

**IN THE OFFICE OF THE SECRETARY OF EDUCATION  
COMMONWEALTH OF PENNSYLVANIA**

<b>DR. GENE LAWRENCE RIZZO,</b>	:	
<b>Appellant,</b>	:	
	:	
v.	:	<b>TTA No. 02-06</b>
	:	
<b>APPOLLO-RIDGE SCHOOL</b>	:	
<b>DISTRICT,</b>	:	
	:	
<b>Appellee.</b>	:	

**OPINION AND ORDER**

Gene Lawrence Rizzo (“Dr. Rizzo”) filed an appeal with the Secretary of Education (the “Secretary”) of the decision of the Apollo-Ridge School District (the “District”) dismissing him from his position with the District. In response, the District filed a Motion to Transfer Appeal for Lack of Substantive Jurisdiction (the “Motion”).

**Findings of Fact**

1. The District hired Dr. Rizzo on July 28, 2006, effective July 3, 2006.
2. In August 2006, at a meeting with the District’s Acting Superintendent, Dr. Rizzo was personally served with a Statement of Charges signed by the Board President and Secretary.
3. On September 16, 2006, the District’s Board of School Directors (the “Board”) held an evidentiary hearing regarding Dr. Rizzo’s termination.
4. By letter dated November 6, 2006, the Board issued its Adjudication and Decision terminating Dr. Rizzo immediately from his employment with the District.
5. On December 11, the Secretary received Dr. Rizzo’s Petition of Appeal filed pursuant to Section 11- 1131 of the Public School Code.
6. On December 18, 2006, the Secretary received the District’s Answer to the Petition for Appeal and the District’s Motion.

7. In a letter dated December 19, 2006, the Secretary advised counsel that he had appointed a hearing officer in this matter.

8. On December 21, 2006, the appointed hearing officer held a conference call with counsel for Dr. Rizzo and counsel for the District regarding the District's Motion.

9. Based on the discussion during the conference call, the hearing officer and counsel agreed that the parties should file briefs regarding the Secretary's jurisdiction to hear Dr. Rizzo's appeal.

10. Dr. Rizzo was granted two extensions of time to file his brief so that he could secure the information needed to complete his brief.

11. Counsel have now filed their respective briefs

### **Background**

In its Motion, the District alleges that Dr. Rizzo is not a professional employee because he has not attained tenure in the Commonwealth of Pennsylvania. Based on this allegation, the District argues that the Secretary does not have jurisdiction to adjudicate Dr. Rizzo's appeal of his termination by the District.

Dr. Rizzo provides four arguments to support his position that the Secretary should dismiss the District's Motion and allow Dr. Rizzo's appeal to proceed. First, Dr. Rizzo states in his brief that records provided by the Public School Employees' Retirement System ("PSERS") show that Dr. Rizzo was a full-time salaried active employee of the East Allegheny School District from April 1, 1976 to September 30, 1978. Thereafter, he was employed by East Allegheny School District from October 1, 1978 to December 31, 1978 on a part-time basis. Based on the documentation from PSERS that Dr. Rizzo attached as exhibits to his brief, Dr. Rizzo argues that he obtained tenure in Pennsylvania, and is therefore, a professional employee.

Second, Dr. Rizzo states that he possesses an Administrative I Certificate and that a copy of the Certificate is attached to his brief. A copy of the Certificate is not attached to his brief, but the District has not disputed that Dr. Rizzo possesses such a Certificate. Dr. Rizzo argues that it would be illogical to have attained such certification without being considered a professional employee.

Third, Dr. Rizzo argues that the District was required to raise the issue of Dr. Rizzo's professional employee status at the hearing before the Board, which it did not do. Thus, Dr. Rizzo argues he is at a great disadvantage because he was not provided the opportunity to factually put forth, on the record, his status as a professional employee.

Finally, Dr. Rizzo argues that if he is considered to be a temporary professional employee, the District's termination cannot be based on immorality under section 1108, or if the District seeks to dismiss Dr. Rizzo under section 1122, the District must follow the requirements of sections 1122, 1129 and 1131.

### **Discussion**

As used in Article XI of the Public School Code,

(1) The term "professional employe" shall include those who are certificated as teachers, supervisors, supervising principals, principals, assistant principals, vice-principals, directors of vocational education, dental hygienists, visiting teachers, home and school visitors, school counselors, child nutrition program specialists, school librarians, school secretaries the selection of whom is on the basis of merit as determined by eligibility lists and school nurses.

...

(3) The term "temporary professional employe" 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 employe whose services have been terminated by death, resignation, suspension or removal.

24 P.S. §11-1101(1), (3).

Section 1108 of the Public School Code provides, in relevant part;

A temporary professional employe initially employed by a school district prior to June 30, 1996, whose work has been certified by the district superintendent to the secretary of the school district, during the last four (4) months of the second year of such service, as being satisfactory shall thereafter be a "professional employe" within the meaning of this article.

24 P.S. §11-1108(b)(1). "[I]t is clear from a thorough reading of Article XI of the Code, and particularly Section 1108, 24 P.S. §11-1108, that the key feature distinguishing temporary professional employes from professional employes is tenure." *Phillippi v. School District of Springfield*, 29 Pa. Cmwlth. 185, 195, 367 A.2d 1133, 1140 (1977).

Dr. Rizzo argues that because records from PSERS show that he worked for the East Allegheny School District as a full-time salaried employee for at least a two-year period, he automatically attained tenure in Pennsylvania and is, therefore, a professional employee. Dr. Rizzo cites the case of *Pookman v. Upper St. Clair School District*, 506 Pa. 74, 483 A.2d 1371(1984), and section 1108 of the Public School Code, to support his position that after two years of full-time employment, an individual automatically attains tenure in Pennsylvania.

However, neither section 1108 nor the *Pookman* case supports Dr. Rizzo's position. As stated above, in order to become a professional employee as defined in Article XI, section 1108 requires that a temporary professional employee work at a school district for a period of two years and be rated satisfactory by the superintendent during the last four months of the second year of service. The *Pookman* case reiterates the language of section 1108. The *Pookman* case does not, as Dr. Rizzo claims, state that after two years of full-time employment, an individual automatically attains tenure in Pennsylvania.

Even accepting that the PSERS documentation shows that Dr. Rizzo worked for a Pennsylvania school district as a full-time employee for at least two years, the documentation

does not show whether Dr. Rizzo was a substitute or a temporary professional employee. Although section 1108 provides the manner in which a temporary professional employee can become a professional employee, it does not provide any manner in which a substitute can become a professional employee. Even if Dr. Rizzo was a temporary professional employee; the documentation also fails to show whether Dr. Rizzo was rated satisfactory during the last four months of the second year of service. Thus, without any evidence that Dr. Rizzo met all the requirements of section 1108, there is no basis to conclude that Dr. Rizzo attained tenure and met the definition of a professional employee.

The case of *Ralston v. Derry Township School District*, 363 Pa. 58, 69 A.2d 69 (1949), supports a determination that Dr. Rizzo has not attained tenure and is not a professional employee. In *Ralston*, Mr. Ralston's educational employment was as follows:

- 1924-1933 - taught at school district in Oil City, Pennsylvania
- 1933-1936 - taught at school district in Kossuth, Pennsylvania
- 1936-1946 - taught outside Pennsylvania
- 1946-1947 - Supervising Principal in Pennsylvania (Independence Twp. school district)
- 1947-1948 - Supervising Principal in Pennsylvania (Derry Twp. School District)

In 1925, Mr. Ralston received a provisional college certificate, which was made permanent in 1937. In addition, Mr. Ralston was certified in 1934 by the Superintendent of Public Instruction as being legally qualified to act as a Supervising Principal in a third or fourth-class school district that was without a school district superintendent. In August 1947, Derry Township hired Mr. Ralston as a Supervising Principal and the parties executed a professional employee's contract. In June 1948, the Derry Township School Board adopted a resolution terminating Mr. Ralston's employment.

In *Ralston*, the Pennsylvania Supreme Court reviewed the tenure statutes to determine whether Mr. Ralston was a professional employee when hired by Derry Township in 1947. The

Tenure Act of 1937 required that within thirty days of the effective date of the Act, a school district was to enter into tenure contracts with all professional employees then employed by the school district and to do the same with each professional employee employed at or before the time the employee first entered the service of the school district. The right to receive a tenure contract was not extended to teachers who may have been previously employed but were not so employed at that time.

The Tenure Act of 1939 provided for a class of temporary professional employees and provided that tenure was not to be granted until the temporary professional employee served two years of satisfactory service in the school district and the employee's work was certified during the last four months of the second year at satisfactory.

Since Mr. Ralston was not employed by a Pennsylvania school district during the time the Tenure Act of 1937 was in effect, Mr. Ralston did not acquire tenure under that Act. Mr. Ralston also did not acquire tenure under the Tenure Act of 1939 because after 1939, Mr. Ralston did not satisfactorily complete two years of service in any school district in Pennsylvania. Therefore, when Derry Township hired Mr. Ralston in 1947, the professional employee contract that had been executed was void because Mr. Ralston had not met the qualifications that entitled him to such a contract. Thus, even though Mr. Ralston had a certificate qualifying him to be a Supervising Principal, he was not entitled to tenure status because he failed to qualify under the provisions of the Tenure Acts of 1937 and 1939. *Ralston*, 363 Pa. at 62-63, 69 A.2d at 71.

The *Ralston* case clearly supports a determination that Dr. Rizzo is not a professional employee as defined in Article XI because he has not provided evidence that he attained tenure in Pennsylvania. The *Ralston* case also refutes Dr. Rizzo's statement in his brief that there are

no cases in Pennsylvania involving the issue of whether or not a temporary professional employee could be considered for an Administrative I Certificate. As stated above, in the *Ralston* case, the Superintendent of Public Instruction certified Mr. Ralston as being legally qualified to act as a Supervising Principal in a third or fourth-class school district that did not have a district Superintendent even though Mr. Ralston had not attained tenure and, therefore, was a temporary professional employee.

The only documentation Dr. Rizzo provided to prove that he had received tenure in Pennsylvania is documentation from PSERS showing that he worked at the East Allegheny School District from April 1, 1976 to September 30, 1978 as a full-time employee. Dr. Rizzo has not provided any documentation that the Superintendent of the East Allegheny School District certified to the secretary of the school board that Dr. Rizzo was rated satisfactory during the last four months of his second year of service. It is possible that Dr. Rizzo could have worked at least two years at East Allegheny School District and received an unsatisfactory rating but was not terminated at that time.<sup>1</sup>

Thus, the Secretary cannot presume that simply because Dr. Rizzo was a full-time employee at a school district for at least two years that he attained tenure and is a professional employee. Because there is no documented proof that Dr. Rizzo attained tenure status in Pennsylvania, the Secretary does not have jurisdiction to adjudicate Dr. Rizzo's appeal of his dismissal by the Apollo-Ridge School District.

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<sup>1</sup> In *Young v. Littlestown Area School District*, 24 Pa. Cmwlth. 621, 358 A.2d 120 (1976), a temporary professional employee worked for a school district for two years. The school district failed to give her a regular professional employee contract and failed to provide a reason for not giving her such a contract but retained her for a third year. The Court found that there was no reason to give regular status to a temporary professional employee rated unsatisfactory but retained for another year.

In addition, the *Ralston* case refutes Dr. Rizzo's argument that his possession of an Administrative I Certificate is dispositive of the issue of whether he is a professional employee. Dr. Rizzo argues in his brief that to obtain his Administrative I Certificate he had to have a minimum of five years of professional school experience and complete an approved program of graduate study preparing him for certain duties. 22 Pa. Code §49.121. Dr. Rizzo argues that since he was required to have five years of professional school experience to receive an Administrative I Certificate, it would be illogical that he would be considered a temporary professional employee.

However, the regulation that sets forth the requirements to obtain an Administrative Certificate does not include the requirement that the person be tenured in Pennsylvania. In addition, the regulation does not require that the five years of experience be in Pennsylvania. In fact, Dr. Rizzo states that he received his Administrative I Certificate in April 1988. The PSERS records that Dr. Rizzo provided to show his employment in Pennsylvania do not show that he was employed for five years in Pennsylvania prior to receiving the Administrative I Certificate. Thus, based on the documents provided by Dr. Rizzo, he received his Administrative I Certificate based on five years of experience outside of Pennsylvania.

Thus, both the *Ralston* case and section 49.121 of the Pennsylvania regulations refute Dr. Rizzo's argument that possession of an Administrative I Certificate means Dr. Rizzo attained tenure and is a professional employee.

Dr. Rizzo further argues that because the District did not raise the issue of whether Dr. Rizzo was a temporary professional or a professional employee during the hearing before the Board, the District cannot now raise the issue on appeal. Dr. Rizzo claims that failing to raise

this issue before the School Board put him at a great disadvantage because he was not provided an opportunity to put facts in the record showing his status as a professional employee.

However, the Secretary only has jurisdiction to adjudicate Dr. Rizzo's appeal if he is a professional employee. 24 P.S. §11-1131. Thus, regardless of whether or not the District raised this as an issue during the hearing before the Board, the Secretary cannot adjudicate an appeal over which he does not have jurisdiction. *See, Fiorenza v. Chichester School District*, 28 Pa. Cmwlth. 134, 367 A.2d 808 (1977) (since plaintiff was not a professional employee at time of his dismissal, Secretary lacked jurisdiction to hear his appeal).

In addition, the Secretary provided Dr. Rizzo with an opportunity to provide documentation to the Secretary to prove that Dr. Rizzo is a professional employee; however, Dr. Rizzo failed to provide such documentation. Simply providing PSERS documents showing that Dr. Rizzo was a full-time employee of a school district for at least two years does not provide sufficient evidence that Dr. Rizzo is a professional employee pursuant to sections 1101 and 1108 of the Public School Code. Thus, the Secretary does not have jurisdiction to adjudicate Dr. Rizzo's appeal.<sup>2</sup>

Because the Secretary does not have jurisdiction to adjudicate Dr. Rizzo's appeal, the matter must be transferred to the appropriate common pleas court. 42 Pa. C.S.A. §5103; *Kielbowick v. Ambridge Area School Board*, 156 Pa. Cmwlth. 356, 627 A.2d 276 (1993).

Accordingly, the following Order is entered:

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<sup>2</sup> Dr. Rizzo also argues in his brief that if he is considered a temporary professional employee, the District's termination cannot be based on immorality under section 1108. In addition, Dr. Rizzo argues that if the District seeks to dismiss him under section 1122, the District must follow the requirements of sections 1122, 1129 and 1131. Because the Secretary does not have jurisdiction to adjudicate Dr. Rizzo's appeal, this issue is not being addressed.

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COMMONWEALTH OF PENNSYLVANIA

DR. GENE LAWRENCE RIZZO,  
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TTA No. 02-06

ORDER

AND NOW, this 28th day of February, 2007, it is hereby ordered and decreed that the Secretary of Education does not have jurisdiction to adjudicate the appeal of Dr. Gene Lawrence Rizzo and, therefore, the Apollo-Ridge School District's Motion to Transfer Appeal for Lack of Substantive Jurisdiction is **GRANTED**, and this matter is transferred to the Court of Common Pleas of Armstrong County pursuant to 42 Pa. C.S.A. §5103.

  
Gerald L. Zahorchak, D.Ed.  
Secretary of Education

Date Mailed: February 28, 2007