

DR. MICHAEL A. COLUCCI, :
 :
 PETITIONER, :
 :
 V. : COMMISSIONER OF EDUCATION
 :
 BOARD OF EDUCATION OF THE :
 BOROUGH OF TUCKERTON, : DECISION
 OCEAN COUNTY, :
 :
 RESPONDENT. :
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SYNOPSIS

Petitioning superintendent/business administrator claimed the Board terminated his employment without following statutorily required tenure removal procedures.

The ALJ found that petitioner filed his petition 160 days after he received the final notice of “the subject of the requested contested case hearing.” The ALJ dismissed the petition as untimely, finding it barred by the 90-day rule, *N.J.A.C. 6A:3-1.3*.

The Commissioner adopted the findings and determination in the Initial Decision as his own.

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.

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The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. Petitioner’s exceptions were submitted in accordance with *N.J.A.C.* 1:1-18.4.

In his exceptions, petitioner renews his argument, initially raised in his Brief in Opposition to Motion to Dismiss Appeal, that, pursuant to *Lavin v. Board of Education of the City of Hackensack*, 90 *N.J.* 145 (1982), he has a statutory entitlement to the procedural safeguards enacted by the Legislature in *N.J.S.A.* 18A:6-7¹, *N.J.S.A.* 18A:6-10 and *N.J.S.A.* 18A:6-11 and, therefore, the 90-day limitations period is inapplicable to his claims herein.

Upon careful and independent review of the record, the Commissioner concurs with the Administrative Law Judge that this matter is untimely, pursuant to *N.J.A.C.* 6A:3-1.3(d). In so concluding, the Commissioner finds without merit petitioner’s argument that the 90-day

¹ Petitioner’s reference to this provision may have been a typographical error, since, in his earlier brief, referenced above, he refers to “*N.J.S.A.* 18A:6-7.1” when arguing that he was denied the safeguards to which he was entitled by statute. In any event, neither *N.J.S.A.* 18A:6-7, which requires persons employed in teaching capacities to take an oath to support the Constitution of the United States, nor *N.J.S.A.* 18A:6-7.1, which establishes the requirements for criminal history record checks for candidates of school employment, appears germane to petitioner’s claims.

time limitation is inapplicable because his claim is a “statutory entitlement,” unrelated to his employment or performance, within the intendment of the Court’s determination in *Lavin, supra*. In *Lavin*, the Supreme Court created a *limited* exception to the timely filing requirements when it ruled that crediting military service is a statutory entitlement that is a reward for military service, not for performance as a teacher, and, thus, is not subject to the applicable limitations period. However, this limited exception for statutory entitlements has been strictly applied. *See, e.g., North Plainfield Educ. Ass’n v. Bd. of Educ.*, 96 N.J. 587 (1984); *Kaprow v. Board of Education of Berkeley*, 131 N.J. 572 (1993); *Nissman v. Board of Education of the Township of Long Beach Island*, 272 N.J. Super. 373 (App. Div. 1994), *certif. denied*, 137 N.J. 315 (1994). As the Supreme Court in *Kaprow* reasoned:

Because the decision necessary to confer tenure under N.J.S.A. 18A:28-5 is based on an evaluation of teacher performance, behavior, and efficiency, *** the only way Kaprow could acquire tenure rights, and therefore RIF rights, was through employment in the school district. Kaprow’s RIF rights are then distinguishable from the petitioner’s right to military service credit in *Lavin*; Kaprow is not entitled to his RIF rights independent from the administration of a school system or from his standing as a tenured assistant superintendent.*** *Kaprow, supra*, at 586.

Similarly, even assuming, *arguendo*, the procedural safeguards established in statute would apply to petitioner herein, an issue which would be addressed were this matter to be reviewed on its merits, such statutory rights and protections are acquired only through employment in the school district and cannot, therefore, be viewed as independent from his employment or from the administration of a school system. Where such a “functional relationship” exists, *Kaprow, supra*, at 586, the “statutory entitlement” exception in *Lavin* does not apply.² Furthermore, the

² See also, *Balwierzczak et al. v. Board of Education of the Township of Berkeley Heights, Union County*, decided by the Commissioner December 8, 1999 (No. 407-99), *aff’d* State Board of Education May 3, 2000, where former employees of the Union County Regional High School District alleged that the Board of Education of Berkeley Heights, the district to which they transferred upon dissolution of the regional district, denied them their rights to the

Commissioner finds nothing in this record which warrants relaxation of the filing requirement, pursuant to *N.J.A.C.* 6A:3-1.16.

Accordingly, the Initial Decision is adopted for the reasons expressed therein and amplified above. The Petition of Appeal is dismissed.

IT IS SO ORDERED.³

COMMISSIONER OF EDUCATION

Date of Decision: October 2, 2003

Date of Mailing: October 3, 2003

salary guide placement to which they were entitled pursuant to *N.J.S.A.* 18A:13-64, the Commissioner found that the pertinent statute was designed to operate, upon the dissolution of a regional district, as a “save harmless” provision, and absent rights and benefits accrued through prior employment, *N.J.S.A.* 18A:13-64 does not operate to independently create a benefit; *Nadasky et al. v. Board of Education of the Township of Clark, Union County*, decided by the Commissioner July 9, 2001 (No. 211-01), where retired employees of the Board asserted a statutory right to be paid for unused accumulated sick leave at the contractual rate established by their collective bargaining agreement, the Commissioner rejected their claim that the 90-day rule was inapplicable pursuant to *Lavin, supra*; *Board of Education of the Township of Hamilton, Mercer County v. M.M. on behalf of minor child, C.B.*, decided by the Commissioner November 19, 2001 (No. 452-01L), where the petitioning Board of Education argued that reimbursement of tuition is a statutory entitlement not subject to the 90-day rule, the Commissioner determined that, to the extent a local board seeks an order directing payment of tuition pursuant to *N.J.S.A.* 18A:38-1 *et seq.*, such a proceeding is subject to compliance with *N.J.A.C.* 6A:3-1.1 *et seq.* and does not fall within the limited exception enunciated in *Lavin, supra*, for statutory entitlement.

³ This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*