

PATRICIA OSMAN, :
 :
 PETITIONER, :
 :
 V. :
 : COMMISSIONER OF EDUCATION
 BOARD OF EDUCATION OF THE :
 TOWNSHIP OF DELRAN, : DECISION ON REMAND
 BURLINGTON COUNTY, :
 :
 RESPONDENT. :

SYNOPSIS

Petitioner, teaching staff member who possessed a standard NJ Instructional Certificate with two endorsements, Elementary School Teacher and Teacher of Reading, alleged that the Board improperly terminated her employment. Board contended petition was untimely filed. In prior proceedings, the ALJ concluded that petitioner obtained tenure in the District in the position title “teacher,” and, therefore, when the Board discovered that petitioner did not possess a valid endorsement for her then-current assignment, it could either reassign her to another assignment within the scope of her valid endorsements or file tenure charges to remove her pursuant to *N.J.S.A.* 18A:6-10. Instead, the Board summarily dismissed her, and the ALJ found that petitioner had 90 days within which to challenge the Board’s action. The ALJ concluded that the petition of appeal was time-barred and, on that basis, ordered the petition and counterclaim dismissed with prejudice. The Commissioner adopted the findings and determination of the Initial Decision as his own, and the State Board of Education affirmed.

On appeal, the Appellate Division affirmed that petitioner was tenured at the time of her termination and that her petition was untimely filed under applicable rule. However, the Court remanded the matter for a determination as to whether the 90-day rule should be relaxed under the circumstances of this matter. The State Board, in turn, remanded the matter to the Commissioner.

On review of the record in accordance with the remand directives of the Court and the State Board, the Commissioner determined that relaxation is not warranted. Petitioner was not required to establish that she did not fraudulently acquire an English endorsement, which would place her in a difficult or unjust position because of her pending case against the State Board of Examiners, in order to pursue her claim that her tenure rights had been violated. Nor did petitioner require a ruling from the Board of Examiners with regard to her two valid endorsements in order to pursue her claim. The petition was dismissed as untimely.

<p>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.</p>

OAL DKT. NO. 428-99
AGENCY DKT. NO. 556-12/98
STATE BOARD NO. 7-00

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For the Petitioner: Arnold M. Mellk, Esq. (Wills, O’Neill & Mellk)
For the Respondent Board: John T. Barbour, Esq.

The Commissioner decided this matter on December 20, 1999, dismissing the within Petition of Appeal as untimely. The State Board of Education affirmed the Commissioner’s decision on May 3, 2000. On appeal, the Appellate Division affirmed that the Petition of Appeal was untimely. However, the Court remanded the matter “for a determination on whether to relax the ninety-day rule under the circumstances of this unusual matter.” *Patricia Osman v. Board of Education of the Township of Delran*, A-5517-99T1, slip op. at 9. The facts and procedural history are as stated by the Court in its decision.

The Commissioner recognizes that he may, in his discretion, relax the 90-day limitation period established in regulation¹ for filing a petition of appeal “in any case where a strict adherence thereto may be deemed inappropriate or unnecessary or may result in injustice.”²

However,

[T]he Commissioner, the State Board of Education, and the courts have read *N.J.A.C. 6:24-1.2* very strictly and have applied it almost

¹ The 90-day rule was previously found at *N.J.A.C. 6:24-1.2(c)* and is now codified at *N.J.A.C. 6A:3-1.3(d)*.
² *N.J.A.C. 6:24-1.15*, now codified at *N.J.A.C. 6A:3-1.16*.

without exception. The Commissioner has indicated that the relaxation authorized in *N.J.A.C. 6:24-1.15* is reserved for limited situations wherein a compelling reason can be demonstrated for expanding the limitation period. Such possible reasons have been described as follows:

Where a substantial constitutional issue was presented, where judicial review was sought of an informal administrative determination, and where a matter of significant public interest is involved.*** (citations omitted) *Portee v. Board of Education of the City of Newark*, 94 *N.J.A.R.2d* (EDU) 381, 384.

In the instant matter, petitioner asserts that she “could not have filed her petition of appeal until the adjudication of the Order to Show Cause brought against her.” (Petitioner’s Brief Before the State Board of Education, February 3, 2000 at 3) The Commissioner does not agree.

There is no question that petitioner was duly notified that the Board was terminating her employment on January 13, 1997, thereby triggering the 90-day filing period then found in *N.J.A.C. 6:24-1.2(c)*. *Susan Beshaw v. Board of Education of the Borough of Oakland, Bergen County*, State Board decision, February 4, 1998, *aff’d* Appellate Division March 23, 1999, A-3985-97T5. At that point, to the extent petitioner and her counsel believed that she had acquired tenure status which protected her from such summary action, as she later, through counsel, alleged in her Petition of Appeal, she had a viable employment claim to bring against the Board. Had such a claim been decided in her favor, petitioner would have been reinstated to a position within the scope of her still-valid instructional endorsements, or, if such a position were not available, she would have been placed on the appropriate preferred eligibility list. In either event, although her reinstatement or preferred eligibility would eventually have been subject to any action by the State Board of Examiners to suspend or revoke her still-valid certificates, *a determination by the Board of Examiners was in no way necessary* in order for

petitioner to pursue her initial claim that she had acquired tenure and that the Board had violated her tenure rights by dismissing her without following the procedures of *N.J.S.A.* 18A:6-10.³

As the ALJ noted in her Initial Decision, prior to any determination by the State Board of Examiners with respect to its Order to Show Cause, the Board could have brought tenure charges of unbecoming conduct against petitioner pursuant to *N.J.S.A.* 18A:6-10, based upon the allegation that she forged her English endorsement and/or that she was aware of the fraudulent credential in her personnel file. If the Board had done so, *it* would have carried the burden of proving petitioner's misconduct. However, the papers submitted before the Office of Administrative Law in this matter claim that the Board acted on January 13, 1997 under the belief that petitioner *was not* tenured and *not* entitled to the protections of the tenure law. Indeed, in prior proceedings, the Board vigorously disputed that petitioner had acquired tenure.⁴ The Board also argued, in the alternative, that even if petitioner had acquired tenure, her tenure was "relinquished" upon her acceptance of a full-time position for which she was not properly certified. (Respondent's Summary Judgment Brief at 21) Thus, the Board's action to summarily terminate petitioner's employment on January 13, 1997 was not, on its face, frivolous or "particularly suspicious" as suggested by the Appellate Court. (*Osman, supra*, at 8)

³ As the ALJ stated in her Initial Decision:

The basis for petitioner's claim, herein *** is her assertion that she acquired tenure in respondent's district and therefore could not be removed except pursuant to the process set forth in *N.J.S.A.* 18A:6-10. That claim was not in any way affected by the September 24, 1998 determination of the Board of Examiners. If petitioner was a tenured teacher in respondent's district in January 1997 when it purported to terminate her employment, it was because she had taught for the requisite period of time pursuant to one of her valid endorsements. (Initial Decision at 6)

⁴ Without the protections of tenure, the Board's summary dismissal of petitioner would have carried a presumption of correctness, notwithstanding that the Board had received a communication from the State Department of Education that petitioner was "*permitted* to continue teaching under her two legitimate certificates until such time as the Board [of Examiners] takes action against her certificates." (emphasis supplied) (Board's Supplemental Certification in Lieu of Affidavit of Dr. Carl Johnson, Superintendent of Schools, Exhibit N, Letter from Ida Graham, Director, dated January 9, 1997)

The Commissioner concludes that holding petitioner to the 90-day filing requirement under the circumstances of this matter would *not* have compelled her to “establish that she did not fraudulently obtain an English endorsement***” so as to place her in a difficult or unjust position. (*Id.* at 8) Rather, a timely filed claim would have alleged, as her later untimely petition did, that she acquired tenure and could not be summarily dismissed; thus, her *only* burden would have been to so demonstrate that she satisfied the statutory requirements in *N.J.S.A.* 18A:28-5 and was, thus, entitled to tenure protection. Such a claim did not require, as petitioner and her counsel contended, a finding by the State Board of Examiners as to the fate of the two valid endorsements under which petitioner believed she had acquired tenure; therefore, there was no reason for her to await such a decision from the State Board of Examiners before challenging her termination.

Under these circumstances, the Commissioner finds that holding petitioner to the 90-day rule is not unduly harsh. Although this particular matter presents unusual facts, petitioners who raise service-related claims have been consistently held to the filing limitations period. *See Cordell Wise v. Board of Education of the City of Trenton, Mercer County*, Commissioner Decision September 11, 2000, *aff'd* State Board January 3, 2001; *Nadasky et al. v. Board of Education of the Township of Clark, Union County*, Commissioner Decision July 9, 2001; *Atkin v. Board of Education of the City of Elizabeth, Union County*, Commissioner Decision February 22, 1999, *aff'd* State Board July 7, 1999, *aff'd* App. Div. A-128-99T1; *Nissman v. Board of Education of the Township of Long Beach Island, Ocean County*, 272 *N.J. Super.* 373 (App. Div. 1994); *John Portee v. Board of Education of the City of Newark, supra*; *Kaprow v. Board of Education of Berkeley Tp.*, 131 *N.J.* 572 (1993); *Sasse v. Board of Educ. of Borough of Pt. Pleasant, Ocean County*, 92 *N.J.A.R.2d* (EDU) 339; *Davenport v. Butler Board of Educ.*, 92 *N.J.A.R.2d* (EDU) 614; and *LeMee v. Board of Education of the Village of Ridgewood, Bergen County*, 1990 S.L.D. 671. Furthermore, this matter presents no issues of constitutional

dimension. Nor does petitioner's claim implicate a matter of broader public interest but, rather, presents a concern individual to herself, based upon a unique set of circumstances.

Accordingly, the Commissioner finds that the record before him does not warrant relaxation of the 90-day rule and the within Petition of Appeal is properly dismissed as untimely filed.

IT IS SO ORDERED.⁵

COMMISSIONER OF EDUCATION

Date of Decision: 3/4/02

Date of Mailing: 3/4/02

⁵ This decision, as the Commissioner's final determination, 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.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.