

New Jersey Commissioner of Education

Final Decision

Ali Kesim,

Petitioner,

v.

Board of Education of the Borough of
New Providence, Union County,

Respondent.

Synopsis

The petitioner challenged the Board's decision to terminate his employment as a custodian in the school district following a physical altercation with another employee; petitioner had also been involved in other repeated incidents of conduct that resulted in discipline. The petitioner asserted that the Board's action violated the tenure laws, *N.J.S.A.* 18A:17-3. The Board contended that petitioner's employment was subject to a Custodial Collective Bargaining Agreement (CBA), and that there is no grant of tenure in the CBA of this district. The parties filed cross motions for summary decision.

The ALJ found, *inter alia*, that: there are no genuine issues of material facts in dispute, and the matter is ripe for summary decision; the issue for determination was whether the Board violated the Tenure Act, *N.J.S.A.* 18A:17-3, and the district's CBA when it terminated petitioner's employment; petitioner was hired by the Board as a custodian in October 1998; in each year of his employment, petitioner received and signed an Employment Contract containing a clause which allows for the termination of the contract by either party with 30 days' notice in writing; all custodians and bus drivers in the district, as tenure ineligible employees, received an employment contract with a fixed term each year; the relevant CBA expired on June 30, 2018, and does not use the word "tenure" in any provision; petitioner received written notice on or about February 8, 2018 that the Board was terminating his employment effective January 24, 2018 because of a physical altercation with another employee on January 18, 2018, as well as prior repeated incidents which resulted in discipline; the notice informed petitioner that he was terminated pursuant to the notice provision in his contract, and that he would be placed on paid leave through his termination date of February 22, 2018; although the relevant CBA stated that "permanent status" was given to all custodians after the beginning of their fourth consecutive year of employment, the CBA also gives the Board the right to relieve employees of their duties for just cause through the notice provision in the annual contract. The ALJ concluded that petitioner was properly terminated on contractual notice for just cause. Accordingly, summary decision was granted in favor of the Board, and petitioner's cross-motion was denied.

Upon comprehensive review, the Commissioner concurred with the findings and conclusions of the ALJ. Accordingly, the Initial Decision of the OAL was adopted as the final decision in this matter, and 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.

April 23, 2019

New Jersey Commissioner of Education

Final Decision

Ali Kesim,

Petitioner,

v.

Board of Education of the Borough of
New Providence, Union County,

Respondent.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions filed pursuant to *N.J.A.C.* 1:1-18.4 by the petitioner, Ali Kesim, and the New Providence Board of Education's (Board) reply thereto. In this matter, the petitioner is challenging the Board's decision to terminate his employment as a custodian in the school district.¹ The Administrative Law Judge (ALJ) granted summary decision in favor of the Board and recommended that the petition of appeal be dismissed. In so doing, the ALJ found that the petitioner did not have tenure as a custodian under *N.J.S.A.* 18A:17-3 because he was appointed for a fixed term for each year of his employment with the District. Additionally, the Board did not violate the Collection Bargaining Agreement (CBA) when it terminated petitioner's employment because the CBA did not provide custodians in the District with tenure.

¹ The Board acted to terminate the petitioner's employment based on a physical altercation with another employee, as well as other repeated incidents that have resulted in discipline.

In his exceptions, the petitioner maintains that the Initial Decision should be rejected because the ALJ failed to apply the plain language of *N.J.S.A.* 18A:17-3 and misinterpreted the holding in *Wright v. Board of Educ. of E. Orange*, 99 *N.J.* 112 (1985). The petitioner argues that he held tenure when he was unilaterally terminated because the CBA that was in effect at the time states, “[w]hen an employee commences his/her fourth year of consecutive employment in the district, that employee shall have permanent status under the agreement.” Thus, the CBA effectively accords permanent status to all custodians who are employed by the Board for a period of over three years and these employees are no longer subject to the non-renewal procedures of *N.J.S.A.* 18A:27-4.1. The petitioner further contends that simply because the agreement in *Wright, supra*, contained the word “tenure” does not mean that every agreement in every school district throughout the state has to have the word “tenure” in order for custodians to earn it. Accordingly, the Board should be ordered to immediately reinstate the petitioner at a salary level appropriate for the 2018-2019 school year. Finally, if summary decision is not entered in favor of the petitioner based on the relevant case law and plain reading of the CBA, this matter should be remanded to the OAL for a hearing as to all material facts in dispute, including the intent of the parties to the CBA.

In reply, the Board maintains that in the Initial Decision the ALJ properly found that *N.J.S.A.* 18A:17-3 grants tenure to custodial employees only if such employees are not appointed to fixed terms. When custodial employment is governed by a CBA, the CBA may grant tenure to custodial employees. Despite the petitioner’s allegations, the ALJ did not establish a bright line rule requiring all CBAs to contain the word “tenure.” Instead, the ALJ reviewed the terms of the CBA in this case and determined that, unlike in *Wright, supra*, an agreement that contains a clear, express provision granting custodian tenure does not exist in the current CBA. Therefore, the ALJ considered extrinsic evidence including the Board’s practice

of issuing non-tenured employees Employment Contracts, similar to the contract that was signed annually by the petitioner while tenured employees were issued Salary Statements. Further, the ALJ properly credited petitioner's execution of a fixed term employment contract containing a thirty (30) day notice provision for termination in each of his nearly twenty (20) years of employment as evidence of petitioner's non-tenured status. Therefore, the Initial Decision should be adopted as the final decision in this matter.

Upon a comprehensive review of the record in this matter, the Commissioner concurs with the ALJ – for the reasons thoroughly set forth in the Initial Decision – that the petitioner did not have tenure as a custodian under *N.J.S.A.* 18A:17-3, and the Board did not violate the CBA when it terminated petitioner's employment. The Commissioner is also in accord with the ALJ's determination that there are no material facts in dispute prohibiting the dissolution of this matter by summary decision.

Pursuant to *N.J.S.A.* 18A:17-3, boards of education have the discretion to deny tenure to custodial staff or to confer that status upon them. In order to exercise the discretion to deny tenure to custodial staff, a board of education must appoint the custodians for a fixed term. Each year of his employment with the Board, the petitioner entered into a fixed employment contract that was effective July 1 through June 30. Therefore, the petitioner did not acquire tenure under *N.J.S.A.* 18A:17-3. The Commissioner is also not persuaded by the petitioner's assertion that he acquired tenure based on the language in the CBA, which stated “[w]hen an employee commences his/her fourth year of consecutive employment in the district, that employee shall have permanent status under the agreement.” As explained by the ALJ, the word “tenure” is not used anywhere in the CBA as opposed to the circumstances in *Wright, supra*, where the agreement between the board of education and the custodians' union contained a clear, express provision that stated: “[a]ll members of the bargaining unit shall receive tenure after

three years of employment.” *Id.* at 184. Based on the evidence in the record related to the nature of the petitioner’s employment contracts, coupled with the language of the CBA, the ALJ properly found that the CBA did not grant petitioner tenure. As a result, the manner in which the Board terminated the petitioner’s employment was not barred by *N.J.S.A.* 18A:17-3, nor did it violate the CBA.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter and the petition of appeal is hereby dismissed.

IT IS SO ORDERED.²

COMMISSIONER OF EDUCATION

Date of Decision: April 23, 2019

Date of Mailing: April 23, 2019

² 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

SUMMARY DECISION

OAL DKT. NO. EDU 08311-18

AGENCY DKT. NO. 122-5/18

ALI O. KESIM,

Petitioner,

v.

**BOARD OF EDUCATION OF THE BOROUGH
OF NEW PROVIDENCE, UNION COUNTY,**

Respondent.

Nicholas Poberezhsky, Esq., for petitioner Ali O. Kesim (Caruso Smith Picini,
attorneys)

Anthony P. Sciarrillo, Esq., for respondent New Providence Board of Education
(Sciarrillo Cornell, attorneys)

Record Closed: February 1, 2019

Decided: March 15, 2019

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On or about May 21, 2018, petitioner Ali O. Kesim (petitioner) filed an action with the Commissioner of the Department of Education against respondent New Providence Board of Education (respondent or Board) challenging his termination on or about February 25, 2018, from his position as a custodian employed by the Board for

approximately twenty (20) years as violative of the tenure laws. N.J.S.A. 18A:17-3. The Board filed its Answer to the Petition for Relief on or about June 4, 2018.

The matter was transmitted by the Department of Education to the Office of Administrative Law (OAL), where it was filed on June 11, 2018, for plenary 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. I convened a telephonic case management conference with the parties on July 2, 2018, to discuss the potential issues in the case, scheduling, and other case management concerns. It became apparent that the matter was amenable to dispositive motion practice and a briefing schedule was agreed upon, as well as plenary hearing dates should those be needed. After some adjustments to the schedule, the Board filed a Motion for Summary Decision on or about November 9, 2018. On or about January 21, 2019, petitioner filed a Cross-Motion for Summary Decision. Responses and replies were thereafter submitted. Those motion submissions having been received, the matter is now ripe for decision.

ISSUE PRESENTED ON THE MOTION

Whether respondent Board violated the Tenure Act, N.J.S.A. 18A:17-3, and the New Providence Education Association – Custodians Unit (Association) Collection Bargaining Agreement when it terminated his employment.

UNDISPUTED MATERIAL FACTS

1. Petitioner was hired as a custodian by the Board on October 5, 1998. See Certification of Dr. David Miceli, ¶ 4 (Miceli Certification). During his employment, petitioner later served as a “custodian/bus driver.” See Miceli Certification, ¶ 5.

2. At the end of each school year, the Board is required to inform all employees, tenured or non-tenured, of their status of employment for the

following year. See Miceli Certification, ¶ 7. Such notice includes information regarding salary for the following school year. See Miceli Certification, ¶ 8.

3. To distinguish tenured employees from non-tenured employees or employees not eligible to earn tenure (“tenure ineligible employees”), tenured employees receive a “Salary Statement” while non-tenured and tenure ineligible employees receive an “Employment Contract.” See Miceli Certification, ¶ 9. Both documents set forth the employee’s name and salary, and require the employee to sign the document and return it to the Superintendent’s office. See Miceli Certification, ¶ 10.

4. Unlike a Salary Statement, the Employment Contract contains a termination clause which provides:

It is hereby agreed by the parties hereto that this contract may at any time be terminated by either party’s giving to the other 30 days’ notice in writing of intention to terminate the same, but that in the absence of any provision herein for a definite number of days’ notice, the contract shall run for the full term named above.

See Miceli Certification, ¶ 11.

5. The Employment Contract contains a fixed term, specifying a start and end date. See Miceli Certification, ¶ 12. All custodians and bus drivers, as tenure ineligible employees, receive an “Employment Contract” each year. See Miceli Certification, ¶ 13.

6. District custodians are represented by the New Providence Education Association – Custodians Unit (“Association”). See Miceli Certification, ¶ 21. During his employment with the Board, Petitioner was a member of the Association. See Miceli Certification, ¶ 22. The Board and Association are parties to the Custodial Collective Bargaining Agreement (CCBA). See Miceli Certification, ¶ 23.

7. The relevant CCBA expired on June 30, 2018. The CCBA does not use the word “tenure” in any provision. See Miceli Certification, ¶ 25.

8. In each year of his employment, petitioner received and signed an Employment Contract, containing a thirty-day notice provision. See Miceli Certification, ¶ 14. In advance of the 2017-2018 school year, petitioner received an Employment Contract dated June 29, 2017, for the period of July 1, 2017 through June 30, 2018. See Miceli Certification, ¶ 15. On or about July 21, 2017, petitioner reviewed and signed that Employment Contract. See Miceli Certification, ¶ 16.

9. On or about February 8, 2018, the Board provided written notice to petitioner that the Board took action to terminate his employment effective January 24, 2018. See Miceli Certification, ¶ 18. The reason stated was a physical altercation with another employee on January 18, 2018, as well as prior “repeated incidents that have resulted in discipline.” See Miceli Certification, Exhibit 5. The notice also informed petitioner that he was terminated pursuant to the notice provision in his Employment Contract, and that he would be placed on a paid leave of absence through his termination date of February 22, 2018. See Miceli Certification, ¶ 19.

10. From 1998 until June 30, 2018, the CCBA stated that “permanent status” was given to all custodians after the employee began his or her fourth consecutive year of employment. Prior thereto, “[a]ll new employees shall be hired with fixed term contracts.” See Certification of Maryanne Rodriguez, ¶¶ 6-8.

11. Specifically, Article V Employee’s Rights, Section D.3 of the relevant CCBA sets forth:

When an employee commences his/her fourth year of consecutive employment in the district, that employee shall have permanent status under the terms of this Agreement and shall not be disciplined, discharged, or not reappointed without just cause. Grievances regarding the above shall be

subject to binding arbitration under the terms of this Agreement.

[Miceli Certification, Exhibit 6.]

12. Article VI Board's Rights, Section C.3 of the relevant CCBA sets forth:

The Board reserves to itself sole jurisdiction and authority over matters of policy and retains the right through the Administration, in accordance with applicable laws and regulations:

* * *

3. To relieve employees from duties for just cause.

[Id.]

LEGAL DISCUSSION

It is well-established that if there is no genuine issue as to any material fact, a moving party is entitled to prevail as a matter of law. Brill v. The Guardian Life Insurance Co. of America, 142 N.J. 520, 540 (1995). The purpose of summary decision is to avoid unnecessary hearings and their concomitant burden on public resources. Under the Brill standard, a fact-finding hearing should be avoided "when the evidence is so one-sided that one party must prevail as a matter of law." Brill guides us thusly:

[A] determination whether there exists a "genuine issue" of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party.

[Id. at 540]

In explaining the standard to be applied in summary motion practice, the Brill Court explained:

The same standard applies to determine whether a prima facie case has been established by the party bearing the burden of proof in a trial. . . . If a case involves no material factual disputes, the court disposes of it as a matter of law by rendering judgment in favor of the moving or non-moving party.

[Id. at 536-37]

As a result of the undisputed material facts set forth above, I **CONCLUDE** that the issue of whether petitioner was tenured and thereby protected from termination in the manner in which it was undertaken by the Board can be decided as a matter of law. The assertions by petitioner in the Certification of Marilyn Rodriguez as to what the negotiators “understood” or “meant” by the long-standing phrases used in the CCBA of “fixed term” and “permanent,” which pre-dated her involvement in said negotiations, is not sufficient to raise a genuine issue of material fact for this case.

The Tenure Act provides in relevant part:

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

[N.J.S.A. 18A:17-3 (emphasis added).]

Separately, a board may confer tenure on a custodial employee “by virtue of the express terms of the collective bargaining agreement.” Camden Bd. of Educ. v. Alexander, 352 N.J. Super. 422, 447 (App. Div. 2002), *rev’d on other grounds by Camden Bd. of Educ. v. Alexander*, 181 N.J. 187 (2004), (citing Wright v. Bd. of Educ. of E. Orange, 99 N.J. 112 (1985)).

In Wright, the board provided notice to the custodian that his employment would be terminated. 99 N.J. at 183. The CBA between the custodial union and the board stated: “[a]ll members of the bargaining unit shall receive tenure after three years of

employment.” Id. at 184. The custodian challenged his termination, arguing that the board permissibly bypassed N.J.S.A. 18A:17-3 when it negotiated a tenure provision. Id. The Supreme Court determined that although the custodian was appointed to a fixed term, the CBA explicitly granted the custodian tenure. 181 N.J. at 184-85. Therefore, the custodian’s termination was improper. Id.

I **CONCLUDE** that the instant matter is distinguishable from Wright. Throughout his employment with the Board, petitioner was employed for one-year, fixed terms from July 1 through June 30. More specifically, for the 2017-2018 school year, petitioner reviewed and signed an Employment Contract for the period of July 1, 2017 through June 30, 2018. In Wright, the Supreme Court noted that the CBA between the board and the custodians’ union contained a clear, express provision that stated: “[a]ll members of the bargaining unit shall receive tenure after three years of employment.” Id. at 184. In the instant matter, no similar express provision exists. As correctly stated by respondent, the word “tenure” is not used anywhere in the CCBA. Therefore, the CCBA did not grant petitioner tenure.

By way of contrast, the undersigned is aware that some Collective Bargaining Agreements for custodians in other districts specifically state: “Effective July 1, 1998, employees who achieve three (3) consecutive years of employment shall be appointed for an unfixed term and shall acquire tenure in accordance with N.J.S.A. 18A:17-3.” See, e.g., Pagan v. Elizabeth Bd. of Educ., OAL Dkt. EDU-6936-17, Initial Decision (January 2, 2018).

There is no dispute that petitioner was no longer a probationary employee who could be terminated at will but he was nevertheless employed for a fixed term. There is no grant of tenure in the CCBA in this district. In each year of his employment, petitioner was provided with an Employment Contract, which he was required to review, sign, and return to the Superintendent’s office. I concur with respondent that each Employment Contract was for a fixed term and contained the following provision:

It is hereby agreed by the parties hereto that this contract may at any time be terminated by either party’s giving to the

other 30 days' notice in writing of intention to terminate the same, but that in the absence of any provision herein for a definite number of days' notice, the contract shall run for the full term named above.

On February 8, 2018, the Board provided written notice to Petitioner of its intent to terminate his employment because of a physical altercation with another employee on January 18, 2018, as well as prior "repeated incidents that have resulted in discipline." See Miceli Certification, Exhibit 5. That correspondence explicitly stated that his termination was made in accordance with the notice provision of his Employment Contract. Therefore, Petitioner was placed on a paid administrative leave effective January 24, 2018. That paid administrative leave continued for thirty (30) days, in accordance with his Employment Contract. Petitioner was then terminated effective February 22, 2018.

In sum, this Board did not negotiate tenure rights for custodians but rather was granted sole authority to terminate petitioner for just cause subject to the notice provisions of the annual employment contract. I **CONCLUDE** that petitioner could be terminated on contractual notice for just cause in the sole authority and jurisdiction of the Board.

ORDER

It is **ORDERED** that the motion of respondent New Providence Board of Education for an Order Granting Summary decision is hereby **GRANTED**. It is further **ORDERED** that the cross-motion of petitioner Ali O. Kesim for an Order Granting Summary Decision is hereby **DENIED**.

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.

March 15, 2019
DATE


GAIL M. COOKSON, ALJ

Date Received at Agency: 3/15/19

Date Mailed to Parties:

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