

PHILLIS STILWELL, :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE : DECISION

TOWNSHIP OF NORTH BRUNSWICK, :

MIDDLESEX COUNTY, :

RESPONDENT. :

SYNOPSIS

Petitioner appealed the termination of her employment by the respondent Board, alleging that the school district violated her tenure rights when she was summarily terminated by a vote of the Board on October 21, 2015. Petitioner contended that she had been employed by the Board in a clerical position and had acquired tenure pursuant to *N.J.S.A. 18A:17-2(b)(2)*. The Board asserted that petitioner was employed by the school district as a non-tenured custodian/maintenance employee within the meaning of *N.J.S.A. 18A:17-3*, and received extra pay to perform additional inventory control duties; as a non-tenured janitorial/custodial employee, petitioner was lawfully dismissed without the filing of formal tenure charges.

The ALJ found, *inter alia*, that: the central issue herein is whether petitioner held a tenured position from which she could not be summarily terminated; petitioner was continuously employed by the Board as a custodian from March 2008 until her termination in October 2015; in 2010, petitioner applied for and was given a position identified as Inventory Control Clerk, for which she received an employment letter that set forth that she was approved for reassignment as Inventory Control Clerk, a position which came with a stipend on top of her base salary as a custodian; petitioner continued in this position until she was terminated from the District’s employ on October 21, 2015; petitioner’s argument that she was employed in a tenured clerical position is without merit, as she never received notice from the Board that she had obtained tenure; petitioner remained under the supervision of the buildings and grounds department; and petitioner was obligated to assist with special custodial duties that are never assigned to clerical staff. The ALJ concluded that petitioner was employed as a custodian and received a stipend to perform the duties of an inventory control clerk, but this did not convert her custodial position into a clerical position; petitioner did not acquire tenure in the district as she was never employed in a position that would earn tenure. Accordingly, the ALJ affirmed the Board’s termination action.

Upon comprehensive review of the record and the undisputed facts in this matter, the Commissioner rejected the Initial Decision, finding, *inter alia*, that: it is undisputed that clerical tenure is acquired by operation of law pursuant to *N.J.S.A. 18A:17-2(b)*; the duties performed in a position, not the position title itself, control whether tenure can be accrued in that position; based on an analysis of the petitioner’s actual duties and time allocated to performing clerical tasks as compared to custodial tasks, petitioner’s exclusive role was to serve as inventory control clerk, a position that is clerical in nature; petitioner served in her clerical position for more than five years, and therefore earned tenure; petitioner was terminated without tenure charges having been filed and therefore was deprived of her tenure right to a hearing pursuant to *N.J.S.A. 18A:6-10*. Accordingly, the Commissioner ordered the Board to reimburse petitioner for back pay, benefits and emoluments for the period from October 21, 2015 to July 18, 2016.

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.

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 RESPONDENT. :

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner’s exceptions and respondent’s reply thereto – submitted in accordance with *N.J.A.C. 1:1-18.4* – were also considered by the Commissioner.

The Administrative Law Judge (ALJ) found that petitioner was employed as a custodian and received a stipend to perform the duties of an inventory control clerk. The ALJ reasoned that petitioner’s employment or job title did not change from custodian to inventory control clerk because she never received notice from the Board of having obtained tenure; she remained under the supervision of the buildings and grounds department; and she was obligated to assist with special custodial duties that are never assigned to clerical staff.

Petitioner’s exceptions substantially reiterate the substance of her submissions at the OAL, recasting the arguments therein to support her contention that the ALJ erroneously concluded that petitioner was not a tenured employee in the District. Specifically, petitioner argues that the ALJ improperly applied the law of tenure acquisition because the ALJ’s decision was based on “irrelevant factors” such as petitioner’s job title, supervisor, salary schedule, and board recognition of tenure. Petitioner also argues that the ALJ failed to make specific findings

of fact as to the nature of her daily duties and responsibilities, or the proportion of time spent on various tasks, and that the record demonstrates that majority of petitioner's duties were clerical in nature. Petitioner further argues that the Board failed to follow the law when it summarily terminated her from her tenured clerical position; therefore she is entitled to back pay, benefits, and emoluments from October 21, 2015 through to July 18, 2016.

In reply, respondent also restates the positions advanced in the Board's submissions at the OAL. Respondent contends that petitioner was a custodian through title, duties, supervision, and pay as she received a small stipend in addition to her annual custodian salary for the clerical tasks that she performed. Respondent argues that petitioner was in the custodial bargaining unit and salary guide, was paid in accordance to her custodial contract, and her duties were not clerical in nature because her responsibilities involved daily physical labor, which was beyond the duties of other secretaries and clerks employed by the District. Respondent submits that the ALJ properly relied on the testimony of the Assistant Superintendent and the Building and Grounds Supervisor in determining that the inventory control clerk position was not clerical in nature. Respondent argues that the ALJ's decision was appropriate based on the facts and evidence set forth in the record; further, the petitioner was terminated for fraudulent misrepresentation of her income, and she has waived her right to any future public employment pursuant to her guilty plea and sentencing.

As a preliminary matter, the crux of the dispute here is whether petitioner's position as an inventory control clerk was "clerical," conferring tenure rights following satisfaction of the requirements of *N.J.S.A.* 18A:17-2, or whether she was a non-tenured custodian with additional duties that were clerical in nature.¹ In order to properly make a

¹ If it is determined that petitioner was tenured in a clerical position, then a determination must be made as to whether the Board violated any tenure rights in terminating petitioner from her position.

determination of the nature of a particular position, thorough fact finding and analysis of the duties performed and the balance of the time between the various duties and responsibilities performed – if the position requires performance of both clerical and non-clerical duties – must be conducted. *See Marlene Marbut v. Board of Education of the Township of South Brunswick, Middlesex County*, 97 N.J.A.R.2d (EDU) 99 (N.J. Admin. 1996); *see also Quinlan v. Bd. of Educ. of the Twp. of North Bergen*, 73 N.J. Super. 40 (App. Div. 1962). The Commissioner finds that the Initial Decision did not include proper findings of fact with regard to whether the inventory control clerk position was clerical or custodial, and the ALJ failed to provide clear analysis for her determination that petitioner was a non-tenured custodian. The record in this matter, however, is sufficient for the Commissioner to make a final determination without remand to the OAL.² Therefore, upon a comprehensive review of the record, the Commissioner rejects the ALJ's decision.

It is undisputed that tenure is acquired by operation of law pursuant to N.J.S.A. 18A:17-2(b), which provides: “[a]ny person holding any secretarial or clerical position or employment under a board of education of any school district or under any officer thereof” shall acquire tenure after either “[t]he expiration of a period of employment of three consecutive calendar years in the district or such shorter period as may be fixed by the board or officer employing him,” or “[e]mployment for three consecutive academic years, together with employment at the beginning of the next succeeding academic year” The term “clerical” is not defined in the statute; however, case law and decisional law have provided guidance on the meaning of clerical, as well as the nature of the duties typically associated with the same. In *Barnes v. Bd. of Educ. of Jersey City*, 85 N.J. Super. 42, 44-45 (App. Div. 1964), the Appellate Division rejected the notion that “secretarial” and “clerical” are synonymous, holding

² The Commissioner also notes that the relevant facts are not in dispute.

“the phrase ‘clerical position’ was intended to extend the statutory protection coverage beyond secretarial employment.” The Appellate Division further held “since tenure statutes are intended to secure efficient public service by protecting public employees in their employment, the widest range should be given to the applicability of the law.” *Id.* at 45 (citations and internal quotation marks omitted). Guided by *Barnes*, ALJs have relied on the dictionary definition of “clerk” in an effort to determine whether the nature of the work performed was clerical. *See e.g., Amelia Colon-Serrano v. Bd. of Educ. of the City of Plainfield, Union County*, OAL Dkt. No. EDU 11588-06N at *6 (Dec. 13, 2007), Commissioner Decision No. 31-08 (Jan. 28, 2008) (“Webster’s Ninth New Collegiate Dictionary defines a clerk as a) an official responsible for correspondence, records, and accounts and vested with specified powers or authority, b) one employed to keep records or accounts or to perform general office work”) (internal citations and quotation marks omitted); *Betsey Roach v. School District of South Orange-Maplewood*, 96 N.J.A.R.2d (EDU) 370 at *18 (N.J. Admin. 1995) (“clerk is one employed (as in a business office) to keep records or accounts or to perform more or less routine office tasks . . . a person employed, as in an office, to keep records, accounts, files, handle correspondence, or the like”) (internal citation and quotation marks omitted).

Clerical duties may include but certainly are not limited to: answering telephones, filing records, photocopying documents, data input and data collecting, assisting supervisors, completing forms maintained in the ordinary course of business, and performing tasks as assigned by supervisors. *See Colon-Serrano, supra* at *3 (finding that “answer[ing] the telephones, answer[ing] the phone for her various supervisors, fil[ing], photocopy[ing] student records, photocopy[ing] papers for her superiors . . . not only for herself or her department but also for the neighboring departments[,]” and “prepare[ing] reports documenting student

absences, complete[ing] student transfer forms” were clerical duties); *Diane Giardina v. Bd. of Educ. of the Twp. of Pequannock, Morris County*, OAL Dkt. No. EDU 7677-03 at *12 (Feb. 18, 2005), Commissioner Dec. No. 124-05 (Apr. 4, 2005) (finding that the petitioner’s position as office aide was tenure eligible as her responsibilities were consistent with clerical duties because the petitioner “typed, made copies of documents, engaged in bookkeeping and other office-related tasks”, prepared various reports and interacted with students and parents as directed by her supervisor, managed “petty cash, the substitute teacher payroll, staff attendance,” and “updated student rosters (incoming and outgoing students), ordered supplies and books and organized use of the school facilities by outside groups”). This tribunal has also found that “gathering videotapes, films and other instructional materials requested by teachers, delivering these requested items to various school buildings, picking them up after use and performing simple maintenance tasks such as untangling twisted tapes, cleaning cassettes or splicing broken film” constituted clerical work. *Roach, supra*. Additionally, in *Roach*, the petitioner was expected to “travel to all elementary schools to deliver supplies and equipment” and her position was characterized as ‘a diverse one,’ which entailed overseeing of the media library, delivering media to the six elementary schools, and assisting with the inventory and maintenance of our large stock of audio visual equipment,” and her responsibilities also included receiving delivery of “new Apple IIE computers . . . unpacking them, recording serial numbers and helping to connect the parts.” *Id.*

It is well-settled that duties performed in a position, not the position title itself, control whether tenure can be accrued in the position. *See Quinlan, supra* at *50 (noting that nature of the work performed is a crucial factor in determining whether the position is tenure eligible); *Roach, supra* (finding that the petitioner, who held various job titles in the district –

including “audiovisual library technician” and “media aide (clerical)” – had tenure in the district as her duties were *predominantly* clerical); *see also Giardina, supra*, at *24-28; *Delores Kopko v. Bd. of Educ. of the Twp. of Middletown, Monmouth County*, OAL Dkt. No. EDU 7302-10 (July 25, 2011), Commissioner Dec. No. 370-11 (Sep. 7, 2011). In accepting same, the Commissioner notes that the “mere fact that an employee performs clerical duties” or that a position requires “additional, non-clerical duties” – such as a paraprofessional – is not controlling. *See Giardina, supra* at 24-28 (finding that “petitioner held a clerical position eligible for tenure pursuant to *N.J.S.A. 18A:17-2* when she served as an Office Aide since the bulk of her duties was clerical) (internal citations and quotation marks omitted). Therefore, the Commissioner’s determination of this matter rests on whether petitioner’s duties were predominantly clerical or custodial in nature, as well as the amount of time allocated towards performing her clerical tasks as compared to her custodial tasks.³

Petitioner’s responsibilities – as set forth in the job description for inventory control clerk – were as follows:

- A. Receive all materials delivered to school:
 - 1. Check orders, with assistance of supervisors as needed
 - 2. Follow procedure for forwarding receiving copies to the Administration Building
 - 3. Follow procedures for inventory control system to computer
- B. Verify delivered goods conform with order
- C. Fill in-school supply requests
- D. Maintain inventory control system
- E. Assist in determining general supply purchases as indicated by computer projections
- F. Perform shipping duties for returned materials
- G. Perform any other related duties as assigned by the school principal
- H. Assist in custodial activities as directed by the plant manager, Supervisor of Buildings and Grounds and School Business Administrator.

³ The Commissioner notes that the parties failed to include job descriptions for clerical staff and custodial staff in support of their arguments in this matter; however, the Commissioner deems that the job description for the inventory control clerk – coupled with the testimony of the witnesses – is sufficient to determine the nature of petitioner’s position.

It is evident from a review of petitioner's job duties that a majority of her responsibilities were clerical in nature. Petitioner's detailed testimony regarding her job responsibilities reveals that between July 2010 (reassignment from custodian to inventory control clerk) and October 2016 (termination from her position as inventory control clerk), her daily tasks primarily consisted of the responsibilities listed in A, B, and D. The testimony further reveals that petitioner performed the responsibilities listed in F on a weekly basis, and the responsibilities listed in C and E annually and as needed throughout the school year. Responsibilities listed in G and H were performed on a need basis or when assigned. Specifically, the custodial activities were performed infrequently or when there was a need for extra support in the Buildings and Grounds Department. Testimony provided by Board employees did not contradict petitioner's account of her job responsibilities and her discharge of her duties. Significantly, the Board's Buildings and Grounds Supervisor testified that in the middle school, the person in charge of the tasks set forth in the inventory control clerk job description only works four hours per day on said tasks, and works as a custodian for the remaining four hours of her workday; whereas, petitioner's eight-hour days were allotted to performing the job responsibilities of her inventory control clerk position. Notably, petitioner's evaluations were also for the duties performed as an inventory control clerk, not custodian. Therefore, petitioner's exclusive role was to serve as inventory control clerk, which position is clerical in nature.

With regard to respondent's contentions that petitioner was a custodian with "additional" clerical duties because she was in the custodial bargaining unit and salary guide, was paid in accordance to her custodial contract, and performed duties that were not clerical in nature because her responsibilities involved daily physical labor beyond what was required of other secretaries and clerks employed by the District, the Commissioner is unpersuaded. In

Quinlan, supra, the Appellate Division found that the petitioner – who worked “half and half” as “clerk” and “attendance officer” – retained tenure accrued as a “clerk” because she continued to perform clerical duties, and the fact that the petitioner was “listed in a work schedule for attendance officers . . . or that she was referred to in a resolution of the board [] as an attendance officer[,]” or that she referred to herself as an attendance officer, did not undermine her clerical duties. Similarly, the Board’s labelling of petitioner as a custodian (and petitioner’s occasional custodial tasks) did not change the fact that her day-to-day duties were clerical in nature. The physical demands of some of petitioner’s tasks – while purportedly atypical of other secretarial and clerical staff in the District – certainly does not render the inventory control clerk position non-clerical because of the broad definition afforded to the term “clerical,” and due to the parallel between the physical demands of petitioner’s position and the clerical position in *Roach, supra*. Respondent seems to disregard the fact that the majority of petitioner’s tasks as inventory control clerk are not typically assigned to custodial staff. Additionally, it is not inconceivable for a member of the Buildings and Grounds Department to serve in a clerical position within the Department, especially when the tasks and responsibilities of that position are clerical in nature.

It bears noting that in the “abilities” section of the inventory control clerk job description, three of the four abilities listed are: ability to keep accurate written records; ability to use a computer with ease for the purpose of inventory record keeping, electronic communication and for tasks related to position; and knowledge of basic receiving procedures. These requisite “abilities” are ordinarily not essential for the performance of custodial duties, but are more commonly necessary for tasks performed by clerical and/or secretarial staff, as demonstrated by the case law and decisional law pertaining to clerical tenure. Therefore, to consider petitioner’s

position akin to that of a custodian – when the requisite skills, abilities, and responsibilities are not comparable or substantially similar – is wholly inappropriate.

The tenure statute – *N.J.S.A. 18A:6-10 et seq.* – provides in pertinent part that “[n]o person [under tenure] shall be dismissed . . . expect for inefficiency, incapacity, unbecoming conduct, or other just cause, and then only after a hearing” In this matter, petitioner – a tenured clerical staff member of the District – was terminated without tenure charges having been filed with the Commissioner; therefore, petitioner was deprived of her tenure right to a hearing pursuant to *N.J.S.A. 18A:6-10*. As such, petitioner is entitled to back pay, benefits, and emoluments from October 21, 2015 through to July 18, 2016.

The tenure statute should be “liberally construed to achieve its beneficent ends.” *Spiewak v. Bd. of Educ. of Hamilton Twp., et al.*, 90 *N.J.* 63, 74 (N.J. 1982). Here, petitioner served as an inventory control clerk – a position that was clerical in nature – for five years; therefore, petitioner obtained tenure in the District as a clerical staff member. Accordingly, the Initial Decision of the OAL is rejected, and respondent is directed to reimburse petitioner for back pay, benefits, and emoluments from October 21, 2015 through to July 18, 2016.

IT IS SO ORDERED.⁴

COMMISSIONER OF EDUCATION

Date of Decision: November 13, 2017

Date of Mailing: November 15, 2017

⁴ 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.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 20522-15

AGENCY DKT. NO. 364-12/15

PHILLIS STILWELL,

Petitioner,

v.

NORTH BRUNSWICK BOARD OF

EDUCATION,

Respondent.

Edward A. Cridge, Esq., on behalf of petitioner Phillis Stillwell (Melk O'Neill, attorneys)

Marc G. Mucciolo, Esq., for respondent North Brunswick Board of Education (Methfessel & Werbel, attorneys)

Record Closed: July 14, 2017

Decided: August 14, 2017

BEFORE **GAIL M. COOKSON**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner Phillis Stilwell (petitioner) appeals her termination effective October 21, 2015, from the North Brunswick Board of Education (Board) under cover of December 4, 2015. The Board filed its Answer to the Petition on Appeal under cover of December 18, 2015. The matter was transmitted to the Office of Administrative Law (OAL), on December 21, 2015, for hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to -

15 and N.J.S.A. 52:14F-1 to -13. The central issue is whether petitioner held a tenured position from which she could not be summarily terminated.

On January 11, 2016, I held a case management conference telephonically with the parties in which discovery and hearing dates were discussed. A hearing was originally scheduled for August 4, 2016, but was adjourned several times at the request of one or both parties, with one additional adjournment due to adverse weather. The plenary hearings were ultimately held on February 27 and May 1, 2017. Post-hearing briefs were permitted and the record closed on July 14, 2017, with receipt of the written closing statements as the final submissions.

FACTUAL DISCUSSION

Based upon due consideration of the testimonial and documentary evidence presented at the hearing, and having had the opportunity to observe the demeanor of the witnesses and assess their credibility, I **FIND** the following **FACTS**:

It is not disputed that on October 13, 2015, a Complaint and Summons was issued against petitioner as the defendant in the Superior Court of New Jersey, Middlesex County, for the offense of theft by deception for falsifying household income in order to obtain free school lunches for her four children for over a six year period. As a result of this criminal complaint, the Board voted to terminate petitioner's employment at its October 21, 2015, Board meeting. On October 5, 2016, a Judgment of Conviction was entered on petitioner's guilty plea to a criminal third degree offense of theft by deception, sentencing her to one year of probation, forfeiture of her Board pension, prohibition of any future employment within any school district, and restitution of \$3,776.10, plus court fees.

The issue at hand is whether petitioner was protected from summary termination under the tenure laws such that she would have the right to her salary from October 2015 to October 2016.

Petitioner commenced employment with the Board on March 1, 2008 as a substitute custodian and then became a permanent night custodian, assigned to Judd School, effective September 1, 2008, at an annual salary of \$29,334 (Step A). On June 17, 2010, petitioner's employment contract for July 1, 2010, through June 30, 2011, was for base salary of \$30,273 (Step A) plus a stipend of \$549 for the fact that she had a boiler license. In 2010, it was announced that there was an opening for the inventory control clerk. Petitioner applied for it and was given that position. Accordingly, a new employment letter was issued on July 22, 2010, setting forth that she was approved for reassignment as Inventory Control Clerk, with a salary of \$31,715 (Step A), inclusive of the same base salary but both the boiler license stipend and an additional stipend for inventory control of \$893. Petitioner's work location was moved to the high school.

Petitioner described her duties as the inventory control clerk as including receiving shipments, checking them against the purchase orders, logging them into the computer, and correcting any errors in those orders. The summer was the heaviest time of year for shipments. Generally, she could receive from one to twenty a day. She physically gathered and delivered the supplies received up to five or six times a day. Petitioner also maintained the online inventory and placed internal (staff) requests for supplies. She would handle the supplies of caps and gowns during graduation season, and she could be called on to escort vendors into the building.

Petitioner could be called on to provide custodial assistance. She attended the daily morning meetings, and would occasionally substitute for needed coverage at lunch time or with garbage cleanup. She estimated that such would occur maybe once per month. Petitioner had no boiler duties after she assumed inventory control, notwithstanding that she still received that stipend. Petitioner's evaluations were written up by either Ed Wiznicka, Custodial Supervisor, or Knox. It appeared that a custodian standard form was used but that on some of her evaluations, that word was crossed out and "shipping and receiving" was written in.

On cross-examination, petitioner acknowledged that she reported to Lorraine Knox, Plant Manager, as did all custodians. No clerks or secretaries reported to Knox. William O'Connor, who was in charge of Maintenance and Custodial services, had a

secretary but she would be the only clerical staff that reported to him. Petitioner admitted that snow duty was demanded only of custodians, including her. She was also eligible for overtime pay for custodial needs for special night or weekend events at the high school.

John Petela testified for the Board with respect to the general employment structure at the Board; employment, salary and contractual guidelines; and the circumstances surrounding petitioner's termination. With respect to the latter, petitioner's theft and fraudulent free lunch certifications were uncovered in the fall of 2015 as a result of an annual audit conducted by the Assistant Business Administrator. It was reported to the police and raised at the next Board meeting. The Business Administrator supervises Building and Grounds department, among others, that was under the direction of its then-Supervisor William O'Connor. Lorraine Know reported to O'Connor, who was the Plant Manager.

Petela sent the termination letter to petitioner, but also spoke to her before it became official. She received thirty days of pay in lieu of notice. Petela stated that she never raised the tenure issue at the time. In his mind, it was clear that petitioner was a custodian with additional inventory duties. In support of that opinion, Petela reviewed the various salary guides that apply under the union contract to teachers, clerks or custodial and maintenance personnel. He also confirmed that tenure letters always go out to those receiving it after the Board vote. In addition, he confirmed that only custodial and maintenance employees would be called in to shovel snow. He could not recall on cross-examination whether he had ever reviewed petitioner's evaluations.

William O'Connor also testified for the Board. He retired last fall but worked forty-three years for North Brunswick, starting as a bus driver and courier, and working his way up to Supervisor of Buildings and Grounds. He had approximately seventy employees under his supervision, with authority to recommend hiring decisions to the Board. O'Connor explained that the inventory control clerk duties were always awarded to someone on the custodial staff. Petitioner's replacement, for example, was a custodian at the middle school. Petitioner's eligibility to earn overtime came only from the fact that she was governed by the custodial/maintenance salary guidelines in the

union contract. While the work entailed some computer skills, it was dominated by physical labor. O'Connor reviewed all custodial evaluations with Wiznicka before they would be issued to employees. While he noted that the form was often modified for petitioner, he believed that was because the job duties listed were more natural for the regular custodial responsibilities.

I **FIND** by the preponderance of the credible evidence that petitioner was a non-tenured custodian who received a minimal stipend to perform the duties of an inventory control clerk. I **FIND** that the latter stipend never transmuted her employment or job title into a clerical position with the Board. This is further supported by the fact that petitioner never received a notice of having obtained tenure. Furthermore, petitioner remained under the supervision of Lorraine Knox, and remained obligated to assist with special custodian duties such as snow shoveling, to which clerical staff were never assigned.

LEGAL DISCUSSION

N.J.S.A. 18A:17-2(c) provides that any person holding any secretarial or clerical position or employment in a school district, after the expiration of a period of employment of three consecutive years in the district or a shorter period as may be fixed by the Board, shall hold the position or employment under tenure during good behavior and efficiency. Petitioner argues that this provision protected her employment with the Board once she became the inventory control clerk. The Board notes, and it is not disputed, that N.J.S.A. 18A:17-3 does not require tenure for utility workers/janitors. Instead, the Legislature allows boards of education discretion to deny tenure by appointing janitors for a fixed term, it permits boards and utility workers to negotiate terms of employment, and allows boards to determine which utility worker, if any, shall receive tenure. Wright and E. Orange Personnel Ass'n v. E. Orange Bd. of Educ., 99 N.J. 112, 118-19.

A claimant of tenure in situations such as this one bears the burden of presenting sufficient competent and credible evidence of facts essential to his or her claim. Here, petitioner must prove by a preponderance of competent and credible evidence that the

respondent employed her in a clerical position in order for her claim for tenure to succeed. Wright, supra, 99 N.J. at 119.

Based on the foregoing facts and applicable law, I **CONCLUDE** that petitioner was employed as a custodian under the supervision of the Department of Building and Grounds. She earned an extra stipend for both her inventory control duties and her boiler license, but the former did not transmute her position into a clerical one. Therefore, she does not have tenure, was never awarded tenure, and was never in a position that would earn tenure.

ORDER

Accordingly, and for the reasons articulated above, it is **ORDERED** that the termination action of respondent North Brunswick Board of Education is hereby **AFFIRMED**. It is further **ORDERED** that the appeal of petitioner for relief under Title 18A is hereby **DISMISSED** with prejudice consistent with the reasons set forth above.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.



August 14, 2017

DATE

GAIL M. COOKSON, ALJ

Date Received at Agency:

8/14/17

Date Mailed to Parties:

id

APPENDIX

WITNESSES

For Petitioner:

Phillis Stillwell

For Respondent:

William O'Connor

John Petela

EXHIBITS

For Petitioner:

- P-1 Appointment Letter, dated July 15, 2008
- P-2 Contract for Employment, dated June 17, 2010
- P-3 Inventory Control Clerk Reassignment Letter, dated July 22, 2010
- P-4 Inventory Control Clerk Contract Letter, dated July 27, 2010
- P-5 Inventory Control Clerk Employment Contract, dated July 22, 2010
- P-6 Employment Contract, dated June 23, 2011
- P-7 Employment Contract, dated June 28, 2012
- P-8 Employment Contract, dated June 23, 2013
- P-9 Employment Contract, dated May 29, 2014
- P-10 Performance Review, dated April 13, 2011
- P-11 [not in evidence]
- P-12 Performance Review, dated August 21, 2013
- P-13 Performance Review, dated June 1, 2014
- P-14 Inventory Control Clerk Job Description
- P-15 Termination Letter, dated October 21, 2015
- P-16 Judgment of Conviction, dated October 5, 2016

For Respondent:

- R-1 Petition of Appeal

- R-2 Answer to Petition
- R-3 Discovery Request/Document Demand
- R-4 Board's Responses to Discovery Demands
- R-5 Stilwell Application and Letter, dated June 6, 2008
- R-6 Board Letter of Employment, dated February 21, 2008
- R-7 Board Letter of Employment with Contract, dated July 15, 2008
- R-8 Board Letter of Employment, dated April 30, 2009
- R-9 Board Letter of Employment, dated July 22, 2010
- R-10 Board Letter of Employment with Contract, dated July 27, 2010
- R-11 Board Letter of Termination, dated October 22, 2015
- R-12 Custodial-Maintenance Interview Form, dated July 1, 2008
- R-13 Custodial-Maintenance Interview Form, dated June 2, 2010
- R-14 Custodial-Maintenance Interview Form, dated July 13, 2010
- R-15 Custodial-Maintenance Interview Form, dated July 14, 2010
- R-16 Work Appraisal 2008-2009
- R-17 Work Appraisal 2009-2010
- R-18 Work Appraisal 2010-2011
- R-19 Work Appraisal 2012-2013
- R-20 Work Appraisal 2013-2014
- R-21 Job Description
- R-22 Letter from Prosecutor, dated October 11, 2016
- R-23 Plea Agreement, dated October 5, 2016
- R-24 Presentence Report, dated September 27, 2016
- R-25 Complaint and Summons, dated October 13, 2015
- R-26 Order of Forfeiture of Public Employment, dated July 18, 2016
- R-27 Payroll Documents
- R-28a Contract Agreement, 2016-2019
- R-28b Contract Agreement, 2012-2015