

ATLANTIC CITY EDUCATION ASSOCIATION,	:	
on behalf of itself and the members named	:	
herein, REVEREND DAVID BELL,	:	
LUIS CARMONA, MICHAEL DAVIS, RALPH	:	
MONAGAS, MICHAEL MOODY, JAMES PALIN,	:	
RAY RODRIGUEZ, SANTOS VERGARA,	:	
KENNETH WHITE, RICHARD JOHNSON,	:	
JORGE COSME AND WILLIAM SMALLWOOD,	:	
	:	
PETITIONERS,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE CITY OF	:	DECISION
ATLANTIC CITY, ATLANTIC COUNTY,	:	
	:	
RESPONDENT.	:	

SYNOPSIS

Petitioning Association and former head custodians alleged Board’s actions terminating their employment or transferring them to regular custodian positions and reducing their salaries accordingly, was violative of their tenure and seniority rights. Board contended they had no tenure as “head custodians,” and it acted for reasons of economy.

Citing *Spiewak*, the ALJ determined that petitioners acquired a tenured status in the Board’s employ in the position of custodian (janitor). *N.J.S.A.* 18A:17-3, 17-4. ALJ determined that the position of chief (head) janitor denotes a special assignment within the general classification of janitorial services and, therefore, it comes within the scope of the tenure statute. The Board’s attempt to create a “supervisory subclass of Head Custodians” who do not have tenure must fail. Thus, the ALJ found that Petitioners Johnson, Cosme and Smallwood had more years of service than several employees who were retained, fell under the tenure protection of custodians and were to be afforded all the benefits and emoluments attached thereto. ALJ ordered that they be immediately restored to their rightful positions with all of the lost wages and other emoluments withheld from them for the 1997-98 school year. ALJ further ordered that the compensation of all other petitioners be returned to the level they would have earned during the 1997-98 school year pursuant to the Appellate Decision in *Bassett* (compensation of a tenured teacher cannot be reduced following his/her transfer from one teaching position to another). To the extent the Board’s contract appears to create the opportunity to reduce the compensation of petitioners, the contract “contravene[s] a specific term or condition of employment set by a statute.” (*Spiewak*) ALJ granted summary decision to petitioners and dismissed the Board’s motion for summary decision.

Commissioner concurred with the ALJ that petitioners were entitled to the relief they sought. Commissioner directed Board to reinstate Petitioners Johnson, Cosme and Smallwood and, should there be an ensuing RIF, to provide each with preference over less senior staff. *N.J.S.A.* 18A:17-4 . Moreover, the Commissioner directed the Board to compensate them with lost wages and emoluments, less mitigation, if any, from the date of their respective terminations to the date of their reappointments. The Board was directed to restore each of the remaining petitioners to the salary level each enjoyed during the 1997-98 school year and to reimburse them for the amount, less mitigation, if any, representing the difference between what each should have received in the 1998-99 school year and up to the date of restoration, as per this decision, and what each was actually paid by the Board, after being relieved from assignment as head custodian.

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The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Exceptions were filed by petitioners and the Board, and a reply was filed by petitioners in accordance with *N.J.A.C.* 1:1-18.4.¹ All submissions were considered by the Commissioner in reaching his decision.

Upon careful and independent review of the record in this matter, the Commissioner concurs with the ALJ that petitioners are entitled to the relief they seek. The Supreme Court has provided direction regarding the options local boards enjoy when employing custodians. That is, a local board may, “without contravening the terms of the statute,

¹ Petitioners disagreed only with the relief ordered by the ALJ in his recommended decision. Specifically, Petitioners Johnson, Cosme and Smallwood seek, not only to be reinstated, but to be compensated with all lost wages and emoluments withheld from them during the 1998-99 school year, and up to the date of reappointment. The remaining petitioners seek an amended order providing not only that their salaries return to that which they earned in the 1997-98 school year, but that they be awarded back pay equal to the difference between the amount they earned during the 1997-98 school year and the reduced amount they earned during the 1998-99 school year, and

permissibly pick and choose between the statutory minimum of no tenure for any custodial employee and the statutory maximum of instant tenure for all custodians.” *Wright, supra*, at 119.

As the Court instructs:

teachers’ tenure statute is fundamentally different from the janitors’ statutory tenure provision, *N.J.S.A.* 18A:17-3. The teachers’ tenure statute speaks in the imperative, providing that all teachers shall have tenure after three years of employment. A teacher’s statutory right to tenure cannot be altered by contract and boards have no discretion to deny a teacher tenure if he is reemployed after three years of service. Conversely, *N.J.S.A.* 18A:17-3 grants an employing board discretion in determining whether to grant tenure to custodians.*** Therefore, negotiation of custodians’ tenure rights must be permitted***. *Wright, supra*, at 122.

In *Wright*, the Court upheld a collective bargaining agreement which provided that custodians would receive tenure after three years of employment. Similarly, the collective negotiations agreement between the Board herein and the Atlantic City Education Association (ACEA) provided that

After three (3) years of uninterrupted continuous service, each custodial employee shall be appointed for an unfixed term so as to provide the tenure protection available to such employees under the provisions of Chapter 137, Public Laws of 1960 (*N.J.S.A.* 18A:17-3 and *N.J.S.A.* 18A:17-4). (Board’s Appendix at p. 15)²

There can be no dispute that each of the petitioners acquired tenure as a custodian; indeed, the parties stipulated to this fact. “Once tenure accrues in a designated *category* of employment, it is *not nullified* by the title given to a particular position.” *Brunner, supra*, at 157. (emphasis added)

Thus, despite the Board’s efforts to distinguish the classes of custodians and head custodians,

up to the date of restoration of their proper compensation. (Petitioners’ Exceptions at p. 2) The Board’s exceptions reiterated the arguments in its post-hearing brief, as recounted in full by the ALJ.

² The record indicates that the ACEA is the majority representative of all custodians in the District. (Petition of Appeal at p. 2) However, its collective bargaining agreement does not recognize “head custodians” as members. (Initial Decision at p. 15) Respondent argues that the petitioning head custodians were members of the Atlantic City Head Custodians’ Association (ACHCA) and were governed by a different agreement, see *infra*, which recognized the supervisory nature of the head custodial position.

arguing they are “radically different positions that require a separation of bargaining units in order to separate the supervisory and non-supervisory classes” (Board’s Exceptions at p. 8), the Commissioner has recognized that

[t]he title “head custodian” merely denotes a special assignment within the general classification of janitorial services and, therefore, it comes within the scope of the tenure statute. [Therefore,] [p]etitioner’s title can be changed without violation of the statute, *but as long as he remains within this category/class of employment he is afforded the protections of a tenured janitor. Reinertsen, supra*, at slip. op. pp. 5-6. (emphasis added)

Therefore, the Board’s attempt to create a “supervisory subclass of Head Custodians” who *do not* have tenure must fail. (Initial Decision at p. 21)

With respect to petitioning Head Custodians Bell, Carmona, Davis, Monagas, Moody, Palin, Rodriguez, Vergara and White, since they had all acquired tenure as custodians, the Board was not permitted to reduce their compensation when it abolished their respective positions as head custodian and reassigned them to *another* janitorial/custodial position. *N.J.S.A. 18A:17-3*. As petitioners correctly observe, this principle, which was central to the outcome in *Reinertsen*,

comports with decisions which provide that the compensation of a tenured teacher cannot be reduced following his/her transfer from one teaching position to another. *Bassett v. Board of Education of Oakland*, *** 223 *N.J. Super.* 136 (App. Div. 1988), and those which provide that the compensation of a tenured secretarial/clerical employee cannot be reduced following his/her transfer to another secretarial/clerical position, *Casey v. Board of Education of the Township of Cinnaminson, Burlington County*, [95 *N.J.A.R.* 2d EDU 585] ***. (Initial Decision at pp. 12-13, citing to Petitioners’ Brief in Support of Summary Decision at pp. 8-9)

To the extent the Board’s contract appears to create the opportunity to reduce the compensation of petitioners, the contract “contravene[s] a specific term or condition of employment set by a statute.” *Spiewak, supra*, at 76. In this respect, as the ALJ correctly observes, the agreement of

Atlantic City Head Custodians' Association (ACHCA) "is of no moment in the instant matter."
(Initial Decision at p. 28)

Turning to Petitioners Johnson, Cosme and Smallwood, the Commissioner concurs that, pursuant to *Barnes, supra*, *Brunner, supra*, and *Lauffer, supra*, each acquired tenure in the category of "custodian," and, as such, enjoyed the protections of *N.J.S.A.* 18A:17-3 and 18A:17-4.³ As the ALJ properly noted:

There is neither question nor doubt that a board of education is authorized, by statute, to terminate janitors in its employ who possess a tenure status for reasons other than "neglect, misbehavior or other offenses." *N.J.S.A.* 18A:17-3. Janitorial positions may be abolished for reasons of economy. *Impey, supra*. [However,] [i]n exercising its authority to effectuate a RIF, the board must *** comply with the statutory provisions, pursuant to *N.J.S.A.* 18A:17-4 ***. (Initial Decision at p. 27)

When the Board determined on June 23, 1998 to eliminate the custodial positions held by tenured employees, Johnson, Cosme and Smallwood, for reasons of economy, they were obliged to respect the seniority rights of each. *N.J.S.A.* 18A:17-4. In that the record clearly demonstrates that Johnson, Cosme and Smallwood were *not* the least senior custodians at the time of the RIF, their termination was contrary to the statutory mandate.

Accordingly, the Initial Decision is adopted for the reasons expressed therein and amplified above. The Board is directed to reinstate Petitioners Johnson, Cosme and Smallwood and, should there be an ensuing RIF, provide each with preference over less senior staff. *N.J.S.A.* 18A:17-4. The Board is further directed to compensate Johnson, Cosme and Smallwood with lost wages and emoluments, less mitigation, if any, from the date of their respective terminations to the date of their reappointments. With respect to the remaining petitioners, the Board is directed to restore each of them to the salary level each enjoyed during the 1997-98

³ Indeed, the parties stipulate that although both Cosme and Smallwood were assigned to a position known as "stockroom worker," both served in "custodial/janitorial" positions. (Initial Decision at p. 7)

school year, *and* to reimburse each for the amount, less mitigation, if any, representing the difference between what each should have received in the 1998-99 school year and up to the date of restoration, as per this decision, and what each was actually paid by the Board, after being relieved from assignment as head custodian. Mindful of the Board's "financial stress" (Initial Decision at p. 18), the Commissioner reiterates that this decision in no way precludes the Board from prospectively implementing a reduction in force in accordance with *N.J.S.A.* 18A:17-3 and 17-4.⁴

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

October 7, 1999

⁴ This decision, as the Commissioner's final determination in the instant matter, 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.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.