

HEATHER HUDSON, :
 :
 PETITIONER, :
 :
 V. : COMMISSIONER OF EDUCATION
 :
 BOARD OF EDUCATION OF THE : DECISION
 TOWNSHIP OF MOUNT OLIVE, :
 MORRIS COUNTY, :
 :
 RESPONDENT. :

SYNOPSIS

Petitioner – formerly a non-tenured English teacher in the respondent’s district – appealed her mid-year termination for misconduct following an incident in which she responded to a student’s disruptive behavior by taping and wrapping a scarf around the student while he was sitting in a chair. Petitioner claimed that the respondent could not terminate her without “just cause” and asserted that the Board improperly reported her termination to the State Board of Examiners as required by *N.J.S.A. 18A:16-1.3*. The Board contends that it acted within its discretion to terminate non-tenured employees and argued that the Commissioner does not have jurisdiction over this matter, as it does not arise under the school laws.

The ALJ found that: a school board has virtually unlimited discretion, absent a violation of constitutional or legislatively-conferred rights, in the termination of non-tenured teachers; employment contracts of non-tenured teachers which contain provisions for termination by either party upon a specified number of days of notice may be terminated in accordance with the contract without the need to demonstrate just cause; petitioner’s contention that just cause is required prior to termination is derived from the Collective Bargaining Agreement between the Board and the Education Association of Mt. Olive; the Commissioner does not have jurisdiction over contractual disputes; the respondent prematurely notified the State Board of Examiners of petitioner’s termination, however – because petitioner did not pursue her grievance in an “administrative tribunal of competent jurisdiction” pursuant to *N.J.S.A. 18A:16-1.3*, the respondent’s procedural violation had no impact. The ALJ concluded that the OAL does not have jurisdiction to grant petitioner’s requested relief, and dismissed the petition.

Upon independent review and consideration, the Commissioner adopted the Initial Decision of the OAL as the final decision in this matter for the reasons expressed therein. 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.

September 21, 2009

OAL DKT. NO. EDU 9142-08
AGENCY DKT. NO. 145-5/08

HEATHER HUDSON, :
 :
 PETITIONER, :
 :
 V. : COMMISSIONER OF EDUCATION
 :
 BOARD OF EDUCATION OF THE : DECISION
 TOWNSHIP OF MOUNT OLIVE, :
 MORRIS COUNTY, :
 :
 RESPONDENT. :

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The Board filed timely exceptions to the Initial Decision. Petitioner requested and was granted three extensions of time within which to file her exceptions and the Board requested and was granted an extension of time to file a reply to petitioner's exceptions. These submissions were received in accordance with the revised timelines.

Although in all other respects agreeing with the Administrative Law Judge's (ALJ) decision, the Board excepts to her determination that the Board engaged in a procedural violation by prematurely notifying the State Board of Examiners of petitioner's termination only two-days after its action to terminate her employment. Although concurring with the ALJ's finding that this alleged violation did not alter her holding because Petitioner never pursued her grievance in the appropriate forum, the Board calls to the Commissioner's attention *N.J.A.C. 6A:9-17.4*, the regulation implementing *N.J.S.A. 18A:16-1.3* which in sub-part (a) provides:

The Chief School Administrator of a District shall notify the Board of Examiners when: (2) Non-tenured teaching staff members who are accused of criminal offenses or unbecoming conduct resign, retire or are removed from their positions...
(Board's Exceptions at 1)

Clearly, the Board argues, this provision does not require the District to wait to notify the State Board of Examiners when an employee is dismissed for unbecoming conduct. The Board, therefore, proposes that it committed no statutory or regulatory violation by immediately notifying the State Board of Examiners of petitioner's termination. (*Id.* at 2)

Petitioner's exceptions challenge the ALJ's determination that the Commissioner does not have subject matter jurisdiction over this matter as it is, fundamentally, one of contract interpretation. In support of her position, petitioner recasts and reiterates her arguments advanced below, essentially maintaining that this is not a contract dispute, but rather is controlled by *N.J.S.A.* 18A:16-1.3 in that she is challenging whether the Board satisfied the "just cause" criteria of this provision necessary to report her termination to the State Board of Examiners and, as such, this matter falls within the jurisdictional purview of the Commissioner. (Petitioner's Exceptions at 6-8) Petitioner further disputes the ALJ's finding that she should have properly pursued her grievance with respect to her termination through arbitration pursuant to her Collective Bargaining Agreement (CBA). Petitioner argues that the CBA expressly states:

It is however, expressly understood that if the subject matter of the grievance involves an alleged violation or misinterpretation of Board policy or **an alleged improper administrative action or decision**, *the grievance shall terminate at the Board level and there shall be no right to proceed to arbitration* as provided herein.
[Exhibit G, Agreement, pg. 8] emphasis added
(Petitioner's Exceptions at 8)

As indicated above, she argues – because the subject matter of her grievance involves improper administrative action – her “case was not permitted to be the subject of arbitration pursuant to the

CBA” (*Id.* at 8) Petitioner, therefore, requests that the Commissioner reject the recommended decision of the OAL. In the alternative, she asks that the decision be modified to require this matter to be sent to arbitration. (*Id.* at 11)

In reply, the Board advances that petitioner attempts to obfuscate the underlying issue in this matter by her claim that the term “just cause” is derived from *N.J.S.A.* 18A:16-1.3 rather than – as found by the ALJ – her collective bargaining agreement (CBA). In so claiming, it contends, petitioner continues to misread the provisions of this statute, specifically

[u]nder the statute’s provisions, “just cause” relates only to whether there was cause for the employee’s actual termination, [thereby triggering a reporting responsibility for the Board.] (...) In this matter, the reasoning as to whether or not Petitioner’s termination was with “just cause” is derived directly from the terms of the relevant [CBA] in effect between the parties.

Pursuant to the terms of the [CBA], “the Board shall have the right to take disciplinary action for good and just cause. Disciplinary action may include...termination.” See [CBA] at Article 19 [Exhibit G, Petitioner’s Exceptions] (...) Throughout Petitioner’s Exceptions, and indeed throughout each submission by Petitioner during the course of this litigation, she has claimed that her termination was without just cause. Accordingly, Petitioner’s underlying termination, and whether or not just cause existed for same, is governed by the terms of the [CBA] and has no relation to any school law provision contained in Title 18A...

Thus, Petitioner’s claim relates directly to the terms of the Agreement. Petitioner did not challenge the Board’s finding of just cause before an arbitrator, as was her right under the terms of the Agreement, and her failure to do so then invoked the [reporting] provisions of *N.J.S.A.* 18A:16-1.3. (Board’s Reply Exceptions at 8-9)

Similarly, the Board argues, petitioner is mistaken in her allegation that the terms of the CBA precluded her from submitting her grievance to arbitration. “Petitioner’s grievance over her termination is not alleging an improper administrative action. Rather, she alleges that she was disciplined without just cause, in violation of the Agreement itself.” The terms of both the CBA

and the New Jersey Employer-Employee Relations Act, *N.J.S.A.* 34:13A-29, expressly provide that issues of “discipline,” including terminations, are subject to the grievance procedure, including – ultimately – binding arbitration. Petitioner’s failure to exhaust her administrative remedies under the CBA is fatal to the allegations contained in her petition. (*Id.* at 10-11, quotation at 11)

Upon full consideration, the Commissioner concurs with the ALJ that summary decision is appropriately granted to the Board, as she lacks jurisdiction over the instant matter.¹ In so determining, the Commissioner is fully cognizant that it is by now well-established that a district board has virtually unlimited discretion in hiring, firing or renewing non-tenured teachers. *Dore v. Bedminster Twp. Bd. of Ed.*, 185 *N.J. Super.* 447 (App. Div. 1982). “[A]bsent 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.” *Id.* at 456. Where a non-tenured teacher challenges a district board’s decision to terminate her employment, she is entitled to litigate that claim only if the facts she alleges, if true, would constitute a violation of constitutional or legislatively-conferred rights. *Guerriero v. Board of Education of the Borough of Glen Rock*, decided by the State Board of Education, February 5, 1986, *aff’d*, Docket #A-3316-85T6 (App. Div. 1986). (*See also Kufel v. Union County Vocational-Technical School District* 96 *N.J.A.R.* 2d (EDU) 446; *Randy Pratt v. Board of Education of the Borough of Butler, Morris County*, decided by State Board of Education, January 6, 1999; *Lydia Anderson v. State-operated School District of the City of Newark*, decided by State Board of Education, February 7, 2001). The instant petitioner has made no such claim and, therefore, the

¹ It is noted that subsequent to the termination of her employment, petitioner received 60-days pay in accordance with the terms of her employment contract.

Commissioner lacks jurisdiction to consider the underlying reasons for petitioner's mid-year termination.

Petitioner's argument that her challenge to whether or not the Board satisfied the "just cause" provision of *N.J.S.A.* 18A:16-1.3 brings this matter within the jurisdictional purview of the Commissioner of Education, is wholly without merit. This provision, in pertinent part, specifies:

A board of education shall notify the State Board of Examiners whenever a non-tenured, certificated employee is dismissed prior to the end of any school year for just cause as a result of misconduct in office...The State Board of Examiners shall maintain a list containing the name...of the employee and the reason for the dismissal. If a disciplinary grievance arbitration is conducted pursuant to... [*N.J.S.A.*] 34:13A-29 as to the dismissal, or if the dismissal is appealed to a court or administrative tribunal of competent jurisdiction the board of education shall not notify the State Board of Examiners unless just cause due to misconduct in office is found by the arbitrator, the court or administrative tribunal of competent jurisdiction.

The Commissioner is in full accord with the ALJ that

N.J.S.A. 18A:16-1.3 has no relevance to a board's decision to terminate an employee or the reasons underlying the termination. Rather, this provision only concerns a board's actions after a non-tenured, certificated employee is terminated mid-year. (Initial Decision at 11)

It is noted that *N.J.S.A.* 18A:16-1.3 – on its face – imposes a reporting obligation on the Board. It provides no right of appeal as to the validity of the Board's reasons for termination but, rather, contemplates that any challenge to the reasons for an individual's removal from employment be made in an appropriate forum and a challenge so made serves to postpone the Board's reporting responsibilities until a "court or administrative tribunal of competent jurisdiction" has made a determination on the individual's appeal. For the reasons detailed above, the Commissioner of

Education lacks jurisdiction to review the reasons for the instant petitioner's termination. The Commissioner, therefore, is not a court or tribunal of competent jurisdiction as contemplated by *N.J.S.A. 18A:16-1.3*. Here, petitioner's claim was derived from and appropriately advanced pursuant to her CBA through arbitration, as a contractual claim in Superior Court or as an action before the Public Relations Commission. (See *N.J.S.A. 18A:16-1.3*)

However, the Board's Motion to Dismiss filed below specifically advances:

the Collective Bargaining Agreement ...between the Mount Olive Board of Education and the Education Association of Mount Olive..., Article 2...provides that if a grievance is not resolved at the Board level, "the Association may, within the limitations contained herein, submit the grievance to arbitration, which shall be binding to the extent permitted by law." (emphasis added) Art. 2(C)(5). (Exhibit G)

A grievant may submit a written request to the Association to pursue arbitration within 10 days of receiving the Board's grievance determination. The Association then has 28 days to file a petition with the American Arbitration Association. Art. 2(C)(5). The recommendation of the arbitrator is binding. Art. 2(C)(6). (emphasis added. Article 5A, Subsection D provides that "[a]ny grievance not processed in accordance with the time limits specified herein shall be deemed relinquished by the grievant." (emphasis added). (Exhibit G) (Board's Motion to Dismiss at 3-4)

Petitioner's failure to pursue her claim to its conclusion in an appropriate forum – pursuant to her CBA – was a fatal error and provides her no recourse here.

The Commissioner declines petitioner's alternative exception request – that she order that this matter be sent to arbitration – as the Commissioner lacks the jurisdictional authority to consider such a request or to issue such an order.

Notwithstanding this result, the Commissioner cannot support the Board's argument that it was not guilty of a procedural infraction by reporting petitioner's termination to the State Board of Examiners two days after the Board acted to dismiss her. Rather the

Commissioner agrees with the ALJ that such action was “premature” as “[t]his did not afford petitioner the opportunity to pursue an appropriate appeal prior to notification.” (Initial Decision at 12) However – as also found by the ALJ – given petitioner’s failure to pursue her grievance in an appropriate forum, “the Board’s procedural violation has no impact because the Board is required to notify the State Board unless the dismissal is appealed to ‘an administrative tribunal of competent jurisdiction.’ *N.J.S.A. 18A:16-1.3*” (Initial Decision at 12)

Accordingly, the recommended decision of the OAL is adopted as the final decision in this matter for the reasons stated therein. Summary Decision is hereby granted to the Board and the instant petition of appeal is hereby dismissed.

IT IS SO ORDERED.²

COMMISSIONER OF EDUCATION

Date of Decision: September 24, 2009

Date of Mailing: September 24, 2009

² This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L. 2008, c. 36* (*N.J.S.A. 18A:6-9.1*).