

ROBERT RICHARDSON,	:	
	:	
PETITIONER,	:	
	:	
V.	:	
	:	
BOARD OF EDUCATION OF	:	
THE CITY OF TRENTON,	:	COMMISSIONER OF EDUCATION
MERCER COUNTY,	:	
	:	
RESPONDENT.	:	DECISION
	:	
AND	:	
	:	
IN THE MATTER OF THE TENURE	:	
HEARING OF ROBERT RICHARDSON,	:	
SCHOOL DISTRICT OF THE CITY OF	:	
TRENTON, MERCER COUNTY.	:	

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SYNOPSIS

In consolidated matter, the Board certified tenure charges of unbecoming conduct and insubordination against Robert Richardson, Coordinator of Custodial and Grounds, and Richardson appealed his termination as coordinator, asserting violation of his tenure rights.

The ALJ determined that Richardson did not acquire tenure either under the janitor tenure statute, *N.J.S.A.* 18A:17-3 and/or the Veterans Tenure Act, *N.J.S.A.* 38:16-1, since he was appointed for fixed terms annually from 1997 through 2001 and that employment was dependent on annual review. Because the ALJ found that tenure did not exist, the tenure charges were dismissed. Accordingly, Richardson’s petition asserting violation of tenure charges was also dismissed.

Upon review of the record, the Commissioner determined to set aside the Initial Decision and to remand the matter to the OAL for further factfinding and expansion of the record as may be necessary to determine whether Richardson was eligible for tenure under the janitor tenure statute, *N.J.S.A.* 18A:17-3 and/or the Veterans Tenure Act, *N.J.S.A.* 38:16-1, so as to establish his employment rights, if any.

May 7, 2002

OAL DKT. NOS. EDU 6181-01 and 870-02 (CONSOLIDATED)  
AGENCY DKT. NOS. 317-8/01 and 511-12/01

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The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Robert Richardson (hereinafter, “Richardson”) submitted exceptions and the Board replied in accordance with *N.J.A.C.* 1:1-18.4.

In his exceptions, Richardson reiterates that his termination was improper inasmuch as he had acquired tenure pursuant to *N.J.S.A.* 18A:17-3 and/or *N.J.S.A.* 38:16-1, the Veterans Tenure Act, when the Board appointed him on November 24, 1997 to the position of Coordinator of Custodial and Grounds for an indefinite term. (Richardson’s Exceptions at 1, 2) In this connection, Richardson acknowledges that he signed annual “contracts,” along with all tenured staff members. However, Richardson maintains that these “contracts” are not determinative where the Board did not *initially* appoint him to a fixed term.

In reply, the Board acknowledges that the initial resolution “does not mention a fixed term \*\*\*.” (Board’s Reply at 1) However, the Board contends that the resolution is not the sole source of information to be used in determining whether Richardson has been granted tenure. Rather, the ALJ properly considered not only the initial resolution,

but also a series of individual contracts subsequently executed by [Richardson] in each year of employment. \*\*\* Indeed, one contract codified the resolution and was executed merely days later. This contract clearly states that the initial term of employment would be from December 1, 1997 to June 30, 1998. Subsequent contracts covered the 1998-99, 1999-2000, and 2000-2001 school years until [Richardson’s] termination in June 2001. (*Id.* at 2)

Furthermore, the Board reasons that the pertinent statute does not prescribe the manner in which a local board must codify its appointments of custodians. In the absence of such prescription, the Board concludes, it was “free to employ any number of mechanisms” to confirm its appointments. (*Id.* at 3)

Upon careful and independent review of the record in this consolidated matter, the Commissioner determines to set aside the Initial Decision and to remand this matter to the OAL for the reasons set forth below.

Essential to the resolution of this matter is the threshold issue of whether the position held by Richardson, *i.e.*, that of Coordinator of Custodial and Grounds, is one wherein the individual *could lawfully acquire tenure* and, consequently, benefit from the rights and protections of such tenure. *If* Richardson were so eligible for tenure pursuant to either “the janitor tenure statute,” *N.J.S.A.* 18A:17-3 or the Veterans Tenure Act, *N.J.S.A.* 38:16-1, as he claims, *then* the question of whether he was appointed by the Board to a fixed or indefinite term becomes relevant.

Initially, the Commissioner recognizes that the janitor tenure statute has been liberally construed. *See Barnes v. Bd. of Ed. of Jersey City*, 85 N.J. Super. 42, 46 (App. Div 1964), *cert. denied* 43 N.J. 450; *Brunner v. Board of Education of the City of Camden*, 1960 S.L.D. 155, 157; and *Lauffer v. Board of Education of the Borough of Leonia, Bergen County*, 1984 S.L.D. 1290, 1293. Additionally, that statute “must be read as conveying tenure status to a category or class of employment (*i.e.* janitorial) and not to a specific position.” *Lauffer, supra*, at 1293. Although Richardson asserts that, indeed, his former position “falls under the general janitor category/class of employment,” (Petitioner’s Letter Memorandum, January 4, 2002 at 5), the Board disputes this classification. Instead, the Board argues that Richardson’s duties were “predominantly administrative” and “substantively different from the hands-on responsibilities of head custodians, custodian assistants, custodian engineers and cleaners under his supervision.” (Board’s Letter Brief, February 7, 2002 at Exhibit C) As such, the Board reasons that “the janitorial tenure statute does *not* apply to an administrator who has not previously accrued tenure as a janitor or custodian.” (*Id.* at 1) (emphasis added) In support of its position, the Board points to the job description for Richardson’s former position, and argues that

The physical abilities requirements clearly show that [Richardson] was hired for an administrative position. Between 40-60% of the employee’s time is devoted to telephone, desk work and sitting, while less than 10% is devoted to lifting, bending, shoveling and groundskeeping. By contrast, the job description for an [Assistant] Custodian involves a great deal of manual labor and “hands on” cleaning.\*\*\* (*Id.* at 3)

The Commissioner recognizes that such a tenure analysis must consider “that titles given to positions in school districts are not always accurately descriptive of the work done and the controlling factor is not the name assigned to the job but the duties which are

performed.” *Brunner, supra* at 158. Thus, in *Brunner*, in determining whether petitioner, as “chief janitor” was, in fact, a member of the janitorial staff, the Commissioner:

considered the rules and regulations adopted by respondent Board in regard to its janitorial staff. The responsibilities of the chief janitor are set forth in these rules under 16 items. Generally, they assign to him responsibility for assigning, training and supervising all janitors and for inspecting the quality and adequacy of their work, supplies and equipment. A study of the list of duties of the chief janitor confirms the belief of the Commissioner that he is a “head” or “supervising janitor” with the kinds of responsibilities which such a title would logically imply. The rules of the Board support the petitioner’s argument that the chief janitor is a member of the janitorial staff and, as such, is included in the provisions for tenure. *Brunner, supra*, at 158.

In the instant matter, however, the record, developed by the parties pursuant to a motion and cross-motion for summary decision, is insufficient to determine conclusively whether Richardson was, in fact, “a member of the *janitorial staff* of the school district” (emphasis added) *Brunner, supra*, at 158, so as to make him eligible for tenure under *N.J.S.A.* 18A:17-3.

If, on remand, it is determined that Richardson was not eligible for tenure under *N.J.S.A.* 18A:17-3, then further analysis under that statute is unnecessary,<sup>1</sup> However, the analysis cannot end there, since Richardson concurrently argues that he has acquired tenure pursuant to *N.J.S.A.* 38:16-1, the Veterans Tenure Act. In this regard, while the parties do not dispute that Richardson is a veteran who was honorably discharged, the current record is devoid of argument as to whether, or how, this law, which is not a part of New Jersey’s statutory school tenure scheme, should be applied under these circumstances.

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<sup>1</sup> Notably, in *Burrows, supra*, the Board similarly contended that petitioner, a Director of Building and Grounds, was not employed as a “janitor.” *Burrows, supra* at 605. There, however, the ALJ *first* determined that Burrows had been, at all times during his employment, appointed by the Board for fixed, specific periods of time. She did not reach to the issue of whether Burrows was, in fact, employed as a “janitor.” *Burrows, supra*, at 608.

Finally, to the extent that the issue of whether Richardson was appointed to a fixed or indefinite term of employment becomes relevant in forthcoming proceedings, the Commissioner finds, even assuming, *arguendo*, that Richardson was *initially* appointed to a fixed term,<sup>2</sup> the same conclusion could not be reached regarding his subsequent years of employment, where there was no Board appointment and Richardson signed only “Instructional Staff Contracts.” The Commissioner herein finds that these documents represent, substantively, nothing more than “salary notifications” advising Richardson of his increases for 1997-98, 1998-99 and 1999-2000, “notwithstanding the nomenclature utilized in the titling of [these particular forms] or that [their] wording subjects the increase[s] to the successful completion of [Richardson’s] job responsibilities [for those years].” (*Ralph McCullough v. Board of Education of the City of Trenton, Mercer County*, Commissioner Decision January 15, 2002, slip op. at 10, 11) Furthermore, “It is by now well-established that salary agreements, standing alone, do not establish yearly appointments for definite terms.” (*McCullough citing Smith v. Board of Education of the Township of East Brunswick*, decided by the Commissioner August 15, 1983, *aff’d* State Board April 4, 1984) Consequently, based on the record before him, the Commissioner concludes that, at least after the 1997-98 school year, the Board did not appoint Richardson for a fixed term of employment.

Accordingly, this matter is remanded to the OAL for further factfinding and expansion of the record as may be necessary to determine whether Richardson was eligible for tenure under the janitor tenure statute, *N.J.S.A.* 18A:17-3 *and/or* the Veterans Tenure Act, *N.J.S.A.* 38:16-1, so as to establish his employment rights, if any, in accordance with the Commissioner’s decision herein. Recognizing the potential for this consolidated matter to

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<sup>2</sup> This, by virtue of a duly executed Employment Contract providing a starting date of December 1, 1997 and an ending date of June 30, 1998. (Board’s Cross Motion for Summary Decision at Exhibit A)

proceed to a tenure hearing, the Commissioner notes that an interlocutory determination by the ALJ shall be appealable, upon request by either party, pursuant to *N.J.A.C.* 1:1-14.10.

IT IS SO ORDERED.<sup>3</sup>

COMMISSIONER OF EDUCATION

Date of Decision: May 7, 2002

Date of Mailing: May 7, 2002

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<sup>3</sup> This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.