



## NEW JERSEY LAW REVISION COMMISSION

### **Draft Tentative Report Relating to Clarification of Tenure Issues**

**November 10, 2014**

The New Jersey Law Revision Commission is required to “[c]onduct a continuous examination of the general and permanent statutory law of this State and the judicial decisions construing it” and to propose to the Legislature revisions to the statutes to “remedy defects, reconcile conflicting provisions, clarify confusing language and eliminate redundant provisions.” *N.J.S. 1:12A-8*.

This Report is distributed to advise interested persons of the Commission's tentative recommendations and to notify them of the opportunity to submit comments. Comments should be received by the Commission no later than **January 30, 2015**.

The Commission will consider these comments before making its final recommendations to the Legislature. The Commission often substantially revises tentative recommendations as a result of the comments it receives. If you approve of the Report, please inform the Commission so that your approval can be considered along with other comments. Please send comments concerning this Report or direct any related inquiries, to:

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## Executive Summary

In July 2014, the Commission authorized work on a project to conduct research and possibly clarify the language of N.J.S. 18A:17-2, the statute by which certain New Jersey school employees obtain tenure. This project springs from application of the statute in three separate cases involving school secretaries attempting to retain tenure rights. In its current state, N.J.S. 18A:17-2 does not address the tenure rights of clerks, secretaries, and certain other non-teaching school employees in voluntary transfer and promotion situations.

The Commission is now considering a recommendation to revise the current statute in this area so as to clarify tenure issues as discussed below.

## Background

In July 2014, the Commission authorized work on a project to conduct research and possibly clarify the language of N.J.S. 18A:17-2, the statute by which certain New Jersey school employees obtain tenure. This project springs from application of the statute in three separate cases involving school secretaries attempting to retain tenure rights.

In the first case, *DiNapoli*, a secretary was found to have forfeited tenure rights when voluntarily reassigned to a separately tenurable, certificated position with the same employer. The new position is abolished after three years and she argues that she should be able to bump a non-tenured secretary to reacquire her old position.<sup>1</sup>

In the second case, *Given*, a tenured school district clerk accepted a separately tenurable secretary position and was subsequently involuntarily returned to her clerk position. She did not automatically obtain tenure as a secretary, but was found to have retained her tenure as a clerk.<sup>2</sup>

In the third case, *Colon-Serrano*, a tenured secretary was found to have forfeited tenure rights upon promotion to a non-tenurable, certificated position with the same employer.<sup>3</sup>

In its current state, N.J.S. 18A:17-2 does not address the tenure rights of secretaries upon promotion to certificated, separately tenurable positions with the same employer. The statute is also silent regarding the tenure rights of secretaries upon promotion to separately tenurable and non-certificated positions. Neither does the statute address the tenure rights of secretaries upon promotion to a non-tenurable, certificated position.

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<sup>1</sup> *DiNapoli v. Board of Education of the Township of Verona*, 434 N.J. Super. 233 (2014).

<sup>2</sup> *Given v. East Windsor Regional School District*, 1978 S.L.D. 43

<sup>3</sup> *Colon-Serrano v. Plainfield Bd. Of Educ.*, 2007 WL 4644775 (N.J. Adm.)

## Discussion

Only one recent New Jersey case cites *DiNapoli*, and regards the termination of a Newark police officer, to make the point that an agency's conclusions are reviewed de novo.<sup>4</sup> Two interesting scholarly articles refer to N.J.S. 18A:17-2, but are concerned chiefly with the tenure rights of teachers and school custodians.<sup>5</sup>

During the July Commission meeting, at which this project was first presented, it was pointed out that, as tenure rights in New Jersey expanded, the statutes were not always made consistent. In fact, although N.J.S. 18A:17-2 is silent on the subject of movement by employees to other positions, N.J.S. 18A:28-5 and -6, pertaining to the tenure of teaching staff members, contain language ostensibly calculated to address the various situations relevant to this project and may be of assistance.

For instance, N.J.S. 18A:28-5, titled Tenure of teaching staff members, contains the following language:

c. For purposes of this chapter, tenure in any of the administrative or supervisory positions enumerated herein shall accrue only by employment in that administrative or supervisory position. Tenure so accrued shall not extend to any other administrative or supervisory position and nothing herein shall limit or restrict tenure rights which were or may be acquired pursuant to N.J.S.18A:28-6 in a position in which the individual actually served.

Here, teachers are advised that tenure in a particular position is obtained only during employment in that position. N.J.S. 18A:28-6, titled Tenure upon transfer or promotion, also contains language that may be applicable to the Commission's work in this area:

a. Any such teaching staff member under tenure or eligible to obtain tenure under this chapter, who is transferred or promoted with his consent to another position covered by this chapter ... shall not obtain tenure in the new position until after ...

This section addresses what happens when a teacher is voluntarily transferred, followed by specific tenure requirements. N.J.S. 18A:17-2, had it contained similar language, might have helped avoid appellate review of the Commissioner's decision in *Given*, which featured a tenured clerk arguing that she immediately acquired tenure upon reassignment as a secretary. While it does not appear that either of the above passages would have helped clarify *DiNapoli* or *Colon-Serrano*, it may be possible to synthesize appropriate language from the respective decisions in those cases.

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<sup>4</sup> *In re Nance*, City of Newark, N.J. Super. Unpub. 2014 WL 3818677.

<sup>5</sup> Arnold Shep Cohen, Striking a Balance Between Teachers' Employment Rights and Professional Responsibilities, 154-JUL N.J. Law. 43 and Sanford R. Oxfeld, The Plight, Inter Alia, of Public School Custodians, 285-DEC N.J. Law. 27.

The Appendix below contains proposed additional provisions to N.J.S. 18:17-2, intended to resolve and clarify the issues raised in *DiNapoli* and other recent cases.

Subsection d.1. addresses the situation in *Given*, in which a tenured clerk voluntarily transferred to a new tenurable position, but was involuntarily returned to her original position before she could obtain tenure; she argued unsuccessfully that the tenure she acquired as a clerk immediately transferred upon reassignment as a secretary. This provision covers both voluntary and involuntary transfers and incorporates language from subsections a. and b. of N.J.S. 18A:17-2, which identifies those persons covered by the statute. It also features language from subsection a. of N.J.S. 18A:17-6, which identifies limitations on obtaining tenure in a new position.

Subsection d.2. addresses the situation in *DiNapoli*, in which a tenured employee voluntarily transferred to new tenurable position, and was found to have abandoned her previous tenured position. It also addresses *Colon-Serrano*, which featured a tenured employee who voluntarily transferred to new non-tenurable position, and was deemed to have relinquished the protection of her clerical tenure. This subsection incorporates language from the Court's decision in *DiNapoli*, which interpreted and applied N.J.S. 18:17-2, while protecting *involuntarily* transferred employees.<sup>6</sup>

### **Commission's Recommendation**

The Commission has identified potential revisions intended to clarify current New Jersey statute, N.J.S. 18A:17-2, regarding the movement or transfer of tenured clerical, secretarial, and other non-teaching employees, and now seeks comments from knowledgeable and interested individuals regarding this Draft Tentative Report.

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<sup>6</sup> See 434 N.J. Super. 239, "[T]he language of N.J.S.A. 18A:17-2 limits the retention of tenure to the time during which the employee holds her secretarial office, position or employment."

## Appendix—Proposed Changes to Existing New Jersey Statute

The text of 18A:17-2, with proposed revisions shown with underlining, is 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 subarticle B of article 2 of chapter 6 of this title.

d. For 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, he 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, retention of tenure is limited to the time during which the employee holds his office, position or employment.