



NEW JERSEY LAW REVISION COMMISSION

Final Report Relating to

Clarification of Tenure Issues

January 23, 2020

The New Jersey Law Revision Commission is required to “[c]onduct a continuous examination of the general and permanent statutory law of this State and the judicial decisions construing it” and to propose to the Legislature revisions to the statutes to “remedy defects, reconcile conflicting provisions, clarify confusing language and eliminate redundant provisions.” N.J.S. 1:12A-8.

This Report is distributed to advise interested persons of the Commission's tentative recommendations and to notify them of the opportunity to submit comments. Comments should be received by the Commission no later than **December 21, 2019**.

The Commission will consider these comments before making its final recommendations to the Legislature. The Commission often substantially revises tentative recommendations as a result of the comments it receives. Please send comments concerning this Report or direct any related inquiries to:

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Executive Summary

The Commission authorized a project concerning N.J.S. 18A:17-2, the statute by which certain school employees obtain tenure. The project resulted from the application of the statute in three separate cases involving school secretaries attempting to retain tenure rights. In its current form, N.J.S. 18A:17-2 does not address the tenure rights of clerks, secretaries, and certain other non-teaching school employees in voluntary transfer and promotion situations.

The Commission recommends revision of the current statute to clarify tenure issues, as discussed below.

Background

According to the New Jersey Education Association, teacher tenure is an employment security device by which the teacher attains permanent status and protection against dismissal except for just cause. But under N.J.S. 18A:17-2, secretarial, clerical, and other non-teaching employees working for public schools are eligible to obtain tenure, as well.

In *DiNapoli v. Board of Education of the Township of Verona*, the Appellate Division held that a secretary forfeited tenure rights when she voluntarily reassigned to a non-secretarial position with the same employer.¹ The new position was abolished after more than three years and she argued that she should have been able to “bump” a non-tenured secretary and reacquire her old position.² The Court found that “the Legislature did not intend to afford secretaries tenure preservation upon transfer or promotion from secretarial employment.”³

But in *Given v. East Windsor Regional School District*, a tenured school clerk accepted a separately tenurable secretary position and was subsequently involuntarily returned to her clerk position.⁴ She did not automatically obtain tenure as a secretary, but was found to have retained her tenure as a clerk.⁵

Finally, in *Colon-Serrano v. Plainfield Board of Education*, a tenured secretary was found to have forfeited tenure rights upon promotion to a non-clerical, non-tenurable position with the same employer.⁶

In its current form, N.J.S. 18A:17-2 does not address the tenure rights of secretaries upon promotion to certificated, separately tenurable positions with the same employer. The statute is

¹ *DiNapoli v. Board of Education of the Township of Verona*, 434 N.J. Super. 233 (App. Div. 2014).

² *Id.* at 240

³ *Id.*

⁴ *Given v. East Windsor Regional School District*, 1978 S.L.D. 43

⁵ *Id.* at

⁶ *Colon-Serrano v. Plainfield Bd. Of Educ.*, 2007 WL 4644775 (N.J. Adm. 2007)

also silent regarding the tenure rights of secretaries upon promotion to separately tenurable and non-certificated positions. Neither does the statute address the tenure rights of secretaries upon promotion to a non-tenurable, certificated position.

Discussion

The New Jersey Supreme Court recently upheld the Appellate Division's opinion in *Miller v. State-Operated Sch. Dist. of the City of Newark*.⁷ Citing the Appellate Court's decision, the Supreme Court agreed that a clerical employee who previously held various job titles under the Act, and was later reassigned to a position not protected by the Act, still retained tenure rights accrued under N.J.S. 18A:17-2.⁸ The Court found that it was improper for the Commissioner of Education and the trial court to rely on N.J.S. 18A:28-2, a provision exempting public school teachers from certain portions of the Civil Service Act, as Miller was not a teacher.⁹

Other current case law follows *DiNapoli* regarding the cessation of tenure when an employee transfers from a secretarial to a nonsecretarial position. In *Saylor v. Board of Education of the Town of West New York*, the Administrative Law Judge found that plaintiff did not serve in a tenured position for the requisite amount of time (three years) and could not "tack on" subsequent service to make up for the shortfall.¹⁰

Other cases cite to *DiNapoli*, but do not discuss public school clerical employees. *In re Nance* regards the termination of a Newark police officer and cites *DiNapoli* to make the point that an agency's conclusions are reviewed de novo.¹¹ Five other cases refer to *DiNapoli* to establish that a party challenging an agency action has the burden to prove the action was arbitrary, capricious, or unreasonable. *In re Biricik* involves a dismissal challenge by a tenured school teacher.¹² *In re Gabrys* features a police officer who requested his resignation be characterized as a leave of absence.¹³ The plaintiff in *In re Del Valle* was a Department of Human Resources employee arguing for displacement rights after a layoff.¹⁴ And in *In re Kingston*, a Department of Public Works laborer brought an action after being disciplined for fighting and forced to undergo a fitness-for-duty psychological examination.¹⁵ In *Chatman v. State-Operated School District of City of Newark*, a vice principal promoted and later demoted from his position as interim principal brought suit claiming he attained tenure as a principal.¹⁶ *State v. S.B.*, a criminal law case, cites *DiNapoli* to emphasize that "Courts should be extremely

⁷ *Miller v. State-Operated Sch. Dist. of the City of Newark*, 2018 WL 9946356 (July 27, 2018)

⁸ *Id.* at *6.

⁹ *Id.* at *5.

¹⁰ *Saylor v. Board of Education of the Town of West New York*, 2019 WL 3453811 (N.J. Adm.)

¹¹ *In re Nance*, City of Newark, N.J. Super. (App. Div.) Unpub. 2014 WL 3818677.

¹² *In re Biricik*, School District of Jersey City, Hudson County, N.J. Super. (App. Div.) Unpub. 2014 WL 5782677.

¹³ *In re Gabrys*, Town of Dover, N.J. Super. (App. Div.) Unpub. 2014 WL 7192537.

¹⁴ *In re Del Valle*, Union County, N.J. Super. (App. Div.) Unpub. 2014 WL 8580962.

¹⁵ *In re Kingston*, Township of Verona, N.J. Super. (App. Div.) Unpub. 2014 WL 8894103.

¹⁶ *Chatman v. State-Operated School District of City of Newark*, N.J. Super. (App. Div.) Unpub. 2018 WL 3352676.

reluctant to add terms to a statute, lest they usurp the Legislature’s authority.”¹⁷ *DiNapoli* was again cited by the Appellate Division in *Still v. State-Operated School District of the City of Camden*, where it rejected the District’s argument that *DiNapoli* applied to a lead educator who lost her job and was told she did not retain tenure rights from her previous experiences as an elementary school and technology coordinator.¹⁸

Two interesting scholarly articles refer to N.J.S. 18A:17-2 but are concerned chiefly with the tenure rights of teachers and school custodians.¹⁹

During the Commission meeting at which this project was first presented, it was pointed out that, as tenure rights in New Jersey expanded, the statutes were not always made consistent. In fact, although N.J.S. 18A:17-2 is silent about movement by employees to other positions, N.J.S. 18A:28-5 and -6, pertaining to the tenure of teaching staff members, contain language ostensibly calculated to address the various situations relevant to this project.

N.J.S. 18A:28-5, titled Tenure of teaching staff members, contains the following language:

c. For purposes of this chapter, tenure in any of the administrative or supervisory positions enumerated herein shall accrue only by employment in that administrative or supervisory position. Tenure so accrued shall not extend to any other administrative or supervisory position and nothing herein shall limit or restrict tenure rights which were or may be acquired pursuant to N.J.S.18A:28-6 in a position in which the individual actually served.

Here, teachers are advised that tenure in a particular position is obtained only during employment in that position.

N.J.S. 18A:28-6, titled Tenure upon transfer or promotion, also contains language that may be applicable to the Commission’s work in this area:

a. Any such teaching staff member under tenure or eligible to obtain tenure under this chapter, who is transferred or promoted with his consent to another position covered by this chapter ... shall not obtain tenure in the new position until after

...

* * *

¹⁷ *State v. S.B.*, 445 N.J. Super. 49 (App. Div.) (2016); *See also Haines v. Taft*, 450 N.J. Super 295, 309 (2017); *Carcol Enterprises, LLC v. Central License Bureau of City of Elizabeth*, 2018 WL 3447512 at *10 (July 18, 2018) (Quoting the same language)

¹⁸ *Still v. State-Operated School District of the City of Camden*, 2018 WL 3282284, at fn. 2 (App. Div. July 5, 2018).

¹⁹ Arnold Shep Cohen, *Striking a Balance Between Teachers’ Employment Rights and Professional Responsibilities*, 154-JUL N.J. Law. 43 and Sanford R. Oxfeld, *The Plight, Inter Alia, of Public School Custodians*, 285-DEC N.J. Law. 27.

This section addresses what happens when a teacher is voluntarily transferred, followed by specific tenure requirements.

Had N.J.S. 18A:17-2 contained similar language, this might have helped avoid appellate review of the Commissioner's decision in *Given*, which featured a tenured clerk arguing that she immediately acquired tenure upon reassignment as a secretary. While it does not appear that either of the above passages would have helped clarify *DiNapoli* or *Colon-Serrano*, it is possible to synthesize language from the respective decisions in those cases.

The Commission proposes adding additional language to N.J.S. 18A:17-2, intended to resolve and clarify the issues raised in *DiNapoli* and the other secretarial/clerical tenure cases.

As initially drafted, subsection d.(1) in the Appendix, below, addressed the situation in *Given*, in which a tenured clerk voluntarily transferred to a new tenurable position, but was involuntarily returned to her original position before she could obtain tenure; she argued unsuccessfully that the tenure she acquired as a clerk immediately transferred upon reassignment as a secretary. This provision covers both voluntary and involuntary transfers and incorporates language from subsections a. and b. of N.J.S. 18A:17-2, which identifies those persons covered by the statute. It also features language from subsection a. of N.J.S. 18A:28-6, which identifies limitations on obtaining tenure in a new position.

Subsection d.(2) addressed the situation in *DiNapoli*, in which a tenured employee voluntarily transferred to new tenurable position, and was found to have abandoned her previous tenured position. It also addresses *Colon-Serrano*, which featured a tenured employee who voluntarily transferred to new non-tenurable position, and was deemed to have relinquished the protection of her clerical tenure. In the original version of this report, this subsection incorporated language from the Court's decision in *DiNapoli*, which interpreted and applied N.J.S. 18:17-2, while protecting *involuntarily* transferred employees.²⁰ Although commenters were generally supportive of the proposed language, and found this section to be consistent with the outcome of *DiNapoli*, the Commission, upon further analysis, judged it to be ambiguous as to which tenured position is at issue. A representative from the State Department of Education advised that language specifying that the position to which an employee transfers or accepts promotion is not tenure-eligible or is covered by another chapter would bring the statute directly in line with applicable case law.

Also under subsection d.(2), the proposed word "voluntarily" is intended to protect those tenured individuals who are involuntarily transferred into either non-tenured positions, or to positions not within the same job category.

²⁰ See 434 N.J. Super. 239, "[T]he language of N.J.S.A. 18A:17-2 limits the retention of tenure to the time during which the employee holds her secretarial office, position or employment."

To address a concern that non-teachers are to be treated similarly to teachers with regard to retaining tenure, the Commission initially proposed an additional subsection, d.(3), with language derived from N.J.S. 18A:28-6, discussed above, which would provide that a tenured individual, whether voluntarily or involuntarily transferred or promoted, would be returned to a former tenured position in case the new position is terminated other than for cause before tenure is obtained there. The phrase “other than for cause” was added to avoid an unintended and harsh result for individuals who are not terminated for cause. To ensure consistency and clarity, an inquiry of the definition of the phrase “for cause” revealed thirty-eight (38) references to the phrase under Title 18A. Although most references pertained to positions other than that discussed in *DiNapoli*, the meaning appears consistent within the context of employees in education.

Analysis of the scope of the term “termination” in this proposed subsection revealed that neither Title 18A nor Chapter 17 provides a definition for the term. In this instance, and within the context of a reduction in/of force, the term is afforded its plain language meaning in the statute and case law.

The situation in which “tenure may be preserved if a person is [terminated] for cause, and whether that is what the Legislature intended” was also contemplated. For example, if an individual was promoted to a managerial or supervisory position where he or she may not be a good fit in the new position and was subsequently terminated for that reason, may that individual return to a previously tenured position where the individual was an asset to the staff? This depends on two factors – whether the new position was covered by the same tenure as the position previously held, and whether the individual was found to have abandoned the previous tenured position as was found in *DiNapoli* by voluntarily accepting the new position.

The Supreme Court in *Dennery v. Board of Education of the Passaic County Regional High School District #1, Passaic County* found that “[a] mere overlap in duties, however, does not mean that two positions are equivalent for tenure purposes. If a newly-created position is similar to a tenure holder’s abolished position but also requires additional duties or different responsibilities, then the newly-created position is not considered to be substantially similar to the former position.”²¹ Although the Supreme Court of New Jersey in *Dennery* dealt with a teacher’s tenure issue, it provides valuable information as to the strict requirements for tenure useful in this instance since the goal here is “to clarify certain provisions of Title 18 and create a uniform statutory scheme that reconciles the potential disparate statutory treatment of tenure involving teaching and non-teaching employees.” Thus, it would appear that tenure would not be preserved if an individual was terminated for cause; either because the new position was not covered by the same tenure, because the individual was found to have abandoned the previously tenured position, or both.

²¹ 131 N.J. 626, 640 (1993) (citing *Santasiero v. Parsippany-Troy Hills Bd. Of Educ.*, 1984 S.L.D. 854, 879).

Lastly, Commission consideration revealed that proposed subsections d.(1) and d.(3) might be more efficiently consolidated into subsections d.1(a) and d.1(b) respectively as shown in the new language proposed below.

New Jersey Statute Relating to School Superintendents

The statutory provisions pertaining to superintendents provide some additional guidance for consideration of any proposed changes to this area of the law. It was noted during Staff's research of this issue that while assistant superintendents receive the protections of tenure after satisfactory completion of the requisite period of service, superintendents are not tenured employees, and, instead, serve under employment contracts. But even though superintendent positions are not tenurable at this time, tenure rights for positions held below that of a superintendent remain intact and are retained by the individual elevated to the position of superintendent. Thus, if an individual loses a superintendent position, he or she may resume a lower tenured position.

N.J.S. 18A:17-20.4, entitled "Effect on pre-existing tenure rights; tenure rights of superintendent promoted from within district," provides the following:

Nothing in this section or in this act shall affect any tenure rights which shall have already accrued to any superintendent prior to the effective date of this amendatory and supplementary act. A superintendent of schools promoted from within a district shall retain all tenure rights accrued in any position which was previously held by the superintendent in the district.

N.J.S. 18A:17-20.5, entitled "Appointment of administrative principal; reappointment; powers and duties; tenure rights," provides in pertinent part:

* * *

No administrative principal hereafter appointed shall have tenure in any other position in the district; but nothing in this section or in P.L.1991, c. 267 (C. 18A:17-20.1 et al.) shall affect any tenure rights which shall have already accrued to any individual who was appointed as or functioning as an administrative principal prior to the effective date of . . .

* * *

Regarding whether employees transferring from secretarial or clerical positions can retain tenure acquired during such employment, the court in *DiNapoli* noted that the Legislature enacted the aforementioned N.J.S. 18A:17-20.4, which affords tenure retention rights to superintendents, representing an intent to preserve tenure for certain employees who transferred or were promoted to a different position prior to achieving tenure in that position. Although the court pointed out that N.J.S. 18A:17-2 contains no similar tenure retention provision regarding tenured secretarial employment, it was not clear to the Commission that the Legislature

deliberately enacted the statutes in such a way as to disadvantage non-teaching staff by, for instance, creating a tenure gap in the period between two positions within the same job category.

Accordingly, the proposed new language is calculated to protect the tenure rights of individuals staying within the same overall job category.

Commission's Recommendation

This project proposes revisions intended to clarify N.J.S. 18A:17-2, regarding the movement or transfer of tenured clerical, secretarial, and other non-teaching employees. Staff sought input from knowledgeable and interested stakeholders regarding this subject matter, including the New Jersey Association of School Administrators, the New Jersey School Board Association, the New Jersey Principals and Supervisors Association, the New Jersey Department of Education, and the New Jersey branch of the American Federation of Teachers.

The New Jersey Principals and Supervisors Association had no comment.

The New Jersey School Board Association responded in favor of Alternative 1, below, stating they feel it clarifies the limits of secretarial tenure and is preferable to the existing language, even as they support renewable contracts with school district staff over tenure.

Conclusion

Based on input received, Staff recommends the adoption of the language shown with underline, below.

Appendix

The proposed modifications (shown with underlining) are as follows:

18A:17-2. Tenure of secretaries, assistant secretaries, school business administrators, business managers and secretarial and clerical employees

a. Any secretary, assistant secretary, school business administrator or business manager of a board of education of any school district who has or shall have devoted his full time to the duties of his office and has or shall have served therein for three consecutive calendar years, and

b. Any person holding any secretarial or clerical position or employment under a board of education of any school district or under any officer thereof, after

1. The 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

2. Employment for three consecutive academic years, together with employment at the beginning of the next succeeding academic year, an academic year being the period between the time when school opens in the district after the general summer vacation and the beginning of the next succeeding summer vacation, and

c. Any person, who has acquired, or shall hereafter acquire, tenure in any secretarial or clerical office, position or employment under the board of education of a school district and has been appointed district clerk or secretary, or shall hereafter be appointed secretary of said district, as such secretary,

shall 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 for neglect, misbehavior or other offense and only in the manner prescribed by sub-article B of article 2 of chapter 6 of this title.

d. Any person identified in a. or b. of this section, under tenure or eligible to obtain tenure under this chapter:

1. (a) Who is transferred or promoted to another position covered by this chapter shall not obtain tenure in the new position until after meeting the specific tenure requirements for the new position;

(b) Who is transferred or promoted from the tenured position, to a position that is covered by this chapter, but is terminated before tenure is obtained therein, and who has tenure in the same district and under the same chapter, shall be returned to the former position at the salary

which would have been received had the transfer or promotion not occurred together with any increase to which the individual would have been entitled during the period of such transfer or promotion.

2. Who is voluntarily transferred or promoted from the tenured position, to a position that is not tenure-eligible, or to a position that is covered by another chapter, forfeits tenure of the office, position, or employment held prior to such transfer or promotion.