

#67-10 (OAL Decision: Not yet available online)

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

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### SYNOPSIS

Petitioner – a per diem substitute teacher for the Newark Public Schools since approximately 1984 – was notified by the district on January 21, 2009 that he had been placed on “inactive status” as a substitute teacher. In October 2009, petitioner filed an appeal with the Department of Education alleging that he was entitled to lost wages as a result of his being placed on “inactive” status by the district for the period from January 21, 2009 through June 8, 2009. In addition to lost wages, petitioner claimed that he had suffered emotional distress as a result of his being placed on the inactive list. The Board contended it was under no legal obligation to employ petitioner, and that his petition was not timely filed and should therefore be dismissed. The Board filed a motion for summary decision.

The ALJ found that: the matter was ripe for summary decision as there were no material facts in dispute; petitioner learned that he had been placed on “inactive” status on January 21, 2009, but did not file his petition until October 2009; petitioner’s appeal was therefore untimely filed. Further, petitioner failed to point to any statute or regulation that gives him a right to steady employment as a substitute teacher, and the OAL has no jurisdiction to grant the relief sought by the petitioner. Accordingly, the ALJ granted the respondent’s motion for summary decision, and dismissed the petition with prejudice.

The Commissioner concurred with the ALJ that this matter must be dismissed in light of petitioner’s failure to timely file his claim, additionally noting that petitioner was not a regular teaching staff member, but rather an “at-will” employee with no basis on which to claim entitlement to current, past or future employment. Accordingly, the petition was dismissed.

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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March 11, 2010

OAL DKT. NO. EDU 13414-09  
AGENCY DKT.NO. 260-9/09

DOMENIC MALINCONICO, :  
PETITIONER, :  
V. : COMMISSIONER OF EDUCATION  
STATE-OPERATED SCHOOL DISTRICT : DECISION  
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In this matter, petitioner alleges that after working as a substitute teacher in respondent's district for over twenty years he was inappropriately removed from the active substitute teacher list. He seeks compensation for lost wages. (Petition of Appeal, Paragraphs 8 and 10) In a Motion for Summary Decision, the respondent countered that petitioner's claim is without foundation both because it was untimely filed and because he is an at-will employee with no entitlement to the rights and relief that he seeks.<sup>1</sup>

In the Initial Decision on the merits, the Administrative Law Judge (ALJ) concluded that petitioner's appeal was untimely, in that it was filed past the 90 day period allowed by *N.J.A.C. 6A:3-1.3(i)*. More specifically, the ALJ found that petitioner admittedly learned of his removal from the active substitute list on January 21, 2009, but did not file his petition until October 1, 2009. After reviewing the Initial Decision, the record, and the

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<sup>1</sup> Petitioner applied for emergent relief after the filing of respondent's motion for summary decision. The relief was denied by the Administrative Law Judge, whose decision was adopted by the Commissioner.

exceptions submitted by the parties,<sup>2</sup> the Commissioner concurs with the ALJ – for the reasons articulated in the Initial Decision – that the petition was untimely.

Although the foregoing determination makes it unnecessary to proceed to the substantive aspects of petitioner’s claim, the Commissioner will nonetheless address the findings of the ALJ concerning petitioner’s status as a substitute teacher.

The ALJ found that the Commissioner has no jurisdiction over petitioner’s claims because they are not grounded in school law. Upon review, the Commissioner agrees with the ALJ’s conclusions. Petitioner was a substitute teacher, serving the respondent under a county substitute certificate authorizing nothing more than day-to-day substitution for regularly employed teaching staff members for limited periods of time. The only “employment relationship” petitioner had with respondent was inclusion on its list of qualified persons who could be called, on an “as-needed” basis, to fill in for absent teachers.

As an on-call, day-to-day substitute, petitioner was not a teaching staff member; rather, he was an occasional, non-contractual, “at-will” employee with no basis on which to claim entitlement to current, past or future employment. While petitioner may have enjoyed his work as a substitute teacher, and while he may believe that respondent’s decision not to continue using him in that capacity was unwarranted, in the absence of factually supported allegations that respondent’s action was taken in violation of a specific law, petitioner has no entitlement to a plenary hearing and there is no basis on which the Commissioner could order respondent to reverse its decision.

Finally, petitioner’s objection, in his exceptions, to the ALJ’s summary decision suggests a lack of understanding of the contested case process. As the Initial Decision explains,

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<sup>2</sup> Except for his objection to summary disposition, petitioner’s exceptions reiterate the arguments that he made in the Office of Administrative Law, all of which were addressed in the Initial Decision.

the absence of material disagreement between the parties concerning the factual basis of the controversy eliminated the need for a plenary hearing and allowed summary disposition based upon the applicable law. A review of the audio tape of the January 8, 2010 hearing concerning petitioner's application for emergent relief reveals that the ALJ advised petitioner on that occasion that the plenary hearing might be unnecessary. She clearly explained that she might issue a summary decision prior to the date that had been tentatively scheduled for a hearing.

Accordingly, for the reasons set forth above, the Commissioner adopts the Initial Decision as the final decision in this case. Respondent's Motion for Summary Decision is granted and the petition is dismissed.

IT IS SO ORDERED.<sup>3</sup>

COMMISSIONER OF EDUCATION

Date of Decision: March 11, 2010

Date of Mailing: March 11, 2010

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