EDU # 11677-98 and 1161-99 (consolidated)
C # 320-01
SB # 40-01

THERESA ALFIERI AND THERESE MEZAK, :

PETITIONERS-APPELLANTS, :

V. :

BOARD OF EDUCATION OF THE TOWNSHIP OF SADDLE BROOK, BERGEN COUNTY, :

RESPONDENT-RESPONDENT. :

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, September 17, 2001

For the Petitioners-Appellants, Bucceri & Pincus (Gregory T. Syrek, Esq., of Counsel)

For the Respondent-Respondent, Anthony N. Gallina, Esq.

Theresa Alfieri and Therese Mezak, petitioners in this consolidated case, are tenured teaching staff members employed as remedial teachers on a part-time hourly basis by the Board of Education of the Township of Saddle Brook (hereinafter "Board"). Although they are paid on an hourly basis, the Board did not appoint them to work a definite number of hours per week. Rather, under the terms of their appointments they are permitted to work up to a maximum of 19½ hours per week, and their hours fluctuated from week to week.

Until the 1998-99 school year, petitioners had established their own schedules based in part on the number of students they determined should have one-on-one

instruction. At that time, the superintendent concluded that too much one-on-one instruction had been scheduled, causing an ineffective use of time and leading to a disparate caseload among the remedial teachers. For that reason, he directed that, absent permission to do otherwise, the remedial teachers were to provide small group instruction to a minimum of three students at a time. Following implementation of this directive in the 1998-99 school year, the petitioners had less control over their schedules and worked fewer hours annually than they had during the previous year.

In their petitions of appeal to the Commissioner of Education, the petitioners claimed that the Board had violated their tenure and seniority rights by reducing their hours of employment in the 1998-99 school year while retaining non-tenured teachers in full-time assignments. They sought employment as full-time elementary teachers and back pay, along with pre- and post-judgment interest.

On July 23, 2001, an Administrative Law Judge ("ALJ") recommended dismissing the petitions. The ALJ found it "legally…insignificant" that the petitioners' hours were reduced, concluding that "[t]enured part-time remedial instructors like Alfieri and Mezak do not have statutory entitlement to full-time positions. Their tenure is with respect to their part-time activities only." Initial Decision, slip op. at 9.

In addition, the ALJ agreed with the Board that there had not been a reduction in force, reasoning:

> A reallocation of the number of hours worked among part-time teachers, and the number of students for whom they are responsible, does not give rise to any claim that the force has been reduced. As point [sic] out by the Board, the number of part-time hourly teaching staff members was not reduced, nor were their positions abolished. Nor were any transferred to other positions. The administration, and hence the Board, had every reason to exercise its discretion

> with respect to establishing a minimum number of students per group. Moreover, it was uncontradicted that a part-time hourly instructor can teach a group of less than three with administrative approval – there was no blanket prohibition against it.

Id. at 9-10.

On September 17, 2001, the Commissioner of Education adopted the ALJ's decision with clarification and dismissed the petitions. Initially, the Commissioner corrected the ALJ's assertion that the petitioners' tenure protection extended only to part-time assignments. The Commissioner explained that "once an individual fulfills the statutory requirements for tenure acquisition, that individual is tenured in the position of teacher, irrespective of the fact that the position filled may be part-time, as opposed to full-time." Commissioner's Decision, slip op. at 16. However, the Commissioner concurred with the ALJ that:

> petitioners 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. (J-7, J-16, J-18, J-27, J-31) Further, petitioners' employment hours fluctuated from year to year, even pay period to pay period, based on those needs. (J-33 to J-36) 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. To accept petitioners' position would mean that if <u>at any point</u> their schedule required fewer hours than in the previous year, or portion of

> a year, then they would be able to invoke their tenure and seniority rights.

Id. at 17 (emphasis in original).

The petitioners filed the instant appeal to the State Board, contending, inter alia, that a reduction in their hours of employment and compensation had occurred, which triggered their tenure and seniority rights. We do not agree and affirm the decision of the Commissioner.

Like the Commissioner, we stress that tenure acquisition is not affected by whether a teaching staff member is employed on a full-time or part-time basis. Spiewak v. Rutherford Bd. of Ed., 90 N.J. 63 (1982). We also emphasize that, when affected by a reduction in staff pursuant to N.J.S.A. 18A:28-9, a tenured teaching staff member employed on a part-time basis may claim entitlement on the basis of his tenure status to a full-time position in preference to a non-tenured individual. Lichtman v. Ridgewood Bd. of Ed., 93 N.J. 362, 364-68 (1983). Additionally, it is well settled that a reduction in hours of employment is considered a reduction in force. Klinger v. Board of Educ. of Cranbury, 190 N.J. Super. 354, 357 (App. Div. 1982), certif. den., 93 N.J. 277 (1983). However, we 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 19½ hours per week. Consequently, their hours have fluctuated not only from year to year but also from pay period to pay period. Moreover, the petitioners developed their own schedules prior to

the 1998-99 school year, determining the size of the groups that they taught and, thereby, the number of hours that they worked.

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. In addition, a conclusion that a reduction in staff occurred ignores the fact that petitioners, and not the Board, had determined the number of hours that they had worked during the 1997-98 school 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. If the Board had reduced that maximum to less than 19½ hours per week, and if the petitioners had actually suffered a reduction in the number of hours that they worked weekly as a result of the Board's action, there would be no question but that a reduction in staff had occurred within the meaning of N.J.S.A. 18A:28-9. Such action would have triggered petitioners' tenure and seniority rights. However, 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.

We reject the petitioners' argument that denying them relief applies contractual principles to tenure in contravention of the New Jersey Supreme Court's decision in Spiewak v. Rutherford Bd. of Ed., 90 N.J. 63 (1982). The issue in Spiewak was whether part-time remedial teachers could achieve tenure. The Supreme Court held that such teachers could achieve tenure if they met the precise conditions of N.J.S.A. 18A:28-5. In doing so, the Court found that all employment as a teacher counted towards tenure acquisition except that of substitute teachers, for which there was an express statutory exception. Because there was no such exception for teachers employed temporarily, the Court rejected the view that remedial teachers could not acquire tenure because they had contractually agreed to employment characterized as temporary. In this context, the Court emphasized that "…the tenure provisions of N.J.S.A. 18A:28-5 constitute a mandatory contractual term that may not be waived or bargained away….Whether certain teachers are entitled to tenure never depends on the contractual agreement between the teachers and the board of education." Id. at 76-77.

In contrast to Spiewak, there is no question that petitioners in this case achieved tenure pursuant to N.J.S.A. 18A:28-5. Rather, the issue here is whether a reduction in staff occurred under N.J.S.A. 18A:28-9 such as to trigger the petitioners' tenure rights. That issue was not involved in Spiewak, and, therefore, Spiewak does not entitle the petitioners to the relief they seek. In this respect, contrary to the petitioners' contention and as set forth above, our conclusion that no reduction in staff occurred in this instance

does not mean that the petitioners could never be subject to such a reduction. Hence, our determination does not render their tenure rights meaningless.

Our conclusion that a reduction in staff did not occur is not altered by the fact that commencing with the 1998-99 school year, the superintendent issued an administrative directive requiring petitioners to instruct students in groups consisting of a minimum of three students unless they obtained administrative approval to teach students in smaller groups or to provide one-on-one instruction. Again, because the petitioners had been allowed to determine the size of the groups that they taught prior to the 1998-99 school year, they had control over the number of hours that they worked. The fact that they had less control over their hours after the superintendent issued his directive cannot be used to support a conclusion that their tenure and seniority rights were triggered by the resulting change.

Therefore, for the reasons stated herein, as well as those expressed by the Commissioner, we affirm the Commissioner's decision in this case.

Attorney exceptions are noted.

January 8, 2003

Date of mailing _____