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Administrative Law—Education Law Interpreted as Including Subject Area Tenure Classification

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also to provide him with a common and definite place to examine the contents of the rule establishing such limitation in order to determine its legality, effectiveness and accuracy. Therefore, judgment for defendant is to be affirmed.

Bd.

EDUCATION LAW INTERPRETED AS INCLUDING SUBJECT AREA TENURE CLASSIFICATION

In *Becker v. Board of Education, Etc.*[87] the Court was faced with the question of whether petitioner, a teacher, who had taught within the same school district for about six years, was entitled to "tenure" status within the meaning of Section 3013 of the Education Law.[88]

Petitioner had been appointed as an elementary teacher by respondent board in 1952. In the spring of 1955, the principal of the school where petitioner was employed and the district superintendent of schools both recommended that petitioner be granted tenure. Respondent, however, took no action on this recommendation but instead tendered to petitioner an appointment as a special teacher for another probationary period of three years, beginning July 1, 1955, which was two months prior to the time that her original probationary period as an elementary teacher was to terminate. Petitioner under the latter appointment taught kindergarten for two years and then accepted another probationary appointment as a secondary teacher. In 1958, the respondent board notified the petitioner that she would no longer be needed. In response to her dismissal, the petitioner brought the present proceeding to compel the Board of Education to reinstate her and to grant her tenure.[89]

The School Board has taken the position that petitioner, who has not officially been appointed to tenure status, is not entitled to tenure because she has never taught in one "area" or category of subject matter beyond the required three year probationary period.[90]

Petitioner, however, argues that since the Education Law makes no mention of this "area" or subject matter classification she is entitled to tenure even

87. 9 N.Y.2d 111, 211 N.Y.S.2d 193 (1961).
88. N.Y. Educ. Law § 3013.
89. N.Y. Civ. Prac. Act art. 78.
90. Matter of Feldbauer v. Board of Education, 65 N.Y. State Dep't Rep. 68 (1943); N.Y. State Educ. Dep't Law Pamphlet 11, "Tenure and salaries of Teachers," pp. 9-10:

> Tenure classifications naturally fall into divisions of secondary (grades 9-12) and elementary (grades 1-8) teachers, principals, supervisors, directors, etc. . . . A transfer from one position to another within the same tenure area does not affect the teacher's tenure rights and is at the discretion of the board of education. After a teacher has acquired tenure he may not be transferred to a position in a different tenure area without his consent.

Conversely, the Education Department has taken the position that continuing a teacher in service within the same "area" or category of subject matter beyond the three-year probationary period, with the acquiescence of the Superintendent, has the affect of a formal appointment of that teacher to tenure status. Geruso v. Board of Education, 71 N.Y. State Dep't Rep. 158 (1950).

though she moved from one area or category to another because she has taught more than the three year probationary period.[91]

As the Court observes, other than the rulings and decisions of the State Commissioner, there appears to be no controlling authority for decision of this case.

Public policy alone then must be looked to in order to determine whether the concept of "area," in reference to tenure, can be read into Section 3013 of the Education Law. The Court of Appeals held that it could, thereby affirming the Supreme Court[92] and Appellate Division,[93] which had dismissed the petition.

The Court places significance on the fact that petitioner voluntarily accepted successive appointments by respondent board which were clearly labeled probationary. Although the Court agrees that this does not amount to a legal waiver, it appears clear that the Court is basing their decision on grounds of public policy. As stated by the Court: "The strongest arguments for affirmance are: first, that modern concepts of education carefully distinguish between teaching competence in various teaching fields rather than hold that 'all teachers are alike'; second, that the statute has been construed for years administratively as contemplating 'area tenure'; and, third, that whatever the possible unfairness to this petitioner from an affirmance, reversal could produce State-wide chaos."[94]

Bd.

ARTICLE VII, SECTION 7 OF STATE CONSTITUTION NOT TO BE GIVEN RETROACTIVE EFFECT

In *Ayman v. Teachers' Retire. Bd. of City of N.Y.*,[95] petitioners, members of the New York Retirement system, proceeded under Article 78 of the N.Y. Civil Practice Act for orders directing that certain actuarial values and mortality tables be used in calculating their retirement benefits. The Court of Appeals, relying upon the case of *Birnbaum v. New York State Teachers Retirement System*,[96] held that the defendant Board *may not* calculate the retirement annuities due petitioners on the basis of the table in effect at the time of their retirement.

In the *Birnbaum* case, which involved the same question under the New York State Teachers Retirement System,[97] this Court held that the constitutional amendment[98] providing that after a stated date (July 1, 1940), member-

91. Supra note 88.
92. 16 Misc. 2d 209, 189 N.Y.S.2d 731 (Sup. Ct. 1958).
93. 8 A.D.2d 885, 189 N.Y.S.2d 640 (3d Dep't 1959).
94. Becker v. Board of Education, Etc., supra note 87 at 118, 211 N.Y.S.2d at 197.
95. 9 N.Y.2d 119, 211 N.Y.S.2d 198 (1961).
96. 5 N.Y.2d 1, 176 N.Y.S.2d 984 (1958).
97. N.Y. Educ. Law art. 11.
98. N.Y. Const. art. VII, § 7.
After July first, nineteen hundred forty, membership in any pension or retirement system of the state or of a civil division thereof shall be a contractual relationship, the benefits of which shall not be diminished or impaired.