

To be entitled to professional employee status, one must serve a two year probationary period as a temporary professional employee and satisfactorily complete the last four months of such service, Section 1108, 24 P.S. Section 11-1108. If these requirements are met, the person can be a professional employee even though her School Board and supervisors believe otherwise and do not rate her or give her a temporary professional employee's contract, see *Elias v. Board of School Directors of Windber Area*, 218 A. 2d 738, 421 Pa. 260 (1966).

The Appellant did not serve two years in the capacity of temporary professional employee; she was a substitute during one-fourth of the two year period she was employed by the Jersey Shore School District. The School Code distinguishes "substitute" from "temporary professional employees" in Section 1101:

"(2) The term 'substitute' shall mean any individual who has been employed to perform the duties of a regular professional employee during such period of time as the regular professional employee is absent on sabbatical leave or for other legal cause authorized and approved by the board of school directors or to perform the duties of a temporary professional employee who is absent.

"(3) The term 'temporary professional employee' shall mean any individual who has been employed to perform, for a limited time, the duties of a newly created position or of a regular professional employee whose services have been terminated by death, resignation, suspension or removal." 24 P.S. Section 11-1101(2) and (3)

As a substitute, the Appellant was not entitled to any of the rights of temporary professional employee status and, therefore, was not entitled to count her service as part of the two year probationary period, see *Love v. School District of Redstone Township*, 375 Pa. 200, 100 A. 2d 55 (1953). In *Love*, the teacher worked four years as a substitute. The Pennsylvania Supreme Court held she was not entitled to professional employee status, because she failed to serve two years as a temporary professional employee.

The Appellant was employed as a substitute during the fall semester of the 1971-72 school year. She thereafter worked only one and a half years in the capacity of a temporary professional employee.

Accordingly, we make the following

#### ORDER

AND NOW, this 7th day of April, 1975, the Appeal of Gareth Smith is dismissed for lack of jurisdiction.

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Appeal of Carroll Bittner, from the Decision of the Board of School Directors of the Jersey Shore Area School District, Lycoming County, Pennsylvania.

In the Office of the Secretary of Education,  
Commonwealth of Pennsylvania, at  
Harrisburg, Pennsylvania

No. 234

#### OPINION

John C. Pittenger  
*Secretary of Education*

Carroll Bittner, Appellant herein, has appealed from the decision of the Board of School Directors of the Jersey Shore Area School District terminating her services as teacher in the ESEA reading program.

## FINDINGS OF FACT

1. The Appellant, Carroll Bittner, was employed without a contract by the Jersey Shore Area School District at the beginning of the 1971-72 school year to teach in a special, Federally funded ESEA Title I reading program for elementary students.
2. During the 1971-72 school year, the Appellant was paid on a full-time basis for 175 days of service or at a rate of \$35.00 per day. The start of the reading program for that year was apparently delayed until approval from the Department of Education could be obtained.
3. In May, 1972, the Department of Education notified all school districts that persons employed in Federally funded programs were to be accorded the same professional rights as other employees performing similar services. (See School Administrator's Handbook, Section 82-100).
4. During the 1972-73 school year, the Appellant taught reading for four and a half hours a day, at a rate of \$5.00 per hour. In addition, she had homebound instruction assignments and also performed substitute services for the district. The Appellant's services were reviewed, but she was not formally rated.
5. The Appellant is certified in the areas of elementary education and early childhood education.
6. On the first day of school for the 1973-74 school year, the Appellant was informed that there was no position for her.
7. The funding for the Jersey Shore Area School District's ESEA Title I reading program in 1973-74 remained essentially unchanged from the previous year. During the 1972-73 school year there were six E.S.E.A. teachers, including the Appellant. During the 1973-74 school year, there were four E.S.E.A. teachers, including three who had served the previous year. Two of these teachers have been issued temporary professional employee contracts.
8. Through her attorney, the Appellant requested a hearing on her dismissal. By letter dated September 24, 1973, the district's solicitor denied the request.
9. On October 15, 1973, the Appellant's Petition of Appeal was received in the Office of the Secretary of Education. The Appellant contends that she is entitled to professional employee status and that, therefore, the School Board illegally terminated her employment.
10. A hearing before the Secretary of Education was scheduled for November 15, 1973. At the request of Appellant's counsel, it was rescheduled for December 12, 1973. It was rescheduled again for January 11, 1974. Instead of having a hearing, both parties then agreed to submit the case on a stipulated statement of facts. By letter dated May 9, 1974, the Appellant's counsel informed the Department that the parties were unable to reach agreement on the stipulation of facts. Accordingly, a hearing was scheduled for June 20, 1974. At that hearing testimony was offered on behalf of the Appellant and the School District.

## DISCUSSION

The deciding issue in this appeal is whether or not the Appellant is a professional employee. If she is, she has tenure and her employment cannot be terminated except in accordance with the dismissal or suspension procedures of Article XI of the Public School Code of 1949, as amended, 24 P.S. §11-1101 et seq., *In re Swink*, 200 A. 2d 132, 132 Pa. Super. 107 (1938); *Jacobs v. School District of Wilkes-Barre Township*, 50 A. 2d 354, 355 Pa. 449 (1947); *Charleroi Area School District v. Secretary of Education*, 334 A. 2d 785, \_\_\_ Pa. Cmwlth. \_\_\_ (1975). The Jersey Shore Board of School Directors admits it did not follow those procedures because it does not believe the Appellant is a professional employee. Based on the facts that the Appellant served two years in the Jersey Shore School District as a reading teacher, a position for which she was certified, that she served on a better than half-time basis, and that she was never rated unsatisfactory, we conclude that she is a professional employee, *Elias v. Board of Directors of Windber Area School District*, 218 A. 2d 738, 421 Pa. 260 (1966). Accordingly, we must order her reinstatement.

The mistake the school board makes in this area is common to many, it is based on the notion that the employment rights of the school district's teaching staff are directly related to and dependent upon the source of funds for the teachers' salaries. According to the school board,

because the Appellant's salary was paid for out of federal ESEA Title I reading program funds, she is not eligible for professional employee status. There is nothing in the school laws to support this contention.

The General Assembly recognizes that educational funds will come from sources other than state and local taxation. In fact, the State Board of Education is encouraged in Section 1317 of the Administrative Code of 1929, as amended, 71 P.S. §367(b)(3.1) to obtain Federal funds for educational purposes.

The right to professional employee status depends on what a person does, not how that person is paid, see *Appeal of Spano*, 267 A. 2d 848, 439 Pa. 256 (1970), *Rhee v. Allegheny Intermediate Unit Number 3*, 315 A. 2d 644, 11 Pa. Cmwlth. 394 (1974). In *Spano* the court held that a person who comes within the definition of "teacher" found in Section 1141(1) of the School Code who is certificated as a teacher can be a professional employee. The Appellant is certificated in early childhood development and as an elementary teacher. During the 1971-72 school year she worked approximately seven hours a day as a reading teacher. During the 1972-73 school year she worked four and a half hours on a regular basis as a reading teacher and, in addition, provided homebound instruction and spot substituting for the district. Based on what the Appellant did as an employee in the Jersey Shore Area School District, it is clear she is eligible for professional employee status.

Further, it is apparent from the record she is entitled to that status. The fact that she was not formally rated during her two years of service is irrelevant; failure to rate an employee eligible for professional employee status is construed to mean the employee is performing satisfactorily, *Elias v. Board of Directors of Windber Area School District*, op. cit. The school board contends she is not entitled to professional employee status because there is no evidence of her employment by the school board, that is, no contract and no minutes of the board recognizing her employment. This issue was dealt with in *Mullen v. Board of School Directors of the Dubois Area School District*, 259 A. 2d 877, 436 Pa. 211 (1970) where the school board tried to avoid giving professional employee status to a person who had served two years in the district because approval of the contract was never recorded in the board's minutes. The court's comments in rejecting the school board's argument in that case are applicable here:

"However, it is clear beyond doubt that the expression of the board members' approval required by the statute can be evidence in ways other than by a formal vote recorded in the minutes. To allow this does no violence to the purpose of the statute. The overwhelming bulk of evidence in this case indicates that the Board members did in fact approve Mullen's employment. To hold that the lack of a formal vote recorded in the minutes, the presence or absence of which is entirely within the control of the Board, renders this contract null and void, would be to exalt form over substance. What possible value can there be in establishing rigid civil service requirements to protect public employees, if such legislation can be defeated by school board mistakes in the appointive process? We hold the requirement of a formal recorded vote to be directory only, although with the caveat that the proof from which Board approval can be inferred must be solid.

"Any result other than the one we reach today would arm every school board in the Commonwealth with a tool by which they could regularly avoid otherwise valid contracts. All they would need do is fail to specifically record in their minutes the required vote; then at their whim, as in this case, a contract could be voided by acknowledgement of the failure. Such a situation is clearly violative of the avowed legislative policy of creating in this state

an atmosphere hospitable to school teachers. Our teachers ought not have the burden of being required to know all the statutes relative to their employment. Neither should they have to carefully examine the minutes of their hiring board in order to ascertain that each and every requirement was complied with. The burden of complying with the statute rests with the school board; should they fail to conduct their business as required, the consequences ought to lie at their door, not at the door of their victims. They must not be permitted to advantage themselves of their own failures to the detriment of their employees." *Mullen*, *Ibid.*, 259 A. 2d at 880-881.

The features distinguishing this case from *Mullen* are not of sufficient weight to prevent application of the court's decision. The Appellant did not receive a temporary professional employee's contract while *Mullen* did; but this, it appears, did not result from lack of knowledge of her employment, it resulted instead from the school board's policy not to give contracts to those it considered to be part-time employees, that is, those working less than five hours a day. Because the Appellant was paid for two years of teaching services, we conclude that the board approved her employment. Service for such a long period raises a strong presumption of board approval; the burden is on the board to rebut that presumption, this it has not done.

We are not unmindful that the Appellant worked less than a full school year during the 1971-72 school year; she worked 175 days, not the 180 days required by the School Code for a school year. To be a professional employee, one must serve two years, Sections 1180, 1121 of the School Code. We find that the Appellant has complied with these provisions. It is clear she worked when allowed to do so. She taught in the reading program for the full period it was offered that year. She was ready to start work at the beginning of the school year, but could not since the program had yet to be approved.

In concluding that the Appellant satisfied the two year service requirement, we are guided by the spirit of the *Mullen* decision. A school board will not be permitted to deny members of its staff their professional rights by scheduling them for just less than a school year.

The school board contends only persons employed on a full-time basis can be professional employees. In the *Appeal of JoEllen Lipperini*, *Teacher Tenure Appeal No. 235*, we applied the definition of teacher used in *Spano*, *op cit*, and held that a kindergarten teacher regularly employed to teach on a half day basis became a professional employee after two years of service because she devoted half of a normal work week to teaching and other direct educational activities. The lack of other work for her to be assigned to in accordance with Section 1147 could not affect her professional rights. In this case, the Appellant did work on a regular basis as a reading teacher for more than half of a normal work week and, in addition, took substitute and homebound teaching assignments.

If the district had to cut back on its teaching staff for the E.S.E.A. reading program due to a cut back of Federal funds, it should have suspended the Appellant. Further, even if the Appellant's services were no longer needed after two years of employment, and she had to be suspended, the district should have recognized that she had attained professional employee status. The policy the district has followed means the the Appellant, after serving and satisfactorily completing two years of service, would have to serve an additional two years of service in another district before receiving professional employee status. Such a policy is contrary to Section 1108(b) of the School Code.

Accordingly, we make the following

#### ORDER

AND NOW, this 25th day of June, 1975, it is hereby Ordered and Decreed that the Appeal of Carrol Bittner be sustained and the Board of Directors of the Jersey Shore Area School District reinstate her without loss of pay and with the status of professional employee.