

**CLAUDE WRIGHT, JR., AND EAST
ORANGE PERSONNEL ASSOCIATION,**

Petitioners,

v.

**EAST ORANGE BOARD OF EDUCATION,
ESSEX COUNTY,**

Respondent.

Decided July 13, 1982

Initial Decision

SYNOPSIS

Petitioner, a janitor employed by respondent Board of Education, alleged that the Board had improperly terminated his employment violating his tenure status acquired under a negotiated agreement. The Board contented that petitioner, who has been reemployed by fixed term contracts, had not attained tenure.

The administrative law judge assigned to the case concluded that the Board had violated petitioner's tenure rights. The judge found that the labor contract between the Board and the Personnel Association afforded janitors tenure after three consecutive years of employment under fixed contracts term. Accordingly, the Board was ordered to reinstate petitioner.

Barry A. Aisenstock, Esq. for petitioners (Rothbard, Harris & Oxfeld, attorneys)

Melvin Randall, Esq. for respondent (Love & Randall, attorneys)

CAMPBELL, ALJ:

This is an action for reinstatement of Claude Wright, Jr., as a custodian in the employ of the East Orange Board of Education.

Petitioner alleges he enjoyed a tenure status and was terminated in violation of tenure rights. Whether this is so is the issue to be tried. The Board denies petitioner attained tenure and, therefore, it could not have violated his tenure rights.

The matter was joined before the Commissioner of Education and transmitted to the Office of Administrative Law as a contested case,

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pursuant to *N.J.S.A.* 52:14F-1 *et seq.* Hearing commenced on May 3, 1982, at the Office of Administrative Law, Newark, New Jersey. Petitioner presented documents, which were entered in evidence by consent, and rested. The Board called petitioner. On conclusion of direct examination, a conference of counsel was held. A joint stipulation of facts was produced. Petitioner was directed to move for summary judgment because no essential facts were in dispute. A schedule of brief submissions was established. The record closed on June 2, 1982, with receipt of respondent's brief in opposition to motion for summary judgment.

For the reasons set forth below, I conclude that petitioner's motion for summary judgment must be granted and the Board's action terminating his employment reversed.

I.

Petitioner was hired as a custodial employee by the Board, effective October 5, 1977. During his employment, he was part of a group covered by a labor agreement between the majority representative and the Board. Although the majority representative changed, contract language pertinent to this case did not. The pertinent article states that all members of the bargaining unit shall receive tenure after three years of employment.

Petitioner's employment was under contract for fixed periods not in excess of 12 months. The Board gave notice on or about May 20, 1981, that his employment would not be continued in the 1981-82 school year.

II.

Petitioner contends that he acquired tenure rights and they were violated. *N.J.S.A.* 18A:17-3 sets forth the requirements for acquisition of tenure by a janitor or custodian. It states,

Every public school janitor of a school district shall, unless he is appointed for a fixed term, hold office, position or employment under tenure during good behavior and efficiency and shall not be dismissed or suspended or reduced in compensation, except as the result of the reduction of the number of janitors in the district made in accordance with the provisions of this title or 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. [Section 18A:6-8 *et seq.*]

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Thus a janitor employed without fixed term can gain tenure immediately upon beginning employment.

The labor agreements in effect between the Board and the majority representative at all pertinent times contain an article, presently XIII, which states, "All members of the bargaining unit shall receive tenure after three (3) years of employment."

Petitioner argues the Board would now disavow that which it legally negotiated. *State of New Jersey v. State Supervisory Employees Association*, 78 *N.J.* 54 (1978), clearly holds that a public employer and a majority representative are free to negotiate terms and conditions of public employment which have not been set by specific statute or regulation. In refining that holding, the Supreme Court found that where there is a scope within a statute that allows of negotiation, the parties are free to negotiate within that scope.

According to petitioner, an analysis of *N.J.S.A.* 18A:17-3 shows that the maximum benefit to be gained by janitorial employees would be tenure and the minimum benefit would be denial of tenure based upon appointment for a fixed term. This is the scope within which the parties have a right to negotiate. The labor agreements do not go beyond the limit of statute. The majority representative has obtained something better than the minimum allowed by statute for the bargaining unit.

The Board has a right to give fixed appointments up to the completion of three years of employment. In that way, an employee who has not measured up to standards may be removed by the Board. This can be done either by a denial of the fourth contract or by termination in accordance with the termination clause of the individual employment contract.

On or about May 20, 1980, the Board entered into a contract with petitioner. Prior to that time, the Board had furnished petitioner with notices of employment. By issuing a fourth contract for fixed term, the Board subverted the entitlement gained for petitioner through collective bargaining.

Petitioner further contends the Board's action violated *N.J.S.A.* 34:13A-5.2 which states, in pertinent part,

Representatives designated or selected by public employees for the purposes of collective negotiation by the majority of the employees in a unit appropriate for such purposes or by the majority of the employees voting in an election conducted by the Commission, as authorized by this act, shall be the exclusive representatives for collective negotiation concerning the terms and conditions of employment of the employees in such unit.

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Job security and the derivative rights of tenure affect terms and conditions of employment. Issuance of individual contracts violates the cited statute, and the individual contracts accordingly are void. Notices of fixed-term appointment, likewise, violate the contract provision.

The Board negotiated a labor agreement conferring certain benefits on employees. The Board acted within its statutory authority when it did so. In the present case, the Board had three years in which to observe and evaluate petitioner. It continued his employment beyond the end of the third year. Now the Board says it has retained the right to fire petitioner at will and that the labor agreement has no meaning.

Petitioner being a tenured employee, the Board has violated *N.J.S.A.* 18A:17-3, which directs the procedure for removal of a school janitor under tenure, and *N.J.S.A.* 18A:6-9 *et seq.*, which encompass the Tenure Employees Hearing Law (*N.J.S.A.* 18A:6-10 through 6-18). The Board's action, even with the statement of reasons, does not comport with the statutory requirements. The termination of a tenured employee is beyond the powers of a board of education, no matter how good it believes its reasons to be, except by procedures complying with the Tenure Employees Hearing Law.

The Commissioner of Education has held that where procedural defects occur in the preferment of tenure charges, a board may not proceed on them but may refile them, if appropriate, *Newark Bd. of Ed. v. Feitel*, 1977 *S.L.D.* 451.

Petitioner being a tenured employee, he must be reinstated with all emoluments due him together with interest.

III.

The Board also cites *N.J.S.A.* 18A:17-3 and observes that petitioner was appointed for fixed terms and agreed to such appointments. The 1980-81 employment contract clearly identifies a contract period for which petitioner was employed; *i.e.*, July 1980-June 30, 1981.

The Board notified petitioner on May 20, 1981, that it elected to terminate his employment as of July 17, 1981. The notification was clearly in compliance with the terms of the contract. He was given the 60 days' notice required.

It is conceded that the Board would not have been able to terminate petitioner's employment if petitioner had been employed other than under a fixed term contract. However, the contract between petitioner and the Board clearly shows that petitioner was appointed for a specific term and he accepted employment on that basis. Therefore, no rights survived the expiration of the fixed term.

Case law is clear that tenure for janitors, unlike tenure for professional employees, is a matter of personal privilege which may be waived by acceptance of employment for a fixed term as was done here. *See, e.g., Gilliam v. Toms River Reg'l School Dist. Bd. of Ed.*, 1974 *S.L.D.* 540. Petitioner's claim to tenure flies in the face of the statute and a long series of decisions on the point.

The Board also contends petitioner's reliance on the labor agreement is without merit and legal support. *N.J.S.A.* 34:13A-8.1, part of the New Jersey Employer-Employee Relations Act, specifically provides, "Nothing in this act shall be construed to annul, or to preclude the continuation of any agreement during its current term heretofore entered into between any public employer and any employee organization, nor shall any provisions hereof annul or modify any pension statute or statutes of this State." In the Board's view, this supports its position that the decision to appoint custodians for fixed terms is a managerial prerogative and cannot be bargained away.

In *State v. State Supervisory Employees' Ass'n*, 78 *N.J.* 58 (1978), the Court held that the adoption of any specific statute or regulation setting or controlling a particular term or condition of employment will preempt any inconsistent provision of same. *See also, Hackensack Bd. of Ed. v. Hackensack Ed. Ass'n.*, (*N.J. App. Div.*, March 9, 1982, A-4996-80T1) (unreported).

While petitioner argues that the Board should be estopped from relying on *N.J.S.A.* 18A:17-3 because of the negotiated agreement, this contention is without merit. The subject clause in the agreement and the length of time it has been a part of the agreement are of no consequence. Neither the Board nor the majority representative was empowered to negotiate a provision in a labor agreement which modified *N.J.S.A.* 18A:17-3. This procedure would create a tenure status arising from circumstances neither contemplated nor intended by the Legislature.

Article XIII of the labor contract attempted to replace the discretionary authority given the Board by the Legislature. The Board's action was *ultra vires*. Article XIII, therefore, is unenforceable.

Even assuming the absence of the article, the parties could not have agreed validly to provide janitors with tenure status after three years in the bargaining unit if the janitors were appointed for fixed terms. Such an agreement would intrude impermissibly on matters of managerial prerogative and would contravene the specific standards established by *N.J.S.A.* 18A:17-3 and hence be unenforceable. *Bernards Tp. Bd. of Ed. v. Bernards Tp. Ed. Ass'n*, 79 *N.J.* 311 (1979).

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Petitioner having held his position under appointment for a fixed term, the Board was within its authority to terminate his employment at any time upon proper notice.

IV.

This matter turns on whether the Board properly bargained Article XIII of the labor agreement.

I do not read *Bernards Tp., supra*, as does the Board. That case does stand for the proposition that negotiable terms and conditions of employment are matters which directly affect the work and welfare of public employees, but do not infringe upon essential managerial prerogatives delegated by the Legislature to the public employer. *Bernards Tp., supra*, at 320-1. Neither *Bernards Tp.* nor the cases it draws from can be read to support the Board's argument that Article XIII is void because *ultra vires*.

N.J.S.A. 18A:17-3, set forth above, gives boards of education the authority to grant tenure to janitors at any time or at no time. Tenure for janitors is a term and condition of employment. Unlike tenure for professional employees of school boards, the precise terms of acquisition of janitorial tenure have not been spelled out by the Legislature. See, *N.J.S.A.* 18A:28-5.

I must presume that when the parties entered into the labor agreement, both were cognizant of *N.J.S.A.* 18A:17-3. By setting a specific period of good service as requisite to acquisition of tenure, the parties reserved to the Board a period of observation and evaluation—a period of probation—of the employee. The Board may, as petitioner points out, not renew the employment of the probationary employee or may terminate that employment upon proper notice at any time up to the end of the third full year of employment.

If neither happens, the employee acquires a tenure status and may be reduced in compensation or terminated only under the terms of the Tenure Employees Hearing Law above. This scheme was the intention of the parties when they negotiated Article XIII.

The scheme does not take away an "essential managerial prerogative." *Bernards Tp., supra*, at 321. The Board's agreement to it, therefore, cannot be *ultra vires* and, hence, void.

In *Jean Williamson v. Phillipsburg Bd. of Ed.*, OAL Dkt. No. EDU 1828-80, decided July 9, 1981, the administrative law judge concluded, and the Commissioner of Education affirmed, that Williamson, who was not reemployed for a fourth year, was not entitled to relief for

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two reasons. First, a labor agreement, including an article nearly identical to that under consideration here and providing tenure for custodial employees after three years' satisfactory service, had been deleted from the labor contract before Williamson completed her third year of service. Also, relief was not found in the Board's practice of recognizing tenure for custodians after three years of satisfactory service by employing them thereafter without fixed terms of service. Second, Williamson had been employed for exactly three years at the expiration of her contract on June 30, 1979. Administrative staff had found her work during the last year to be less than satisfactory. She was not given a fourth contract. The third one-year contract expired on its own terms.

Neither circumstance exists in the present case. Article XIII is in force and effect. Petitioner Wright served for more than three years in his position.

Particularly instructive language is found in *State v. State Supervisory Employees Ass'n, supra*, at 80-2:

We affirm PERC's determination that specific statutes or regulations which expressly set particular terms and conditions of employment, as defined in *Dunellen*, for public employees may not be contravened by negotiated agreement. For that reason, negotiation over matters so set by statutes or regulations is not permissible. We use the word "set" to refer to statutory or regulatory provisions which speak in the imperative and leave nothing to the discretion of the public employer. All such statutes and regulations which are applicable to the employees who comprise a particular unit are effectively incorporated by reference as terms of any collective agreement covering that unit.

Yet, the 1974 amendment to *N.J.S.A.* 34:13A-8.1 was not an empty gesture. Under *Dunellen*, terms and conditions of public employment whose regulation was entrusted to the Civil Service Commission by general statutes were not negotiable even though the Commission had not promulgated any rule governing a particular matter. Under the amended version of *N.J.S.A.* 34:13A-8.1, such a general statute will not preclude mandatory negotiation over particular terms and conditions of employment as to which the Civil Service Commission could have but has not enacted preemptive regulations. There are many areas in which the Commission has sought to comprehensively regulate the terms and conditions of public employment. The Legislature has determined that collective negotiation concerning such nonregulated terms and conditions of public employment should

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be mandatory and any negotiated agreement thereon valid. It must be emphasized, however, that the adoption of any specific *statute* and *regulation* setting or controlling a particular term or condition of employment will preempt any inconsistent provision of a negotiated agreement governing that previously unregulated matter. In short, the parties must negotiate upon and are free to agree to proposals governing any terms and conditions of public employment which have not been set, and thus preempted, by specific statutes or regulations [emphasis added].

It is implicit in the foregoing that *statutes or regulations concerning terms and conditions of public employment which do not speak in the imperative, but rather permit a public employer to exercise a certain measure of discretion, have only a limited preemptive effect on collective negotiation and agreement. Thus, where a statute or regulation mandates a minimum level of rights or benefits for public employees but does not bar the public employer from choosing to afford them greater protection, proposals by the employees to obtain the greater protection in a negotiated agreement are mandatorily negotiable. A contractual provision affording the employees rights or benefits in excess of that required by statute or regulation is valid and enforceable. However, where a statute sets a maximum level of rights or benefits for employees on a particular term and condition of employment, no proposal to affect that maximum is negotiable nor would any contractual provision purporting to do so would be enforceable.* [Here a footnote is indicated.] Where a statute sets both a maximum and a minimum level of employee rights or benefits, mandatory negotiation is required concerning any proposal for a level of protection fitting between and including such maximum and minimum [emphasis added].

....

Our holding permitting negotiation concerning matters not covered by a specific statute does not apply to pension statutes. . . .

The footnote indicated in the text states:

In referring to those statutes which contain maxima, we are speaking, for example, of enactments providing that employees may receive “up to” or “not to exceed” a given level of benefits. An example is *N.J.S.A.* 11:13-2, which provides that where service ratings are used to determine layoffs, seniority credits, not to exceed ten points, may be added to the ratings.

Our reference to statutes containing minimum employee rights or benefits relates, for example, to those enactments which provide that employees receive “at least” or “not less than” a

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certain level of benefits. An example is *N.J.S.A.* 11:26D-1, *post* at 88, which provides a notice of "at least 45 days" be given to an employee in the classified Civil before he may be subject to layoff.

Mandatory or imperative statutes ordinarily are those enactments which set up a particular scheme which "shall" be handled as directed. An example of such a statute is *N.J.S.A.* 18A:28-5(b), which provides that teachers "shall be under tenure during good behavior and efficiency and they shall not be dismissed * * * after employment in such district or by such board for * * * three consecutive academic years, together with employment at the beginning of the next succeeding academic year," except for specifically enumerated reasons.

N.J.S.A. 18A:17-3 does not speak in the imperative. In marked contrast to *N.J.S.A.* 18A:28-5(b), the use of the word *shall* is modified by the word *unless*:

Every public school janitor . . . shall, unless he is appointed for a fixed term, hold his office, position or employment under tenure during good behavior and efficiency

Thus the employing board of education has the certain measure of discretion required by *State Supervisory Employees*.

There is a range of rights, in this case from no tenure to instant tenure. The public employer is not barred from choosing to afford employees a greater protection than the minimum. The negotiated article does not provide a right in excess of the maximum level of rights employees could receive under the statute. Where a statute sets both a maximum and a minimum level of employee rights or benefits, mandatory negotiation is required concerning any proposal for a level of protection fitting between and including such maximum and minimum. These considerations, too, comport with *State Supervisory Employees, supra*.

V.

In consideration of the foregoing discussion and analysis, I **FIND**:

1. Petitioner was appointed effective October 5, 1977, by the Board.
2. Petitioner's employment was terminated by the Board as of July 17, 1981.
3. Petitioner was appointed under successive notices of employment or contracts for fixed periods not in excess of 12 months each.

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4. A labor agreement was entered into between the Board and the East Orange Personnel Association for the period commencing July 1, 1980, and ending June 30, 1982. The agreement was executed on January 21, 1981.
5. The agreement covered all head and assistant custodians employed by the Board.
6. Article XIII of the agreement states "Tenure":
All members of the bargaining unit shall receive tenure after three years of employment.
7. Immediately prior agreements contained the same language.
8. On July 17, 1981, petitioner had been in the Board's employ in excess of three years and nine months.
9. Article XIII was properly bargained, not contrary to public policy and comported with the requirements for negotiability of a matter involving managerial discretion laid down in *State v. State Supervisory Employees Ass'n*, 78 *N.J.* 58 (1978).

I **CONCLUDE** that the termination of employment of Claude Wright, Jr., was in violation of tenure rights he acquired on October 6, 1980, under a valid provision of the labor contract in effect between the East Orange Board of Education and the East Orange Personnel Association.

Petitioners' motion for summary judgment is **GRANTED**.

Accordingly, it is **ORDERED** that Claude Wright, Jr., be reinstated as a custodian in the employ of the East Orange Board of Education retroactive to July 17, 1981, with all rights intact and all emoluments and benefits accruing from that date, mitigated by earnings from other employment in the period July 17, 1981, to the date of reinstatement. Interest on any back pay due petitioner is denied. The Commissioner of Education and this court lack an express grant of authority to award interest.

**After reviewing this Initial Decision, the
Commissioner of Education on
August 30, 1982, issued the following Final Decision:**

The Commissioner has reviewed the entire record of this matter including the initial decision rendered by the administrative law judge.

The Commissioner observes that the Board has filed timely exceptions to the initial decision and that petitioner has filed reply exceptions thereto pursuant to the provisions of *N.J.A.C.* 1:1-16.4a, b and c.

The Board relies on a recent decision, *Walter C. Peck v. Board of Education of the Mainland Regional High School District, Atlantic*

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County, decided April 12, 1982, wherein the Commissioner held that Peck did not acquire a tenure status as a school custodian notwithstanding that board's negotiated agreement which stated in pertinent part:

Tenure as a custodian may be achieved after employment in the Mainland Regional High School District for a period of three consecutive calendar years together with employment at the beginning (July 1) of the next succeeding calendar year. (attachment to Petition of Appeal.)

The Commissioner finds that the factual circumstances herein are similar to those enunciated in *Peck, supra*, notwithstanding the Board's negotiated agreement with the Association. Accordingly, Petitioner Wright may not be accorded tenure status by virtue of the terms of the fixed contracts issued to him by the Board which expired annually on their own terms, pursuant to the provisions of *N.J.S.A.* 18A:17-3.

For the reasons set forth above, the Commissioner reverses the initial decision of Judge Campbell and the instant petition is hereby dismissed.