#498-07 (OAL Decision: http://lawlibrary.rutgers.edu/oal/html/initial/edu00956-07_1.html)

DONALD SLOAN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF CLINTON, HUNTERDON COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner – a custodian employed in respondent's district for over 33 years – challenged his termination pursuant to a reduction in force, alleging that he had acquired tenure. Respondent board contends that petitioner did not attain tenure, as petitioner had been consistently employed for fixed annual terms, precluding automatic tenure pursuant to *N.J.S.A.* 18A:17-3. In addition, the district's policy does not provide tenure status to persons employed in a custodial-maintenance category.

The ALJ found, *inter alia*, that: petitioner had been employed by the respondent for a series of fixed terms, none of which exceeded twelve months; respondent's witnesses presented credible testimony; and petitioner had failed to meet his burden of proving that he had acquired tenure in the district. The ALJ recommended that the petition be dismissed with prejudice.

Upon a thorough and independent review of the record, the Assistant Commissioner concurred with the ALJ that petitioner has no tenure rights, and adopted the Initial Decision as the final decision in this matter. The petition was dismissed.

December 27, 2007

OAL DKT. NO EDU 956-07
AGENCY DKT. NO. 21-1/07

DONALD SLOAN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF CLINTON, HUNTERDON COUNTY,	:	DECISION
RESPONDENT.	:	

Petitioner worked as a custodian in respondent's district for over thirty-three years. Four months into the thirty-fourth year, petitioner's employment was terminated pursuant to a reduction in force. Petitioner challenges the termination, alleging that he had acquired tenure. Upon review of the record of this matter, including the hearing transcripts and exhibits, the Initial Decision of the Office of Administrative Law (OAL) and the parties' exceptions and reply-exceptions, the Assistant Commissioner[1] adopts - as the final decision in this case - the Initial Decision dismissing the petition.

After presiding over two days of testimony, reviewing 100 or more exhibits, and considering the parties' post-hearing submissions, the ALJ summarized the case:

> [C]onsistent with the BOE's policy against tenure for janitorial employees and the policy requiring annual contracts of employment, the BOE annually approved contracts for employment of the petitioner as a non-tenured janitor or in a similar title for terms not in excess of twelve months (July 1 to June 30), and the parties executed a series of contracts with such fixed terms. Contracts for some of the years that the BOE employed the petitioner are not in evidence. However, the BOE presented other evidence to show that it repeatedly and routinely

[1] This matter has been delegated to the Assistant Commissioner, pursuant to *N.J.S.A.* 18A:4-34.

> distinguished tenured employees from non-tenured employees such as those employed as janitors or in similar titles and approved employment of those employed as janitors or in similar titles only for fixed terms not in excess of twelve months. The absence of signed contracts for certain years does not necessarily require the finding that during such years the BOE employed the petitioner without a fixed term. The petitioner admitted that he did not believe he had tenure and he did not prove that the BOE employed him without a fixed term. Considering all of the evidence, consistent with the BOE's routine practice, it employed the petitioner only for a series of fixed terms and did not employ him without a fixed term or permanently. *N.J.R.E.* 406. Further, there is no competent or credible evidence that the BOE's reduction in force of its janitorial staff was for reasons other than for good faith reasons of economy.
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> Initial Decision at 19-20.

The Assistant Commissioner cannot disagree with the ALJ's conclusions. The numerous exhibits and testimony offered by respondent's representatives reveal that petitioner was appointed for separate terms of twelve months or less for each of the thirty-three years of his employment with respondent. For at least 24 of those years respondent was able to enter into evidence copies of the contracts that the parties had executed. For seven of the nine school years for which respondent could not produce copies of executed contracts, respondent offered copies of the minutes of the meetings at which respondent had clearly approved contracts for petitioner - for fixed terms.

The Assistant Commissioner is satisfied that such Board actions constituted 'appointments' for fixed terms, and thereby met the criterion set forth in *N.J.S.A.* 18A:17-3 for establishing non-tenured janitorial positions.[2] Executed contracts are not expressly required by

[2] *N.J.S.A.* 18A:17-3 provides:

> Every public school janitor of a school district shall, unless he is appointed for a fixed term, 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 as the result of the reduction of the number of janitors in the district made in accordance with the provisions of this title or except for neglect, misbehavior or other offense and only in the manner prescribed by subarticle B of article 2 of chapter 6 of this title.
> (Emphasis added.)

the statutory language. And where contracts do not resolve the issue, other indicia of the nature of the appointment – including board minutes and resolutions – may be examined. *Charles Sharpe v. Board of Education of the Township of Wyckoff, Bergen County,* Commissioner Decision March 22, 1993, at 5.

Thus, the contracts and board minutes produced by respondent eliminate the possibility that petitioner attained tenure in any of his thirty-three years of service – save for two of the academic years: 1988-89 and 2003-04. As to the 1998-89 school year, a former Board Secretary employed by respondent from 1983 to 1991 – Claire Mazurak – testified that each year of her service she gave respondent's employees, including petitioner, contracts with fixed terms corresponding to the school year. Unless the employees returned executed copies they were not paid. No evidence was presented to the OAL that petitioner had not been paid for his service in the 1988-89 school year.

The ALJ found Mazurak to be credible, and the Assistant Commissioner finds nothing in the record to overturn that credibility determination. While petitioner testified that respondent employed him without a contract in the late eighties, he conceded that he was not good at recalling dates. Because of this admission of imprecise memory, because the ALJ reasonably concluded that the achievement of tenure should have been a very memorable date for petitioner, because of Mazurak's credible testimony about the annual distribution of contracts with fixed terms and because of the pattern of contract approval and distribution evident in the documentary evidence leading up to 1988, the Assistant Commissioner agrees with the ALJ that petitioner did not show that it was more likely than not that he attained tenure in 1988 or 1989.[3]

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[3] This conclusion is buttressed by the fact that Respondent's Exhibit 25 (R-25) shows that on April 24, 1989, respondent approved a contract for petitioner with the fixed term of July 1, 1989 through June 30, 1990.

The other school year for which respondent produced no executed contract was 2003-04. The Assistant Commissioner finds it unlikely that petitioner would have been awarded tenure in that year. As revealed in Respondent's Exhibit 1 (Exhibit R-1) – an October 31, 2002 letter to petitioner from then-superintendent of schools Elizabeth Nastus, which accompanied a contract for petitioner for the 2002-03 school year – petitioner was put on notice in the fall of 2002 that continued excessive absences and performance deficiencies could result in increment withholding or dismissal. The Assistant Commissioner declines to find that six months after such a warning the superintendent would have recommended that petitioner be awarded tenure.

Further, as the ALJ found, respondent had a long-standing policy of designating janitorial/custodial/maintenance positions as non-tenured. That designation was evidenced by formal written policy, *e.g.* Exhibit R-3 and R-4. Both witnesses for respondent testified that during their tenures in respondent's district, respondent followed that practice. (Hearing Transcript, July 19, 2007, at 19-20, 53)

In addition, the minutes of the board actions approving employment contracts reveal that the district superintendent's annual staff appointment recommendations were presented to the respondent Board in groupings. For instance, tenured teachers were grouped together and so designated. Teachers about to attain tenure were designated as a discrete classification, and untenured teachers comprised yet another separate group. Tenured administrators were recommended for contracts as a group, as were non-tenured administrators.

Similarly, the employment recommendations for custodial/maintenance employees were usually presented as a separate group, or as part of a group entitled 'non-teaching personnel,' 'non-certified staff' or 'support staff.' Fixed terms accompanied the

recommendations and the designation "tenured" was never applied.[4] To the contrary, some meeting minutes expressly identified custodians as non-tenured personnel. *See,* Exhibits R-30, R-31, R-33, R-34, R-37, R-39, R-40, and R-41.

In summary, the factual record does not support petitioner's contention that he acquired tenure in respondent's district. Nor do the cases to which petitioner cites in his exceptions.

Zielinski and Brown v. Board of Education of the Township of East Brunswick, Middlesex County, 96 *N.J.A.R.* 2d (EDU) 3 (App. Div. 1996), is not apposite to this case. In *Zielinski*, the East Brunswick Board of Education had passed a resolution establishing a policy to bestow tenure upon 'efficient' janitors after three years of service. Thus, the question of whether the petitioning janitors had attained tenure after three years of fixed-term contracts had to be examined against the backdrop of the Board policy allowing tenure after three years. Since the only policy articulated by the board of education in the present case clearly rejects tenure for custodians, *Zielinski* does not help petitioner.

Reinertsen v. Board of Education of the Township of East Brunswick, Middlesex County, OAL Dkt. No. EDU 10328-97, Commissioner Decision 1998 – which petitioner cites for the proposition that once a janitor attains tenure he or she retains it, even if promoted, demoted or transferred within the general category of maintenance/custodial positions – can only help petitioner if he shows that he achieved tenure at some point in his thirty-three plus years of service. As mentioned above, petitioner was not able to make such a showing.

The remaining case upon which petitioner relies is also distinguishable from the instant controversy. The janitor in *McCullough v. Board of Education of the City of Trenton,*

[4] *See*, Exhibits R-15, R-16, J-14, R-19, R-20, J-15, R-21, R-25, R-26, J-16, R-27, R-28, J-17, R-29, R-45, R-46, R-47, R-51, R-52, J-29, R-60, R-61, R-62

Mercer County, was initially employed as a substitute. In January 1998, he was offered and accepted a permanent position with the respondent board of education. The first contract for this permanent position – as well as the accompanying letter and some subsequent board minutes – identified a starting date for McCullough, but clearly provided no terminus. Only the salary adjustment notices referenced fixed dates.[5] These facts stand in stark contrast to the present case, where the overwhelming documentary and testamentary evidence shows a practice (and policy) by respondent – over a period of thirty-plus years – of offering petitioner fixed term employment for twelve months or less.

In light of the foregoing the Assistant Commissioner adopts the Initial Decision, as supplemented, as the final decision in this matter. The petition is dismissed.

IT IS SO ORDERED.[6]

ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: December 27, 2007

Date of Mailing: December 28, 2007

[5] Salary agreements, by themselves, do not constitute appointments with fixed terms. *See, e.g. Smith v. Board of Education of the Township of East Brunswick*, Commissioner Decision August 15, 1983, *aff'd* State Board, April 4, 1984.

[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.*