#535-11 (OAL Decision: Not yet available online)

LUCY KOURTESIS, ET AL.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BERGEN COUNTY SPECIAL SERVICES SCHOOL DISTRICT, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

The petitioners in this consolidated case – tenured teachers and speech therapists employed by respondent on an hourly basis to provide services to students in non-public schools – alleged that their hours for the 2010-2011 school year were improperly reduced by respondent in violation of their tenure and seniority rights. Petitioners contended that respondent should not have reduced the hours of all the teachers and therapists in their collective bargaining unit, but should rather have assigned the anticipated number of instructional hours based on seniority. The parties filed cross motions for summary decision.

The ALJ found, *inter alia*, that: there are no genuine issues of material fact, and the matter is ripe for summary judgment; respondent never guaranteed, by contract or otherwise, a minimum number of hours to petitioners; petitioners acquired tenure by working on an hourly basis; petitioners have flexible schedules with fluctuating hours; the 2009-2012 collective bargaining agreement under which petitioners were employed limited hours worked in a day to not more than 6.75; no positions were abolished, the number of staff was not reduced, and no positions were transferred, reassigned or subjected to any other form of adverse action; accordingly, a reduction in force within the meaning of *N.J.S.A.* 18A:28-9 never occurred; and there were no violations of the Open Public Meetings Act (OPMA). Accordingly, the ALJ: determined that petitioners' tenure and seniority rights were not violated; granted respondent's motion for summary judgment; and denied petitioner's appeal.

Upon a thorough and independent review of the record and the Initial Decision, the Commissioner concurred with the ALJ that: the actions of respondent in reducing the number of hours worked did not constitute a RIF as described in *N.J.S.A.* 18A:28-9; did not violate the petitioners' tenure rights; and did not violate the OPMA. Accordingly, the petition was dismissed.

December 5, 2011

OAL DKT NOS. EDU 14171-10; 14168-10; 14172-10; 14173-10; 14186-10; 14175-10; 14174-10; 14170-10; 356-11; 355-11; 354-11; 357-11; 28-11; 23-11; 24-11; 25-11; and 353-11

AGENCY DKT. NOS. 702-12/10; 661-11/10; 628-11/10; 669-11/10; 636-11/10; 666-11/10; 663-11/10; 695-11/10; 665-11/10; 644-11/10; 662-11/10; 627-11/10; 641-11/10; 671-11/10; 705-12/10; 629-11/10; and 643-11/10, respectively.

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RESPONDENT.	:	

The petitioners in this consolidated case – tenured teachers and speech therapists employed by respondent on an hourly basis to provide services to students in non-public schools – allege that respondent violated their tenure and seniority rights when it decreased the number of hours of their employment. They contend that, rather than reducing the hours of all the teachers and therapists in their collective bargaining unit – in consequence of a decrease in demand for services – respondent should have assigned the anticipated number of needed instructional hours on the basis of seniority. More specifically, petitioners argue that their hours should not have been decreased, and that any reduction in demand for services should have resulted in the elimination of the positions of less senior colleagues. As an ancillary matter, petitioners assert that respondent's failure to give petitioners notice of the alleged reduction in employment constituted a violation of the Open Public Meetings Act.

In her Initial Decision, the Administrative Law Judge (ALJ) determined 1) that respondent's above described action did not violate the petitioners' tenure rights, and 2) that the Open Public Meetings Act was not violated:

> [S]ince the petitioners were not entitled to a minimum number of hours, respondent's assignment of fewer hours at the beginning of the 2010–2011 school year did not violate their tenure and seniority rights.
> Initial Decision at 12.

> Since no RIF took place, a board meeting to effectuate same was not required. *See* *N.J.S.A.* 18A:28-9
> Initial Decision at 13.

Upon full consideration of the record, Initial Decision and parties' exceptions, the Commissioner agrees.

Certain undisputed facts are key to an understanding of the issues presented in this controversy. First, petitioners are employed to provide supplemental educational services to students in private schools under programs mandated by State laws. The parties refer to the programs as Chapter 192 and Chapter 193 programs, an allusion to the numeric designations of the portions of the statutes that call for the services.

Although non-public schools are generally outside respondent's jurisdiction, the above-referenced state laws direct that certain special services be administered by respondent and funded by the State. More specifically, when a student in a non-public school has a need for such services the school, together with the parent of the eligible student, submits a formal request to respondent. Respondent assigns the proper staff person to provide the services to the private school student and requests funding for the services from the local school district. The local school district is, in turn, reimbursed by the State. Neither the demand for services in any given school year, nor the reimbursement rate for provided services, is determined by respondent.

The petitioners belong to a separate collective bargaining unit from salaried teachers, which unit has a separate collective bargaining agreement (CBA) that covers wages, hours, and conditions of employment. Pursuant to that CBA, petitioners may not work more than 6.75 hours per day without prior administrative approval, and no minimum number of hours is guaranteed. The 192/193 staff have no holiday or vacation schedules and are not required to work on days that are holidays on the schedules of the private schools at which they work.

The record indicates that throughout their tenure, petitioners have signed yearlong, hourly contracts which set forth their individual hourly rates and longevity stipends. Their total hours have fluctuated from year to year, because the needs of the non-public schools fluctuate. In addition, petitioners have been allowed to set their total number of service hours – so long as the total did not exceed 6.75 hours per day. Schedules have never been assigned based upon seniority, nor is there any such requirement in the collective bargaining agreement for petitioners' unit. Rather, respondent has tried to accommodate staff members by assigning work based upon their preferred locations and number of hours. Respondent has also tried to honor the requests of schools for particular staff.

As regards the across-the-board decrease in hours for the 2010-2011 school year, there is testimony in the record that it was driven by the closure of three parochial schools in which petitioners had been employed, as well as a 13 percent decrease in State funding for the 2010–2011 school year. Rather than terminate employees in difficult economic times, respondent's supervisor of instruction decided to assign fewer hours across the unit.

Under the foregoing circumstances, the respondent's action did not constitute a reduction in force (RIF) – as described in *N.J.S.A.* 18A:28-9:

> Nothing in this title or any other law relating to tenure of service shall be held to limit the right of any board of education to reduce the number of teaching staff members employed in the district whenever, in the judgment of the board, it is advisable to abolish any such positions for reasons of economy or because of reduction in the number of pupils or of change in the administrative or supervisory organization of the district or for other good cause upon compliance with the provisions of this article.
> [Emphasis added.]

While it is true that the courts have recognized that a reduction in hours of employment can be a reduction in force, *see, e.g., Klinger v. Cranbury Bd. of Educ.*, 190 *N.J. Super*. 354, 357 (App. Div. 1982), *certif. denied*, 93 *N.J.* 277 (1983), for an actual reduction in hours to equate to a RIF, staff must be entitled to a minimum number of hours of employment. Conversely, an employee's tenure/seniority rights will lay dormant where hours vary by nature and no reasonable expectation of a prescribed set of hours exists. *See, Theresa Alfieri and Therese Mezak v. Board of Education of the Township of Saddle Brook, Bergen County*, (consolidated), Commissioner Decision No. 320-01, September 17, 2001, State Board Decision No. 40-01, January 8, 2003, *certif. den., Alfieri v. Bd. of Educ.*, 181 *N.J.* 547 (2004).

Similarly, the protections articulated in *N.J.S.A.* 18A:28-5 are not triggered by the facts of this case. That statute provides, in pertinent part:

> The services of all teaching staff members . . . and such other employees as are in positions which require them to hold appropriate certificates issued by the board of examiners, serving in any school district or under any board of education, . . . 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.
> [Emphasis added.]

None of the petitioners were "dismissed." Nor can the Commissioner conclude that any of them were "reduced in compensation," given that the nature of their employment entailed fluctuating hours between and within school years, and their terms of employment included no guarantees regarding the number of hours that they could expect to be assigned.

The instant matter is not the first such controversy to be brought before the Commissioner. In *Alfieri v. Saddlebrook Board of Education,* cited *supra,* petitioners with jobs that guaranteed them no minimum number of hours challenged the Saddlebrook Board of Education's action of requiring petitioners to teach students in groups – as opposed to individually – thereby reducing the total amount of teaching hours. The Commissioner found:

> [P]etitioners were not subject to a reduction in force or other adverse employment action which would trigger their tenure and seniority rights. It is undisputed that petitioners knowingly entered into employment with the Board in positions having fluid hours, not to exceed 19 or 19.5 hours per week, based on the needs of its students for remedial instruction. Further, petitioners' employment hours fluctuated from year to year, even pay period to pay period, based on those needs. Consequently, the Commissioner agrees with the Board that, given the structure of the programs in which petitioners were employed and the terms of their employment agreements, they never had any tenure entitlement to a minimum number of hours worked per year. Therefore, while petitioners' hours of employment were fewer in the 1998-1999 school year than in the previous year, tenure and seniority protections were not triggered because their employment from its inception was intended to be flexible in terms of the precise number of hours to be worked.
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> (*Alfieri v. Saddlebrook Board of Education,* Commisssioner Decision No. 320-01 at 5, citations to the record omitted.)

Upon review of the Commissioner's decision, the State Board of Education concurred:

> [W]e agree with the Commissioner that, given the factual circumstances of this case, the petitioners do not have a tenure entitlement to the full-time positions they seek because they were not subject to a reduction in staff under *N.J.S.A.* 18A:28-9.
>
> As set forth above, the petitioners were not employed for a fixed number of hours. Rather, their hours were fluid up to a maximum of 19 1/2 hours per week. Consequently, their hours have fluctuated not only from year to year but also from pay period to pay period.
>
> Under these circumstances, the fact that the petitioners may have worked fewer hours in any given year than they had during the preceding year does not mean that they were subject to a reduction in staff within the meaning of *N.J.S.A.* 18A:28-9. To hold otherwise would require a conclusion that reductions in staff had occurred from pay period to pay period, as well as from year to year. . . .
>
> When a teaching staff member asserts tenure rights on the basis of a reduction in staff pursuant to *N.J.S.A.* 18A:28-9, consideration of the hours of employment established by the district board upon the staff member's appointment is the starting point for determining whether such a reduction has occurred. In this case, the Board had not required petitioners to work a definite number of hours each week when it appointed them, but, rather, it merely had established the maximum number of hours that they were permitted to work on a weekly basis. . . . . The Board in this case did not act to reduce the maximum number of hours that petitioners could work. Hence, we concur with the Commissioner that, in the absence of any guarantee of a minimum number of hours, a reduction in staff within the meaning of the statute did not occur in this case.
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> *Alfieri v. Saddle Brook Board of Education,* State Board Decision No. 40-01 at 6-7.

The case was ultimately appealed to the New Jersey Supreme Court which denied certiorari (181 *N.J.* 547 (2004).

In their exceptions petitioners have relied on *Spiewack v. Rutherford Board of Education,* 90 *N.J.* 63 (1982) and other cases generally relating to tenure and seniority. While *Spiewak* stands for the proposition that part-time employees may earn tenure – and "bump" non-tenured full-time employees in the same "position" – that proposition is not at issue in this case. It is acknowledged that petitioners are tenured. However, there can be no finding of a reduction in their employment when they have not been terminated and cannot, under the terms and conditions of their employment, expect a specific minimum number of assigned work hours in a given year, month, week or day. The other cases cited by petitioners are similarly inapposite to the instant controversy.

Accordingly, the Commissioner concludes that respondent's action may be upheld, as it was reasonable and did not violate petitioners' tenure rights. Further, the Commissioner finds, for the reasons set forth in the Initial Decision, that the Open Public Meetings Act was not violated by respondent. The petition is therefore dismissed.

IT IS SO ORDERED.[1]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: December 5, 2011

Date of Mailing: December 5, 2011

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36. (*N.J.S.A.* 18A:6-9.1)