#298-09 (OAL Decision: http://lawlibrary.rutgers.edu/oal/html/initial/edu7116-08_1.html)

ROBERT JEANNETTE,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE WEST ESSEX REGIONAL SCHOOL DISTRICT, ESSEX COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioner – formerly a non-tenured custodian in the respondent's district – appealed his termination from employment for failure to take a medical examination after being out of work on sick leave for more than four months. The Board contended that it was within its rights to require this examination under the circumstances, and petitioner's failure to submit to the exam constituted insubordination. The Board further argued that the Commissioner does not have jurisdiction over this matter, as it does not arise under the school laws.

The ALJ found that: the petitioner was employed as a non-tenured custodian, a position not governed by the provisions of *N.J.S.A.* 18A:16-2, which provides that a board of education may require an employee to undergo a physical exam; petitioner's employment was governed by the terms and conditions contained in the Collective Negotiations Agreement (CNA); pursuant to the CNA, custodians are contractual employees serving under renewable one year contracts, and may be dismissed for just cause in accordance with *N.J.S.A.* 18A:17-3; and petitioner's refusal to take the physical exam was insubordinate. The ALJ affirmed the action of the Board and ordered petitioner's employment terminated.

Upon independent review and consideration, the Commissioner rejected the Initial Decision, concurring with the respondent that petitioner's claim arises under the provisions of the CNA between the Board and the West Essex Custodian/Maintenance Association rather than under *N.J.S.A.* 18A:16-2. In so determining, the Commissioner additionally noted that the ALJ erroneously construed *N.J.S.A.* 18A:16-2 as applying solely to tenured employees, and that *N.J.S.A.* 18A:17-3 is inapplicable because petitioner was not a tenured employee. Accordingly, the Commissioner dismissed the petition as beyond the scope of the Commissioner's jurisdiction.

September 16, 2009

OAL DKT. NO. EDU 7116-08
AGENCY DKT. NO. 119-5/08

ROBERT JEANNETTE,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE WEST ESSEX REGIONAL SCHOOL DISTRICT, ESSEX COUNTY,	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have petitioner's exceptions and the reply thereto by the Board of Education (Board), both duly filed pursuant to *N.J.A.C.* 1:1-18.4.

In his exceptions, petitioner preliminarily observes that the Administrative Law Judge (ALJ) erred in improperly limiting the scope of *N.J.S.A.* 18A:16-2 to tenured employees, when the language of the statute contains no such limitation (Petitioner's Exceptions at 1-2); and in referencing two inapplicable statutes, *N.J.S.A.* 18A:17-3 – which governs acquisition of tenure by custodians and establishes the dismissal proceedings to which they are entitled once tenured – and *N.J.S.A.* 18A:6-5 *et al.* – which prohibits inquiry into a prospective employee's religious belief and which the ALJ likely meant as the equally inapplicable *N.J.S.A.* 18A:6-10 *et seq.*, the Tenure Employees Hearing Law (*Id*. at 2). Petitioner then contends – substantially recasting and reiterating the arguments of his post-hearing brief – that the ALJ erred in concluding that: 1) the district superintendent was authorized to order petitioner to undergo a medical examination, when *N.J.S.A.* 18A:16-2 clearly places such authority solely with the Board;

2) petitioner was insubordinate in refusing to take the required examination, when the superintendent's directive to do so was invalid on its face and petitioner nonetheless made good faith attempts at compliance; and 3) the Board did not act arbitrarily or unreasonably in terminating petitioner's employment on grounds of insubordination, when, in fact, the Board's conclusion that petitioner was guilty of insubordination was patently unreasonable under the circumstances. (*Id*. at 4-10) Finally, petitioner objects to the ALJ's statement (at 8) that petitioner had "other viable alternatives, such as submitting a rebuttal medical report," since, according to petitioner, the record contains no support for this assertion, and it would have been pointless in any event to obtain an additional report when the Board did not accept or believe the medical information petitioner had been providing all along. (*Id*. at 9)

In reply, the Board reiterates its stance that the Commissioner does not have jurisdiction over this matter, since it does not arise under the school laws. (Board's Reply at 1-4) The Board further asserts that the Initial Decision was correct in finding that the superintendent was authorized under the applicable collective agreement to compel petitioner to undergo a medical examination,[1] and that petitioner's refusal to do so constituted insubordination. (*Id*. at 4-5) Finally, the Board renews its contention before the OAL that – even if *N.J.S.A.* 18A:16-2 were applicable to this matter (which it is not) and the Commissioner did have jurisdiction to decide petitioner's claim (which she does not) – the Board nonetheless complied with the statute through its affirmation of the superintendent's action by conducting a hearing and subsequently voting to terminate petitioner's employment, and petitioner would nonetheless have no entitlement to the relief he seeks because, as a nontenured employee, he had no right to

[1] The Board notes that the ALJ did *not* make a finding, as suggested by petitioner on exception, that the superintendent was so authorized by *N.J.S.A.* 18A:16-2. (Board's Reply at 4)

re-employment upon expiration of his one-year contract on June 30, 2008 and he presented no evidence that he would have been able to return to work before that date. (*Id*. at 5-7)

Upon review and consideration, the Commissioner finds that she must reject the Initial Decision.

As a preliminary matter, the Commissioner notes that petitioner is correct in his assertions regarding both the ALJ's construction of *N.J.S.A.* 18A:16-2 as applicable solely to tenured employees – when the statute makes no such distinction – and the relevance to this matter of *N.J.S.A.* 18A:17-3 and *N.J.S.A.*18A:6-10 *et seq.* (incorrectly cited as *N.J.S.A.* 18A:6-5 *et al*.) – which pertain specifically to tenured employees, whereas petitioner is undisputedly nontenured.[2]

However, the Commissioner's primary concern with the Initial Decision is of a more fundamental nature. Although petitioner has attempted to cast his claim as a dispute under the school laws – and the ALJ has reviewed it without addressing the Board's consistent arguments to the contrary and despite the agency's notation of such arguments upon transmittal of this matter to the OAL – the Commissioner concurs with the Board that such claim, in fact, arises under neither *N.J.S.A.* 18A:16-2 and its implementing rules nor the arbitrary and unreasonable standard of *Kopera v. West Orange Bd. of Ed.* 60 *N.J. Super*. 288 (App. Div. 1960), but rather – as effectively recognized by the ALJ in her findings and conclusions on the merits – under the provisions of the Collective Negotiations Agreement (CNA) between the Board and the West Essex Custodian/Maintenance Association (Joint Exhibit O).

[2] The Commissioner additionally notes that the ALJ's summation of the parties' positions (at 6-7) is somewhat misleading, in that petitioner does not, as suggested, base his rejection of the superintendent's authority to order an exam under *N.J.S.A.* 18A:16-2 on the fact that petitioner was on medical leave when the order was given, nor does the Board base its argument that *N.J.S.A.* 18A:16-2 is inapplicable in this matter on petitioner's nontenured status.

The record before the Commissioner is abundantly clear that petitioner was not directed to undergo a medical examination as an employee causing concern because he showed signs of deviation from normal mental or physical health such that his fitness to serve safely and appropriately in the school environment was called into question – as *N.J.S.A.* 18A:16-2 contemplates on its face and has been construed by the courts;[3] rather, such directive plainly arose in furtherance of the Superintendent's attempt to verify, pursuant to Article 10A of the CNA, the legitimacy and scope of petitioner's claimed inability to work due to continuing illness, following what was at that point already a nearly four-month absence from employment under circumstances giving rise to a suspicion of abuse. It is likewise clear that the Board moved to terminate petitioner's employment based on a finding that his refusal to submit to the directed examination was an act of insubordination constituting good cause, pursuant to Article 2M of the CNA, for dismissal prior to the expiration of his individual employment contract.

In light of the above, the Commissioner finds that *N.J.S.A.* 18A:16-2 does not apply in this matter and that resolution of the parties' dispute necessarily turns on the extent of their respective rights, and the propriety of their respective actions, as employer and employee under a collectively negotiated agreement – determinations which the Commissioner of Education has no authority to make because such issues do not arise under the school laws notwithstanding that they occur in a school setting.

[3] See, for example, *Kochman v. Keansburg Bd. of Ed.*, 124 *N.J. Super*. 203, 212 (Ch. Div. 1973) and *Gish v. Bd. of Ed. of Paramus*, 145 *N.J. Super*. 96, 104 (App. Div. 1976), certification denied 74 *N.J.* 251 (1977), writ of certiorari denied 434 *U.S*. 879 (1977). Then as now, the statute pertained to "employees," not solely to teaching staff members, and to both physical and psychiatric exams.

Accordingly, the Initial Decision of the OAL – dismissing petitioner's claim on the merits – is rejected for the reasons herein set forth, and the petition of appeal is instead dismissed as beyond the scope of the Commissioner's jurisdiction.[4]

IT IS SO ORDERED.[5]

COMMISSIONER OF EDUCATION

Date of Decision: September 16, 2009
Date of Mailing: September 16, 2009

[4] In so holding, the Commissioner stresses that her rejection of the Initial Decision is based solely on jurisdictional grounds, and that she does not reach the ALJ's finding (at 7-8) that termination of petitioner's employment was authorized and warranted under the CNA.

[5] Pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1), Commissioner decisions are appealable to the Appellate Division of the Superior Court.