

DOLORES L. EMMETT, :
PETITIONER, :
V. : COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE : DECISION
TOWNSHIP OF GLOUCESTER,
CAMDEN COUNTY, :
RESPONDENT. :

SYNOPSIS

Petitioner – formerly employed in a secretarial position by the Gloucester Township Public Schools – claims that she achieved tenure, pursuant to *N.J.S.A.* 18A:17-2, and that her tenure rights were violated when the respondent Board terminated her employment effective December 31, 2004 by resolution December 13, 2004. Respondent argues, *inter alia*, that petitioner was effectively terminated when she received notice of the Board’s action to adopt the resolution.

The ALJ found that: petitioner’s “substitute” employment prior to January 1, 2002 cannot be considered consecutive for the purpose of establishing tenure; petitioner’s actual last day of work on December 23, 2004 is not a factor in determining her tenure status as respondent gave petitioner a paid holiday break by making her termination effective on December 31, 2004; and petitioner must be denied tenure benefits because she received notice that she was being terminated prior to the third anniversary of her employment as a full-time secretary. In so deciding, the ALJ applied the *dicta* of a concurring Appellate Division opinion in the matter of *Nissman v. Board of Education*, 272 *N.J. Super.* 373 (App. Div. 1994).

The Commissioner rejected the Initial Decision, finding that the respondent Board’s actions in this matter cannot be validated by concurring opinion *dicta* regarding the substance of a matter decided by the court on a procedural basis. Instead, the Commissioner analyzed the facts consistent with the principles set forth in the underlying agency decision in *Nissman* – which, unlike the Appellate decision, dealt with the substance of the complaint – and found that the respondent Board enabled petitioner to fulfill the statutory condition for tenure acquisition by setting her termination date at December 31. Therefore, petitioner must be considered a tenured employee who cannot be terminated without tenure removal proceedings. The respondent Board was directed to reinstate petitioner to tenured employment – together with back pay and emoluments less mitigation – from the time of her unlawful termination.

<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>

December 6, 2005

OAL DKT. NO. EDU 2379-05
AGENCY DKT. NO. 72-3/05

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The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed, as have timely exceptions filed by petitioner.

Petitioner’s exceptions reiterate the arguments raised in her filings before the Administrative Law Judge (ALJ), contending once again that: 1) Petitioner has met the statutory conditions for acquisition of tenure; and 2) The Appellate Division decision in *Nissman, supra*, did not reach the substantive issue before it, so that the underlying Commissioner decision—which is squarely on point—should be applied herein. (Petitioner’s Exceptions at 1-3).

Upon review, the Commissioner cannot accept the Initial Decision’s conclusion that the Board’s actions in this matter are validated by *Nissman, supra*. To the contrary, the Commissioner finds the *Nissman* matter neither controlling nor instructive; she does not, as did the ALJ, accord *dicta* within a one-paragraph concurring opinion—expressing agreement with the majority’s ultimate determination of dismissal,

but for substantive reasons rather than procedural¹—the same weight as a majority opinion expressly stating that the court was *not* reviewing the substance of Nissman’s complaint, but only the procedural question of whether it was timely filed.² *Nissman, supra*, at 380-82.

Rather, the Commissioner would analyze the facts of this matter consistent with the principles—with which the Commissioner fully concurs—set forth by in the underlying agency decision in *Nissman* at 92 *N.J.A.R.2d* (EDU) 71:

It is clear from the record that the Board resolved by its April 23, 1990 action that it did not wish to continue petitioner's employment beyond the terms of the contract issued her effective from September 1, 1987 through August 31, 1991. However, by having failed to terminate the contract before the completion of three calendar years, the tenure statute applied by self-effectuation by petitioner's having worked from September 1, 1987 through August 31, 1991. Having a termination date of August 31, 1991, thus made the Board vulnerable to a claim of tenure acquisition after that date***Tenure acquisition is a statutory entitlement. Thus, the determination in this matter rests on whether petitioner achieved tenure status, and the seminal case for so determining is *Spiewak, supra*. As the review conducted by the ALJ notes, based on his careful consideration of the facts extant in this matter, petitioner*** did work the requisite number of years to acquire tenure***[and] thus acquired tenure*** (*Id.* at 75)

Viewed in this light, in the present matter as in *Nissman*, the facts reveal that the Board—notwithstanding a clear intent to deny petitioner tenure by voting to terminate her employment on notice—concomitantly acted to establish an effective termination date that permitted petitioner to remain a Board employee sufficiently long to

¹ The pertinent excerpt reads: “Rather, I would hold, as a matter of law based on the legislative policy developed so well by the majority, that by virtue of N.J.S.A. 18A:27-10 (and N.J.S.A. 18A:27-9), the adoption and service of the Local Board’s resolution before April 30, 1990 had the effect of preventing the acquisition of tenure which would have otherwise been obtained pursuant to N.J.S.A. 18A:28-5(a) on the last day of the three-year contract period.” *Nissman, supra*, at 382-83.

² As in the instant matter, the substantive question was whether a board could prevent tenure acquisition by notification to the employee of its intent not to offer a new contract, notwithstanding that the time remaining on the existing contract—which the employee served—would otherwise have caused tenure to accrue.

complete the years of service required for her to obtain tenure pursuant to law, in this case *N.J.S.A. 18A:17-2(b)1*.³ Therefore, regardless of its intent, the Board in fact enabled petitioner to fulfill the statutory condition for tenure acquisition, so that it cannot now disavow the consequences of its action and claim that petitioner was a nontenured employee who could be terminated in the absence of tenure removal proceedings.

Accordingly, the Initial Decision of the OAL is rejected for the reasons set forth herein. The Board is directed to reinstate petitioner forthwith to tenured employment, and to provide her with back pay and emoluments, less mitigation, from the time of her unlawful termination.⁴

IT IS SO ORDERED.⁵

ACTING COMMISSIONER OF EDUCATION

Date of Decision: December 6, 2005

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³ The Commissioner here notes that— for the reasons set forth in the Initial Decision at 3— the district schools being closed for holiday break during the last few days of petitioner’s employment is of no import in this analysis.

⁴ Petitioner’s request for interest is denied as without support in the record, *N.J.A.C. 6A:3-1.17*; her request for costs is also denied as contrary to the well-established principle that the Commissioner may not direct such compensation in the absence of express statutory authority. *Balsley v. North Hunterdon Bd. of Educ.*, 117 *N.J.* 434, 441 (1990).

⁵ This decision 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.*