

**Felzin v Board of Educ. of the City School  
Dist. of N.Y.**

2007 NY Slip Op 33368(U)

October 4, 2007

Supreme Court, New York County

Docket Number: 0119004/2006

Judge: Alice Schlesinger

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: ALICE SCHLESINGER

PART IA Part 16

Index Number : 119004/2006

FELZIN, EMILY

vs  
BOARD OF EDUCATION

Sequence Number : 001

ARTICLE 78

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavit

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion

PAPERS NUMBERED

**UNFILED JUDGMENT**  
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 1B)

**MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION.**

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE \_\_\_\_\_ FOR THE FOLLOWING REASON(S):

Dated: OCT 04 2007

Alice Schlesinger  
**ALICE SCHLESINGER** J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 16

-----X  
EMILY FELZIN,

Petitioner,

- against -

Index No. 119004/06  
Motion Seq. No. 001

BOARD OF EDUCATION OF THE CITY  
SCHOOL DISTRICT OF NEW YORK and  
JOEL I. KLEIN, as Chancellor of the City  
School District of the City of New York,

Respondents.  
-----X

SCHLESINGER, J.:

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appear in person at the Judgment Clerk's Desk (Room  
'1E)*

Petitioner Emily Felzin commenced this Article 78 proceeding to challenge her August 29, 2006 discharge by the respondent Board of Education of the City of New York (the Board) as a non-tenured teacher. Ms. Felzin asserts that she attained tenure by estoppel in March of 2006 and therefore could not be discharged in August without a hearing. The Board opposes the petition, asserting that Ms. Felzin would not have attained tenure until September 2006 and that she therefore had no right to a hearing in connection with her discharge the month before.

Background Facts

In March of 2003, Emily Felzin was hired by the Board and began work as a kindergarten teacher at PS 197 in District 22 in Brooklyn. Pursuant to Education Law §2573, the appointment was probationary. Ms. Felzin continued in that position until the end of the 2002-2003 school year. In September 2003, Ms. Felzin was appointed to teach kindergarten at a different school, PS 90 in District 21 in Brooklyn. Ms. Felzin continued to teach kindergarten at PS 90 for three academic years until she was discharged on August 29, 2006. In the discharge letter, the Board indicated that it was "denying certification of

Completion of Probation” on the ground that Ms. Felzin had submitted false documentation in connection with required course work.

The above facts are essentially undisputed. The dispute revolves around the significance of those facts as applied to the relevant law.

#### The Education Law

Education Law §2573, subd. 1(a), provides that: “Teachers ... shall be appointed by the board of education ... for a probationary period of three years...” Absent bad faith or a violation of law, the Board may terminate a teacher during the probationary period for any reason or for no reason at all, without a hearing. See *Frasier v. Board of Education*, 71 NY2d 763 (1988). However, once tenured, a teacher may not be disciplined or removed except for “just cause” and in accordance with specific procedures. Educ. Law §3020. “A tenured teacher has a protected property interest in her position and a right to retain it subject to being discharged for cause in accordance with the provisions of Education Law §3020-a ...” *Gould v. Board of Educ.*, 81 NY2d 446, 451 (1993)(citations omitted). Those provisions entitle the teacher to written notice of the charges against her and a hearing.

#### The Disputed Claim of Tenure

Ms. Felzin asserts that she attained “tenure by estoppel” because she was continuously employed by the Board for more than three years, from March 2003 through August 2006. Because she attained tenure in March 2006, she was entitled to a hearing in connection with her August 2006 discharge, she asserts. The Board insists that Ms. Felzin’s three-year probationary period began anew in September 2003 when Ms. Felzin changed schools. Therefore, Ms. Felzin’s August 2006 termination was within the probationary period and she was not entitled to a hearing.

The concept of "tenure by estoppel" is well-recognized by the courts in New York State. "Tenure by estoppel results 'when a school board accepts the continued services of a teacher or administrator, but fails to take the action required by law to either grant or deny tenure prior to the expiration of the teacher's probationary term.'" *Speichler v. Board of Cooperative Educational Services*, 90 NY2d 110, 114 (1997), quoting *Matter of McManus v. Board of Educ.*, 87 NY2d 183, 187; *see also, Gould v. Board of Educ.*, 81 NY2d 446, 451 (1993). It is of "no legal significance" whether the Board of Education knew or did not know that the continued employment would enable the teacher to acquire tenure by estoppel. *Gould*, 81 NY2d at 451, citing *Lindsey v. Board of Ed*, 72 AD2d 185 (4<sup>th</sup> Dep't 1990). It is the mere fact of the continued employment beyond the three-year period which entitles a teacher to tenure by estoppel.

The application of these principles to the facts of this case compels a finding that Ms. Felzin acquired tenure by estoppel. As indicated above, Ms. Felzin began teaching kindergarten on March 31, 2003 at PS 197 and continued there through the end of the academic term. Beginning in September 2003, the next academic year, Ms. Felzin began teaching kindergarten at PS 90, and she continued there until her discharge in August 2006. Because her employment continued for more than 3 years from her date of initial hire without any action by the Board to grant or deny tenure, Ms. Felzin acquired tenure by estoppel in March 2006 and could not be discharged thereafter without a hearing.

Respondent insists that Ms. Felzin's probationary period began anew when she began teaching at PS 90 in September 2003. According to the Board, New York City is unique because "tenure is defined by license area and not by subject area." Resp. Memo of Law in Support of Answer at p. 6. The Board contends that Ms. Felzin began teaching at

PS 197 under a "Common Branches License" for grades 1-6 in March 2003, that she then "abandoned" that position in August 2003 and began teaching in September 2003 at PS 90 under an "Early Childhood License" for grades K-2. Verified Answer at ¶¶27-32. This change in license entitled the Board to require Ms. Felzin to begin her probationary period anew in September 2003, respondent contends.

The Court of Appeals rejected a similar argument in *Ricca v. Board of Educ. of the City School District of the City of New York*, 47 NY2d 385 (1979). In *Ricca*, the teacher was serving as a full-time woodworking teacher and then accepted a temporary assignment to the "Absent Teacher Reserve" pursuant to which he filled in for absent teachers each day instead of teaching the same daily schedule. This change was requested by the Board due to another teacher's injury. At some point thereafter, the teacher resumed his regular woodworking position.

The Court rejected the argument that the teacher's probationary period began to run from the time he resumed his regular woodworking position. Emphasizing (at p. 389) that the teacher's "actual duties" remained the same, the *Ricca* Court rejected the notion that the technical change in the teacher's assignment justified a new probationary period:

The tenure system is not an arbitrary mechanism designed to allow a school board to readily evade its mandate by the creation of technical obstacles on a qualified teacher's trail to tenure (See *Matter of Baer v Nyquist*, 34 NY2d 291). Rather it is a legislative expression of a firm public policy determination that the interests of the public in the education of our youth can best be served by a system designed to foster academic freedom in our schools and to protect competent teachers from the abuses they might be subjected to if they could be dismissed at the whim of their supervisors. In order to effectuate these

convergent purposes, it is necessary to construe the tenure system broadly in favor of the teacher, and to strictly police procedures which might result in the corruption of that system by manipulation of the requirements for tenure. This is not to suggest that the school board in this instance acted with bad faith or from any improper motive. Even "good faith" violations of the tenure system must be forbidden, lest the entire edifice crumble from the cumulative effect of numerous well-intentioned exceptions.

The same principles were applied by the Court of Appeals in *Speichler*, *McManus* and *Gould*, cited above. Indeed, citing its decision in *Ricca*, the *Speichler* Court stated (at p. 117-18):

We are concerned not with the changing labels placed upon the position by respondents, but with the realities of the position and the accompanying duties.

Thus, in *Speichler*, the Court held that petitioner had acquired tenure by estoppel based on actual continuous service as a special education substitute, regardless of whether the teachers she replaced were absent for "definite" or "indefinite" terms. In *McManus*, the Court held that the principal had acquired tenure by estoppel after three years, even though she had first served as "Acting Principal" and her formal appointment as Principal had been for less than three years. And in *Gould*, the teacher acquired tenure by estoppel even though she began her term as an elementary school teacher and then taught special education in high school.

Since it is beyond dispute in this case that Ms. Felzin served as a kindergarten teacher the entire time she worked for the respondent Board of Education, her probationary period did not begin to run anew when she changed schools, even if technically she was

awarded a different license in connection with her assignment to a different school. As Ms. Felzin herself notes in her affidavit and documents, she was at all relevant times certified to teach pre-kindergarten, kindergarten and grades 1-6, and her actual duties as a kindergarten teacher remained the same throughout the entire three-year period.

Also unavailing is respondent's claim of a break in service because Ms. Felzin "abandoned" her first position in late August 2006 before assuming her new position in September. Such an argument "assumes the wrong perspective on the tenure rules, which the Court [of Appeals] has made clear should be read so as to discourage a board's use of technical obstacles and manipulable labels that can deprive a qualified teacher of tenure rights ..." *Speichler*, 90 NY2d at 118 (citations omitted). The situation can be viewed as Ms. Felzin presents it – that she was required to complete a new packet of paperwork when she changed schools, and the Board technically ended Ms. Felzin's position at the first school so she could assume the position at the second school. Moreover, continuous service is not required. See, *Lindsey v. Board of Educ*, 72 AD2d 185 (4th Dep't 1980), cited with approval in *Gould, supra*.

Similarly unavailing is the Board's suggestion that petitioner somehow waived her rights by failing to object when "notified" of the new probationary period. First of all, the documents relied upon are inconsistent. In Ms. Felzin's 2004 performance review completed well after she had changed schools, the probationary period continued to be listed as March 31, 2006, the date Ms. Felzin asserts she attained tenure. It was not until the 2005 performance review that the September 2006 probationary date was indicated. (See Exhibits B and C to Board's Supp. Aff). However, the purpose of the form was to notify Ms. Felzin of her performance review; it was not intended to notify her of a change in her

probationary period. Even more significantly, however, tenure is a "protected property interest" which cannot be easily waived. *Gould, supra*.

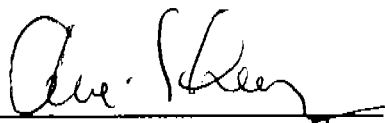
Accordingly, it is hereby

ADJUDGED that the petition is granted to the extent of finding that petitioner Emily Felzin attained tenure by estoppel in March 2006, thereby entitling her to notice of the charges asserted against her in August 2006, a hearing prior to her discharge, and the other protections available to tenured teachers under the Education law.

This constitutes the decision and judgment of this Court.

Dated: October 4 , 2007

**OCT 04 2007**

  
\_\_\_\_\_  
J.S.C.  
**ALICE SCHLESINGER**

**UNFILED JUDGMENT**  
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