

#101-16 (OAL Decision: Not yet available online)

BRENDA MILLER, :
PETITIONER, :
V. : COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT : DECISION
OF THE CITY OF NEWARK, :
ESSEX COUNTY, :
RESPONDENT. :

SYNOPSIS

Petitioner – formerly employed in various secretarial/clerical positions with the respondent school district – challenged the District’s decision to terminate her employment on August 15, 2014, contending that she had acquired tenure in accordance with *N.J.S.A.* 18A:17-2 and that the termination violated her tenure and seniority rights. Further, petitioner alleged that the termination of her employment was carried out by an individual who is neither the State District Superintendent nor someone to whom that duty had been appropriately delegated. The District asserted that petitioner was an unclassified employee within a school district that adheres to the Civil Service Act (Act), and as such she was not entitled to tenure or seniority under the Tenure Act; rather, petitioner was afforded only the rights conferred by the Act. The respondent filed a motion for summary decision.

The ALJ found, *inter alia*, that: there is no genuine issue of material fact in this matter, and the case is ripe for summary decision; there is no dispute that the District has opted to be a Civil Service jurisdiction covered by the Act, *N.J.S.A.* 11A:1-1 *et seq.*; petitioner served under several Civil Service clerical titles during her employment with the District; in June 2012, petitioner’s position was reclassified from a Secretarial Assistant-Confidential to the unclassified titled of Confidential Assistant, and she was advised that as a result of the transfer, “there was a change in (her) employment status from non-instructional (governed by NJ Civil Service Commission) to unaffiliated; petitioner was also advised that her employment record would reflect a resignation from her civil service title effective June 30, 2012, and that she would no longer be afforded Civil Service rights; *N.J.S.A.* 18A:28-2 provides that no person who is in the classified service of the civil service of the state pursuant to Title 11 shall be affected by any provisions of Chapter 28 of Title 18A; conversely, it appears that if someone such as petitioner is not in the classified service, she is then subject to Title 18A. The ALJ concluded that the District is not entitled to summary decision on the claim that the Civil Service Commission (CSC) alone has jurisdiction to govern petitioner’s rights; rather, where petitioner’s rights under Title 11A ended when the District made her an unclassified employee outside the jurisdiction of the CSC, she then became entitled to rights under Title 18A consistent with *N.J.S.A.* 18A:28-2. Accordingly, the ALJ granted summary decision in favor of petitioner and ordered that she be reinstated to a full-time position or assignment as appropriate to her tenure, together with back pay and benefits.

Upon comprehensive review, the Commissioner rejected the Initial Decision, finding, *inter alia*, that petitioner could not have earned tenure under *N.J.S.A.* 18A:17-2 because she did not satisfy the conditions of the statute, as she was employed in her unclassified title for less than the three years required to accrue tenure; accordingly, she could not have accrued tenure under Title 18A. The matter was remanded to the OAL for adjudication of Count Two of the petition, regarding whether petitioner’s termination was carried out by an appropriately delegated individual.

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.

March 8, 2016

OAL DKT. NO. EDU 15475-14
AGENCY DKT. NO. 301-10/14

BRENDA MILLER, :
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 PETITIONER, :
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 V. : COMMISSIONER OF EDUCATION
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 STATE-OPERATED SCHOOL DISTRICT : DECISION
 OF THE CITY OF NEWARK, :
 ESSEX 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 State-Operated School District of the City of Newark (District) and petitioner’s reply thereto.

In this action, petitioner challenges the District’s decision to terminate her employment on August 15, 2014, contending that she had earned tenure in her secretarial or clerical position in accordance with *N.J.S.A.* 18A:17-2. Petitioner also alleges – in Count Two of the petition – that the individual who terminated her employment had not been appropriately delegated the authority to make personnel determinations on behalf of the State District Superintendent. Count Two was not briefed by the parties or addressed in the Initial Decision.

By way of background, petitioner was hired by the District in May 1998 as a Provisional Clerk, Typing. As the District is a Civil Service jurisdiction covered by the Civil Service Act, *N.J.S.A.* 11A:1-1 *et seq.*,¹ the Civil Service Commission (CSC) granted her

¹ Pursuant to *N.J.S.A.* 11A:3-1, the Civil Service Act creates three classifications of employees: career service, senior executive service, and unclassified service. *N.J.S.A.* 11A:3-5 provides that “[t]he political subdivision unclassified service shall not be subject to the provisions of this title unless otherwise specified.” Specifically,

permanent status as a Clerk 1 in January 2000. Petitioner held several other titles – including Technical Assistant 3 Provisional, Senior Clerk, and Secretarial Assistant Typing – through June 2012. Effective July 1, 2012, petitioner’s position was reclassified from a classified position to the unclassified title of Confidential Assistant, and petitioner was informed by the District that she would no longer be afforded Civil Service rights. The District terminated petitioner’s employment on August 15, 2014.

Petitioner filed an appeal of her termination with the Commissioner.² Subsequently, the District filed a motion for summary decision. Upon review, the Administrative Law Judge (ALJ) denied the District’s motion, granted summary judgment in favor of petitioner, and ordered the District to reinstate petitioner to a full-time position as appropriate to her tenure.

In its exceptions, the District argues that the Administrative Law Judge (ALJ) erred in finding that the Commissioner has jurisdiction over the petitioner’s claims because, as a Civil Service employee, the CSC has exclusive jurisdiction over her claims. (District’s exceptions at 4-7). Specifically, the District argues that employees who fall under Civil Service and those who are tenured pursuant to Title 18A have separate disciplinary paths. (*Id.* at 6-7). The District emphasizes that by allowing petitioner to seek an appeal with the CSC and a tenure hearing from the Commissioner, petitioner is being afforded two bites at the apple. (*Id.* at 4-5).

Further, the District contends that the ALJ erred in finding that any secretarial or clerical position is eligible for tenure. (*Id.* at 8-9). The District explains that although

“teaching staff, as defined in N.J.S.A. 18A:1-1, in the public schools and county superintendants and members and business managers of boards of education” are included in the unclassified service. *N.J.S.A.* 11A:3-5.

² Petitioner also appealed her termination with the CSC. The CSC determined that petitioner was not entitled to an appeal before the CSC because it does not have jurisdiction to review the termination of an unclassified employee, in accordance with *N.J.S.A.* 11A:2-6 and *N.J.A.C.* 4A:2-2.1. Petitioner appealed the CSC decision to the Appellate Division, which is currently pending.

N.J.S.A. 18A:17-2 provides tenure to any person holding any secretarial or clerical position in a school district after three consecutive years of employment, employees are not eligible to receive double tenure protections under both Title 11A and Title 18A because *N.J.S.A.* 18A:28-2 excludes persons who are in the classified service of the civil service from obtaining tenure under Title 18A. (*Id.* at 9). Additionally, the District argues that the ALJ erred when he found that petitioner became eligible for tenure when her Civil Service rights ended. (*Id.* at 10-13). The District maintains that even though petitioner's Civil Service rights ended when she resigned from her classified title, she remained in a school district that was exclusively governed by the CSC. (*Id.* at 11).

Finally, the District contends that the ALJ erred in finding that petitioner held tenure in a secretarial position when her title was Confidential Assistant. (*Id.* at 14-17). The District points out that the Initial Decision fails to address when and in what capacity petitioner obtained tenure rights. (*Id.* at 14). Alternatively, the District argues that "even if the extinguishing of Title 11A tenure rights allowed [petitioner] to begin accruing tenure rights under Title 18A, she would not have achieved tenure in this position until three years after June 30, 2012, or July 1, 2015," and petitioner was terminated one year shy of the statutory minimum set forth in *N.J.S.A.* 18A:17-2. (*Id.* at 15).

In reply, petitioner argues that the ALJ properly found that petitioner acquired tenure pursuant to *N.J.S.A.* 18A:17-2. (Petitioner's reply at 7). As tenure laws are construed in favor of employees, petitioner argues that Title 11A did not apply to her as she was unclassified, and that she met the requirements of *N.J.S.A.* 18A:17-2. (*Id.* at 7-12). Specifically, petitioner reiterates that there is no doubt that she acquired tenure under *N.J.S.A.* 18A:17-2(b) because she worked in a secretarial or clerical position since she received a permanent status appointment on

January 1, 2000, more than a decade prior to her termination. (*Id.* at 12). Petitioner contends that there are no exceptions to *N.J.S.A.* 18A:17-2 and “nothing which states that individuals employed in a school district who are able to attain tenure under Civil Service laws are more limited in their right to acquire tenure than those school district employees who can acquire tenure under the education laws.” (*Id.* at 12). Petitioner also argues that her job duties, rather than her title, entitle her to tenure under *N.J.S.A.* 18A:17-2. (*Id.* at 6). However, if the District is raising this issue now, then petitioner contends that the matter should be remanded to the OAL for a factual hearing as to petitioner’s job duties and what position, if any, petitioner is entitled to upon reinstatement. (*Id.* at 5-7).

As a preliminary matter, the Commissioner finds that pursuant to *N.J.S.A.* 18A:6-9, the Commissioner has jurisdiction over controversies and disputes arising under New Jersey’s school laws. Accordingly, the Commissioner has jurisdiction to hear the claims alleged in the petition as they arise under Title 18A.

Upon a comprehensive review of the record in this matter, the Commissioner agrees with the District that petitioner could not have earned tenure under *N.J.S.A.* 18A:17-2 because she did not satisfy the conditions of the statute. Pursuant to *N.J.S.A.* 18A:17-2(b), tenure is granted to “any person holding any secretarial or clerical position or employment under a board of education” after “the expiration of a period of employment of three consecutive calendar years in the district.” However, pursuant to *N.J.S.A.* 18A:28-2, “[n]o person, who is in the classified service of the civil service of the state pursuant to Title 11, Civil Service, of the Revised Statutes, shall be affected by any provisions of this chapter.” Petitioner was employed in a classified Civil Service title from the beginning of her employment with the District through June 30, 2012. Accordingly, during that period, petitioner could not have accrued tenure under

Title 18A because she was in the classified service, and – pursuant to N.J.S.A. 18A:28-2 – Title 18A’s tenure provisions did not apply to her.

Even if petitioner became eligible for tenure under Title 18A when she became an unclassified employee – an issue which the Commissioner need not reach – she did not accrue tenure because she was only employed in that position from July 1, 2012 through August 15, 2014, approximately one year less than the three years required under N.J.S.A. 18A:17-2. Petitioner is not permitted to combine the time she worked in several classified titles to the time she worked as a Confidential Assistant. *See Diana Giardina v. Board of Education of the Township of Pequannock, Morris County, Commissioner Decision No. 124-05, decided April 4, 2005, at 2* (finding that petitioner “may not combine the time she was employed in the position of office aide to the time she was employed as a ten-month secretary for purposes of accruing tenure in the position of secretary, nor may she tack the time she was employed as a ten-month secretary to the time she was employed as an office aide for the purpose of accruing tenure in a clerical position”).

Accordingly – for the reasons expressed herein – the Initial Decision is rejected and the matter is hereby remanded to the OAL for adjudication of Count Two of the petition.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: March 8, 2016

Date of Mailing: March 9, 2016