

STEVEN BALDWIN, :
 :
 PETITIONER, : COMMISSIONER OF EDUCATION
 :
 V. : DECISION
 :
 BOARD OF EDUCATION OF THE :
 TOWN OF WEST NEW YORK, :
 HUDSON COUNTY, :
 :
 RESPONDENT. :

SYNOPSIS

Petitioner – who had been employed as Head Custodian in the respondent Board’s school district since May 2004 – contended that his tenure rights were violated when he was reassigned to the position of Second Shift Custodian in January 2016, and his salary was reduced by the elimination of the additional salary/stipend he had previously received as Head Custodian. The Board denied that its action violated petitioner’s tenure rights. The parties filed opposing motions for summary decision.

The ALJ found, *inter alia*, that: there are no material facts at issue, and the matter is ripe for summary decision; the Board’s contention that petitioner is barred from seeking relief from the Commissioner because he failed to file a grievance regarding his reduction in salary is without merit, as is the Board’s argument that the petition is time-barred; petitioner in this matter has tenure and the rights associated with that status, which include a right not to suffer a reduction in compensation unless guilty of the offenses statutorily defined in *N.J.S.A. 18A:17-3*; the “stipend” at issue here was not provided for services that were “extra-curricular” or “extra duty”, but rather were part and parcel of petitioner’s primary custodial duties; the “stipend” here was not distinguished from his base pay in the annual notices provided to petitioner of his salary for the next school year, and pension contributions were deducted based on his total compensation. The ALJ concluded that the contractual designation of a “stipend” does not override the actual treatment by the Board of the amount of money so designated in the contract. Accordingly, the petitioner’s motion for summary decision was granted and the Board’s cross-motion was denied. The ALJ ordered the Board to restore petitioner’s salary to what he was receiving before his reassignment, with the stipulation that he shall receive that difference only until such time as the salary designated for custodians surpasses the current level designated for Head Custodians, including the so-called “stipend”.

Upon review, the Commissioner concurred with the ALJ’s findings and conclusions, and adopted the Initial Decision of the OAL as the final decision in this matter.

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.

OAL DKT. NO. EDU 8132-16
AGENCY DKT. NO. 109-4/16

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The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. The parties did not file exceptions to the Initial Decision.

Upon such review, the Commissioner adopts the Administrative Law Judge's recommended decision for the reasons expressed therein. Accordingly, petitioner's motion for summary decision is granted and respondent's cross-motion for summary decision is denied, consistent with the terms set forth in the Initial Decision.¹

IT IS SO ORDERED.²

ACTING COMMISSIONER OF EDUCATION

Date of Decision: June 5, 2017

Date of Mailing: June 6, 2017

¹ The Board shall restore to petitioner the salary he has not received since his reassignment from Head Custodian to Second Shift Custodian, *i.e.*, the difference between the Head Custodian salary – including the “stipend” – and the custodian salary. Furthermore, petitioner shall only receive the difference in salary until such time as the salary designated for custodian surpasses the current salary for Head Custodian (inclusive of the “stipend”).

² This decision may be appealed to the Superior Court, Appellate Division, pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1).



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

STEVEN BALDWIN,

Petitioner,

v.

**BOARD OF EDUCATION OF THE TOWN
OF WEST NEW YORK, HUDSON COUNTY,**

Respondent.

OAL DKT. NO. EDU 8132-16

AGENCY DKT. NO. 109-4/16

George T. Syrek, Esq., for petitioner (Bucceri & Pincus, attorneys)

Michael I. Goldman, Esq., for respondent (Florio, Perrucci, Steinhardt & Fader, attorneys)

Record Closed: February 23, 2017

Decided: April 19, 2017

BEFORE **JEFF S. MASIN**, ALJ t/a:

Steven Baldwin filed a Verified Petition on April 11, 2016, with the Commissioner of Education in which he complained that the Board of Education of West New York reduced his salary, in violation of his tenure rights, as guaranteed by N.J.S.A. 18A:17-3. According to the Petition, Baldwin was employed by the Board of Education as a Head Custodian, commencing on May 1, 2004. On January 14, 2016, he was notified that he would be reassigned to the position of Second Shift Custodian, a position he began working on January 15, 2016. According to his Petition, as a Head Custodian Mr. Baldwin received additional salary/stipend above that he would receive as a custodian. When he was reassigned to the position of Second Shift Custodian his salary was

reduced by the elimination of the additional salary/stipend. It is this reduction from which he seeks relief.

The Board of Education denied that its action violated Mr. Baldwin's tenure rights. The Commissioner transferred the contested case to the Office of Administrative Law on June 2, 2016. On December 5, 2016, petitioner Baldwin filed a motion for summary decision. The Board filed its own motion for summary decision on that date as well. The case was assigned to an administrative law judge, however, due to the judge's extensive calendar the matter was reassigned to this judge, sitting on recall, on March 15, 2017, for the purpose of resolving the cross-motions for summary decision. The parties each responded to the cross-motions and then filed replies. In addition, the parties filed a Stipulation of Facts and a Supplemental Stipulation of Facts. This Supplemental Stipulation was received on February 23, 2017, at which time the record closed for the purposes of determination of the motion.

The lengthy Stipulation of Facts, consisting of twenty-one numbered items with attached exhibits, and the Supplemental Stipulation of Facts, consisting of four additional numbered items and exhibits, are incorporated in this decision as exhibits. Additionally, **each of the numbered stipulations is adopted herein as FINDINGS OF FACT** as if recited in full.

According to the stipulated facts, Mr. Baldwin was employed by the Board beginning May 1, 2004 through June 30, 2004, as a Head Custodian. Thereafter, he was employed by the Board in each of the school years from 2004-2005 through 2015-2016. In each of the years he was again employed as a Head Custodian. The parties agree that Mr. Baldwin held tenure with the Board. Additionally, they agree that according to the contractual agreement between the Board and the West New York Education Association, "Individuals assigned to the position of Head Custodian received a stipend in addition to their annual salary." Exhibit J-20, which is a copy of the Agreement for the period July 1, 2012 through June 30, 2015, contains a provision that provides for a "Head Custodian stipend," which is designated at different levels for "High School" and "Elementary." The Stipulation also identifies a series of letters sent by the Board to Mr. Baldwin during various years which simply advise him that his salary for

the year identified in the letter is a specific dollar figure. As an example, the letter sent to Baldwin on April 30, 2014, reads as follows: “Dear Stephen Baldwin: This is to inform you that your salary for the 2014-2015 school year is \$41,132.”

The parties agree that for the 2015-16 school year Baldwin's base salary was \$35,042, plus \$1,350, an additional amount designated in the Agreement as a “Black Seal” “stipend” because he has a boiler license. In addition, the Head Custodian “stipend” applicable for him was \$4,740.

On January 14, 2016, Baldwin was advised of his reassignment from Head Custodian to Second Shift Custodian at PS#4. His salary was then reduced by the “Head Custodian stipend” in the amount of \$4,740 (pro rata). Mr. Baldwin continues to be employed as a custodian by the Board for the 2016-2017 school year, with a base salary of \$35,042, plus the boiler license “stipend.” The applicable head custodian “stipend” for 2016-2017 is \$4,740.³ The Supplemental Stipulation of Facts provides that

1. The contractual stipend paid to Head Custodians employed by the respondent is included and paid as part of their regular salary check. There is no separate check for the Head Custodian contractual stipend.
2. Standard deductions and withholdings such as taxes and pension contributions, are based on the full amount of the salary checks paid to Head Custodians. The full amount includes base salary plus Head Custodian contractual stipend.

It is also noted that the petitioner did not receive a salary notice for the 2015-2016 school year.

In response to the petitioner’s motion for summary decision, the Board initially argues that Mr. Baldwin failed to utilize the administrative remedies provided under the collective bargaining agreement between the Board and the Education Association. Specifically, the Board points to Article IV, subsection C, which reads as follows

³The Board’s notice to Baldwin of January 11, 2017, states that his salary “effective June 1, 2016 to March 30, 2017 will be “Step 16—\$38,863.00.” This amount does not reflect a salary that includes the “so-called “Head Custodian stipend.”

No employee shall be disciplined, reprimanded, reduced in rank or compensation or deprived of any professional opportunity without just cause. Any such action asserted by the board, or agent or representative thereof, shall be subject to the grievance procedure set forth in Article 3.

As Mr. Baldwin never filed any grievance concerning the reduction in salary, he is barred from seeking relief from the Commissioner. In addition, the Board contends that the claimant is time-barred, because Article 3 of the Agreement provides that such a grievance must be filed within thirty school days from the event or condition, or from the time that the person knew or should have known about same. As no petition has ever been filed, Mr. Baldwin has waived his right to seek relief relating to the alleged claim.

In addition to these grounds, the Board contends that if the Commissioner asserts jurisdiction to decide this matter despite the failure of the petitioner to utilize the grievance procedure, the matter must be dismissed and the Board granted summary decision. This result is dictated because the Head Custodian stipend is not salary and therefore is not subject to the restriction on the reduction of salary contained in N.J.S.A. 18A:17-3.

In responding to the Board's motion, Mr. Baldwin contends that, since tenure rights are statutory, an allegation of a violation of tenure rights falls within the statutory jurisdiction of the Commissioner of Education. The grievance procedure contained in the collective bargaining agreement is inapplicable to the dispute. As the Verified Petition was filed with Commissioner within the required ninety days following the Board's action, it was timely filed. Finally, Baldwin asserts that the Board paid him a single salary, one which contained the Head Custodian "stipend" and from which deductions, including pension deductions, were made. Under applicable case law, the petitioner's right to receive that full salary without reduction unless such be based upon statutorily defined grounds is protected by the tenure statute.

N.J.S.A. 18A:6-9 provides that the Commissioner has jurisdiction over disputes regarding "Controversies and disputes arising under the school laws." It has been held in a number of cases that the Commissioner does not have jurisdiction over contractual

disputes. Board of Education, East Brunswick Township v. Township Council in East Brunswick, 48 N.J. 94, 102 (1966). Decisions involving disputes concerning non-tenured employees which arise under provisions of contracts and which do not involve “statutory educational entitlement” have been held to be outside the Commissioner’s jurisdiction. However in the present matter, while the contractual provision cited by the Board states that an employee asserting that he has been reduced in compensation shall present a grievance, the employee here has tenure and the rights associated with that status are protected by a statute which clearly involves an “educational entitlement.” Indeed, N.J.S.A. 18A:17-3 provides that “every public school janitor . . . hold his office, position or employment under tenure during good behavior and efficiency and shall not be dismissed or suspended reduce compensation . . . or except for neglect, misbehavior or other offense. . . .” Mr. Baldwin’s position with the Board, whether characterized as “Head Custodian” or merely as “custodian,” most assuredly falls within the definition of “janitor.” Thus, his right not to suffer a reduction in compensation unless guilty of the statutorily described offenses is protected by statute. The Commissioner most assuredly has jurisdiction over matters arising under the Tenure Act. While the Legislature has determined to provide for arbitration as the means for resolving at least one aspect of the protections accorded by the tenure, that is, the removal of tenure, at present, matters involving the protections associated with the holding of tenure, such as the right to certain positions or the right to be protected against the reduction of salary, have not been the subject of legislative action reassigning the jurisdiction to resolve such disputes. No authority has been cited by the Board suggesting the ability of parties to a negotiated contract between the Board of Education and an Education Association to oust the Commissioner from jurisdiction over a “dispute arising under the school laws.” The rights accorded by the Tenure Act, and the protections thereunder, involve matters of educational expertise which absent some other legislative directions, are within the special expertise of the Commissioner. The Tenure Act defines the specific grounds which allow for reduction of compensation for a tenured employee such as a janitor. The collective bargaining agreement uses different language to describe the grounds upon which such action may be taken. While the contractual “just cause” may well encompass the statutory terminology of “during good behavior . . . neglect, misbehavior or other offense,” it is entirely conceivable that

the contractual term could incorporate conduct and actions falling outside the appropriate definition of the statutory terms. Therefore, it appears that it is for the Commissioner and not an arbitrator to determine whether a tenured janitor may suffer a reduction in compensation that is otherwise protected by tenure rights. Therefore, the Board's application to dismiss the matter for failure to utilize the grievance procedure is **DENIED**.⁴ Further, I **FIND** that the Petition was filed with the Commissioner in a timely manner.

Petitioner moves for summary decision based upon his tenured status as a custodian and his contention that the elimination of the money he was paid while serving as a Head Custodian is money protected from reduction due to that tenured status. All those holding the position of "janitor," regardless of how the position is styled, come within the statutory protection. In Barnes, et al. v. Bd. of Ed., City of Jersey City, 85 N.J. Super. 42, 45-46 (App. Div. 1964), certif. den. 43 N.J. 450 (1964), the court noted

It is appellant's contention that the statutory coverage does not extend to the entire janitorial and custodial staff but is limited to the positions specified. Thus, appellant argues that an assistant janitorial supervisor is not covered, nor utility men, nor a groundskeeper.

The court rejected this approach

Our consideration of the statutes in the light of the principle of liberal construction satisfies us that the Legislature used the terms janitor, custodian, etc., in a generic sense with the intent to include all janitorial and custodial employees.

Thus, petitioner does not argue that he had tenure in a position of Head Custodian, but that as a custodian his tenure right protected him from having his compensation reduced without cause as defined by the statute. The Board's contention, however, is that the additional money petitioner earned while acting as a Head Custodian is not part of that compensation protected by the petitioner's tenured status as a janitor.

⁴Of course, no arbitration of this dispute has occurred, so there is no concern that resort to the Commissioner is providing the petitioner with a second chance to avoid the reduction. No issue of collateral estoppel, or any concern about conflicting decisions, affects this case.

In Reinertsen v. Bd. of Ed., Tp. of East Brunswick, [www/libweb/collections/oal/final/edu06574-07.pdf](http://www.libweb/collections/oal/final/edu06574-07.pdf), the administrative law judge discussed a similar contention that money paid to Reinertsen as a head custodian was a stipend, and not protected by his tenured status.

the petitioner has stated that this stipend was actually part of his base salary and was subject to pension payments. (Petitioner's letter brief in opposition to Respondent's Motion, Feb. 12, 1998). If this is shown to be correct, then the additional money is properly included as part of petitioner's compensation, and in order to be reduced the Board of Education must comply with the requirements of N.J.S.A. 18A:17-3 (reduction in compensation allowed only as the result of a reduction in force, or for misbehavior, neglect or other offense) and N.J.S.A. 18A:6-9 et seq. (hearing with the appropriate due process). The Board did not so comply.

The Board of Education's argument that the additional money was merely a stipend must fail. A stipend is more closely associated with compensation to employees providing additional services than those normally included within their regular employment duties. For example, a teacher who doubles as a coach of a school's sports team or as a yearbook editor/supervisor is often paid by way of stipend. In these circumstances, the money is not considered part of the teacher's salary and is not subject to pension payments. . . . the petitioner in the present case was provided additional compensation for services directly related to his primary employment as a custodian. . . . the petitioner claims that the extra compensation was subject to pension payments. Pursuant to the Teachers' Pension and Annuity Fund Law, N.J.S.A. 18A:66-1 et seq., pension payments are deducted from only "salary" of all employees who are members of the fund. See N.J.S.A. 18A:66-107(a). Since it is found that the "stipend" was subject to pension payments, the money should be properly regarded as salary. Any reduction of this salary cannot be imposed by the Board of Education upon the petitioner except for neglect, misbehavior or other offense, or reduction in force, and only then after a hearing. N.J.S.A. 18A:17-3.

The Commissioner affirmed the judge's decision. Here too, according to the stipulated facts, standard deductions, including pension contributions, were made based upon the "full amount of the salary check paid to Head Custodians. The full amount includes base salary plus Head Custodian contractual stipend." And the Board made no distinction in

its annual letters to Baldwin announcing his compensation for the coming year between the base salary and the stipend.

The Board attempts to distinguish Reinertsen because there is no mention in that decision of any collective bargaining agreement which, as here, sets out a stipend for the Head Custodian position.⁵ However, as Judge Reback noted in Reinertsen, and as here, this “stipend” is not paid for activities that are unrelated to or outside of Baldwin’s “primary employment as a custodian” and pension deductions were taken from the entire compensation, not only from the “base salary.” The letters noticing Baldwin as to the compensation refer only to “salary” and do not separate out from that term, the so-called “stipend.” While it is unclear whether there was actually a contract in Reinertsen that established the “stipend,” the existence of the agreement here does not support a different outcome from that in Reinertsen.

The Board relies on two cases. Schipman and Zeitz v. Piscataway Twp. Bd. of Ed., 1989 S.L.D. 2010 (May 25, 1989) is not helpful, for the claim there was of tenure in a janitorial supervisor position, but here petitioner does not assert that he has tenure as a “Head Custodian,” but only as a custodian. He claims that the salary he received is protected from reduction without resort to the provisions of the statute due to his “custodian” tenure, not through some claim based upon his being able to maintain himself through tenure as a Head Custodian. Dignan v. Bd. of Ed., Rumson-Fair Haven Regional School Dist., 1971 S.L.D. 336, aff’d. 1974 S.L.D. 1376 (State Board of Education); aff’d. 1975 S.L.D. 1083 (App. Div.) involved a claim regarding an extra-curricular assignment as a faculty advisor. The decision determined that there was no tenure protection for such extra duty assignments. Again, here, Baldwin’s work as a Head Custodian was not “extra-curricular,” was not “extra duty,” but was a part of his “primary employment as a custodian.” Neither of these cases affects the weight to be given here to the Reinertsen decision.

Based upon the stipulated facts, I **FIND** that Mr. Baldwin was for many years assigned as a Head Custodian and was paid a salary that included as a part thereof,

⁵The initial decision refers to a “pay schedule.”

what the agreement between the Board and the Education Association referred to as a stipend for the Head Custodian position. The Board provided notice yearly to Baldwin of the “salary” to be paid to him for the next school year, without distinguishing between portions of that “salary” such as “base pay” and “stipend.” The Board deducted pension contributions from this “salary,” again without carving out from that from which said contributions were taken any amount designated as “stipend” or otherwise. The Board determined in January 2016, that Baldwin would be reassigned to a position as Second Shift Custodian PS#4. When he was reassigned, his “salary” was reduced by an amount equal to the “Head Custodian Stipend,” pro-rated from \$4,740. The Board did so without resorting to the grounds or the process provided in N.J.S.A. 18A:17-3 for reduction in compensation of a tenured “janitor.” (“neglect, misbehavior or other offense”).

I **CONCLUDE** that the Board’s action cannot stand. The contractual designation of a “stipend” does not override the actual treatment by the Board of the amount of money so designated in the contract. Clearly, the case law, Reinertsen, supra, existing at the time that Baldwin was employed by the Board as a Head Custodian, May 1, 2004, and thereafter, taught that a stipend was something other than what Baldwin was given and was intended for services unlike those he provided, services that were neither “extra-curricular” nor “extra duty,” but were instead part and parcel of his “primary” custodial duties.

Conclusion and Order

I **CONCLUDE** that the petitioner’s motion for summary decision is **GRANTED** and the respondent’s cross-motion for summary decision is **DENIED**. **IT IS HEREBY ORDERED** that the Board shall restore to Mr. Baldwin such salary as he has not received since his reassignment, the difference between the custodian salary and the Head Custodian salary, including the so-called “stipend.” However, I agree with the Board that Baldwin is not entitled to receive the difference between the salary designated for a custodian and that for a Head Custodian indefinitely. He shall receive that difference until such time as the salary designated for custodians surpasses the

current level designated for Head Custodians, including the so-called "stipend." See Potocki v. Bd. of Ed. of the Princeton Reg' Sch. Dist., <http://www.libweb/collections/oal/final/edu06574-07.pdf>.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.



April 19, 2017
DATE

JEFF S. MASIN, ALJ t/a

Date Received at Agency:

4/19/17

Date Mailed to Parties:
mph

4/19/17

EXHIBITS

Joint Exhibits

- J-A Stipulation of Facts, with attached J-1 through J-22
- J-B Supplemental Stipulation of Facts, with attached J-23
- J-C Agreement between West New York Board of Education and West New York Education Association, July 1, 2012 through June 30, 2015

For petitioner

None

For Respondent

- R-1 Certification of Allan C. Roth, Esq.
- R-2 Certification of Michael I. Goldman, Esq.