#268-09 (OAL Decision: http://lawlibrary.rutgers.edu/oal/html/initial/edu05801-08_1.html)

BELINDA MENDEZ-AZZOLLINI,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF IRVINGTON, ESSEX COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioner, a guidance counselor who was employed by the Board of Education for each year from 2004-05 through 2007-08, contended that she had acquired tenure and that her employment was unlawfully terminated on January 29, 2008. The Board countered that petitioner – owing to leaves of absence, including two granted pursuant to the federal Family and Medical Leave Act (FMLA) – had not provided the thirty-plus months of service required to obtain tenure under *N.J.S.A.* 18A:28-5(c).

The ALJ dismissed the petition, finding that the FMLA on its face precluded petitioner from applying FMLA leave toward acquisition of tenure, since, under FMLA, an employee is not entitled to accrual of any seniority or employment benefits during any period of leave and is required in each instance of leave to be returned to the status quo as it existed prior to the leave's commencement.

The Commissioner rejected the Initial Decision, finding that: 1) the FMLA was not dispositive of petitioner's claim because the act neither required nor prohibited the counting of FMLA leave toward acquisition of tenure, and 2) the matter must be reviewed pursuant to the standards of applicable education case law (*Kletzkin v. Bd. of Ed. of the Borough of Spotswood*). However, the Commissioner found the record insufficient for a determination on the merits under *Kletzkin*, and remanded the matter for further fact-finding and argument.

August 26, 2009

OAL DKT. NO. EDU 5801-08
AGENCY DKT. NO. 112-4/08

BELINDA MENDEZ-AZZOLLINI,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF IRVINGTON, ESSEX COUNTY,	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have exceptions filed by petitioner pursuant to *N.J.A.C.* 1:1-18.4. The Board of Education (Board) did not reply to petitioner's exceptions.[1]

In her exceptions, petitioner contends that the Administrative Law Judge (ALJ) erred in treating leave taken pursuant to the federal Family Medical Leave Act (FMLA) differently from other forms of unpaid leave. According to petitioner, the ALJ failed to consider the numerous State education law decisions cited by petitioner in support of her position, and further misapplied the FMLA by reading 29 *U.S.C.A.* §2614(3)(A) – which states that an employee is not entitled to accrual of employment benefits while on leave – as a bar to counting FMLA leave time toward acquisition of tenure. In this latter regard, petitioner asserts, the ALJ ignored implementing regulations which clarify the referenced provision by expressly stating that an employee returning from unpaid FMLA leave *may*, but is not entitled to, accrue

[1] On May 27, 2009, Board counsel wrote to the Commissioner asking for leave to submit a reply to petitioner's March 10, 2009 exceptions. This request was denied because it was filed well beyond the time frame permitted by rule and was not due to emergency or other unforeseeable circumstances. *N.J.A.C.* 1:1-18.4, *N.J.A.C.* 1:1-18.8(b).

additional benefits or seniority during such leave,[2] and which additionally make it clear that FMLA leave is to be treated as any other leave and that an employee's rights are to be neither enhanced nor diminished by the taking of such leave.[3] (Petitioner's Exceptions at 6-9)[4]

The Commissioner has carefully reviewed this matter and, upon such review, finds that she must reject the Initial Decision.

Initially, the Commissioner concurs with petitioner that, contrary to the conclusion of the Initial Decision, the provisions of the FMLA cannot be read as an absolute bar to accrual of leave time granted pursuant to it toward an employee's acquisition of tenure. While the FMLA plainly creates no *entitlement* to such accrual, neither does it establish a prohibition against it, as evidenced both by the implementing regulation cited by petitioner:

> An employee may, but is not entitled to, accrue any additional benefits or seniority during unpaid FMLA leave. Benefits accrued at the time leave began, however, (e.g., paid vacation, sick or personal leave to the extent not substituted for FMLA leave) must be available to an employee upon return from leave.
>
> 29 *C.F.R.* 825.215(d)(2)

and by the provision of the act itself, at 29 *U.S.C.* § 2651(b), which states that nothing therein shall be construed to supersede any provision of any State law that provides greater family or medical leave rights than those established under the FMLA – which *N.J.S.A.* 18A:28-5 does, in effect, by basing acquisition of tenure on periods of "employment," rather than "active service" or "performance of duties."

---

[2] 29 *C.F.R.* 825.215(d)(2), see *infra.*

[3] Petitioner cites to 29 *C.F.R.* 825.215(c)(1), pay increases conditioned upon seniority or work performed need not be granted unless the employer does so for other employees on unpaid leave; 29 *C.F.R.* 825.215(c)(2), entitlement to same consideration for bonuses as other employees on paid or unpaid leave; and 29 *C.F.R.* 825.215(d)(3), same right to continue life insurance coverage as other instances of unpaid leave. Petitioner also references the FMLA provision at 29 *U.S.C.A.* §2614(3)(B) stating that an employee returning from leave is not entitled to any right, benefit or position of employment other than any right, benefit or position to which the employee would have been entitled had the leave not been taken.

[4] Petitioner additionally reiterates Points II-IV of her OAL brief, wherein she argues that, under education case law, the Board violated her tenure rights so as to entitle her to reinstatement with back pay and other emoluments and benefits of employment. (Petitioner's Exceptions at 2-6, 9)

Consequently, the FMLA is not dispositive of petitioner's claim, as the ALJ has in effect concluded; rather, as recognized by petitioner, the Commissioner must consider this matter in light of applicable school law. Having done so, the Commissioner finds the record presently before her insufficient to render a final decision.

Petitioner argues that there can be but one conclusion in this matter: that she acquired tenure prior to the termination of her employment by the Board. According to petitioner, this is so because: 1) clear and controlling case precedent establishes that, where a teacher performs services under contract during any given year, continuous employment exists for the purposes of satisfying the tenure statute even if the teacher is absent or on leave for part of such year, *Dorothy Kletzkin v. Board of Education of the Borough of Spotswood, Middlesex County*, 136 *N.J.* 275 (1994), affirming decision of the Superior Court, Appellate Division, at 261 *N.J. Super.* 549 (1993), affirming State Board of Education decision dated February 5, 1992; 2) it is undisputed that sequential contracts of employment between the Board and petitioner were in place for sufficient time for petitioner to acquire tenure under *N.J.S.A.* 18A:28-5(c) (employment in the district for the equivalent of more than three academic years within a period of any four consecutive academic years); and 3) petitioner performed services under each of these contracts during the years in question (2004-05 through 2007-08). Petitioner asserts that the fact that she did not provide services – and hence could not be evaluated – during various partial-year leaves arising in the course of the thirty-plus months of continuous employment necessary for her to acquire tenure can be of no import in light of *Kletzkin, supra*; nor does it matter that her absences did not arise as the result of a work-related injury pursuant to *N.J.S.A.* 18A:30-2.1, since the reasoning of the *Kletzkin* decisions applies to leaves of all types.

Important considerations of policy and precedent make it impossible for the Commissioner to agree. While the decision of the State Board of Education, *supra*, might arguably be read without qualification or condition of any kind as suggested by petitioner, the Commissioner can overlook neither the negative educational implications of such a reading nor the fact that – despite holdings regarding the meaning of "employment" in the context of tenure acquisition which might, at first blush, appear absolute – the decisions of both the Appellate Division and the Supreme Court rely in significant measure upon the particular factual circumstances before them in concluding that tenure acquisition was the correct result in Kletzkin's case.

In terms of educational policy, the dangers of unqualified application of *Kletzkin* were explored at some length in a dissenting opinion wherein Justice Stein – who would have held that "employment" in the tenure context contemplated actual service[5] – cautioned that:

> …the Court's conclusion may allow insufficiently-evaluated teachers to acquire tenure. Because tenured teachers cannot be discharged except for substantial cause, the probationary tenure period is critically important in determining a teacher's competence in classroom instruction, and a decision that effectively shortens that probationary period disserves the interests of school children and potentially undermines the purpose of the tenure statute. (*Id*. at 281)***
>
> The Legislature required "employment" for a proscribed *(sic)* probationary period so that a school board could decide which teachers were qualified and should acquire tenure. A school board cannot evaluate a teacher who is on leave, whether that leave is voluntary or involuntary, and therefore cannot make an informed decision to grant the teacher the job security that tenure provides. The Court's holding, that "employment" in the tenure context does not require availability to teach, circumvents the purpose of the statutory probationary period. (*Id*. at 290-91)

Indeed, the interpretation of *Kletzkin* espoused by petitioner could, in theory, result in the acquisition of tenure by a staff member who provides one day of service under a series of annual

[5] This view was rejected by the majority as indicated in the above-cited quotation from the Court's opinion at 280-81. The dissenting opinion in its entirety may be found at 136 *N.J*. 275, 281-291.

contracts in each of four consecutive academic years – a result surely not intended by the Legislature and self-evidently contrary to any semblance of sound educational policy.

Nor is this danger necessarily obviated by the "remedy" suggested by the Appellate Division for the possibility of an insufficiently evaluated teacher acquiring tenure under an unqualified interpretation of the law. As found by Justice Stein:

> In holding that Kletzkin had acquired tenure while on leave, the Appellate Division noted that "the effect of this holding upon a local school board, hesitant to grant tenure to a work-injured employee on involuntary leave, is simply to require that timely notice of dismissal or non-renewal must be given before expiration of the * * * tenure period." (citation omitted) Such a dismissal, however, might be challenged as inconsistent with the statutory mandate against discharge of an employee for claiming workers' compensation benefits, see *N.J.S.A.* 34:15-39.1, and could expose a school board to suits by dismissed disabled employees for retaliatory discharge. (citation omitted)
>
> Not crediting a teacher's time on leave towards acquisition of tenure is preferable, both for the teacher and the school board, to dismissal of the teacher while out on leave. (*Id.* at 289)

Additionally, quite apart from the potential for litigation noted by the dissent, the Commissioner is troubled by the prospect of boards of education feeling compelled to dismiss or nonrenew teaching staff members – whom they might otherwise wish to retain – solely because they are reluctant to risk an employee acquiring tenure before he or she has been sufficiently evaluated due to leave(s) occurring during the statutory probationary period. This is a situation that serves no one well.

With respect to the *Kletzkin* opinions themselves, the Commissioner cannot ignore that the Appellate Division, in affirming the decision of the State Board of Education, centered its discussion on the nature and purpose of *N.J.S.A.* 18A:30-2.1, a statute which does not apply in the present matter:

> We agree with the Board that this case may properly be distinguished from our officially unreported decision in *Stachelski v. Bd. of Ed. of the Bor. of Oaklyn*, A-1144-79, decided April 10, 1981, (Printed at 1981 S.L.D. 1493), *certif. den.*,

> 88 *N.J.* 493, 443 *A.*2d 707 (1981). There we held that a teacher's voluntary one-year maternity leave broke "the seam of employment" for tenure purposes. Referring to *N.J.S.A. 18A:30-2.1* which applies in the present case, the Board here recognized, in effect, a legislative policy that work-injured employees should not lose the benefit of statutorily provided rights by reason of an involuntary work-connected leave, absent a clearly enunciated legislative declaration.
>
> Were we to adopt the interpretation of *N.J.S.A.* 18A:28-5 contended for by Spotswood and NJSBA, a teacher injured on the job during a third year of satisfactory performance, and unable to perform service during the consecutive year because of that injury, would necessarily lose all credit toward tenure of the prior service. Even if the school board desired to grant tenure upon the teacher's completion of 30 months of aggregate service, the consecutive chain of employment would have to be deemed broken, albeit involuntarily and as the result of performing services for the employer. We are unwilling to read such an intent into the statute absent a definitive expression by the legislature. We conclude that the Board reasonably interpreted *N.J.S.A.* 18A:28-5 to provide that Kletzkin's employment continued while receiving full salary under *N.J.S.A.* 18A:30-2.1.
>
> (261 *N.J. Super.* 549, 552-53 (1993))

Moreover, although the Supreme Court, in affirming the judgment of the Appellate Division, did not condition application of its holding on a leave arising pursuant to *N.J.S.A.* 18A: 30-2.1 as the result of a work-related injury,[6] it expressly left open the possibility – notwithstanding that "employment" means contractual employment encompassing leaves of absence so that the thirty-month-plus-one-day period required to obtain tenure pursuant to *N.J.S.A.* 18A:28-5 need not be fully spent in active service – that an extended leave of absence or one that deprives a board of education of its opportunity to evaluate a teaching staff member could still preclude the acquisition of tenure:

> We reject Spotswood's argument, embraced by the dissent, that the statute requires that a teacher render a full thirty months of active service during the probationary period. In rejecting that argument, we recognize the importance of a probationary period as a means of assessing a teacher's performance. (citations omitted) Kletzkin, however, was no stranger to the Board. It had ample opportunity to assess her over twenty-eight months during four school years. Nothing indicates that the Board had any reason to deny her tenure before she was

[6] The Court (at 280) specifically likened *Kletzkin*'s situation to others where continuity of employment was found to have been maintained during a leave of absence, whether voluntary and involuntary.

> injured on the job. *Under the unusual circumstances of this case, we conclude that Kletzkin's brief period of sick leave did not deprive the Board of its opportunity to evaluate her before she acquired tenure. In another case, a more extended leave of absence could lead to a different result.* As the [State] Board recognized, the happenstance that Kletzkin's leave occurred at the end of her probationary period does not justify excluding the time that she was on leave from her probationary period. *(emphasis supplied)*
>
> (136 *N.J.* 275, 280-81 (1994))

These statements, which explicitly pertain to the facts of Kletzkin's situation and render the result of the Court's ruling understandable in her case,[7] are simply not consistent with the categorical reading urged by petitioner; indeed, had the Court intended the principles enunciated elsewhere in its decision to be applied uniformly under all circumstances, its inclusion of the above-cited paragraph would make no sense.

Consequently, where unqualified application of *Kletzkin* holds the potential to thwart the tenure law in whole or part and in the process do a disservice to students, school boards and employees alike – and where the language of the Court's opinion itself provides a basis for something other than uniform application under all circumstances – the Commissioner will not conclude, in the absence of a full factual record and further argument specific to such record, that *Kletzkin* must here be read to require that petitioner acquired tenure simply by being contractually employed for the equivalent of more than three academic years within a period of four consecutive academic years. Rather, the Commissioner prefers to revisit the merits of this matter following development of a factual record setting forth the effect of petitioner's series of leaves on the Board's ability to evaluate her performance, and consideration of argument regarding the appropriate application of *Kletzkin* to such facts.

[7] Indeed, even the dissenting opinion of Justice Stein noted that the result of the Court's ruling "may seem appropriate in the case of respondent, Dorothy Kletzkin, who served subject to the evaluation of the Spotswood school board for twenty-eight months and was injured on the job just two months before she would have completed the full probationary period." *Kletzkin, supra*, at 281.

Accordingly, for the reasons set forth herein, the Initial Decision of the OAL – dismissing the petition of appeal – is rejected, and this matter is remanded for further proceedings consistent with the Commissioner's determination above.

IT IS SO ORDERED.[8]

COMMISSIONER OF EDUCATION

Date of Decision: August 26, 2009
Date of Mailing: August 27, 2009

[8] Pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1), Commissioner decisions are appealable to the Appellate Division of the Superior Court.