

AMELIA COLON-SERRANO :
PETITIONER, :
V. : COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE :
CITY OF PLAINFIELD, UNION COUNTY, :
RESPONDENT. :
_____ :

SYNOPSIS

Petitioner – who claims to have acquired tenure as an attendance aide in respondent Board’s district pursuant to *N.J.S.A. 18A:17-2*, prior to her voluntary transfer in 1994 to the nontenured position of classroom aide – contends that the Board violated her tenure rights when it failed to return her to a clerical position upon nonrenewal of her contract as a classroom aide in 2006. Respondent contends that petitioner is not tenured, as her initial position of attendance aide was not a tenured position.

The ALJ identified two issues to be determined: whether petitioner’s initial position of attendance aide is properly classified as a clerical position, and whether petitioner acquired tenure in this position. The ALJ found that: it is well settled that the duties performed, rather than the title of a position, control whether or not that position is protected by tenure; the duties performed by petitioner in her former position as attendance aide were primarily clerical in nature; therefore, pursuant to *N.J.S.A. 18A:17-2*, the petitioner earned tenure for the time she served in a clerical position as attendance aide. The ALJ ordered the Board to place petitioner in a clerical position held by a nontenured or less senior employee.

Upon a thorough and independent review of the record, the Commissioner adopted in part, and rejected in part, the Initial Decision. The Commissioner concurred that the petitioner had acquired tenure as a clerical employee by virtue of her service as an attendance aide, but found that – because petitioner voluntarily left her tenured clerical employment for the distinct and nontenurable position of classroom aide – the protections of *N.J.S.A. 18A:17-2* were no longer applicable and she had no entitlement to continued employment in the district. Accordingly, the petition was dismissed.

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 28, 2008

OAL DKT. NO. EDU 11588-06
AGENCY DKT. NO. 357-10/06

AMELIA COLON-SERRANO, :
 :
 PETITIONER, : COMMISSIONER OF EDUCATION
 :
 V. : DECISION
 :
 BOARD OF EDUCATION OF THE CITY :
 OF PLAINFIELD, UNION COUNTY, :
 :
 RESPONDENT. :
 _____ :

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. No exceptions were filed by the parties.

Upon review, the Commissioner adopts in part, and rejects in part, the OAL Decision.

Initially, the Commissioner fully concurs with the Administrative Law Judge (ALJ) – for the reasons set forth in her recommended decision – that the petitioner acquired tenure as a clerical employee by virtue of her service as an attendance aide in the school district of the respondent Board of Education (Board).

However, the Commissioner cannot concomitantly agree that the petitioner – who voluntarily left her tenured position in 1994 to accept the separate and nontenurable position of classroom aide, which she then held until the nonrenewal of her contract in 2006 – is now entitled to “bump back” into a clerical position held by a nontenured or less senior clerical employee, as reflected in the Order of the ALJ.

As noted in the Initial Decision, *N.J.S.A.* 18A:17-2 provides that clerical employees who acquire tenure “shall hold [their] office, position or employment under

tenure during good behavior and efficiency and shall not be dismissed or suspended or reduced in compensation except for neglect, misbehavior or other offense and only in the manner prescribed by [the Tenure Employees Hearing Law].” (at 3-4) In this matter, however, the employment from which the petitioner was dismissed was neither her tenured clerical employment nor an extension or “hybrid” continuation of such employment,¹ but rather the clearly distinct, nonclerical, and nontenured classroom aide position to which she voluntarily transferred in 1994 and continued to hold thereafter by virtue of a series of annual contract renewals. Under these circumstances, when the petitioner was advised in July 2006 that her contract would not be renewed, the protections of *N.J.S.A. 18A:17-2* were no longer applicable; in the absence of express legislative provision for retention of accrued tenure rights upon transfer to a position which is not tenure eligible, the petitioner must be deemed to have relinquished the protections associated with her clerical tenure upon acceptance of the nonprotected position of classroom aide.^{2 3}

Accordingly, the Initial Decision of the OAL is adopted as to its finding that the petitioner acquired tenure in her position as attendance aide, but rejected as to its implicit conclusion that the petitioner’s tenure protection continued beyond the voluntary relinquishment of her tenured employment in 1994. Because no relief can now be

¹See, by way of contrast, *Peter A. Keaney v. Bd. of Ed. of the Township of Bloomfield*, Commissioner of Education Decision No. 311-05, decided August 31, 2005; and *Quinlan v. Bd. of Ed. of North Bergen Twp.*, 73 *N.J. Super.* 40 (App. Div. 1962)

² See *Lange v. Bd. of Ed. of Borough of Audubon*, 26 *N.J. Super.* 83 (App. Div. 1953)

³ It is noted that no allegation is made of misrepresentation on the part of the Board as to the nontenured status of classroom aides, nor does the petitioner claim detrimental reliance on Board promises.

awarded as a result of the petitioner's one-time tenured status, the petition is dismissed.⁴

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IT IS SO ORDERED.⁶

COMMISSIONER OF EDUCATION

Date of Decision: January 28, 2008

Date of Mailing: January 28, 2008

⁴The Commissioner deems unpersuasive the case law cited by the petitioner in support of her claim (Post-Hearing Brief at 2-3). Specifically, the petitioner ignores that *Marybeth Driscoll v. Bd. of Ed. of the West Essex Regional School District*, 1993 N.J.A.R.2d (EDU) 761 was reversed by the State Board of Education at 95 N.J.A.R.2d (EDU)348, while *Dianne Giardina v. Bd. of Ed. of the Twp. of Pequannock*, Commissioner of Education Decision No. 124-05, decided April 4, 2005, affirmed State Board of Education Decision No. 23-05, September 7, 2005, pertained to an employee who had transferred from one tenurable position covered by N.J.S.A. 18A:17-2 to another – as did the case on which it relied, *Julia R. Given v. Bd. of Ed. of the East Windsor Regional School District*, 1978 S.L.D. 43, also quoted by the petitioner.

⁵ While the petitioner has no legal entitlement to continued employment in the district, the Commissioner notes that nothing herein is intended to preclude the Board from offering the petitioner – a longtime district employee who, from all appearances, performed satisfactorily as an attendance aide and whose employment as a classroom aide was terminated solely as the result of newly enhanced educational requirements which she could not meet – an available position for which she is qualified.

⁶ This decision 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.*