

To: New Jersey Law Revision Commission
From: Chelsea A. Perdue
Re: Clarification of Tenure Issues - *DiNapoli v. Board of Educ. of Tp. of Verona*
Date: July 7, 2014

MEMORANDUM

I. INTRODUCTION

This potential project arises out of three cases interpreting *N.J.S.A. 18A:17-2*, the statute by which secretaries, assistant secretaries, school business administrators, business managers, and secretarial and clerical employees obtain tenure: *DiNapoli v. Board of Education of the Township of Verona*, *Given v. East Windsor Regional School District*, and *Colon-Serrano v. City of Plainfield Board of Education*.¹

There are three issues inviting statutory clarification. The first issue, raised in *DiNapoli*, is whether a secretary may retain tenure rights acquired under *N.J.S.A. 18A:17-2* upon promotion to a separately *tenurable* and *certificated* position with the same employer.² The second issue, raised in *Given*, is whether a secretary may retain tenure rights acquired under *N.J.S.A. 18A:17-2* upon promotion to a separately tenurable and *non-certificated* position with the same employer. The final issue, raised in *Colon-Serrano*, is whether a secretary may retain tenure rights acquired under *N.J.S.A. 18A:17-2* upon promotion to a *non-tenurable* and certificated position with the same employer. The New Jersey judiciary has recently grappled with all three issues, overruling the Office of Administrative Law in nearly every instance and demonstrating the potential utility of statutory clarification in this area.

II. ISSUE ONE: *DiNapoli v. Board of Education of the Township of Verona*

The Appellate Division held in 2014 that a secretary forfeits tenure rights acquired under *N.J.S.A. 18A:17-2* upon promotion to a separately tenurable, certificated position with the same employer.³ This decision overrules the determination of the Office of Administrative Law and the Commissioner.⁴ The New Jersey Supreme Court denied certiorari on June 2, 2014.⁵

¹ *DiNapoli v. Bd. of Educ. of Twp. of Verona*, 434 N.J. Super. 233, 83 A.3d 857 (N.J. Super. Ct. App. Div. 2014), *certif. denied*, 2014 WL 2566025 (N.J. 2014); *Given v. East Windsor Regional School District*, 1978 S.L.D. 45 (Comm. Jan. 30, 1978), *aff'd*, 1978 S.L.D. 46 (St. Bd. Of Educ. June 7, 1978), *aff'd*, 1979 S.L.D. 832 (App.Div. May 18, 1979); *Amelia Colon-Serrano*, Petitioner-Appellant, EDU # 11588-06N, 2008 WL 2971334 (N.J. Adm. June 18, 2008).

² Hereafter, “secretary” refers to “secretaries, assistant secretaries, school business administrators, business managers, and secretarial and clerical employees.”

³ *DiNapoli v. Bd. of Educ. of Twp. of Verona*, 434 N.J. Super. 233, 235, 83 A.3d 857, 858 (N.J. Super. Ct. App. Div. 2014).

⁴ *Id.* at 859.

In *DiNapoli*, Plaintiff began working in the school system of the Township of Verona in 1977 as a bus-driver.⁶ She was promoted to the position of the secretary of accounts payable and transportation on August 1, 2003, and she acquired tenure.⁷ From October 25, 2006 through June 30, 2009, DiNapoli “agreed to be reassigned” and served as the assistant to the school business administrator.⁸ Beginning July 1, 2009, she “consented to reassignment” to the position of assistant school business administrator, a year-long position requiring administrative certification.⁹ On March 1, 2011, as part of a reduction in force, DiNapoli was released from employment with sixty days pay.¹⁰

DiNapoli’s petition alleges that she retained secretarial tenure pursuant to *N.J.S.A.* 18A:17-2. Therefore, a non-tenured secretary should have been released from employment in order for DiNapoli to continue employment as a tenured secretary.¹¹ The Board of Education of the Township of Verona argued DiNapoli forfeited tenure upon promotion to the certificated position.¹²

Though the Office of Administrative Law and the Commissioner held that DiNapoli retained her tenure rights upon promotion to a separately tenurable and certificated position, the Appellate Division held that she forfeited these rights.¹³ Their reasoning was grounded in many factors. The court examines the language of the statute and compares the statute to three similar statutes: *N.J.S.A.* 18A:28-5, *N.J.S.A.* 18A:28-6, and *N.J.S.A.* 18A:17-20.4.¹⁴ In addition, as promotion required her consent, this “voluntary resignation equates to abandonment.”¹⁵ The certification she obtained upon promotion evidenced her intention to remain in the second position and forfeit her secretarial tenure rights.¹⁶

In its current state, *N.J.S.A.* 18A:17-2 does not address the tenure rights of secretaries upon promotion to certificated, separately tenurable position with the same employer. As employees in clerical positions may make determinations concerning promotion that would affect their life and career in reliance on the current version of the statute, research into possible clarification could aid a number of New Jersey residents in this position.

⁵ *DiNapoli v. Bd. of Educ. of Twp. of Verona* 2014 WL 2566025 (N.J. 2014).

⁶ *DiNapoli v. Bd. of Educ. of Twp. of Verona*, 434 N.J. Super. 233, 234, 83 A.3d 857, 858 (App. Div. 2014), *certif. denied*, 2014 WL 2566025 (N.J. 2014). This position was paid by the hour and non-tenurable. *Ibid.*

⁷ *Ibid.*

⁸ *Ibid.* This position was non-certified. *Ibid.*

⁹ *Id.* at 234–35.

¹⁰ *Id.* at 235.

¹¹ *Ibid.*

¹² *Ibid.*

¹³ *Ibid.*

¹⁴ *Id.* at 239–41.

¹⁵ *Id.* at 249.

¹⁶ *Ibid.*

III. ISSUE TWO: *Given v. East Windsor Regional School District*

The Appellate Division affirmed, in *Given v. East Windsor Regional School District*, the Commissioner's decision that a secretary retains their tenure rights acquired under *N.J.S.A. 18A:17-2* upon promotion to a separately tenurable, non-certificated position with the same employer.¹⁷

In a case similar to *DiNapoli*, Plaintiff Given was employed as a tenured clerk in a school district before accepting a separately tenurable position as a secretary.¹⁸ After twenty-two months, before acquiring tenure as a secretary, Given was returned to her position as a clerk involuntarily.¹⁹ Given argued that she acquired tenure immediately upon reassignment as a secretary, transferring from her years as a clerk.²⁰

The Commissioner held in favor of the school district, implying a probationary period in *N.J.S.A. 18A:17-2*: "The fact that the Legislature has not established a specific statutory probationary period for clerks and secretaries who have been promoted . . . does not obviate the need for such a probationary period."²¹ To permit immediate tenure upon promotion "would work hardship on both the board and the employee" in that the employee requires time to adjust to their technically complex position.²² For a tenured clerk to retain tenure upon promotion to a tenurable secretarial position, they must independently qualify for tenure in the new position pursuant to the requirements of *N.J.S.A. 18A:17-2*.²³

In addition, the Commissioner in *Given* further held "that tenure rights accrued in a school system in any clerical or secretarial position prior to promotion *shall not be negated by such promotion* and shall remain as a continuing entitlement to such employee."²⁴ Secretarial tenure rights are not suddenly extinguished upon accepting a certificated position.²⁵

As it currently reads, *N.J.S.A. 18A:17-2* states nothing concerning the tenure rights of secretaries upon promotion to non-tenurable and separately certificated positions. Permission to research the issue further would present an opportunity to clarify a statute on a judicially determined issue very similar to *DiNapoli*.

¹⁷ *Given v. East Windsor Regional School District*, 1978 *S.L.D.* 45 (Comm. Jan. 30, 1978), *aff'd*, 1978 *S.L.D.* 46 (St. Bd. Of Educ. June 7, 1978), *aff'd*, 1979 *S.L.D.* 832 (App.Div. May 18, 1979).

¹⁸ *Ibid.*

¹⁹ *Ibid.*

²⁰ *Ibid.*

²¹ *Ibid.*

²² *Ibid.*

²³ *Ibid.*

²⁴ *Ibid.* (emphasis added).

²⁵ *Ibid.*

IV. ISSUE THREE: *Colon-Serrano v. City of Plainfield Board of Education*

The Commissioner held in *Colon-Serrano* that a secretary forfeits tenure rights acquired under *N.J.S.A. 18A:17-2* upon promotion to a separately tenurable, certificated position with the same employer, and the State Board of Education adopted this opinion.²⁶ This decision overruled the Office Administrative Law's determination that plaintiff retained her tenure rights.²⁷

Plaintiff Colon-Serrano began working in the school district of the City of Plainfield as an attendance aide in 1984, a non-certificated position.²⁸ In 1994, she accepted a promotion to the position of a classroom aide, a non-tenurable position.²⁹ Colon-Serrano worked as a classroom aide until 2006, when she was released from employment, because she lacked the required minimum college credits.³⁰ Colon-Serrano brought suit, arguing the Board of Education circumvented her tenure rights obtained as an attendance aide.³¹

The case deals primarily with the issue of whether Colon-Serrano's employment as an attendance aide from 1984-1994 constituted a "clerical" position within the meaning of *N.J.S.A. 18A:17-2*.³² The Office of Administrative Law held that her initial employment was clerical under *N.J.S.A. 18A:17-2* after a fact-intensive analysis of her duties.³³ Since the position of attendance aide was clerical, Colon-Serrano obtained tenure in the non-certificated position and could return to this position after being released from employment from the certificated position.³⁴ The Commissioner, upon review, overturned the administrative law judge's decision to reinstate Colon-Serrano, though it was determined that the position of attendance aide was clerical and tenurable under *N.J.S.A. 18A:17-2*.³⁵ The decision rests on a combination of factors. First, the second position was neither clerical "nor an extension or 'hybrid' continuation of such employment."³⁶ Instead, it was "clearly distinct, nonclerical, and nontenured."³⁷ Second, the chain between the first and second position was too long, separated by eight years of employment and multiple contract renewals.³⁸ Third, the non-tenurable position was accepted voluntarily.³⁹ Finally, the "absence of legislative provision for retention of accrued tenure rights

²⁶ Amelia Colon-Serrano Petitioner, OAL DKT. EDU 11588-0, 2008 WL 1795250 (N.J. Adm. Jan. 28, 2008).

²⁷ *Ibid.*

²⁸ Amelia Colon-Serrano, Petitioner, OAL DKT. EDU 11588-06N, 2007 WL 4644775 (N.J. Adm. Dec. 13, 2007).

²⁹ *Ibid.*

³⁰ *Ibid.*

³¹ *Ibid.*

³² *Ibid.*

³³ *Ibid.*

³⁴ *Ibid.*

³⁵ Amelia Colon-Serrano Petitioner, OAL DKT. EDU 11588-0, 2008 WL 1795250 (N.J. Adm. Jan. 28, 2008).

³⁶ *Ibid.*

³⁷ *Ibid.*

³⁸ *Ibid.*

³⁹ *Ibid.*

upon transfer to a position which is not tenure eligible” in *N.J.S.A.* 18A:17-2 indicates legislative intent to prevent this right.⁴⁰ Subsequently, the State Board of Education adopted the Commissioner’s decision.⁴¹

The tenure statute for secretaries, *N.J.S.A.* 18A:17-2, does not address the tenure rights of secretaries upon promotion to a non-tenurable, certificated position. Further research would enable the Law Revision Commission to advance propositions for legislative clarification of the issue to aid in future cases dealing with a secretary, assistant secretary, school business administrator, business manager, and secretarial and clerical employee’s right to retain tenure upon promotion.

		JOB 1		JOB 2	
		Tenurable	Certificated	Tenurable	Certificated
DiNapoli Tenure forfeited	<i>ALJ:</i> for Plaintiff <i>Commissioner:</i> for Plaintiff <i>Appellate Division:</i> for Defendant	X		X	X
Given Tenure not forfeited	<i>Commissioner</i> and <i>Appellate Division:</i> ultimate holding for Defendant as to probationary period, but tenure was not forfeited.	X		X	
Colon-Serrano Tenure forfeited	<i>ALJ:</i> for Plaintiff <i>Commissioner:</i> for Defendant	X			X

V. CONCLUSION

Staff seeks authorization from the Commission to undertake a project in this area in an effort research and clarify the statutory language of *N.J.S.A.* 18A:17-2 in keeping with the determinations in *DiNapoli*, *Given*, and *Colon-Serrano*.

⁴⁰ *Ibid.*

⁴¹ Judith A. Dinapoli, Petitioner, OAL DKT. EDU 7106-11, 2012 WL 1454143 (N.J. Adm. Apr. 23, 2012).