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Accrual of Seniority Rights and Relinquishment of Tenure

By Pearl Ann E. Hendrix

On January 2, 1992, Eileen Kelly was hired by the Middlesex County Vocational Technical School District as a nursing assistant (NA) instructor through the federally-funded program, the Joint Training Partnership Act (JTPA). After she was hired, she received an emergency certificate as a teacher of Production, Personnel and Service Occupations: Nursing Assistant. In September 1992, Kelly signed a second contract for the following school term as an NA instructor. Due to a change in federal regulations, NA instructors were required to possess experience in geriatrics to obtain a permanent certificate as an NA instructor. In October of 1992, Kelly was temporarily assigned to the Licensed Practical Nursing (LPN) program as an instructor to gain the necessary experience. Kelly did not have a provisional or an emergency certificate as an LPN teacher and relied upon her K-12 substitute teacher credential as a nurse. She was reassured by the Assistant Superintendent, Joseph Columbo, and the Director of Health Occupations, Betty Moore, that her credentials were satisfactory to serve as an LPN instructor.

In November 1992, Kelly applied for a permanent full-time LPN instructor position that had become available. The district hired Kelly effective December 14, 1992. The district also hired Rosemary Simmons-Sestito as an LPN instructor effective December 1, 1992. By the end of December 1992, Kelly obtained geriatric experience and received a standard certificate as an NA teacher in March 1993 and a standard certificate as an LPN teacher in May 1993. Kelly worked as an LPN instructor until May 9, 2001, when the position was eliminated due to a reduction in force (RIF).

After the LPN position was eliminated, the District terminated Kelly because it determined that Sestito had more seniority than Kelly based on Sestito's earlier start date and Kelly's use of forty-three workdays for health and bereavement purposes. On June 25, 2001, Kelly filed a verified petition with the Commissioner of Education challenging the seniority determination. The matter was transferred to the Office of Administrative Law (OAL) as a contested case. In the meantime, Kelly accepted a position as an adjunct nursing instructor in the fall of 2001, and then accepted a one-year full-time position in September 2002 as a nursing instructor with the University of Medicine and Dentistry of New Jersey (UMDNJ). In November 2002, the District recalled Kelly for employment because of a vacancy, but Kelly declined the offer because she was under contractual obligation with UMDNJ.

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The administrative law judge (ALJ) issued a decision in Kelly's favor finding that the District was barred from awarding Kelly less seniority than Sestito. In November 2006, the Commissioner of Education rejected the ALJ's conclusion, and Kelly appealed to the State Board of Education which affirmed the Commissioner's decision. Kelly then appealed the Board's decision to the New Jersey Appellate Division arguing that accumulation of seniority should have started in October 1992 when she began teaching as an LPN instructor.

While local school districts can eliminate tenured teaching positions for financial reasons, New Jersey law is clear that a RIF must be based on seniority. A school district must look to the type of teaching certificate the teaching staff member holds to determine seniority in the event of a RIF. It is the responsibility of a chief school administrator to require newly employed or reassigned teaching staff members to show a certificate before assuming any teaching responsibility and to ensure that it is valid. A teacher that holds an emergency certificate is not entitled to seniority rights unless and until the individual becomes a holder of a standard certificate. Once a standard certificate is acquired, years of employment under an emergency certificate count toward seniority under the standard certificate. A substitute credential entitles an instructor to teach as a substitute; however, seniority does not accrue because substitute teachers are not entitled to statutory and contractual benefits as are regular teaching staff members.

In *Kelly v. Board of Education of the Middlesex County Vocational Technical School District*, the Appellate Division explained that Kelly's emergency NA certification did not entitle her to accrue seniority as an LPN instructor because her period of service under an emergency certificate in NA counted towards seniority only after acquiring a standard certificate in NA. The court held that Kelly could "tack on" seniority rights acquired during those periods she served as an NA instructor under the NA emergency certificate to her standard NA certificate. She was not, however, entitled to accrue seniority rights in

LPN for the period she served as an LPN instructor prior to acquisition of her standard certificate in LPN because she never possessed an emergency certificate in LPN. In addition, her substitute K-12 credential did not entitle her to accrue seniority. Kelly did not begin to accrue seniority as an LPN instructor until May 1993 when she received a permanent certificate in LPN. The Appellate Division concluded that the Board properly found that the District acted appropriately when it retained Sestito and dismissed Kelly.

The court did not agree with Kelly's argument that she relied to her detriment on the assurances of Columbo and Moore that she was properly certified to serve as an LPN instructor. Kelly argued that had she not relied on those assurances, she would have obtained an emergency certificate in LPN to avoid any loss of seniority. However, an emergency certificate can only be issued when a board of education can show that it was unable to locate a suitable certificated candidate due to unforeseen shortages or other extenuating circumstances. The Board demonstrated that there was a suitable candidate for the LPN position at the time the Board assigned Kelly to the LPN program. Therefore, Kelly's reliance on the assurances was not to her detriment because she could not have obtained an emergency certificate in LPN.

Applying the reasoning of *O'Toole v. Forestal*, 211 N.J. Super. 394 (App. Div. 1986), the court in *Kelly* explained that tenure and reemployment rights may be voluntarily relinquished and that a refusal of reemployment by a tenured teacher, dismissed due to a RIF, was a relinquishment of tenure and waiver of rights to future employment. As a result, the court concluded that Kelly's refusal of reemployment in November 2002 forfeited her right to the position as an LPN instructor.



The information provided here is necessarily general and is not intended as legal advice or a substitute for legal advice. If you have any questions regarding this Alert, please contact Anthony P. Sciarrillo of the EdLaw Group at edlawgroup@lindabury.com.

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