

#11-16 (OAL Decision: Not yet available online)

ALI FETI,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE	:	DECISION
BOROUGH OF NETCONG, MORRIS	:	
COUNTY, BERNADETTE DALESANDRO	:	
AND KEVIN CARROLL,	:	
	:	
RESPONDENTS.	:	
	:	

SYNOPSIS

In this case, petitioner – formerly employed as a custodian for the respondent Board – challenged the termination of his employment and sought reinstatement, back pay, and compensation for unused sick and vacation days. Petitioner contended, *inter alia*, that he acquired tenure when he was appointed via Board resolution on June 26, 2012 to the position of custodian for an indeterminate term, effective July 1, 2012; accordingly, petitioner argued that he was improperly terminated in violation of his tenure rights at the end of the 2012-2013 school year. The respondent Board asserted that – pursuant to the collective bargaining agreement (CBA) and Board Policy Number 4360, both of which expressly state that custodians are not entitled to acquire tenure – petitioner had been employed under a series of annual contracts with fixed terms since his initial hiring in 2001, and never acquired tenure with the Board.

The ALJ found, *inter alia*, that: for each year prior to 2012-2013, petitioner had been appointed via a one-year fixed term contract; he was initially appointed in 2001 as a custodian, but promoted in his second year to head custodian – a position he retained via annual reappointment through the 2011-2012 school year; petitioner was demoted to custodian effective July 1, 2012 because of performance issues; although the Board’s resolution appointing petitioner as custodian for the 2012-2013 school year – at an annual salary of \$46,000 – did not expressly state that his appointment was for a one-year term, the Board does not grant tenure to custodial staff, and routinely appoints custodians for a one year term; petitioner had always been appointed via a one-year contract until July 2012; although no fully executed contract for 2012-2013 could be produced by either party, any failure to execute such a contract was clearly not intended to confer tenure upon petitioner; in fact, a contract could not be produced only due to the dysfunction of the Board’s business office, and the misfeasance of its prior administrators; the CBA expressly stipulates that custodians in the Netcong school district will not earn tenure; records produced by the Board confirm that petitioner was already paid for 20 unused vacation days; and no further vacation pay is due or owing to petitioner. The ALJ concluded that petitioner was not tenured at the time of his discharge, and that his claims are meritless and/or outside of the Commissioner’s jurisdiction. The ALJ noted that at hearing, the Board did concede that petitioner should have been paid at the rate of \$46,000 for the 2012-2013 school year, and was paid only \$45,000. Accordingly, the ALJ ordered the Board to compensate petitioner in the amount of \$1,000 for the amount owed him for his last year of employment. The remaining claims were dismissed.

Upon comprehensive review, the Commissioner concurred with the findings and conclusions of the ALJ, and adopted the Initial Decision as the final decision in this matter.

This synopsis is not part of the Commissioner’s decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

January 14, 2016

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The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions filed pursuant to *N.J.A.C.* 1:1-18.4 by the petitioner, Ali Feti, and the respondents’ reply thereto. In this matter, the petitioner is challenging the Board’s non-renewal of his employment as a custodian in the school district following the 2012-2013 school year.

The petitioner takes exception to the Administrative Law Judge’s (ALJ) determination that he did not have tenure as a custodian at the time of his discharge. Specifically, the petitioner maintains that since he had no written contract for the 2012-2013 school year, he was a custodian with no fixed term of employment and entitled to tenure under *N.J.S.A.* 18A:17-3 as a matter of law. The petitioner emphasizes that the intent of the Netcong Board of Education (Board) is not relevant to whether he acquired tenure pursuant to *N.J.S.A.* 18A:17-3, and where a board of education does not invoke its power to prevent tenure for custodians, it accrues by default.

Additionally, the petitioner asserts that his demotion from head custodian to custodian for the 2012-2013 school year violated his newly acquired tenure rights. Therefore, the ALJ wrongfully found that he was covered by the collective bargaining agreement¹ (CBA) because the anti-tenure

¹ The CBA states that, “[c]ustodians shall continue the practice of executing annual employment contracts with the Board. Custodians shall not receive tenure.”

strictures of the CBA do not include head custodians and, since his demotion violated his tenure rights, he should have remained head custodian. Finally, the petitioner contends that the ALJ's decision on the claim for unpaid wages and vacation pay misinterprets the documentary evidence and is incorrect.

In reply, the respondents maintain that the ALJ had the opportunity to review numerous documents, as well as the opportunity to assess the credibility of the witnesses at the hearing. There is nothing in the petitioner's exceptions that points to any inappropriate or incorrect findings or conclusions made by the ALJ. The respondents stress that it would have been completely illogical for the Board to decide to grant tenure to the petitioner when it had been appointing him and other custodians on annual contracts for at least a dozen years. Further, the CBA and Board Policy Number 4360² both expressly state that custodians are not entitled to acquire tenure. In light of the petitioner's employment history – coupled with the relevant provisions of the CBA and Policy Number 4360, and the applicable case law – it was reasonable for the ALJ to conclude that the petitioner's 2012-2013 contract was for a fixed one-year period. As a result, the petitioner did not acquire tenure under *N.J.S.A.* 18A:17-3 and his non-renewal in 2013 was consistent with the law.

Upon a comprehensive review of the record in this matter, the Commissioner concurs with the ALJ – for the reasons thoroughly set forth in the Initial Decision – that the petitioner did not have tenure as a custodian at the time of his discharge. The Commissioner is also in accord with the ALJ's determination that the Board did not violate the petitioner's due process rights when it non-renewed his employment. Finally, based on the Board's concession at the hearing, it is undisputed that the Board is required to pay the petitioner \$1000.00 that is owed to him based on the miscalculation of the payment he received for his accrued vacation time.³

² Board Policy Number 4360 states that, “[p]ersons employed as janitors, custodians, and maintenance personnel including supervisory personnel will be employed on fixed term contracts and will not acquire tenure in their positions.”

³ The Commissioner also agrees with the remaining determinations made by the ALJ regarding various claims advanced by the petitioner, including his entitlement to additional compensation for vacation and sick time.

Pursuant to *N.J.S.A.* 18A:17-3, boards of education have the discretion to deny tenure to custodial staff or to confer that status upon them. In order to exercise the discretion to deny tenure to custodial staff, a board of education must appoint the custodians for a fixed term. In this case, it is undisputed that in each year – beginning in 2001 and continuing through the 2011-2012 school year – the Board awarded the petitioner a fixed term, one-year contract; thus, he did not acquire tenure during those years. The dispute concerns whether the petitioner acquired tenure pursuant to *N.J.S.A.* 18A:17-3 when he was reappointed on July 1, 2012, in light of the fact that neither party was able to produce a written contract that included the fixed term of his appointment.⁴

In reaching her conclusion, the ALJ had the opportunity to assess the credibility of the various witnesses who appeared before her and made findings of fact based upon their testimony. In this regard, the clear and unequivocal standard governing the Commissioner’s review is:

The agency head may not reject or modify any findings of fact as to issues of credibility of lay witness testimony unless it is first determined from a review of the record that the findings are arbitrary, capricious or unreasonable or are not supported by sufficient, competent, and credible evidence in the record. [*N.J.S.A.* 52:14B-10(c)].

The Commissioner finds no basis in the record to reject either the ALJ’s recitations of testimony or her determinations of witness credibility.

The ALJ found the petitioner’s theory of what happened in connection with the circumstances of his reappointment for the 2012-2013 school year to be nonsensical. In contrast, the Board’s witnesses testified consistently regarding the events leading up to the petitioner’s reappointment for the 2012-2013 school year, and the intention of the Board to again appoint the petitioner to a fixed one-year term. The ALJ found that a contract for the 2012-2013 school year could not be produced because of dysfunction in the Board’s business office and misfeasance on the part of prior administrative staff; the Board’s intention would have been to again enter into a one-year fixed contract

⁴ The record contains a copy of the Board resolution approving the petitioner’s employment as a custodian effective July 1, 2012, with an annual salary of \$46,000; however, the resolution does not include any additional terms of his employment.

with the petitioner for the 2012-2013 school year. As a result, the petitioner was not tenured under *N.J.S.A. 18A:17-3* when his employment was non-renewed following the 2012-2013 school year. The totality of the evidence in the record amply supports the ALJ's determination, including petitioner's contractual history with the Board and the anti-tenure provisions outlined in both the CBA and Board Policy Number 4360. Finally, the Commissioner finds the petitioner's exceptions unpersuasive, largely reflecting arguments and objections previously raised before the ALJ and taken into account by her in weighing the testimony and the documentary evidence.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter. The Board is directed to pay the petitioner \$1000.00 owed to him for the miscalculation of the payment received for his accrued vacation time. The remaining claims in the petition of appeal are hereby dismissed.

IT IS SO ORDERED.⁵

COMMISSIONER OF EDUCATION

Date of Decision: January 14, 2016

Date of Mailing: January 14, 2016

⁵ Pursuant to *P.L. 2008, c. 36 (N.J.S.A. 18A:6-9.1)*, Commissioner decisions are appealable to the Superior Court, Appellate Division.