquired his position.

To support her view, petitioner offers *John Calabria v. Board of Education of the Township of Winslow, Camden County*, OAL Dkt. No. EDU 6403-02, Agency Dkt. No. 210-7/02; Initial Decision February 4, 2003; Final Decision adopting Initial Decision, March 14, 2003, Decision # 115-03. Calabria was a substitute teacher who, the Commissioner decided, achieved tenure-track status when the teacher he had been replacing returned to the district. Petitioner maintains that her circumstances are identical to Calabria's.

The Administrative Law Judge (ALJ) in the present case 1) accepted petitioner's reasoning, 2) found that petitioner's tenure eligibility had begun on October 21, 2002 and that petitioner had achieved tenure in October 2005, 3) concluded that petitioner's tenure had been violated by the non-renewal of her contract in April 2006, and 4) ordered petitioner's reinstatement with back pay and benefits. These determinations rested upon the ALJ's "Findings of Fact" – particularly the findings set forth below, both of which include legal conclusions:

12. As of October 21, 2002, when Trias returned from military duty and resumed teaching English there was no longer a leave-replacement position available in the English department. Lampf was given a sixty-day notice of termination and Trias completed Lampf's class teaching assignment in the Wessel-Dwyer's English class through June 2003;

and

the office or employment in which he acts pursuant to this section when so acting.

13. As of October 21, 2002, petitioner's "Leave Replacement Employment Contract" was no longer operative because Trias had returned to work or was no longer on leave; causing petitioner to teach the remainder of the 2002-2003 school year in the capacity of a full-time teacher;

Initial Decision at 10-11.

For the following reasons, the Commissioner is compelled to reject the Initial Decision. First, the reliance of both the petitioner and the ALJ on the fact that petitioner continued to teach the same courses in the same room(s) throughout the 2002-2003 school year is misplaced. There is nothing in the record to indicate that particular class assignments or teaching locations constitute terms of employment. To the contrary, the district's employment contracts only designate the subject area that an employee is to teach, the school to which the employee is assigned, and the number of hours the employee will teach. *See, e.g.* Exhibit J to respondent's motion for summary disposition.

Respondent's administrators have the discretion to modify teaching assignments and locations. The fact that petitioner was allowed to continue the classes she was assigned at the beginning of the 2002-2003 school year, and the fact that she stayed in the same location, hold no significance for a determination about the nature of her contract. Stated differently, neither Trias nor petitioner had any contractual/ownership rights in the particular courses that they taught within the English department, or the room they used. Thus, petitioner cannot rely on the courses and the room to justify her assertion that she inherited Trias' job.

Nor can the Commissioner attach a great meaning to the fact that petitioner's Leave Replacement Contract recited that she would substitute for Trias, and that a letter was sent to parents explaining same. As the record reveals, at the time these documents were issued,

Trias was the only teacher taking leave. Thus, he is the only high school English teacher whom petitioner could replace.

In her reply exceptions, petitioner articulates what she calls “the converse” of *N.J.S.A. 18A:16-1.1*, *i.e.*, “that once the leave replacement teacher ceases replacing someone else, time toward tenure shall begin to accrue.” (Reply Exceptions at 2) She leaps from this contention to the assumption that once Trias – whose temporary absence precipitated her employment as a long-term substitute – returned she was no longer replacing someone else, and was entitled to accrue tenure time.

This proposition, again, misconstrues the nature of a teaching position. When the 2002-2003 school year began there were two long-term substitutes – petitioner and Lampf – and a fixed number of permanent positions in the high school English department. When Trias returned, he resumed his permanent position, leaving only one absence requiring a substitute teacher. Either Lampf or petitioner could have been given notice. Petitioner was spared and Lampf was let go. Respondent could have had any number of reasons for choosing to dismiss Lampf instead of petitioner, including the fact that he was hired two months after petitioner.

Similarly, respondent could have had any number of reasons for asking Trias to take over a different set of English classes than the combination he had taught prior to going on military leave. There is nothing in the record or in the education laws to support the notion that a teacher’s eligibility for tenure is dictated by the particular combination of courses he or she teaches within his or her certification/endorsements.

In her reply exceptions, petitioner appears to argue that since boards of education have the authority to add or delete teaching positions, they must have added a permanent, tenure-track position for her in the high school English department when Trias returned. However,

petitioner has put no evidence before the Commissioner that respondent did so. To the contrary, petitioner taught under the Replacement Leave Contract for the entire school year, and no offer of a regular contract was made to her until another high school English teacher retired at the end of the 2002-2003 school year. Her argument relies on speculation, which cannot be utilized by the Commissioner in weighing the merits of this controversy.

This latter point also distinguishes the circumstances of the present case from the facts in *Calabria v. Board of Education of the Township of Winslow, supra*, upon which petitioner heavily relies. In *Calabria*, the petitioner began the 1998-1999 school year working as a replacement teacher of seventh-grade study skills in Overbrook Junior High School. The teacher he was replacing, Jean Hamilton, returned to the Winslow district on March 23, 1999, but accepted a different position, *i.e.* the position of secondary school English teacher in Overbrook Senior High School.³ Significantly, Calabria applied for, interviewed for and was chosen to fill the position of seventh grade study skills teacher in the junior high school, effective March 23, 1999.

Thus, petitioner's situation is not identical to Calabria's. As the *Calabria* ALJ pointed out, Jean Hamilton – the teacher for whom Calabria substituted – left the position teaching seventh grade study skills and took a position teaching a different subject/category in a different school. This created an actual vacancy in the junior high school, for which Calabria applied and interviewed and for which he was awarded a contract. “No one could continue to contemplate Jean Hamilton's return to the seventh grade position once she assumed the position of High School English Teacher.” *Calabria* at 6.

Further, in discussing Calabria's situation, the ALJ for that case construed the Appellate Division decision in *Sayreville Education Assoc. on behalf of Rucki et al. v. Board of*

³ She apparently resigned at the end of that school year.

Education of the Borough of Sayreville, 193 N.J. Super. 424, 428 (App. Div. 1984) to have held that it is retirement, resignation or other termination of the employment of the original holder of a position that transforms the job held by a substitute, as per N.J.S.A. 18A:16-1.1, to a vacancy. *Calabria* at 5.⁴ By way of contrast, there were no vacancies in the Columbia High School English Department. Trias and Wessel-Dwyer were on leave in September 2002. Trias returned. Wessel-Dwyer planned to return at the conclusion of her maternity leave.

The Commissioner notes that, among other considerations, the *Sayreville* court identified economic reasons for holding that only resignation, retirement or other termination creates vacancies:

A further significant consideration is the fact that when a substitute appointment is made because of a temporary absence, a board of education would have to incur the expense of providing duplicative benefits if both the substitute and the absent teacher were to be regarded as simultaneously entitled to all of the statutory and contractually mandated benefits of regular staff membership. Where, however, the absentee's employment relationship with the board has been terminated at the time the "substitute" is appointed and there is hence a vacancy in that position, no question of duplication of benefits arises. Thus, in terms of a board's legitimate economic concerns, the withholding of regular staff membership from a substitute teacher who fills a position whose incumbent is only temporarily absent is a sensible approach and perhaps even a financial necessity.

Sayreville Education Assoc. at 430.

As stated above, Trias did not resign or retire and was not terminated. He returned to his full-time job in the high school English department. This left only one employee (Wessel-Dwyer) on leave, resulting in the need for only one substitute. Petitioner had the good

⁴ See, also, *Lammers v. Bd. of Educ.*, 134 N.J. 264, 268 (1993) ("The 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.")

fortune to be retained as that substitute, instead of being let go, as Lampf was. If she had been regarded as regular staff (as opposed to long-term substitute), the district would have been paying benefits to three teachers for two positions, a result rejected in *Sayreville Ed. Assoc.*

In summary, Petitioner Giacomazzi did not meet her burden to show that there was a “vacancy” in the position she held during the 2002-2003 school year. The fact that Trias taught a different combination of classes when he returned from military duty at the end of October 2002 – *i.e.*, the classes that had generally been taught by another teacher, Wessel-Dwyer, who was on maternity leave – is a red herring. The operative fact is that Trias returned to his position as one of respondent’s permanent English teachers.

After the return of Trias and termination of Lampf, there was one open position in the English department. It was not a vacancy, but rather an absence created by Wessel-Dwyer’s maternity leave. Petitioner taught classes because there was a temporary deficit of one regular teaching staff member. Petitioner presented no facts that would suggest that Wessel-Dwyer resigned, or that Trias intended to relinquish his position in respondent’s high school English department when Wessel-Dwyer returned to work. Thus, the facts in this case show that there were no vacancies in the English department during the 2002-2003 school year and, consequently, no tenure-track positions to which petitioner could lay claim. Not until the retirement of Wastie was there a vacancy that could provide petitioner with a tenure-track position.

Because petitioner has failed to meet her burden of persuading the Commissioner that a vacancy existed in the Columbia High School English Department before the end of the 2002-2003 school year, the time served by petitioner as a substitute during that year may not be counted as service time for the acquisition of tenure, and she thus fails to meet the statutory

condition for the acquisition of tenure in respondent's district, pursuant to *N.J.S.A.* 18A:28-5.⁵

Accordingly, the Initial Decision in this matter is rejected and the petition is dismissed.

IT IS SO ORDERED.⁶

COMMISSIONER OF EDUCATION

Date of Decision: June 13, 2008

Date of Mailing: June 16, 2008

⁵ See, e.g., *Charles Mills v. Board of Education of the Township of Piscataway*, 92 *N.J.A.R.* 2d (EDU) 375,376.

⁶ 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.*