

To: Commission
From: Vito J. Petitti
Re: Clarification of Tenure Issues
Date: April 10, 2017

Memorandum

Background

This project began with the work of an NJLRC extern who reviewed cases identified by the Commission's case searches and informed the Commission of three separate decisions regarding the tenure of secretaries, assistant secretaries, school business administrators, business managers, and secretarial and clerical employees who raised statutory clarification issues. The Commission authorized Staff to undertake a project in this area when it was ascertained that cases such as these frequently arise in New Jersey.

In February 2017, the Commission considered a Revised Draft Tentative Report featuring proposed revisions intended to address a concern articulated by the Commission at the September 2016 meeting that the statute does not make a distinction between voluntary and involuntary transfers. There would not seem to be an issue as regards subsection d.1., as this provision is forward-looking and merely sets out the requirements for obtaining tenure in a new position.

During its discussion in February 2017, the Commission directed Staff to conduct additional research regarding the *DiNapoli* case and the application of specific terms within the statute. Also, the Commission added new language, "other than for cause," after "terminated" in subsection d.3., and provided additional commentary to page 6 of the Report regarding legislative intent.

The DiNapoli Holding

Regarding the intent of the court in *DiNapoli v. Board of Education of the Township of Verona*, the Commission noted that reluctance on the part of the Court to reach its holding would provide a clear signal for the Commission to propose changes in this area.¹ DiNapoli, a tenured accounts payable/transportation secretary with a township Board of Education, agreed to be reassigned a non-certified position as assistant to the school business administrator. After holding the new position for two years and eight months, she again consented to reassignment, accepting the certificated position of assistant school business administrator. After one year and seven months (a total of four years and three months after leaving her original tenured job), her position was abolished during a reduction in force.

The administrative law judge held that DiNapoli retained her secretarial tenure rights when assigned to the position of assistant school business administrator and should have been returned to

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

a clerical or secretarial position held by a non-tenured employee when the Board eliminated her current position. The Commissioner of Education affirmed the decision.

There does not seem to have been any reluctance on the part of the Superior Court of New Jersey, Appellate Division, to reverse the administrative law judge in this case. The court made very clear that, in spite of the Commissioner's determination that DiNapoli retained tenure rights upon transfer to a certificated position, the plain language of the statute did not support such a determination.² "Indisputably, if the Legislature had intended for a secretary, who acquired tenure pursuant to N.J.S.A. 18A:17-2(b) or (c), to retain tenure upon relinquishment of his or her secretarial position, it would have provided for such protection in the statute, similar to provisions found in other tenure retention provisions."³ The court went on to discuss N.J.S. 18A:28-5 as a statutory section which does provide the protections apparently lacking in 18A:17-2. The court continued:

Also in this regard, the Legislature enacted N.J.S.A. 18A:28-6 and 18A:17-20.4, which afford tenure retention rights to teachers and superintendents notwithstanding promotion or transfer. N.J.S.A. 18A:28-6 specifies a tenured teaching staff member, after transfer or promotion, whose new position is terminated before tenure in that position is achieved "shall be returned to his [or her] former position at the salary which he [or she] would have received had the transfer or promotion not occurred[.]" Also, N.J.S.A. 18A:17-20.4 provides similar protection for those promoted to superintendents, who "shall retain all tenure rights accrued in any position which was previously held by the superintendent in the district."

These provisions represent the Legislature's intent to preserve tenure for certain employees who transferred or were promoted to a different position prior to achieving tenure in that position. N.J.S.A. 18A:17-2 does not contain a similar tenure retention provision regarding tenured secretarial employment, thus reflecting the Legislature's decision not to afford such rights. "When the Legislature has carefully employed a term in one place and excluded it in another, it should not be implied where excluded."

Pointing to the fact that the Legislature, through N.J.S. 18A:17-2, limited secretarial tenure to the period of time an employee "holds [his or her secretarial] office, position or employment," the court concluded there could be no finding that DiNapoli retained her tenure rights after being transferred to a non-secretarial position.⁴ Indeed, the court emphasized DiNapoli's failure to "protest or express dissatisfaction with her transfer or promotion to the position of assistant school bus administrator. Moreover...she voluntarily transferred from her tenured secretarial position to another tenure eligible position" and "must be found to have relinquished her secretarial tenure upon promotion to the position of assistant school business administrator."⁵ In addition, the court found nothing in the record to suggest she considered the transfer or promotion a temporary

² *Id.* at 239.

³ *Id.* at 240.

⁴ *Id.* at 241.

⁵ *Id.* at 248.

assignment.⁶ “In fact, in order for DiNapoli to become the assistant school business administrator she needed to obtain the appropriate certification credentials. She obtained the certification, thus evidencing her intention to remain in the position as assistant school business administrator, not secretary. Certainly, the facts support the conclusion that DiNapoli relinquished her secretarial position upon her acceptance of the promotion or transfer to the position of assistant school business administrator.”⁷

Finally, the court dismissed DiNapoli’s argument that, since she was “assigned” to the subsequent positions, she did not waive or voluntarily relinquish her position as secretary. According to the court, “a voluntary resignation equates to abandonment of tenure rights...Thus, when DiNapoli voluntarily assumed the position of assistant to the business administrator and then accepted a promotion to the position of assistant school business administrator, she relinquished her secretarial position and tenure rights.”⁸

Additional Research

Also discussed at the February meeting were the treatment of the terms “for cause,” “bad behavior,” “reduction in force,” and “chapter,” within Title 18A (Education).

There are 38 references to the terms “**for cause**” or “**just cause**” under Title 18A, Education. Most are references to positions other than the one in *DiNapoli* (e.g., board members, contractors, and pension fund members), but the meaning seems consistent when used in case of employees in education. N.J.S. 18A:16-1.3, titled Notification of dismissal for cause of non-tenured certificated employee, provides for dismissal “for just cause as a result of misconduct in office.” N.J.S. 18A:6-10, Dismissal and reduction in compensation of persons under Tenure in public school system, prohibits dismissal of tenured employees “except for inefficiency, incapacity, unbecoming conduct, or other just cause.” N.J.S. 18A:28-5, Tenure of teaching staff members, provides similar treatment: Tenured teachers “shall not be dismissed...except for inefficiency, incapacity, or conduct unbecoming...or other just cause.”

There are no references to the term “**bad behavior**” within Title 18A.

Title 18A contains 22 references to the terms “**reduction in force**” or “**reduction of force.**” The closest thing to a definition is within N.J.S. 18A:28-9, Reduction of force; power to reduce and reasons for reduction, which protects the right of any board of education to reduce the number of teaching staff members, employed in the district whenever, in the judgment of the board, it is advisable to abolish any such positions for reasons of economy or because of reduction in the number of pupils or of change in the administrative or supervisory organization of the district or for other good cause.” Otherwise, the terms are afforded their plain language meaning in statute and in case law.

⁶ *Id.* at 249.

⁷ *Id.*

⁸ *Id.*

The accompanying Revised Draft Tentative Report contains a proposed new provision, d.1., which refers to “[a]ny person...transferred or promoted to another position covered by this **chapter**.” [Emphasis added.] According to the Office of Legislative Services (OLS), there are two meanings for “chapter,” but only one is germane. The use of the word in the above proposed language is obviously not a reference to *chapter laws*, which are acts passed by the Legislature, approved by the governor, organized numerically in order of approval, and compiled annually. Here, the logical meaning of “chapter” is all of the sections contained within N.J.S. 18A:17; OLS refers to N.J.S. 18A:17-2 as “a section within the chapter.” Chapter 17, titled Specific Officers and Employees, contains numerous sections pertaining to various non-teaching employees, including secretaries, assistant secretaries, school business administrators, business managers, janitorial employees, and superintendents.

Conclusion

If the Commission is satisfied that the proposed revisions in the Appendix, below, are responsive to the Commission’s recommendations, or upon the Commission’s further guidance, Staff requests authorization to release a Revised Draft Tentative Report for additional comments.

Appendix—Proposed Changes to Existing New Jersey Statute

The text of 18A:17-2, with originally proposed revisions shown with underlining and strikethrough. The more recent revisions are italicized, 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. 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;

2. Who *voluntarily* transfers or accepts promotion 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.

3. *Who transfers or accepts promotion from the tenured position, to a position that is tenure-eligible, but is terminated other than for cause 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.