

BERNARD SHARKEY, :
 :
 PETITIONER, :
 : COMMISSIONER OF EDUCATION
 V. :
 :
 : DECISION
 BOARD OF EDUCATION OF THE :
 TOWNSHIP OF WASHINGTON, :
 MORRIS COUNTY, :
 :
 RESPONDENT. :

SYNOPSIS

Petitioner – who worked as a financial officer/accounts payable employee for respondent Board beginning on February 1, 2004 – claims to have acquired tenure pursuant to *N.J.S.A. 18A:17-2*. Petitioner received a written notice on February 1, 2007 from his supervisor informing him that he would be terminated effective February 2, 2007. However, the Board did not vote to approve his termination until February 15, 2007, with an effective date of March 30, 2007. Petitioner seeks reinstatement with appropriate back pay and emoluments. The Board contends that petitioner’s position was not tenure-eligible.

The ALJ found that the petitioner’s position, which involved work duties that are clerical in nature, was tenure-eligible, but that he did not work the required period of time to achieve tenure because his last day of work was February 1, 2007. The ALJ ordered the petitioner’s appeal dismissed.

The Commissioner adopted in part, and rejected in part, the Initial Decision. The Commissioner concurred that the petitioner worked in a tenure-eligible position, but found that petitioner’s length of service was, in fact, sufficient to achieve tenure since his effective termination date was March 30, 2007. Accordingly, the Commissioner directed the Board to reinstate petitioner with appropriate back pay and emoluments.

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.

December 29, 2008

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The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions filed by petitioner pursuant to *N.J.A.C. 1:1-18.4*. Because exceptions by the Board of Education (Board) were untimely filed,¹ neither they nor petitioner’s reply have been considered by the Commissioner.

In his exceptions, petitioner contends that the Administrative Law Judge (ALJ) erred in finding that, although petitioner served in a tenure-eligible position, he did not acquire tenure because he was not employed for the requisite period of time. In so finding, petitioner asserts, the ALJ apparently considered petitioner’s employment to have ended with the February 1, 2007 letter of his supervisor purporting to terminate his employment on February 2, 2007, despite the fact that both law and board policy dictate that employment can only be terminated by action of the *Board* – which did not occur in petitioner’s case until

¹ The Initial Decision was mailed on November 24, 2008, so that, pursuant to *N.J.A.C. 1:1-18.4*, exceptions would have been due on or before December 8, 2008 (13 days from the date of mailing, allowing for the 13th day, December 7, 2008, falling on Sunday) unless a request for extension had been received and granted pursuant to *N.J.A.C. 1:1-18.8*. Although no such request was made, the Board’s exceptions bore a face date of December 11, 2008 and were received via fax after the close of business on that day. Petitioner’s reply – although not considered due to exclusion of the Board’s exceptions – was timely filed on December 16, 2008.

February 15, 2007, effective March 30, 2007, *after* petitioner had acquired tenure on February 2, 2007. Consequently, petitioner urges, the Commissioner must find that the Board violated his tenure rights and order that he be reinstated with back pay and emoluments, including pension contributions and compensation for lost medical benefits – with any mitigation offset by the attorneys fees and legal costs he has incurred in litigating this matter. (Petitioner’s Exceptions at 1-8)

Upon review, the Commissioner adopts in part, and rejects in part, the recommended decision of the ALJ.

While the Commissioner concurs with the ALJ that petitioner did, in fact, serve in a position eligible for tenure pursuant to *N.J.S.A. 18A:17-2(b)*, she cannot likewise concur that petitioner’s length of service was insufficient to acquire such tenure. As correctly noted by petitioner, appointment, transfer or removal of a board employee can only be effectuated by the *board of education*, and only upon the recommendation of the chief school administrator and by a recorded roll call majority vote of the full membership of the board. *N.J.S.A. 18A:27-4.1*. It is undisputed that the Board in this matter did not so act until its meeting of February 15, 2007, when it terminated petitioner’s employment as of March 30, 2007; it is likewise undisputed that petitioner began his employment on February 1, 2004 and remained continuously employed thereafter. Under these circumstances, it is of no import that petitioner did not actually *work* on or after February 2, 2007, the date on which he fulfilled the service requirement of *N.J.S.A. 18A:17-2(b)*; what the statute requires is *employment* for the requisite period of time – a condition which petitioner clearly satisfied notwithstanding that he was relieved of performing his duties between February 2, 2007 and the time of his purported termination by the Board. This being so, petitioner did, in fact, acquire tenure, and he could not be terminated in the

absence of tenure removal proceedings pursuant to *N.J.S.A. 18A:6-11 et seq. Dolores L. Emmett v. Board of Education of the Township of Gloucester, Camden County*, Commissioner's Decision No. 440-05, decided December 6, 2005, citing *Blossom S. Nissman v. Board of Education of the Township of Long Beach Island, Ocean County*, at 92 *N.J.A.R.2d* (EDU) 71.

Accordingly, in so far as it concludes that petitioner served in a tenure-eligible position, the Initial Decision of the OAL is adopted for the reasons expressed therein; in so far as it concludes that the Board did not violate petitioner's tenure rights because he did not acquire tenure and could consequently be terminated on notice, it is rejected for the reasons expressed above. The Board is directed forthwith to reinstate petitioner, with back pay and emoluments as appropriate.²

IT IS SO ORDERED.³

ACTING COMMISSIONER OF EDUCATION

Date of Decision: December 29, 2008

Date of Mailing: December 29, 2008

² The record of this matter does not permit determination of petitioner's claims as to the compensation he is owed as a consequence of the Board's violation of his tenure rights. Should a dispute arise between the parties in this regard, nothing herein precludes petitioner from pursuing such claims as a new cause of action.

³ This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L. 2008, c. 36*.