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| RALPH MC CULLOUGH, | : | |
| PETITIONER, | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY, | : | DECISION |
| RESPONDENT. | : | |

SYNOPSIS

Petitioner challenged the Board's decision to terminate him, contending that he had acquired tenure as a janitor and could be terminated only in accordance with the laws governing tenure employee hearings. The Board argued that petitioner had at all times been appointed to a fixed term and, thus, had not acquired tenure.

The ALJ determined that petitioner did not acquire tenure and was properly removed from his position, concluding that his initial appointment for one year as a substitute janitor covered the full term of his employment by the Board even though he was subsequently appointed to the position of assistant custodian.

The Commissioner reversed the determination of the ALJ. The Commissioner determined that the fixed term attendant to petitioner's appointment as a substitute custodian did not govern his subsequent appointment to a permanent position. Instead, the Commissioner concluded that, upon his appointment to the position of assistant custodian, petitioner acquired tenure as a janitor by operation of law because such appointment was for an indefinite period of time as reflected by the documents in the record.

January 15, 2002

OAL DKT. NO. EDU 10053-99
AGENCY DKT. NO. 325-10/99

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The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner's exceptions and the Board's reply thereto were timely filed pursuant to *N.J.A.C.* 1:1-18.4.

Petitioner excepts to the Administrative Law Judge's (ALJ) conclusion that he was appointed for a fixed term and, therefore, did not acquire tenure pursuant to *N.J.S.A.* 18A:17-3. Petitioner argues that, although he commenced his employment with the Board on July 1, 1997 in a substitute custodian capacity, he was appointed to a permanent, higher-level position with an annual salary in February 1998, and received a further salary upgrade in April 1998. Memoranda confirming these Board actions make no mention of a fixed term of employment. (Petitioner's Exceptions at 1) Rather, he maintains, "[t]he only items in the various memoranda that can be said to relate to a 'term' are the salary indicators." (*Id.* at 2) Petitioner cites *Gilliam v. Toms River Board of Education*, 1974 *S.L.D.* 540 for the proposition that "salary indicators," standing alone, do not constitute fixed terms of employment. (*Ibid.*) Even assuming that the relevant memoranda could be termed to be "inconclusive," petitioner points to *Richard Cromwell v. Board of Education of the Township of River Vale, Bergen*

*County,* decided by the Commissioner January 6, 2000, wherein the ALJ, when faced with such a situation, reviewed the board minutes to resolve the issue. Here, petitioner argues, the applicable Board minutes dealing with his employment appointment are wholly silent with respect to a term of employment. (*Id.* at 2) In that all relevant memoranda indicate that he was appointed for other than a fixed term, petitioner claims he acquired immediate tenure which cannot be removed by nonreappointment.

In reply, the Board advances that petitioner has had signed contracts for the whole time of his employment with the Board, *i.e.*, 1997-98 and 1998-99. These contracts, it avers, "unambiguously express a one-year salary and state that renewal is pre-conditioned upon successful completion of job responsibilities in the current year." (Board's Reply Exceptions at 2) The Board next cites to a number of school law cases for the proposition that "Board minutes and/or resolutions are merely a secondary source of information to be evaluated in the absence of executed contracts." *(Ibid*.) Because the contract documents in this matter are clear on their face with respect to the Board's intent, it proffers, recourse to extraneous materials such as Board minutes to ascertain such intent is unnecessary. (*Ibid.)* In that the within record clearly evidences that petitioner was employed pursuant to fixed term contracts, the ALJ correctly determined that he did not acquire tenure as a custodian in the District.

Upon his independent and careful review, the Commissioner is compelled to reverse the Initial Decision as he finds, based on the totality of the record before him, that petitioner acquired tenure in the position of custodian effective January 27, 1998 and, consequently, the Board's action terminating his employment on July 26, 1999 was improper and a violation of his tenure rights. In making such determination the Commissioner notes that the statutory provision which governs the tenure of custodial employees, *N.J.S.A.* 18A:17-3, specifies:

> Every public school janitor of a school district shall, *unless he is appointed for a fixed term*, hold his office, position or employment under tenure during good behavior and efficiency and shall not be dismissed or suspended or reduced in compensation, except as the result of the reduction of the number of janitors in the district made in accordance with the provisions of this title or except for neglect, misbehavior or other offense and only in the manner prescribed by subarticle B of article 2 of chapter 6 of this title. (emphasis supplied)

Local boards, therefore, have broad discretion to establish tenure rights for custodial employees. It is clear from the statute that a custodian employed without a fixed term gains tenure immediately upon beginning employment. In contrast, the statute allows an employing board to deny tenure to all custodians, in that appointment for a fixed term is an appointment without statutorily mandated tenure. (*See Wright v. Board of Educ. of the City of East Orange*, 99 *N.J.* 112 (1985).) At issue here is whether any Board action or inaction with respect to petitioner's employment status resulted in an indefinite appointment so as to entitle him to statutory tenure. The Commissioner observes that where it becomes necessary to resolve a question as to whether a particular individual was appointed for a fixed term or an indefinite one, case law has established the procedure by which this issue is resolved. As recognized by the ALJ in *Charles Sharpe v. Board of Education of the Township of Wyckoff*, *Bergen County,* decided by the Commissioner March 22, 1993:

> When deciding whether or not the appointment is for a fixed term, the Commissioner and the courts have looked first at the individual contracts between the parties, and, where that inquiry is ambiguous, or inconclusive, at other indicia of the nature of the appointment, including board minutes and resolutions, negotiated agreements, and letters." (Slip Opinion at 5)

Close examination of the within record evidences the following sequence of events:

- July 1, 1997 – Memo from Gilda Rorro, Assistant Superintendent, Human Resources Development, to petitioner advising him that on June 30, 1997, the Board voted to appoint him to the position of

Substitute Custodian, effective July 1, 1997 through June 30, 1998, at a salary rate of $9.00 per hour. (*See* P-1.)

- January 30, 1998 – "Recommendation for Employment" form was completed whereby the Superintendent recommended that petitioner be appointed to Probationary Assistant Custodian position effective January 27, 1998, at an annual salary of $19,092 (Step 1). This form additionally contained two asterisked provisions, 1) "Employee has 60 days from the above date to present employment verification and or military experience," and 2) "I have read this Recommendation for Employment form and realize that this is not a *contract* until approved by the Board of Education." (emphasis supplied) A provision at the bottom of this form (Part B) stating "I have read the above contractual recommendation (Part A) and agree to terms stated," was signed by petitioner and the District's Human Resources Administrator. (*See* P-3.)

- February 24, 1998 – Letter from Oscar Jamerson, Jr., Human Resources Consultant to petitioner advising that, on February 23, 1998, the Board approved the appointment of petitioner from Probationary Assistant Custodian to Assistant Custodian, effective January 27, 1998, at an annual salary of $19,092 Step 1. (*See* P-2.)

- April 30, 1998 – "Classified Staff Contract" form given to and executed by petitioner. Such form specified that pending the successful completion of his 1997-98 job responsibilities, petitioner's 1998-99 salary would be $21,108. (*See* P-4.)

The Commissioner initially concurs with the ALJ that the contract between petitioner and the Board at the time of his initial hiring as a substitute custodian, at an hourly salary rate, is clear and unambiguous, providing for a fixed term of employment commencing July 1, 1997 and ending June 30, 1998. He does not, however, agree with the ALJ's determination that the District's actions taken with respect to petitioner's employment in January and February 1998 represented mere changes in petitioner's "job title and salary, but not his term of employment." (Initial Decision at 2) Rather, the Commissioner finds and concludes that on January 30, 1998, petitioner was recommended for an employment contract, subsequently adopted by the Board, in a wholly distinguishable category of employment from that for which he was initially hired *i.e.*, a

*permanent* assistant custodian position, albeit at that time on a probationary basis, as opposed to his initial *substitute* appointment, which, by its very terminology connotes a position where one is merely "taking the place of another" rather than having an actual "position" of his own. As such, it cannot reasonably be argued that the fixed term attached to petitioner's initial substitute position extended to his employment progression to a permanent appointment.

Close scrutiny of the documents relevant to petitioner's employment in this new position, the January 30, 1998 Recommendation for Employment Form, P-3, and the District's letter to petitioner advising him of the Board's approval of his appointment, P-2, evidences language which, although specifying a definite effective or starting date, is unquestionably silent with regard to any ending date. Even assuming, *arguendo*, that these materials could be termed "ambiguous" in this regard, a review of the minutes of the Board's February 23, 1998 meeting[1] reflecting its action with respect to petitioner's appointment similarly discloses silence as to a "term of employment." Specifically, the relevant portion of these minutes in its entirety reads:

> McCullough, Ralph (Mr.) Monument
> Fr: Probationary Assistant Custodian
> To: Assistant Custodian
> Eff. Date: 1/27/98
> Rate of Pay: $19,092 Step 1
> (no change in salary)
>
> (Mr. McCullough obtained his boiler operator's license.)
> Acct. # 11-000-260-110-0000-52-00

The Commissioner similarly rejects any claim that the April 30, 1998 "Classified Staff Contract" form, P-4, manifests that petitioner's appointment was for a fixed term. Rather, it is clear that, substantively, this document is a "salary notification" advising petitioner of an

[1] The referenced Board minutes were brought to the record as Exhibit P-7 of Petitioner's Brief in Opposition to Motion for Summary Decision, dated September 6, 2000, and were referenced by petitioner in his exceptions. It is noted that these minutes were not moved into evidence as an exhibit during the course of the hearing at the OAL. It is further noted that, while the District takes issue with the necessity of resorting to these minutes to determine petitioner's employment status, it does not question their authenticity or the propriety of their introduction here.

increase in his salary for 1998-99, notwithstanding the nomenclature utilized in the titling of this particular form or that its wording subjects the increase to the successful completion of petitioner's 1997-98 job responsibilities. It is by now well-established that salary agreements, standing alone, do not establish yearly reappointments for definite terms. (*See 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; *see, also, Gilliam, supra.*) To the contrary, these notices are more commonly recognized as indicia of the tenure status of an employee. Specifically:

> Such salary notices or salary agreements are generally reserved for those employees who have acquired a tenure status in the employ of a board of education. *Once an employee has acquired tenure*, as for example, a teaching staff member, pursuant to *N.J.S.A.* 18A:28-5, the board's offer of a contract to the teacher becomes superfluous in regard to the term of employment. The term is indefinite and continuous; therefore, the only subject matter to be contracted for is the employee's annual salary and emoluments…[T]he need for a contract between a board of education and a tenured employee, setting forth all the terms and conditions of employment is no longer necessary and the board resorts to the issuance of a salary notice or salary agreement, pursuant to the negotiated agreement to the tenured employee." (emphasis in original) (*Cromwell, supra,* Slip. Opinion at 6-7, *quoting Smith v. Bd. of Ed. of the Twp. of East Brunswick*, *supra,* at 13)

Consequently, based on the record before him, the Commissioner concludes that petitioner was appointed to his custodial position for other than a fixed term and he was, therefore, a tenured employee of the Board pursuant to *N.J.S.A.* 18A:17-3, with the effective date of that appointment, January 27, 1998. As such, absent the following of the procedures set forth in *N.J.S.A.* 18A:6-10, petitioner was improperly discharged from his position, in violation of his tenure rights, when the Board acted on July 26, 1999 to terminate his employment.[2]

[2] The Commissioner rejects any suggestion by the Board that petitioner's alleged agreement to a six-month period of probation in July 1998 constituted a waiver of his tenure rights. Although the Board may have been contemplating termination of petitioner's employment, the fact remains that, having received tenure, he could not be removed except pursuant to the dictates of the Tenure Employees Hearing Law, *N.J.S.A.* 18A:6-10 *et seq.*

Accordingly, the Commissioner reverses the decision of the OAL and holds that petitioner's termination on July 26, 1999 was without force and effect.

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: 1/15/02

Date of Mailing: 1/16/02

[3] 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:2-1.1 *et seq.* Commissioner decisions are deemed filed three days after the date of mailing to the parties.