

## New Jersey Commissioner of Education

### Final Decision

Sherry Marcus,

Petitioner,

v.

Board of Education of the Township of Upper Deerfield,  
Cumberland County,

Respondent.

### Synopsis

Petitioner – formerly a non-tenured instructional aide in the respondent Board’s school district – filed an appeal with the Commissioner that was dated August 23, 2022, though not received until September 1, 2022, challenging the non-renewal of her employment for the 2022-2023 school year. Petitioner had been employed by the Board as a non-tenured instructional aide under annual contracts for a number of years. The Board filed a motion for summary decision, which was opposed by the petitioner.

The ALJ found, *inter alia*, that: there are no material facts at issue in this case, and the matter is ripe for summary decision; petitioner was employed by the district as a part-time instructional aide for the 2021–2022 school year, and had been employed for a number of years prior; her position was non-certificated and nontenured, and was a yearly position which required annual renewal; on April 20, 2022, the district superintendent issued a *Rice* notice to petitioner, providing formal notification that the Board was considering the possibility of non-renewal of her contract; subsequently, a letter dated May 10, 2022, was sent to petitioner, advising that her employment contract would not be renewed for the 2022-2023 school year; pursuant to *N.J.A.C. 6A:3-1.3(i)*, the filing of an appeal to the Commissioner must be done within ninety days from the date of the nonrenewal notice, and nothing tolls the ninety-day time limit; here, petitioner’s appeal was due no later than August 12, 2022, but was not filed with the Office of Controversies and Disputes until September 1, 2022; the petition was therefore late filed; and petitioner’s argument that the 90-day rule should be relaxed based upon her belief that the nonrenewal notice was “void” is without merit. Accordingly, the ALJ granted summary decision to the Board, and dismissed the petition.

Upon comprehensive review of the record, the Commissioner, *inter alia*, adopted the ALJ’s factual findings and conclusion that the petition was untimely filed. Accordingly, the Board’s motion for summary decision was granted, and the petition of appeal was dismissed as untimely.

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.

**New Jersey Commissioner of Education**  
**Final Decision**

Sherry Marcus,

Petitioner,

v.

Board of Education of the Township of  
Upper Deerfield, Cumberland County,

Respondent.

The record of this matter, the Initial Decision of the Office of Administrative Law (OAL), the exceptions filed by petitioner pursuant to *N.J.A.C. 1:1-18.4*, and respondent Board's reply thereto, have been reviewed and considered.

The threshold procedural issue in this case is whether the petition should be dismissed pursuant to the 90-day rule, *N.J.A.C. 6A:3-1.3(i)*. *Kaprow v. Bd. of Educ. of Berkeley Twp.*, 131 N.J. 572, 582 (1993). Petitioner was previously employed as a nontenured part-time instructional aide with respondent's district. Respondent sent petitioner a letter dated May 10, 2022, advising her that her employment contract would not be renewed for the 2022-2023 school year. On May 14, 2022, petitioner requested a written statement of reasons for the nonrenewal of her contract. On June 10, 2022, the Board Superintendent provided petitioner with a written statement of reasons. Petitioner appealed the nonrenewal decision to the Commissioner of Education. According to an acknowledgment notice in the case file, her petition – dated

August 23, 2022 – was received by the Office of Controversies and Disputes on September 1, 2022.

After the matter was transmitted to the OAL, respondent filed a motion for summary decision. Petitioner filed opposition. The Administrative Law Judge (ALJ) requested supplemental briefs regarding whether the petition was filed in compliance with the 90-day rule, *N.J.A.C. 6A:3-1.3(i)*. Following review of all written submissions and oral argument, the ALJ granted the Board's motion for summary decision upon concluding that the petition was untimely filed. The ALJ reasoned that because petitioner received the May 10, 2022, nonrenewal letter sometime between May 10 and May 14, 2022, the petition should have been filed no later than August 12, 2022 (ninety days from May 14, 2022). Additionally, the ALJ considered and rejected petitioner's argument that the 90-day rule should be relaxed based upon her belief that the nonrenewal notice was "void" because: (1) the Board violated the Open Public Meetings Act (OPMA), *N.J.S.A. 10:4-6 to -21*, on April 26, 2022, when it prevented her from discussing her employment status during the public portion of the board meeting despite her prior written request regarding same; and (2) the Board violated *Rice v. Union County Regional High School Board of Education*, 155 *N.J. Super.* 64, 73 (App. Div. 1977), as it never provided her with a *Rice* notice for the special board meeting held on May 9, 2022, at which, she contends, the Board must have taken action regarding her employment.

In her exceptions, petitioner does not challenge the ALJ's factual findings. Rather, she disputes the ALJ's legal conclusions and reiterates arguments that were previously considered and rejected. She contends that the 90-day rule should be relaxed because of the Board's violation of OPMA and its failure to provide her with a *Rice* notice for the May 9, 2022, special

board meeting. In response, the Board maintains that the 90-day rule should not be relaxed under the circumstances as the ALJ correctly concluded that petitioner's contentions regarding the Board's violations of OPMA and *Rice* notice requirements are unsupported by law.

Upon review, the Commissioner adopts the ALJ's factual findings and conclusion that the petition was untimely filed. *N.J.A.C. 6A:3-1.3(i)* mandates that petitions shall be filed "no later than the 90<sup>th</sup> day from the date of receipt of the notice of a final . . . action by the district board of education." The 90-day limitation period "represents a fair and reasonably necessary requirement for the proper and efficient resolution of disputes under the school laws." *Kaprow*, 131 *N.J.* at 582. It "provides a measure of repose" and "gives school districts the security of knowing that administrative decisions regarding the operation of the school cannot be challenged after ninety days." *Ibid.*

Here, the ALJ correctly concluded that the 90-day limitation period began when petitioner received the May 10, 2022, nonrenewal letter. *Salazar-Linden v. Bd. of Educ. of Twp. of Holmdel, Monmouth Cnty.*, Commissioner Decision No. 99-08 (March 3, 2008), at 5-6, *aff'd*, 2009 *N.J. Super. Unpub.* LEXIS 2713 \* (App. Div. Oct. 28, 2009). It is undisputed that petitioner received the May 10, 2022, nonrenewal letter by May 14, 2022. Therefore, she had a meaningful opportunity to file her petition by August 12, 2022. The mandatory filing deadline is not subject to change based upon a petitioner's legal strategy, as that would defeat the measure of repose to which school districts are entitled. *See Nissman v. Bd. of Educ. of Twp. of Long Beach Island, Ocean Cnty.*, 272 *N.J. Super.* 373, 382 (App. Div. 1994) (affirming State Board decision to dismiss petition as time barred and explaining that while petitioner may have opted not to file a petition sooner for tactical reasons, the Board "was entitled to know within 90 days of its action whether

its [decision] was going to be challenged”). Consequently, petitioner’s belief that the May 10, 2022, nonrenewal letter was void based upon the Board’s violation of OPMA and *Rice* notice requirements—even assuming these contentions had merit—does not constitute “unusual and compelling circumstances” warranting relaxation of the mandatory 90-day filing deadline.<sup>1</sup> *Id.* at 591. Moreover, petitioner has not demonstrated that this matter implicates a novel constitutional issue or a compelling public interest.

Accordingly, respondent’s motion for summary decision is granted, and the petition of appeal is hereby dismissed as untimely.

IT IS SO ORDERED.<sup>2</sup>

  
ACTING COMMISSIONER OF EDUCATION

Date of Decision: June 10, 2024  
Date of Mailing: June 12, 2024

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<sup>1</sup> To the extent that the ALJ rendered conclusions regarding the merits of petitioner’s contentions that the Board violated OPMA or *Rice* notice requirements, the Commissioner declines to adopt those conclusions because it is unnecessary to do so in light of the petition’s procedural defect.

<sup>2</sup> This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.



**State of New Jersey**  
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**

**SUMMARY DECISION**

OAL DKT. NO. EDU 09462-22

AGENCY REF NO. 226-9/22

**SHERRY MARCUS,**

Petitioner,

v.

**TOWNSHIP OF UPPER DEERFIELD**

**SCHOOL DISTRICT,**

Respondent.

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**Kevin McCann, Esq.,** for petitioner (Chance & McCann, LLC, attorneys)

**Amy Houck-Elco, Esq.,** for respondent; **Carl Taylor, Esq.,** on the briefs (Cooper Levenson, attorneys)

Record Closed: April 10, 2024

Decided: April 29, 2024

BEFORE **ELAINE B. FRICK, ALJ:**

**STATEMENT OF THE CASE**

Respondent, Township of Upper Deerfield School District (the District), did not renew petitioner's annual contract as a nontenured part-time aide for the 2022–2023 school year. Petitioner appealed the District's action. The District filed a motion for

summary decision, asserting that as a matter of law, summary decision shall be entered affirming the District's nonrenewal of petitioner's contract. Petitioner contends the motion should be denied as there are genuine issues of material facts regarding the District's actions in its nonrenewal of her contract.

### **PROCEDURAL HISTORY**

The District's superintendent issued a letter on May 10, 2022, to petitioner, advising her that her contract would not be renewed. Petitioner submitted her appeal request to the Commissioner of the Department of Education (DOE) on August 23, 2022. The matter was transmitted to the Office of Administrative Law on October 19, 2022, where it was filed to be heard as a contested matter. N.J.S.A. 52:14B-1 to 14B-15 and N.J.S.A. 52:14F-1 to 14F-13.

Telephonic conferences were conducted with counsel for the parties. Respondent requested to submit a summary decision motion and a briefing schedule was set. The parties submitted their motion filings and briefs. Oral argument on the motion was scheduled for November 29, 2023. On that date, before oral argument was to be heard, the undersigned ALJ sua sponte raised the procedural issue regarding the ninety-day appeal filing requirement of N.J.A.C. 6A:3-1.3(i). The parties agreed to adjourn the oral argument and submit supplemental briefs on the ninety-day appeal issue. Oral argument was rescheduled.

Respondent submitted its supplemental letter brief. Petitioner's supplemental brief was not submitted as scheduled. Prior to the next scheduled oral argument date, respondent's then counsel of record left the law firm, and counsel assigned to take over the file requested to adjourn the oral argument, to which petitioner's counsel consented. The attorneys requested a telephonic conference to reset the motion scheduling. During the telephonic conference, petitioner's request for a new date for the submission of their supplemental brief, with consent of respondent, was granted. The parties further confirmed a mutually agreeable date for oral argument, which was scheduled. Petitioner's supplemental submission on the motion was filed thereafter. Oral argument was heard via Zoom audio/video technology on April 10, 2024.

### **FACTUAL DISCUSSION AND FINDINGS**

The following facts were confirmed as uncontested by the parties, or otherwise deemed to be factual from the written submissions and argument of counsel. I thus **FIND** as **FACTS**:

Sherry Marcus was an employee of the District as a part-time instructional aide for the 2021–2022 school year. The position was non-certificated and nontenured. It is an annual position, requiring annual renewal.

Marcus was first hired as a part-time instructional aide by the District for the 2008–2009 school year. She asked on an annual basis to renew her contract. Her contract was not renewed after the end of the 2010 school year. She was hired again as a part-time instructional aide in November 2011, and was so employed through the end of the 2021–2022 school year.

The superintendent of the District, Dr. Peter Koza, issued a letter to Marcus on April 20, 2022, which the parties confirm is commonly known as a Rice notice, which is referencing the case Rice v. Union Cnty. Reg'l High Sch. Bd. of Educ., 155 N.J. Super. 64, 73 (App. Div. 1977) (pursuant to the rights afforded under the Open Public Meetings Act, reasonable advance notice is to be provided to an employee of an upcoming public meeting if their rights might be adversely affected at the meeting, and the employee is provided the opportunity to request a public discussion).

The Rice notice stated:

This letter is to notify you that there will be a discussion regarding your employment in the Upper Deerfield Township school District. If it is determined that a non-renewal is necessary in the best interest of the district, you will be notified of such decision. Therefore, accept this communication as formal notification that there will be a discussion regarding your employment status in our district. Notification will be provided to you with respect to the outcome of the discussion.



You have the right to request that the Board conduct any discussions that may affect your employment in open session at the next Board meeting on Tuesday, April 26, 2022 at 7:00 PM in the Woodruff School Library. Please notify Mrs. Lisa D'Imperio at the Woodruff School or Dr. Frank Badessa at the Board Office by noon on Monday, April 25, 2022 if you plan on attending the meeting and having this discussion in the public forum.

(Koza letter, April 20, 2022, attached to the District's Statement of Material Facts, Exhibit C.)

Marcus sent an email to the school representative on April 20, 2022, indicating that she would be attending the board meeting and would like any discussions pertaining to her employment to be done in open session. (Marcus email, April 20, 2022, attached to Petitioner's Response to Respondent's Statement of Material Facts and Counter Statement of Material Facts, Exhibit B.)

Marcus attended the Board of Education (BOE) meeting on April 26, 2022. She contends she was prevented from discussing her employment status at the meeting as she had requested, which she asserts is a violation of the Open Public Meetings Act (OPMA), N.J.S.A. 10:4-12(b)(8). She claims that when a BOE member asked about the nonrenewal, the meeting was moved to a closed session.

The BOE meeting minutes of April 26, 2022, were attached as Exhibit C to Petitioner's Response to Respondent's Statement of Material Facts and Counter Statement of Material Facts. The minutes confirm that motions were approved to table the issuance of notices of continuation of employment for the 2022–2023 school year to multiple staff members, such as nontenured professional staff, noninstructional staff, secretaries, computer technicians, crossing guards, etc. (BOE meeting minutes of April 26, 2022, at 1–6.) Marcus' name was not on the agenda.

Under the heading "Public Participation" of the meeting minutes, the following appears:

Sherry Marcus questioned Dr. Koza and the Board as to why she was not being renewed for the 2022-2023 school year? Barb Ostberg also question [sic] them as well? Dr. Koza stated they are not meeting the performance standards of the Board.

(BOE Minutes of April 26, 2022, at 9, punctuation original.)

Petitioner contends that there was no discussion at the meeting about her nonrenewal. She claims that Superintendent Koza did not make a statement about her performance, as the meeting minutes indicate.

A BOE special meeting was held on May 9, 2022. Marcus did not receive a Rice notice regarding the meeting.

The day after that BOE meeting, Superintendent Koza issued a letter on May 10, 2022, which stated:

Please be advised that at the May 9, 2022 Special Meeting of the Upper Deerfield Township Board of Education, your name was not included among those individuals for renewal. Prior to the April 26, 2022 Board of Education meeting you were notified in a meeting and via a letter that it was possible your position would be non-renewal [sic]. At this time I am formally notifying you that you will not be renewed for the 2022-2023 school year.

(Superintendent Koza letter, May 10, 2022, to Marcus regarding nonrenewal, attached as Exhibit D to District's initial motion submission.)

Marcus issued an email to Superintendent Koza on May 14, 2022, requesting a written statement of reason for the nonrenewal of her contract for the 2022–2023 school year. (Marcus letter May 14, 2022, attached as Exhibit E to petitioner's response to statement of facts.) A few weeks thereafter, Marcus' attorney, Kevin P. McCann, issued a letter on May 31, 2022, to Superintendent Koza, indicating "Sherry Marcus accepts you[r] offer for reemployment for the 2022-2023 school year." (Kevin P. McCann, Esq., letter May 31, 2022, attached as Exhibit E to the District's initial motion submission.) The

letter outlined that Marcus had received the Rice notice for the April 26, 2022, BOE meeting, that her request to discuss the matter in open session had been “improperly denied” and tabled, and that the BOE had gone into executive session. McCann’s letter further indicated that Marcus did not receive Rice notice for the May 9, 2022, BOE meeting, at which time “action of employment was taken” and Superintendent Koza issued his May 10, 2022, letter to Marcus. McCann further indicated that due to the superintendent’s failure to comply with Rice requirements and failure to comply with the statute, N.J.S.A. 18A:27-4, et seq, the superintendent’s action in issuing the May 10, 2022, letter was invalid. McCann requested that the superintendent forward a reemployment contract for Marcus for the 2022–2023 school year. (McCann letter, May 31, 2022.)

Superintendent Koza issued a letter response on June 10, 2022, to Marcus’ email request of May 14, 2022, for a statement of written reasons for nonrenewal of her contract. The superintendent’s letter indicated:

I did not recommend your renewal, as I believe you are not the right fit in your position at the district. Among other reasons, as an educator, your responsibility is to adhere to policies and procedures, protect student interest, and work to educate students in a healthy environment. In general you failed to demonstrate skills and performance sufficient to warrant a recommendation that you be renewed.

The items listed above resulted in the decision to non-renew your employment contract.

You have ten days from the date of this letter to notify me in writing whether you are requesting an informal hearing before the Board to permit you to convince the Board to offer you reemployment. Be advised that should you request an informal hearing it will be scheduled within thirty (30) days.

(Superintendent’s letter, June 10, 2022, attached as Exhibit F to the District’s initial motion submission.)

The “informal hearing before the Board” is commonly referred to as a Donaldson hearing, referring to the case Donaldson v. Bd. of Educ. of the City of North Wildwood, 65 N.J. 236 (1974) (an informal hearing before a BOE shall be conducted, if timely

requested, for a nontenured teaching professional to present information to convince the BOE to offer reemployment rather than nonrenewal of their contract). Such a hearing must be requested by the individual within ten days of the issuance of a statement of reasons by the chief school administrator as to why a nontenured teaching staff member's contract was not renewed.

On the same date when the superintendent issued his letter of reasons for nonrenewal to Marcus, counsel for the District issued a letter to Marcus' attorney, McCann, in response to McCann's letter of May 31, 2022, wherein McCann indicated Marcus was accepting the superintendent's offer of reemployment for the 2022–2023 school year. (The District's counsel's letter, June 10, 2022, attached at Exhibit G of the District's initial motion submission.) Counsel for the District stated in their letter that Marcus "does not have a contract for employment for the 2022-2023 school year. Your client was non-renewed by the Superintendent." (District's counsel's letter, June 10, 2022.) Further, counsel for the District indicated that under the law, Marcus was not required to receive Rice notice for the May 9, 2022, BOE meeting because Marcus' name was not on the agenda. There was no action to be taken. The letter further indicated that pursuant to N.J.S.A. 18A:27-10, the superintendent exercised his statutory authority to provide a nontenured teacher with notification of nonrenewal, which authority does not require BOE approval. (District's counsel's letter, June 10, 2022.)

The District's counsel noted that upon receipt of a nonrenewal notice, a nontenured teacher may request a statement of reasons within fifteen days of the notice, which Marcus had done. The written reasons response from the superintendent must be issued within thirty days of receipt of the request for reasons. The District confirmed that the superintendent's letter of reasons of June 10, 2022, was within thirty days of Marcus' request email of May 14, 2022. (District's counsel's letter, June 10, 2022.)

Marcus' attorney issued a letter to Superintendent Koza thereafter on June 13, 2022. The letter stated:

It seems to me that you are way out of time to schedule a Donaldson hearing. We will be filing a Petition with

Commissioner. The letter that you are addressing to my client was supposed to be done before May 15, 2022, not June 10, 2022, when it was received. Thank you[,] we will copy you with position to commissioner.

(McCann's letter of June 13, 2022, attached at Exhibit I to petitioner's response to statement of facts.)

Marcus did not request a Donaldson hearing. Marcus submitted a petition for reinstatement/renewal of her position of employment to the Commissioner of the DOE on August 23, 2022.

The District asserts that this matter is ripe for summary decision. Petitioner was timely notified of nonrenewal prior to May 15. When she asked for a statement of reasons for nonrenewal, the superintendent properly complied by issuing his June 10, 2022, letter within a thirty-day timeframe from petitioner's request for the reasons. Petitioner could have sought a Donaldson hearing but did not do so. Instead, petitioner chose to submit a petition to the DOE. Her petition was untimely, as it was submitted more than ninety days from the date of her receipt of the nonrenewal letter of May 10, 2022.

Even if the petition were considered timely filed, the District contends there is no basis for petitioner to claim that a Rice notice violation occurred and invalidated the issuance of the nonrenewal letter. The District asserts that it went beyond what is statutorily required by the superintendent having issued the Rice notice regarding the April 26, 2022, BOE meeting. The BOE tabled the issue of renewals of employment contracts. The District acknowledges there was no discussion in the open session by the BOE about nonrenewal of petitioner's contract. It argues that there is no statutory right for a nontenured employee to be heard by the BOE, or to have their employment status discussed at a BOE meeting, prior to the issuance of a nonrenewal notice by the superintendent. The statute empowers the superintendent to issue the nonrenewal notice prior to May 15. There is no requirement that the superintendent must gain the "approval" of the BOE before the superintendent issues their determination.

The District indicates that there was no obligation to issue a Rice notice for the May 9, 2022, BOE meeting. Marcus' name did not appear on the agenda, so there would

be no discussion regarding her nonrenewal. Again, the authority rests with the superintendent to issue a nonrenewal letter by May 15, and the superintendent is not required to obtain approval from the BOE before issuing a nonrenewal letter. The superintendent's letter of May 10, 2022, satisfied the statutory requirement to notify petitioner by May 15, 2022. Petitioner timely requested reasons for her nonrenewal, which were timely furnished by the superintendent in his June 10, 2022, letter. The asserted reasons were sufficient, as there is no statutory nor case law requirement that a detailed listing or explanation of reasons is required.

Petitioner had the opportunity thereafter to request a Donaldson hearing, or to have an informal hearing before the BOE to convince them of reasons why she should be renewed. She never requested a Donaldson hearing. The District asserts she cannot now claim that there was a violation of her Rice rights or that she did not have the opportunity to appear before the BOE. Under such circumstances, the District contends that summary decision should be entered, since there is no factual dispute regarding the District's compliance with the notification requirements for the nonrenewal of a nontenured employee's contract. N.J.S.A. 18A:27-3.2.

Petitioner asserts that summary decision should be denied. She contends that the BOE improperly tabled the issue of her employment status. Her recollection of the April 26, 2022, BOE meeting differs from the meeting minutes, where it is noted that the superintendent commented about her performance. She contends this is a genuine issue of material fact in dispute, as she asserts there was no discussion and that her OPMA rights were violated by the BOE opting not to discuss her employment. Moreover, she was never provided Rice notice of the May 9, 2022, BOE meeting, at which time the list of staff members to be renewed was ratified. Petitioner acknowledges that her name was not on the agenda. However, she argues that does not circumvent the Rice notice requirement since the exclusion of her name from the list of staff who were to be renewed meant that she was an employee whose contract was not going to be renewed. This is a violation of Rice notice requirements, and a violation of her right to request to have her employment discussed in open session.

Petitioner further contends that the May 10, 2022, letter of nonrenewal by

Superintendent Koza was improper, having been issued the day after the BOE meeting. This demonstrates that there had to have been some discussion about her nonrenewal by the BOE members, which petitioner asserts may have happened in executive session at the May 9, 2022, BOE meeting.

Marcus contends there are deficiencies in the superintendent's letter of reasons for nonrenewal. The June 10, 2022, deficiencies letter was sparse and incomplete, without details or context as to what skills or performance petitioner failed to demonstrate. The reasons provided further do not align with her annual evaluation report. (Evaluation report dated June 14, 2022, for 2021–2022 school year.) She received all satisfactory ratings for effectiveness and attitude. Comments for Marcus indicated that she provides instructional support in the academic setting, fulfills her responsibilities as a Basic Skills Intervention aide, assists the teachers, and has provided coverage for the teachers. This discrepancy demonstrates that there is a dispute as to whether the superintendent properly satisfied his requirement to provide a statement of reasons for nonrenewal, and thus summary decision must be denied.

Petitioner thus contends that there are genuine issues of material fact in dispute to warrant denial of the District's summary decision request.

Petitioner asserts that the issue of filing her petition in ninety days, since the May 10, 2022, letter of nonrenewal is void on its face due to her OPMA rights having been violated, should be dismissed. Her right to be heard at the April 26, 2022, BOE meeting was denied, and she thereafter never received notice of the May 9, 2022, BOE meeting. Recognizing that the letter of nonrenewal would be void on its face, her attorney transmitted a letter of acceptance of continuing her contract of employment. Petitioner asserts that letter was not responded to by the District, so the ninety-day limitation for filing has yet to be tolled.

Petitioner acknowledges that she received the June 10, 2022, letter of reasons for nonrenewal. Since that could be considered a response to her counsel's May 31, 2022, letter of acceptance of a position of employment, the ninety-day clock would run from

petitioner's receipt of the June 10, 2022, letter. If that date is applied, then the petition submitted to the Commissioner on August 23, 2022, was within the ninety-day time limit.

Petitioner further asserts that the New Jersey Administrative Code provides for a relaxation of the rules in such circumstances, to consider the June 10, 2022, letter as the date from which the ninety days should toll. Petitioner asserts that N.J.A.C. 6A:3-1.16 gives the Commissioner of the DOE authority to relax or dispense with the rules in determining controversies and disputes under the school laws, in situations where strict adherence may be inappropriate, unnecessary, or result in injustice. The ninety days should be relaxed here since petitioner was denied her OPMA rights on April 26, 2022, she never received Rice notification for the May 9, 2022, meeting, and her belief that the May 10, 2022, letter of nonrenewal was void on its face was reasonable. Thus, petitioner's appeal should not be dismissed for having been filed more than ninety days after the "voided" May 10, 2022, letter of nonrenewal and within ninety days of the June 10, 2022, letter of reasons for nonrenewal.

### **LEGAL ANALYSIS AND CONCLUSIONS**

In an administrative law matter, a "party may move for summary decision upon all or any of the substantive issues in a contested case." N.J.A.C. 1:1-12.5(a). The motion "shall be served with briefs and with or without supporting affidavits." N.J.A.C. 1:1-12.5(b). The judge may grant the motion "if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." Ibid. The non-moving party will prevail if they "set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding." Ibid.

The law surrounding the nonrenewal of nontenured teachers is established by both statute and case law. The pertinent statute, N.J.S.A. 18A:27-10, provides that "[o]n or before May 15 in each year, each nontenured teaching staff member continuously employed by a board of education since the preceding September 30 shall receive either (a) A written offer of a contract for employment . . . , or (b) A written notice from the chief school administrator that such employment will not be offered." Ibid. The primary purpose



of the statute is to provide nontenured teaching staff with timely notice when their contract is not being renewed so that they can look for other employment. See Wachstein v. Burlington Cnty. Bd. of Educ., 1976 S.L.D. 928, 931.

The chief school administrator, here the superintendent, is required to issue the nonrenewal letter to a nontenured teaching staff member before May 15, as required by N.J.S.A. 18A:27-10. A nontenured teacher who is not recommended for renewal by the chief school administrator is deemed nonrenewed. N.J.S.A. 18A:27-4.1(b). Prior to notifying the employee of their nonrenewal, the superintendent shall notify the BOE of the recommendation not to renew the contract and the reasons for the recommendation. Ibid. An employee whose contract is not renewed shall have the right to receive a written statement of reasons for nonrenewal and thereafter request a Donaldson hearing. N.J.S.A. 18A:27-4.1(b).

The employee's request for a written statement of reasons for nonrenewal must be made by the employee within fifteen days of their receipt of the nonrenewal letter. N.J.S.A. 18A:27-3.2. The response shall be given to the teaching staff member "in writing within 30 days after the receipt of such request." N.J.S.A. 18A:27-3.2.

The employee has the right to a Donaldson hearing, which is an informal appearance before the BOE, to permit the employee "to convince the members of the board to offer reemployment." N.J.S.A. 18A:27-4.1(b); see N.J.A.C. 6A:10-9.1(c). The Donaldson hearing must be requested within ten days of the employee's receipt of the written reasons for nonrenewal. N.J.A.C. 6A:10-9.1(a). Once requested, the Donaldson hearing must occur within thirty calendar days thereafter. N.J.A.C. 6A:10-9.1(b).

The BOE is required to notify a nontenured teaching staff member of its final determination regarding nonrenewal only when the teacher has requested and participated in the informal Donaldson hearing. N.J.A.C. 6A:10-9.1(i); Donaldson v. Bd. of Educ. N. Wildwood, 65 N.J. 236 (1974). The BOE is not required to notify the teacher of nonrenewal if the employee never requested the Donaldson hearing. Thus, if a Donaldson hearing is not requested, once the employee has received the notice of

nonrenewal from the superintendent, as a matter of law, the employee's contract is deemed nonrenewed.

Although the controlling statute of N.J.S.A. 18A:27-10 requires affirmative action from the chief school administrator to notify nontenured teaching staff members of nonrenewal, it does not require the BOE to resolve or ratify a nonrenewal at a public meeting in advance of the issuance of the superintendent's nonrenewal letter. Welch v. Bd. of Educ., 159 N.J. Super. 29 (App. Div. 1978). Thus, regardless of whether an employee who received a nonrenewal letter requested a Donaldson hearing or not, the BOE is never required to take formal action to accept or reject the chief school administrator's determination of nonrenewal. N.J.S.A. 18A:27-10.

The nonrenewed member may seek an appeal of the determination of nonrenewal by submitting a petition for relief with the Commissioner of the DOE, asserting a controversy has arisen under the school laws. N.J.A.C. 6A:3-1.3(a); 6A:3-1.3(d). The petition must be filed "no later than the 90th day from the date of receipt of the notice of a final order, ruling, or other action by the district board of education, individual party, or agency, that is the subject of the requested contested case hearing." N.J.A.C. 6A:3-1.3(i). The ninety-day time frame in a dispute of the nonrenewal of a nontenured teaching staff member begins to run from the date the employee receives the notice of nonrenewal.

The New Jersey Open Public Meetings Act (OPMA), N.J.S.A. 10:4-1 to 4-21, imposes certain notice and other requirements with which a BOE must comply. Under the OPMA, the public has a right to advance notice of governmental meetings where public business is discussed. N.J.S.A. 10:4-9. The regulation specifies that "[a] public body may exclude the public only from that portion of a meeting at which the public body discusses any . . . matter involving the employment" of a public employee "unless all the individual employees or appointees whose rights could be adversely affected request in writing that the matter or matters be discussed at a public meeting." N.J.S.A. 10:4-12(b)(8).

In the matter of Rice v. Union Cnty. Reg'l High Sch. Bd. Of Educ., 155 N.J. Super. 64 (App. Div. 1977), the Appellate Division held that:

[t]he plain implication of the personnel exception to the New Jersey Open Public Meetings Act is that if all employees whose rights could be adversely affected decide to request a public hearing, they can only exercise that statutory right and request a public hearing if they have reasonable advance notice so as to enable them to (1) make a decision on whether they desire a public discussion and (2) prepare and present an appropriate request in writing.

(Rice, 155 N.J. Super. at 73.)

Thus, “when ‘all individual employees . . . whose rights could be adversely affected request in writing that the matter or matters be discussed at a public meeting,’ the governing body may not opt to shut its doors.” Kean Federation of Teachers v. Morell, 233 N.J. 566, 584–5 (2018) (quoting N.J.S.A. 10:4-12(b)(8)). However, “[t]he OPMA does not contain a requirement about the robustness of the discussion that must take place on a topic.” Id. at 588.

Where any action taken by a public body at a meeting does not conform with the provisions of OPMA, a potential remedy is the voiding of the action taken by the public body. There is no remedy if the public body “took no action that could be voided.” McGovern v. Rutgers, 211 N.J. 94, 112 (2012).

Here, it must be determined whether the District will prevail on its motion for summary decision, seeking to dismiss Marcus’ petition for relief as a matter of law. The first contention is whether Marcus adhered to the ninety-day period for the filing of an appeal with the Commissioner. The May 10, 2022, notice of nonrenewal from the superintendent to Marcus is straightforward and plainly notifies Marcus that she will not be renewed for the 2022–2023 school year. There are no conditions, nor ambiguity in the letter for Marcus to dispute.

Marcus does assert that the nonrenewal notice was voided when her Rice rights were violated by the BOE not having an open public discussion regarding her employment at the April 26, 2022, BOE meeting. She further contends the May 10, 2022, nonrenewal

letter was voided by the District having failed to provide to her Rice notice for the May 9, 2022, BOE meeting, where she asserts there must have been some discussion by the BOE either at the meeting or sometime prior, regarding her nonrenewal. The District contends that the issuance of the Rice notice for the BOE meeting of April 26, 2022, did not trigger an absolute requirement that Marcus' employment status would be discussed at the meeting. It further contends that it is not statutorily required to provide Rice notice if Marcus' name was not on the agenda. She was not on the agenda for the May 9, 2022, BOE meeting. Only those getting renewed were listed on that agenda. Marcus asserts that the absence of her name on the agenda was a trigger that she would be nonrenewed, and thus possible discussion would be had, and must have occurred, so her Rice notice requirements were violated, and thus the May 10, 2022, nonrenewal notice was voided.

The statute governing the nonrenewal notice requirement, N.J.S.A. 18A:27-10, does not trigger the need for a Rice notice to be issued to the nontenured teaching staff member if they are not going to be renewed. The statute places the authority to issue the renewal or nonrenewal notice in the hands of the chief administrative officer, which is the superintendent here. The statute does not require petitioner to have the opportunity to discuss her nonrenewal status in advance of receipt of the notice. The superintendent is required to advise the BOE in advance of the issuance of the nonrenewal notice to the employee. N.J.S.A. 18A:27-4.1(b). This again does not trigger a Rice notice requirement. There is no requirement that the BOE must formally approve or disapprove of the superintendent's determination in advance of the issuance of the nonrenewal letter. The only requirement for a BOE "discussion" to be had on the issue is where the nonrenewed employee has requested a statement of reasons for nonrenewal in a timely manner, and thereafter timely requests a Donaldson hearing. The Donaldson hearing is not an adversarial proceeding. It is the employee's opportunity to assert their reasons to convince the BOE to consider renewal of the employee's contract. If no action is taken by the BOE to change the nonrenewal, the employee's next form of recourse is to initiate a petition with the Commissioner, which must be done within ninety days from the date of the nonrenewal notice. Nothing tolls the ninety-day time limit.

Marcus' assertion that the nonrenewal notice was voided is not supported by the plain reading of the statutes, regulations, and the case law. The notice was issued in

advance of the statutory deadline of May 15. I **CONCLUDE** the nonrenewal notice dated May 10, 2022, was properly issued, in unambiguous and unconditional form. I **CONCLUDE** that petitioner received the notice sometime between May 10, 2022, and May 14, 2022, which is the date petitioner requested her statement of reasons for nonrenewal. Considering the latest date of May 14, 2022, and counting ninety days thereafter, Marcus was required to submit a petition to the Commissioner by August 12, 2022. The petition was submitted on August 23, 2022. I thus **CONCLUDE** that the petition was not timely filed, and this matter shall be **DISMISSED**.

Consideration has been given to Marcus' contention that there should be a relaxation of the rules, given her belief that the May 10, 2022, letter was voided, and rather that the June 10, 2022, letter of reasons for nonrenewal should be deemed the controlling date to trigger the ninety-day time frame. Marcus further contends that this relaxation should further be considered, given that she notified the District she was accepting reemployment, as per the May 31, 2022, letter from her counsel, since the May 10, 2022, letter would have been voided and the BOE was not in compliance with issuing nonrenewal by May 15. Her reemployment should have thus occurred since the statute requires reemployment for the year if the District failed to issue an intended nonrenewal letter by May 15, 2022.

These arguments rely upon the acceptance that a Rice notice requirement was violated. As addressed above, there is no Rice requirement. Marcus has not raised a genuine issue to require an evidentiary hearing by asserting that the BOE possibly discussed her employment in closed or executive session, in violation of OPMA. The fact that the BOE had issued notice for the April 26, 2022, meeting does not trigger a mandate to have a discussion. Nor is the statute somehow overridden by Rice and OPMA if there was no discussion had where the Rice notice had been issued. There is no "robustness" requirement for discussions to be had under the OPMA, and even if the Board somehow violated the OPMA, the Board took no action on Marcus' employment at the April 26th meeting; thus, there is no Board action that could be voided as a result of any OPMA violation. Just as there was no requirement for Marcus to receive a Rice notice in advance of the April 26, 2022, BOE meeting, there was no requirement for Marcus to receive a Rice notice in advance of the May 9, 2022, meeting.

Marcus promptly acted to request a notice of reasons for nonrenewal, which was issued to her in a timely manner. The purpose of the statement of reasons is to disclose any “correctible deficiencies” in a teacher’s performance that may help to aid them in obtaining and maintaining future positions in teaching employment. Donaldson, 65 N.J. at 245. Although a BOE should provide a nonrenewed teacher with the true reasons for its decision, if it fails to do so, there is “no authority to impose a penalty for a board’s failure to provide accurate reasons unless it is established that the real reasons for the board’s action are in violation of constitutional or legislatively conferred rights.” Sheridan v. Bd. of Educ., EDU 08068-03, Initial Decision (October 18, 2004), modified, Commissioner Final Agency Decision (December 1, 2004) <https://njlaw.rutgers.edu/collections/oal/>. “Absent constitutional constraints or legislation affecting the tenure rights of teachers, local boards of education have an almost complete right to terminate the services of a teacher who has no tenure and is regarded as undesirable by the local board.” Dore v. Bd. of Educ., 185 N.J. Super. 447, 456 (App. Div. 1982). The BOE may decline to follow the superintendent’s recommendation for renewal, but “may not do so arbitrarily and capriciously.” Jackson Twp. Bd. of Educ. v. Jackson Educ. Ass’n ex rel Scelba, 334 N.J. Super. 162, 168 (App. Div. 2000).

Reasons for nonrenewal that are vague do not override a board’s broad discretion in deciding whether to retain nontenured teachers. See, Sheridan and Guerriero v. Bd. of Educ. of the Borough of Glen Rock, State Board of Education (February 5, 1986), aff’d, No. A-3316-85T6 (App. Div. 1986). Even when a teacher has received satisfactory evaluations, a board has no obligation to renew a nontenured teacher’s employment. See, Bd. of Educ. v. Wyckoff Educ. Ass’n, 168 N.J. Super. 497 (1979).

Marcus’ contention that the letter of reasons for nonrenewal was vague and contrary to her annual evaluation does not present a genuine issue of material fact to be determined at an evidentiary hearing. The letter stated she was not a good fit and “failed to demonstrate skills and performance sufficient to warrant a recommendation that [she] be renewed.” The letter also alludes to her responsibility as a teacher to “adhere to policies and procedures,” but does not provide any more description as to what that means. In Marcus’ final evaluation, her performance was graded as satisfactory, but did

note recommendations for improvement regarding her attendance and compilation of data to provide to teachers to assist them. As established in Wyckoff and Sheridan, satisfactory evaluations and vague statements of reasons do not override the virtually unlimited discretion that a BOE has in deciding whether or not to renew nontenured teaching staff. Considering this fact in the light most favorable to Marcus that the letter provided a vague explanation is of no consequence because Marcus has not alleged that the statement of reasons was pretextual and that the Board nonrenewed her for an unconstitutional or illegal reason. Thus, Marcus' contention regarding the vagueness of the letter of reasons further does not support her request for a relaxation of the rules to consider her petition to have been timely filed.

Marcus was advised in the letter of reasons that she had the right to request an informal hearing, being a Donaldson hearing, within ten days of receipt of the June 10, 2022, letter of reasons. Marcus did not request a Donaldson hearing, and instead opted to file her petition. She was not mandated to have a Donaldson hearing before opting to file the petition, as the District suggested in its motion submission that Marcus failed to exhaust her administrative remedies. However, she was required to have the petition filed with the Commissioner of the DOE within ninety days of the notice of nonrenewal.

The case law pertaining to adherence to the ninety-day time limit for filing does not provide for a relaxation of the rules for untimely filing. The language of the statute setting the ninety-day time frame to file a petition is mandatory. If a petitioner spends part of that time period attempting to resolve the matter in other ways, it does not provide justification to toll or extend the ninety-day limit. Pacio v Bd. of Educ. of Lakeland Reg'l High Sch. Dist., 1989 S.L.D. 2060. Likewise here, petitioner's assertions that her belief that the nonrenewal letter was void and that she took other efforts to assert her objection under Rice and OPMA violations did not toll the ninety-day time frame or otherwise require a relaxation of the rules.

Taking into consideration Marcus' arguments for relaxation of the rules in the light most favorable to her, there still is no genuine issue of material fact presented to mandate an evidentiary hearing on the matter, nor any compelling reason to relax the rules. Hence,

I **CONCLUDE** that summary decision should be entered in favor of the District, and the matter shall be **DISMISSED**.

**ORDER**

It is **ORDERED** that respondent's motion for summary decision is **GRANTED** and this matter shall be **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified, or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify, or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**. Exceptions may be filed by email to [ControversiesDisputesFilings@doe.nj.gov](mailto:ControversiesDisputesFilings@doe.nj.gov) or by mail to **Office of Controversies and**



**Disputes, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500.** A copy of any exceptions must be sent to the judge and to the other parties.

April 29, 2024  
DATE

  
ELAINE B. FRICK, ALJ

Date Received at Agency:

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Date Mailed to Parties:

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EBF/sg/jm

**APPENDIX**

May 1, 2023, Motion for Summary Decision filed by respondent

June 1, 2023, Opposition to the motion filed by petitioner

June 9, 2023, Reply brief to opposition filed by respondent

November 29, 2023, Supplemental brief on ninety-day-rule issue by respondent

March 11, 2024, Supplemental brief on ninety-day-rule issue by petitioner