

#214-15 (OAL Decision: Not available online)

DARCY KOLODZIEJ, :  
PETITIONER, :  
V. : COMMISSIONER OF EDUCATION  
BOARD OF EDUCATION OF THE : DECISION  
SOUTHERN REGIONAL HIGH SCHOOL :  
DISTRICT, OCEAN COUNTY, :  
RESPONDENT. :

---

### SYNOPSIS

Petitioner – formerly employed as a teaching staff member in respondent Board’s school district – alleged that the failure of the Board to employ her for the 2007-08 school year violated her tenure and seniority rights. The petitioner was employed as a teacher in the school district for the 2002-03 through 2004-05 academic years, before taking a Board-approved maternity leave for the 2005-06 school year; she then returned to work for the 2006-07 school year. The petitioner sought reinstatement to her tenured position, together with back pay and emoluments. The Board contended that the petitioner had not acquired tenure because of a break in service, and that her non-renewal in April 2007 as part of a reduction in force (RIF) was proper. The case was heard at the OAL, and the ALJ issued an Initial Decision which concluded that petitioner: had obtained tenure and had 3.9 years of seniority credit at the time of the RIF; should have been recalled by the District in September 2007; and was entitled to retroactive back pay in the amount of \$137,212 for the 2007-08 through 2009-10 school years, as well as seniority credit for the same years. In a decision dated May 16, 2013, the Commissioner rejected the Initial Decision, determining that petitioner had not attained tenure pursuant to *N.J.S.A. 18A:28-5* at the time of her dismissal in 2007. Petitioner appealed this decision, and on July 24, 2014, the Appellate Division reversed and remanded the matter to the Commissioner for a determination of petitioner’s seniority rights and any consequent entitlement to relief.

On remand, the Commissioner noted that the only dispute between the parties regarding the Appellate Division’s instructions on remand was whether the petitioner is entitled to seniority credits for 30 days under *N.J.A.C. 6A:32-5.1(b)* for her unpaid maternity leave during the 2005-06 school year. The Commissioner found, *inter alia*, that: the interpretation of *N.J.A.C. 6A:32-5.1(b)* is key to the determination of petitioner’s seniority entitlement because the amount of back pay and seniority credit is dictated by whether the petitioner is entitled to 30 days of credit for the 2005-06 school year, when she was out on unpaid maternity leave; and if petitioner receives the 30 day credit for that period, she would have acquired 3.9 years of seniority credit at the time of the 2007 RIF and would have had more seniority than the teacher retained by the District. In light of the Appellate Division’s interpretation of *N.J.A.C. 6A:32-5.1(b)* in *Erica A. Cohen v. Emerson Board of Education*, 225 *N.J. Super.* 324 (App. Div. 1988), the Commissioner has no discretion but to find that the petitioner is entitled to receive 30 days of seniority credit for the 2005-06 school year – despite the fact that she was on an unpaid maternity leave for more than 30 days – and therefore, at the time of the RIF, petitioner had 3.9 years of seniority credit and should have been recalled in September 2007. Accordingly, the Commissioner determined that petitioner is entitled to retroactive back pay in the amount of \$137,212 and seniority credits for the 2007-08 through 2009-2010 school years.

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 19, 2015

OAL DKT. NO. EDU 6491-07  
AGENCY DKT. NO. 188-7/07

DARCY KOLODZIEJ,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE	:	DECISION
SOUTHERN REGIONAL HIGH SCHOOL	:	
DISTRICT, OCEAN COUNTY,	:	
	:	
RESPONDENT.	:	

---

This matter originated as a petition of appeal filed by the petitioner, Darcy Kolodziej – a health and physical education teacher – challenging the Southern Regional High School District’s (District) decision not to renew her employment for the 2007-08 school year due to a reduction in force (RIF). The Administrative Law Judge (ALJ) issued a series of Orders over the course of the litigation that addressed petitioner’s tenure and seniority rights and her entitlement to damages, followed by an Initial Decision that confirmed the ALJ’s previous findings. The ALJ ultimately determined that the petitioner obtained tenure and seniority rights with the District. The ALJ found that at the time of the RIF in 2007, the petitioner had acquired 3.9 years of seniority credit – which was more seniority than that of Edmond Costa, another physical education teacher in the District who had acquired 3.8 months of seniority credit. As a result, the petitioner should have been recalled by the District in September 2007 instead of Mr. Costa. The ALJ further determined that petitioner was entitled to retroactive back pay, less unemployment benefits received by the petitioner, in the amount of \$137,212.00 for the 2007-08,

2008-09 and 2009-10 school years, and seniority credit for those years as if she were properly employed.<sup>1</sup>

In a decision dated May 16, 2013, the Commissioner rejected the Initial Decision and determined that the petitioner had not attained tenure at the time of her dismissal in 2007. The petitioner appealed the Commissioner's May 16, 2013 decision, and on July 24, 2014, the Appellate Division reversed and remanded this matter to the Commissioner for a determination of petitioner's seniority rights and any consequent entitlement to relief. Specifically, the Appellate Division suggested that the Commissioner evaluate whether the petitioner is entitled to 30 days of seniority credit for the 2005-2006 school year under *N.J.A.C. 6A:32-5.1(b)*, in light of the fact that the petitioner was out on unpaid maternity leave for the entire school year.<sup>2</sup>

Seniority is part of the regulatory framework adopted under authority of *N.J.S.A. 18A:28-10* to establish the order of dismissals among a district's tenured staff in the event of a reduction in force. The only dispute between the parties regarding the Appellate Division's instructions on remand is whether the petitioner is entitled to seniority credit for 30 days under *N.J.A.C. 6A:32-5.1(b)* for her unpaid maternity leave during the 2005-2006 school year. Pursuant to *N.J.A.C. 6A:32-5.1(b)*:

Seniority, pursuant to *N.J.S.A. 18A:29-9 et seq.*, shall be determined according to the number of academic or calendar years of employment, or fraction thereof, as the case may be, in the school district in specific categories as hereinafter provided. The periods of unpaid absences not exceeding 30 calendar days aggregate in one academic or calendar year, leaves of absence at full or partial pay and unpaid absences granted for study or research shall be credit toward seniority. All other unpaid absences or leaves of absence shall not receive seniority credit.

---

<sup>1</sup> Pursuant to the ALJ's interim Order, the District reinstated the petitioner to her former position in September of 2010.

<sup>2</sup> Following the remand of this matter from the Appellate Division, the parties were afforded an opportunity to submit their respective positions in connection with the petitioner's seniority rights.

The interpretation of *N.J.A.C.* 6A:32-5.1(b) is a key component of the petitioner's seniority entitlement in this case because the amount of back pay and seniority credit is dictated by whether the petitioner is entitled to 30 days of credit for the 2005-2006 school year when she was out on an unpaid maternity leave. Specifically, if the petitioner receives a 30 day credit for the 2005-2006 school year, she would have acquired 3.9 years of seniority credit at the time of the 2007 RIF and would have been entitled to a position as a physical education teacher for the 2007-2008 school year. On the other hand, if the petitioner does not get credit for 30 days of her unpaid maternity leave, she would have acquired 3.8 years of seniority credit at the time of the 2007 RIF and would have been tied for seniority with Mr. Costa. It is undisputed that in the case of a tie, a board of education has the discretion to determine which teacher to recall.

In *Erica A. Cohen v. Emerson Board of Education*, 225 *N.J. Super.* 324 (App. Div. 1988) the Appellate Division considered competing seniority rights of two teachers and analyzed the language contained in *N.J.A.C.* 6A:32-5.1(b).<sup>3</sup> One component of the appeal in that case involved a challenge to the State Board of Education's interpretation of *N.J.A.C.* 6A:32-5.1(b). The State Board of Education interpreted the plain language of *N.J.A.C.* 6A:32-5.1(b) to preclude "credit for any portion of an unpaid leave which, when totaled with all other unpaid leaves during that calendar or academic year, is in excess of 30 days." *Erica A. Cohen v. Emerson Board of Education*, 1985 S.L.D. 2562, 2573-2574. The State Board further noted that its "interpretation is consistent with the purpose of the seniority system to insure equitable determinations on the basis of actual service, and we find that to broaden the exception provided by *N.J.A.C.* 6:3-1.10(b) would undermine that purpose." *Id.* at 2574.

---

<sup>3</sup> At the time of the *Cohen, supra*, decision the predecessor regulation to *N.J.A.C.* 6A:32-5.1(b) was *N.J.A.C.* 6:3-1.10(b), which includes the identical language contained in *N.J.A.C.* 6A:32-5.1(b).

On appeal the Appellate Division recognized and accepted the State Board of Education's position regarding the purpose of the seniority system and the importance of "equitable determinations on the basis of actual service." *Cohen, supra*, 225 N.J. Super. at 10. However, the court rejected the State Board of Education's interpretation of the language found in N.J.A.C. 6A:32-5.1(b), and instead found that under N.J.A.C. 6A:32-5.1(b), the first 30 days of an unpaid maternity leave is counted toward seniority, and any additional leave time is not credited for seniority purposes. The court expounded, "[i]f the Board has determined that 30 days' aggregate leave within a year is sufficiently inconsequential not to affect an employee's seniority rights, then the rule should be equitably applied to those who take more or less than that period." Applying that interpretation of the regulatory language, the court concluded that the petitioner in *Cohen, supra*, was entitled to seniority credit for the first 9 days of her maternity leave that was paid sick time and the first 30 days of her unpaid maternity leave; and the remainder of her unpaid maternity leave was properly deducted from her seniority credits. *Cohen, supra*, 225 N.J. Super. at 10-11.

In light of the Appellate Division's interpretation of N.J.A.C. 6A:32-5.1(b) in *Cohen, supra*, the Commissioner has no discretion but to find that the petitioner is entitled to receive 30 days of seniority credit for the 2005-2006 school year despite the fact that she was on an unpaid maternity leave for more than 30 days. Therefore, at the time of the reduction in force in 2007, the petitioner had acquired 3.9 years of seniority credit. As a result, the petitioner had more seniority than Mr. Costa and she should have been recalled by the District in September 2007. Finally, neither the Family and Medical Leave Act, 29 U.S.C. §§ 2601-2654, nor the Collective Bargaining Agreement between the parties dictate a different result as neither can serve to give the petitioner less rights than that afforded by the applicable regulatory provision.

Accordingly, the petitioner is entitled to retroactive back pay, less unemployment benefits received by the petitioner<sup>4</sup>, in the amount of \$137,212.00 for the 2007-08, 2008-09, and 2009-10 school years.<sup>5</sup> The petitioner is also awarded seniority credits for the 2007-08, 2008-09, and 2009-10 school years as if she had actually been employed.

IT IS SO ORDERED.<sup>6</sup>

COMMISSIONER OF EDUCATION

Date of Decision: June 19, 2015

Date of Mailing: June 19, 2015

---

<sup>4</sup> The District is responsible for reimbursing the unemployment benefits to the Department of Labor and a copy of this decision will be forwarded to that Department.

<sup>5</sup> Following the remand of this matter from the Appellate Division, the petitioner requested that the Commissioner award her damages in the form of lost wages and other benefits stemming from a RIF that occurred in 2013. Any potential damages that were the result of the 2013 RIF were not a part of this case. If the petitioner believed that the Board violated her tenure and seniority rights in 2013, a separate petition of appeal should have been filed.

<sup>6</sup> Pursuant to *P.L. 2008, c. 36 (N.J.S.A. 18A:6-9.1)*, Commissioner decisions are appealable to the Superior Court, Appellate Division.