

TAEA CROSS, :  
PETITIONER, :  
V. : COMMISSIONER OF EDUCATION  
BOARD OF EDUCATION OF THE : DECISION  
BOROUGH OF ELMWOOD PARK,  
BERGEN COUNTY, :  
RESPONDENT. :  
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SYNOPSIS

Petitioner, a bus driver/utility worker, contended that the Board improperly terminated her employment in December 2010, in violation of her tenure rights. The Board asserted that the petitioner's bus driver position is not entitled to tenure protection, and her services as a utility worker do not meet the full-time criteria for tenure as a custodian. The parties agreed to proceed on a summary basis as the essential facts in the matter were not in dispute.

The ALJ found, *inter alia*, that: petitioner does not qualify for tenure as a bus driver; petitioner was employed under a fixed-term contract, and her fixed-term, part-time employment as a utility worker does not meet the criteria for janitorial tenure under N.J.S.A. 18A:17-3. Accordingly, the ALJ concluded that petitioner did not have tenure in her former position and therefore no tenure rights were violated. The ALJ ordered the petition dismissed.

The Commissioner concurred with the ALJ that 1) petitioner could not earn tenure as a bus driver, and 2) as a part-time utility worker with fixed term appointments, she qualified neither for tenure under N.J.S.A. 18A:17-3 nor the tenure benefit provided in the applicable collective bargaining agreement. 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.

OAL DKT. NO EDU 1522-11  
AGENCY DKT. NO. 35-2/11

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Petitioner challenges her dismissal from employment as a bus driver/utility worker in respondent's district. The petition was filed in February 2011 with an application for emergent relief. The Initial Decision of the Office of Administrative Law (OAL) recites that the parties agreed – on February 15, 2011 – to a summary proceeding, and submitted their respective papers by April 6, 2011.

On June 21, 2011, the Initial Decision was transmitted to the Commissioner.<sup>1</sup> It included a finding that petitioner had not earned tenure in respondent's district, and a conclusion that respondent had not violated petitioner's rights when it dismissed her on December 15, 2010.

Review of the record, initial decision and exceptions leads to the conclusion that the ALJ did not err in recommending dismissal of the petition. As noted by the ALJ, bus drivers – in contrast to teaching staff members and janitorial employees – enjoy no statutory right to tenure. *See, e.g., Albert v. Bd. of Educ. of the Freehold Reg'l High School Dist.*, 1977 S.L.D. 594, at 601. Nor does petitioner allege that the applicable collective bargaining

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<sup>1</sup> The Initial Decision includes a belated denial of emergent relief which, at the present juncture, the Commissioner regards as moot.

agreement (CBA) bestows tenure upon bus drivers, *per se*. Rather, petitioner appears to rely on the fact that her position involved “utility” duties, which she characterizes as janitorial.

However, neither *N.J.S.A. 18A:17-3* – the statute setting forth the conditions for tenure of janitorial employees – nor the provisions of the applicable CBA support petitioner’s position. The provisions of *N.J.S.A. 18A:17-3* exclude from tenure those janitorial employees who are appointed for fixed terms. The exhibits annexed to the March 11, 2011 supplemental certification of respondent’s Business Administrator/Board Secretary, William Moffitt, indicate that petitioner’s employment was renewed annually for a fixed term – via board resolution. Such annual renewal for a fixed term precludes tenure under *N.J.S.A. 18A:17-3* unless the CBA includes provisions to the contrary.

While the record transmitted to the Commissioner does not include a copy of the applicable CBA, the parties appear to agree that Article VI of the CBA provides that tenure rights shall be acquired after three years of satisfactory services for full-time custodial and maintenance personnel. Relying on such authority as *Wright and East Orange Personnel Ass’n v. East Orange Bd. of Educ.*, 99 NJ 112 (1985), petitioner argues that Article VI entitled her to tenure in 2007, after she had completed three years of service in respondent’s district.

In *Wright*, the validity of a contractual provision similar to Article VI was at issue. The New Jersey Supreme Court held that “inasmuch as *N.J.S.A. 18A:17-3* does not preempt a school board’s power to grant tenure to custodial employees after three years of satisfactory performance [whether or not the employee’s appointment terms were fixed], and inasmuch as a negotiated provision to that effect advances the primary purpose of the statute without significantly interfering with educational policy,” the provision was valid. *Wright, supra* at 123. However, respondent maintains – and petitioner does not appear to deny – that

Article VI bestows tenure rights after three years of satisfactory service for full-time custodial and maintenance personnel. As a part-time utility worker, petitioner did not qualify for the tenure benefit provided by Article VI.

As petitioner did not introduce any evidence to refute the allegations of fact – set forth in the Certification dated February 16, 2011 of Richard D. Tomko, respondent's Superintendent – concerning the incidents which led to petitioner's suspension and subsequent dismissal, the determination that petitioner did not acquire tenure constitutes a full disposition of the claims in the petition. Further, pursuant to the “entire controversy doctrine,” this matter may not be refiled to adjudicate facts and/or claims which were known or should have been known during the prosecution of this case.<sup>2</sup>

Finally, the Commissioner notes that petitioner's arguments regarding respondent's treatment of another employee are unhelpful to the disposition of this case. The achievement of tenure is dictated by statute. *Spiewak v. Board of Education of the City of Plainfield*, 90 N.J. 63 (1982). If, as here, the facts reveal that petitioner did not meet the statutory criteria for tenure, she is foreclosed from claiming the benefits of same.

Accordingly, petitioner's dismissal is upheld and the petition is dismissed.

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

ACTING COMMISSIONER OF EDUCATION

Date of Decision: July 28, 2011

Date of Mailing: August 1, 2011

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<sup>2</sup> The **entire controversy doctrine** holds that the adjudication of a legal **controversy** should occur in one litigation in only one court and that, accordingly, all parties involved in a litigation should at the very least present in that proceeding all of their claims and defenses that are related to the underlying **controversy**. *Cogdell v. Hospital Center*, 116 N.J. 7, 15 (1989). The entire controversy doctrine is applicable to administrative hearings. *City of Hackensack v. Winner*, 82 N.J. 1, 31-32 (1980).

<sup>3</sup> This decision may be appealed to the Appellate Division of the Superior Court pursuant to P.L. 2008, c. 36. (N.J.S.A. 18A:6-9.1)