

EDU #7770-99
C # 488-01
SB # 2-02

PETER I. DONNELLY, :
 :
 PETITIONER-APPELLANT, :
 :
 V. : STATE BOARD OF EDUCATION
 :
 BOARD OF EDUCATION OF THE : DECISION
 BOROUGH OF HASBROUCK HEIGHTS, :
 BERGEN COUNTY, :
 :
 RESPONDENT-RESPONDENT. :

Decided by the Commissioner of Education, December 17, 2001

For the Petitioner-Appellant, New Jersey Principals and Supervisors
Association (Wayne J. Oppito, Esq., of Counsel)

For the Respondent-Respondent, Schwartz, Simon, Edelstein, Celso &
Kessler, LLP (Allan P. Dzwilewski, Esq., of Counsel)

The facts herein were stipulated by the parties and are not in dispute. Peter I. Donnelly (hereinafter "petitioner"), a tenured teaching staff member, had been employed by the Board of Education of the Borough of Hasbrouck Heights (hereinafter "Board") as a teacher of English beginning in September 1973. On or about July 1, 1994, the petitioner was appointed an assistant principal at the junior-senior high school. He held that position until March 31, 1996. On or about April 1, 1996, Paul Palek, the high school principal, left his employment in the district, although he continued on the payroll until April 30, 1996. The petitioner was appointed the acting principal at the junior-

senior high school on April 1, 1996, and he remained in that position until September 30, 1997. Effective October 1, 1997, the Board employed another individual as the high school principal, and the petitioner was returned to his former position of assistant principal. In November 1997, the Board appointed the petitioner as principal of an elementary school. He was continuously employed as an elementary school principal from November 24, 1997 until June 30, 1999. Effective July 1, 1999, the Board transferred the petitioner to his former position as assistant principal.

The petitioner filed a petition with the Commissioner of Education, claiming that his service as an acting principal counted towards his accrual of tenure and that he had achieved tenure as a principal under N.J.S.A. 18A:28-6.¹

On October 29, 2001, an Administrative Law Judge (“ALJ”) agreed with the petitioner that he had achieved tenure as a principal. Observing that the petitioner had served as acting principal for the full 1996-97 school year and for eight months of the 1997-98 year, and as principal for the entire 1998-99 school year, the ALJ found that

¹ N.J.S.A. 18A:28-6 provides, in pertinent part:

Any such teaching staff member under tenure or eligible to obtain tenure under this chapter, who is transferred or promoted with his consent to another position covered by this chapter on or after July 1, 1962, shall not obtain tenure in the new position until after:

(a) the expiration of a period of employment of two consecutive calendar years in the new position unless a shorter period is fixed by the employing board for such purpose; or

(b) employment for two academic years in the new position together with employment in the new position at the beginning of the next succeeding academic year; or

(c) employment in the new position within a period of any three consecutive academic years, for the equivalent of more than two academic years;....

the petitioner's situation would fall squarely within the scope of N.J.S.A. 18A:28-6(c) if his service as acting principal could be counted towards tenure.

In so doing, the ALJ rejected the Board's argument that N.J.S.A. 18A:28-6(c) applied only to staff members employed on an academic, rather than a calendar, year basis.² The ALJ found that nothing in the statutory language limited the application of that provision to ten-month employees, reasoning that:

[u]se of the phrase 'academic year' refers to the passage of time during which a teaching staff member has actually been employed 'in the new position,' not to whatever length of term may be stated in his or her employment contract. Interpreting the statute to cover only ten-month employees would not make sense, since it might discourage teachers from accepting transfers or promotions to upper-management positions. Moreover, the statute expressly applies to promotions as well as transfers. If the Legislature had intended to restrict the statutory coverage to transfers between ten-month positions, it could easily have said so. But see, contra, [Dues v. Board of Education of the Township of Irvington, 97 N.J.A.R.2d (EDU) 616, 617]. In Dues, however, the Commissioner's narrow holding is that a vice principal did not acquire tenure under subsection (a) because she had not been reappointed after two continuous calendar years of employment. Indeed, Donnelly's counsel, who happened to have handled the vice principal's appeal in Dues, recalls that subsection (c) was never an issue in that case. Thus, the Commissioner never had any opportunity to consider the applicability of subsection (c) and any analysis of that provision in the initial decision is nonbinding.

Initial Decision, slip op. at 5 (emphasis in original).

The ALJ concluded that the petitioner's service in an acting capacity should be credited toward the acquisition of tenure as a principal in this instance, explaining that:

² An "academic year" is defined as "the period between the time school opens in any school district or under any board of education after the general summer vacation until the next succeeding summer vacation." N.J.S.A. 18A:1-1. A "calendar year" for tenure purposes has been construed as any 12-month period. Bd. of Ed. Of Manchester Tp. v. Raubinger, 78 N.J. Super. 90, 95-97 (App. Div. 1963).

[d]rawing a distinction between ‘absences’ and ‘vacancies,’ the New Jersey Supreme Court declared that ‘an entitlement to a position arises only when a vacancy exists.’ In Lammers v. Point Pleasant Bd. of Educ., 134 N.J. 254, 268 (1993), the Court explained that ‘[a]n absence exists when the missing teacher is scheduled ultimately to return to the position,’ whereas ‘[a] vacancy exists when the teacher leaves the position permanently, as in the case of a resignation or a retirement.’ Accordingly, the Court ruled that a tenured teacher did not have a seniority entitlement to a teaching position available because the incumbent teacher was out on a one-year maternity leave. Since the teacher on leave intended to return to her position, no vacancy was created and a terminated teacher did not possess a preferred-reemployment right to replace her. Lammers, at 273. See also, Sayreville Educ. Ass’n v. Sayreville Bd. of Educ., 193 N.J. Super. 424, 428 (App. Div. 1984), distinguishing between a temporary absence of a regular teacher ‘whose return to duty is contemplated,’ and a vacancy in which the position being filled ‘is not the place of the other but rather a vacant place.’

Applied to the circumstances of this case, the distinction dictates that Donnelly may count toward tenure all of his service as ‘acting principal’ after April 30, 1996, when Mr. Palek had not only resigned as high school principal, but also had been removed from the payroll. Clearly at this point, if not sooner, Mr. Palek's employment in the district had ended, and Donnelly was no longer merely acting as a substitute, but occupying the position in his own right. As a result, Donnelly obtained tenure credit for all of his service in 1996-97 and 1997-98 when the position of high school principal was ‘vacant.’ It also does not matter that his additional service in 1998-99 was as the principal of an elementary school. Tenure is attained in the position of ‘principal,’ regardless of whether such service occurred at the secondary or elementary level. See Williams v. Plainfield Bd. of Educ., 176 N.J. Super. 154 (App. Div. 1980).

Id. at 6.

The ALJ therefore recommended that the Board recognize the petitioner's tenure rights as a principal and employ him in any principalship in the district occupied by an individual without tenure or with less seniority.³

On December 17, 2001, the Commissioner rejected the ALJ's recommendation and dismissed the petition, concluding that N.J.S.A. 18A:28-6(c) was applicable only to staff members employed on an academic year basis. Relying on his decision in Dues, supra, the Commissioner agreed with the Board that the petitioner's claim was properly analyzed under N.J.S.A. 18A:28-6(a) since he had been employed on a calendar year basis. The Commissioner found that the petitioner could not satisfy the terms of that provision since he had not served two consecutive calendar years with reemployment in the following year as an acting principal or principal.

Notwithstanding such result, the Commissioner noted his agreement with the ALJ's finding that the petitioner's service as an acting principal was properly credited toward his acquisition of tenure as a principal in this instance.

The petitioner filed the instant appeal to the State Board. After a thorough review of the record, we reverse the decision of the Commissioner. We agree with the ALJ that the petitioner achieved tenure as a principal under N.J.S.A. 18A:28-6(c).

Tenure is conferred by a statute, N.J.S.A. 18A:28-1 et seq., which "should be liberally construed to achieve its beneficent ends." Spiewak v. Board of Educ. of Rutherford, 90 N.J. 63, 74 (1982). N.J.S.A. 18A:28-6 defines with specificity the conditions under which a teaching staff member may achieve tenure following a promotion or a transfer with consent. In order to obtain tenure in the new position, the

³ We note that the petitioner does not seek monetary damages.

precise statutory conditions must be met. Zimmerman v. Bd. of Educ. of Newark, 38 N.J. 65, 72 (1962), certif. denied, 371 U.S. 956, 83 S.Ct. 508, 9 L.Ed.2d 502 (1963). The statute makes tenure a mandatory term and condition of employment and it supersedes contractual terms. Spiewak, supra, at 72.

We fully concur with the ALJ and the Commissioner that, on the basis of the facts in this particular case, the petitioner's employment as an acting principal was creditable towards tenure as a principal no later than May 1, 1996, when the position became vacant. Consequently, given the facts stipulated in the record, the petitioner was employed in the position of "principal" for the equivalent of more than two academic years within a period of three consecutive academic years. Contrary to the Commissioner's finding, however, we agree with the ALJ that the protection afforded teaching staff members by N.J.S.A. 18A:28-6(c) is not limited to staff members who are employed on an academic year basis.

"The interpretation of any statute necessarily begins with consideration of its plain language....Absent a legislative intent to the contrary, such language should be given its ordinary meaning." Lammers, supra, at 267-68. As the Court stressed in Spiewak, supra, at 74, quoting In re Jamesbury High School Closing, 83 N.J. 540 (1980): "We are not at liberty to presume the legislature intended something other than what it expressed by its plain language. The Court will not engage in conjecture or surmise which will circumvent the plain meaning of the act." In construing a statute, a court should "effectuate the legislative intent in light of the language used and the objects sought to be achieved." Merin v. Maglaki, 126 N.J. 430, 435 (1992), quoting State v. Maguire, 84 N.J. 508, 514 (1980).

The wording of N.J.S.A. 18A:28-6 is clear and unambiguous. See Spiewak, supra (dealing with the nearly identical language of N.J.S.A. 18A:28-5). N.J.S.A. 18A:28-6(c) provides that a staff member, following a promotion or a transfer with consent, shall achieve tenure after “employment in the new position within a period of any three consecutive academic years, for the equivalent of more than two academic years.” Like the ALJ, we find that there is nothing in the statutory scheme that would support the conclusion that this provision was intended to apply to staff members employed on an academic year basis only.⁴

N.J.S.A. 18:13-16, the predecessor statute to N.J.S.A. 18A:28-5 and 28-6, was amended in 1940 by the addition of subsection (c). L.1940, c. 43. Prior thereto, some local boards had required teachers to resign before the end of a school year as a condition for employment in the following school year. Breitwieser v. State-Operated Sch. Dist., 286 N.J. Super. 633, 647 (App. Div. 1996). In Schulz v. State Bd. of Ed., 132 N.J.L. 345, 351 (E. & A. 1945), the Court found that there was “little doubt” that the 1940 amendment was inspired by and was intended to apply to the situation presented by Ahrensfield v. State Board of Education, 124 N.J.L. 231 (N.J.Sup. 1940), aff'd, 126 N.J.L. 543 (E. & A. 1941), “namely, an artificial splitting of the period of employment to avoid the application of the tenure statute to a regularly employed, full-time teacher.”⁵

⁴ Contrary to the Board’s contention in its exceptions to the report of our Legal Committee, the Supreme Court in Zimmerman, supra, did not hold that the tenure claim made by a teaching staff member employed on an academic year basis was controlled by the section of N.J.S.A. 18A:28-5 dealing with academic year employees. Rather, the Court analyzed the petitioner’s claims under both subsections (a) and (b) and concluded that he had not achieved tenure under either of those provisions.

⁵ In Ahrensfield, the Court had rejected the tenure claim of a female teacher who, at the suggestion of her principal, had resigned one day before the three-year period for tenure acquisition was complete in order to avoid the effect of a resolution adopted by the district board opposing tenure for married female teachers and who was subsequently reemployed in her position for the following school year.

The Sponsor's Statement to the amendment confirms that the purpose of the bill was "to provide for teachers, who aggregate the equivalent of more than three academic years of teaching service in any school district, within a period of four consecutive academic years, the same tenure of position which the present law provides for teachers who teach three calendar years or three consecutive academic years and are employed at the beginning of the fourth academic year." Sponsor's Statement; 1940 Assembly, No. 81.

In Dues, relied upon by the Commissioner, a tenured teacher, who had been promoted to assistant principal and served in that position for the period from July 1, 1994 through June 30, 1996, claimed that she had achieved tenure as an assistant principal.⁶ The Commissioner rejected Ms. Dues' claim, stressing that she had not been reemployed by the district board after serving as an assistant principal for two consecutive calendar years pursuant to the requirement of N.J.S.A. 18A:28-6(a) as interpreted in Martucci v. Board of Education of the City of Linden, Union County, decided by the State Board of Education, December 4, 1996 [acquisition of tenure under N.J.S.A. 18A:28-6(a) requires reemployment in the same position for the next succeeding year after serving for two consecutive calendar years].

The Commissioner in Dues did not expressly address subsections (b) and (c) of the statute, although the ALJ had determined that those provisions were not applicable since they pertained only to staff members employed on an academic year basis. However, it is evident that neither (b) nor (c) would have provided Ms. Dues with tenure

⁶ The district board maintained that Ms. Dues had not been appointed assistant principal until August 18, 1994. However, the Commissioner agreed with the ALJ that even if the appointment had been effective on July 1, 1994, as Dues claimed, she would not have achieved tenure under N.J.S.A. 18A:28-6.

protection under the facts of that case. Since Dues had not been reappointed as assistant principal for the following year, subsection (b), which expressly requires “employment in the new position at the beginning of the next succeeding academic year,” would not apply. Moreover, since she had not served as assistant principal “within a period of any three consecutive academic years, for the equivalent of more than two academic years,” subsection (c) also was inapplicable.

We find, in addition, that the Commissioner’s interpretation of N.J.S.A. 18A:28-6(c) would lead to a situation in which similarly situated teaching staff members would be treated differently for tenure acquisition purposes. Hence, a staff member employed on an academic year basis would receive the benefits of tenure notwithstanding any breaks in service during the relevant period as long as he served for the equivalent of more than two academic years within three consecutive academic years. However, a staff member in the same circumstances who was employed on a calendar year basis would not.⁷ There is absolutely nothing in the statutory scheme that would lead us to conclude that the Legislature intended such an inequitable result. Nor can we discern any rational basis for such a distinction, particularly given the intent of the statute. Moreover, such a holding would violate the dictates of Spiewak insofar as the achievement of tenure would turn on contractual terms, i.e., whether the staff member was employed under a ten-month or a 12-month contract.

⁷ If N.J.S.A. 18A:28-6(c) is not applicable to calendar year employees, then a teaching staff member serving under a 12-month contract could only achieve tenure under subsection (a) of the statute, which requires employment for two consecutive calendar years in the new position with reemployment for the next succeeding year. Thus, a break in service prior to employment for two consecutive calendar years would preclude a 12-month employee from achieving tenure in the position until after employment for an additional two years in that position, the very circumstance that subsection (c) was designed to prevent.

In sum, we find the language of N.J.S.A. 18A:28-6(c) to be clear in providing for tenure after employment in a new position for the equivalent of more than two academic years within three consecutive academic years, and we agree with the ALJ that the petitioner herein satisfied the precise statutory conditions for the achievement of tenure as a principal. In so doing, we reject the Board's contention that the petitioner's transfer to an assistant principalship on October 1, 1997 "stop[ped] the clock' for the purpose of calculating tenure acquisition." Answer Brief, at 9. In support of its contention, the Board relies on Canfield v. Bd. Edu. Of Pine Hills, 51 N.J. 400 (1968). We find such reliance to be misplaced. In Canfield, the Court held that the termination of a teacher's employment just days before she would have satisfied the requirements of subsection (c) was effective on the date the notice of dismissal was given to her despite a provision in her contract requiring 60 days' notice of termination. As a result, the Court found that the petitioner therein had not served for the requisite statutory period to achieve tenure under that provision. In stark contrast, the petitioner in the instant case did serve for the requisite period mandated by N.J.S.A. 18A:28-6(c), notwithstanding a break in his service as a principal during that period, and satisfied the precise conditions for achievement of tenure as a principal under that provision. Spiewak, supra.

Since "principal" is a separately tenurable position under N.J.S.A. 18A:28-5, Nelson v. Board of Educ. of Tp. of Old Bridge, 148 N.J. 358 (1997), the petitioner could not be transferred to another separately tenurable position, such as assistant principal, without his consent. Howley v. Bd. of Ed. of Ewing Township, decided by the Commissioner of Education, 1982 S.L.D. 1328, aff'd by the State Board of Education, 1983 S.L.D. 1554. Thus, the Board's action in transferring him to an assistant

principalship in July 1999 constituted an improper transfer in violation of his tenure rights.

Accordingly, we reverse the decision of the Commissioner and direct that the Board reinstate the petitioner to a position as a principal. To the extent that the Commissioner's decision in Dues can be read to limit the applicability of N.J.S.A. 18A:28-6(c) to staff members employed on an academic year basis, we overrule that determination.

Attorney exceptions are noted.

November 6, 2002

Date of mailing _____