

**To: New Jersey Law Revision Commission**

**From: Mark J. Leszczyszak**

**Re: Revised Draft Tentative Report Relating to Clarification of Tenure Issues**

**Date: July 10, 2017**

## MEMORANDUM

---

This Memorandum summarizes the concerns raised, addressed, and left for comment throughout the Clarification of Tenure Issues project.

The first concern raised during the February 16, 2017, Commission meeting concerned the scope of the term “termination” and whether it “was intended to include situations where an individual is fired, as well as situations where jobs are eliminated”<sup>1</sup> such as a reduction in force. Although the revisions contemplated both scenarios, the question was raised “whether a reduction in force is a termination and whether ... an individual [as a result] automatically goes back to his or her last position.”<sup>2</sup> Neither the title nor the chapter provide a definition for “termination.” Mr. Petitti’s research revealed that although the term termination was not defined, the phrases “reduction in force” and “reduction of force” were referenced 22 times in Title 18A.<sup>3</sup> One particular provision resembled a definition the most, N.J.S. 18A:28-9, “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 provisions 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 the statute and case law.”<sup>4</sup> In accordance with Commissioner Bunn’s proposal that “termination” be defined as “end of employment,”<sup>5</sup> the plain language meaning seems to be sufficient.

The second concern addressed during the February meeting dealt with the situation in which “tenure may be preserved if a person is [terminated] for cause, and whether that is what the Legislature intended.”<sup>6</sup> Commissioner Bell provided an example where “an individual promoted to a managerial or supervisory position may not be a good fit in the new position, but may return to a previous position where the individual was an asset to the staff.”<sup>7</sup> This depends on two factors – whether the new position is covered by the same tenure as the position

---

<sup>1</sup> New Jersey Law Revision Commission Meeting Minutes (Feb. 16, 2017) (on file with the New Jersey Law Revision Commission).

<sup>2</sup> *Id.*

<sup>3</sup> Memorandum from Mr. Vito Petitti, Esq., Counsel, New Jersey Law Revision Commission to the New Jersey Law Revision Commission (Apr. 10, 2017) (on file with the New Jersey Law Revision Commission).

<sup>4</sup> *Id.*

<sup>5</sup> New Jersey Law Revision Commission Meeting Minutes, *supra* note 1 (manuscript at 2).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

previously held and whether the individual is 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.”<sup>8</sup> Although the Supreme Court of New Jersey in *Dennery* dealt with a teacher’s tenure issue, it provides information as to the strict requirements for tenure useful in this instance since the goal 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.”<sup>9</sup> 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, or because the individual was found to have abandoned the previously tenured position, or both.

Justice Long raised the concern that the language in proposed subsection d.3. “may produce a harsh result for individuals who are not terminated ‘for cause.’”<sup>10</sup> Commissioner Bunn’s recommended addition of “other than for cause” to that subsection “so that it reads ‘but is terminated, other than for cause’”<sup>11</sup> appears to resolve the issue. Commissioner Bell then inquired “whether a statutory definition existed for the phrase ‘for cause’” since the context is understood as the Commission discusses the issue but it may not be clear otherwise.<sup>12</sup> Mr. Petitti’s research revealed 38 references to the phrase under Title 18A, with most being “references to positions other than the one in *DiNapoli*...but the meaning seems consistent when used in case of employees in education.”<sup>13</sup>

During the Commission Meeting of April 20, 2017, Justice Long and Chairman Gagliardi suggested that if there is no intended difference between proposed subsections d.(1) and d.(3) the two may be unified.<sup>14</sup> Commissioner Bell added that the provisions may be clearer if subsections d.1. and d.3. were consolidated as subsections d.(1)(a) and d.(1)(b) respectively.<sup>15</sup>

Additionally, Justice Long inquired whether the word “voluntary” is a critical word, to which Mr. Petitti replied “that the original intention was to clarify the language and align the statute with the ruling in *DiNapoli*.”<sup>16</sup> Chairman Gagliardi ultimately advised that Staff redraft “the provisions, maintaining the voluntary/involuntary distinction, and to solicit comments.”<sup>17</sup> Further, Commissioner Hartnett noted that proposed subsection d.(3. gives protection that *DiNapoli* did not recognize, and Chairman Gagliardi noted “that it is possible to fix the problem

---

<sup>8</sup> 131 N.J. 626, 640 (1993) (citing *Santasiero v. Parsippany-Troy Hills Bd. Of Educ.*, 1984 S.L.D. 854, 879).

<sup>9</sup> New Jersey Law Revision Commission Meeting Minutes, *supra* note 1 (manuscript at 2).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> Memorandum from Mr. Vito Petitti, Esq., *supra* note 3 (manuscript at 3).

<sup>14</sup> New Jersey Law Revision Commission Meeting Minutes (Apr. 20, 2017) (on file with author).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

of disparate treatment – albeit not entirely – he asked whether it would be appropriate to adopt language probably intended by the Legislature.”<sup>18</sup> The Chairman then “advised Staff draft two versions of the recommendations for an upcoming meeting, which the Commission would release for comment.”<sup>19</sup>

The current Revised Draft Tentative Report incorporates the Commission’s advice in that it provides two alternatives – one with the original proposed drafted provisions, and the other with proposed subsections d.(1) and d.(3) consolidated. If the draft meets with Commission approval, Staff seeks authorization to release the Revised Tentative Report for comment.

---

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*