

App. Div. # 5517-99T1
SB # 7-00
C # 78-02R
SB # 18-02

PATRICIA OSMAN, :
 :
 PETITIONER-APPELLANT, :
 : STATE BOARD OF EDUCATION
V. :
 : DECISION
BOARD OF EDUCATION OF THE :
 TOWNSHIP OF DELRAN, :
 BURLINGTON COUNTY, :
 :
 RESPONDENT-RESPONDENT. :

Remanded by the Appellate Division, October 17, 2001

Remanded by the State Board of Education, December 5, 2001

Decision on Remand by the Commissioner of Education, March 4, 2002

For the Petitioner-Appellant, Wills, O'Neill & Mellk (Arnold M. Mellk, Esq.,
of Counsel)

For the Respondent-Respondent, John T. Barbour, Esq.

This case arose when the Board of Education of the Township of Delran (hereinafter "Board") terminated the employment of Patricia Osman (hereinafter "petitioner") on January 13, 1997 after it was notified by the Burlington County Superintendent of Schools that the English endorsement she possessed on her Instructional Certificate appeared to be fraudulent on its face.¹ On January 23, 1997,

¹ The petitioner also held an elementary and a reading endorsement on her instructional certificate. The legitimacy of those endorsements has not been challenged.

the State Board of Examiners issued an Order to Show Cause why the petitioner's Certificate should not be revoked or suspended. The petitioner successfully contested the Order to Show Cause and, in a decision rendered on September 24, 1998 and mailed on October 13, 1998, the State Board of Examiners dismissed the matter, agreeing with the Administrative Law Judge ("ALJ") that, while there was ample evidence of wrongdoing, there was no evidence that the petitioner was the responsible party.

On December 18, 1998, the petitioner filed a petition with the Commissioner of Education alleging that the Board had improperly terminated her employment in January 1997 in violation of her tenure rights. The petitioner claimed that she had achieved tenure in the district as a teacher as a result of her service under her elementary and reading endorsements, and she sought reinstatement to a teaching position.

In the ensuing administrative appeals process, the ALJ, the Commissioner and the State Board of Education all agreed that the petitioner was tenured at the time of her termination. However, they also concurred that the petitioner's claim was time-barred by N.J.A.C. 6:24-1.2(c) [now codified at N.J.A.C. 6A:3-1.3(d)], which requires that a petition be filed within 90 days of notice of the action being challenged.

In dismissing the petition, the Commissioner indicated in a footnote that he was not considering whether the circumstances warranted relaxation of the 90-day time limit since the petitioner had not argued that issue. In affirming the Commissioner's decision, the State Board made no comment concerning relaxation.

The Appellate Division affirmed the State Board's determination that, although the petitioner was tenured at the time of her termination, her petition was time-barred.

Nonetheless, given the informal nature of administrative proceedings and in the absence of a controlling rule, the Court found that the petitioner should not be prejudiced by a failure to formally request relaxation of the 90-day time limitation. Since the Commissioner had not considered whether the circumstances warranted relaxation and because the State Board had not commented on the question, the Court determined that it was necessary to remand this matter to the State Board so that we could return it to the Commissioner for his findings and determination of whether the 90-day rule should be relaxed in this instance. Pursuant to that directive, we remanded this matter to the Commissioner on December 5, 2001.

On March 4, 2002, the Commissioner concluded that the facts of this matter did not warrant relaxation of the 90-day rule, and he dismissed the petition. The Commissioner rejected the petitioner's contention that she could not have filed a petition challenging the termination of her employment until after the Board of Examiners had rendered a determination on the Order to Show Cause. In so doing, the Commissioner observed that when the petitioner was notified that the Board was terminating her employment in January 1997, "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," Commissioner's decision, slip op. at 2-3 (emphasis in original), "although her reinstatement...would eventually have been subject to any action by the State Board of Examiners to suspend or revoke her still-valid certificates." Id. at 2.

The Commissioner stressed that the petitioner's claim that she had achieved tenure and could not be summarily dismissed "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." Id. at 4. In addition, the Commissioner pointed out that the Board had "vigorously disputed" the petitioner's contention that she had achieved tenure, and he found that 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." Id. at 3. Under these circumstances, the Commissioner concluded that holding the petitioner to the 90-day rule was not unduly harsh.

The petitioner filed the instant appeal to the State Board.

After a careful review of the record, we affirm the decision of the Commissioner. We find that the facts herein do not present the exceptional circumstances that would compel relaxation of the 90-day limitation. See Kaprow v. Board of Educ. of Berkeley Tp., 131 N.J. 572, 590-91 (1993). As the ALJ pointed out, the petitioner knew in January 1997 "that she was a tenured employee holding a valid instructional certificate with two valid endorsements which entitled her to continued employment in the district." Initial Decision of October 29, 1999, slip op. at 8. The petitioner's claim that she had achieved tenure and could not be removed from her tenured position except for inefficiency, incapacity, unbecoming conduct, or other just cause, and then only after a hearing held pursuant to the requirements of the Tenure Employees Hearing Law,

N.J.S.A. 18A:6-10 et seq., arose on January 13, 1997 when the Board acted to terminate her employment and “was not in any way affected by the September 24, 1998 determination of the Board of Examiners.” Id. at 6. As the ALJ explained:

When respondent purported to terminate her employment without complying with the requirements of the tenure law, petitioner had 90 days within which to challenge the board’s action before the Commissioner of Education by filing a petition of appeal. For whatever reason petitioner chose not to do that, perhaps also for strategic legal reasons. She too waited to see whether the New Jersey State Board of Examiners would take actions against her legitimate instructional certificate/endorsements. There is no question that the 90-day period mandated by N.J.A.C. 6:24-1.2(c) applies to an alleged violation of statutory tenure rights. Like the teaching staff member in Nissman v. Board of Educ., 272 N.J. Super. 373 (App. Div. 1994), petitioner herein could have presented the same substantive argument in January 1997 as she did when she filed her petition in December 1998, well beyond the 90-day period which commenced with her termination of employment in January 1997. As in Nissman, the respondent herein had a right to know within 90 days of January 13, 1997 whether its action was going to be challenged.

Id. at 8.

Accordingly, we affirm the Commissioner’s decision to dismiss the petition in this matter.

August 7, 2002

Date of mailing _____