

PAMELA MILLER, :
PETITIONER, :
V. : COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE : DECISION
TOWNSHIP OF WEST AMWELL, :
HUNTERDON COUNTY, :
RESPONDENT. :

SYNOPSIS

Petitioner – a former half-time art teacher in respondent’s district – alleged that the Board improperly terminated her on contractual notice when she had already obtained tenure in her position. She further alleges that the Board failed to comply with the regulatory requirements of the Provisional Teacher Program. Respondent asserted that petitioner had not yet obtained tenure in the district because during the first six months of her employment, she was working as a substitute teacher and held no certification as a teacher of art.

The ALJ found, *inter alia*, that: the facts in this matter are essentially undisputed and summary decision is appropriate; although petitioner raised the issue of the district’s alleged failure to provide required observations and evaluations during her first year of teaching, the issue was constructively abandoned since neither petitioner nor the Board briefed or otherwise pursued it; petitioner did not hold an appropriate certificate to teach art during her first six months in the district – when she filled a vacancy under a substitute credential – and, therefore, that time does not count toward tenure. The ALJ concluded that the Board’s termination of petitioner’s contract was appropriate and should be affirmed.

Upon a thorough and independent review of the record, the Commissioner concurred with the ALJ that respondent Board properly exercised its contractual right to terminate petitioner’s employment, rejected the petitioner’s exceptions, and adopted the Initial Decision with clarification.

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.

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The record, the Initial Decision of the Office of Administrative Law (OAL), and the exceptions submitted by the parties have been reviewed.¹ The Commissioner adopts the Initial Decision as the Final Decision in this case with the following clarifications.

In her first exception, petitioner maintains that the Administrative Law Judge (ALJ) erred in finding that petitioner constructively waived the claim articulated in Count II of her petition, *i.e.*, that respondent’s alleged failure to properly evaluate her warranted an order restoring her, with back pay and benefits, to a position in respondent’s district. Petitioner requests a remand on that issue, contending that since respondent did not raise it in its summary judgment motion papers, she had no obligation to raise it in hers. She further asserts, in the alternative, that she actually did raise the issue in her summary judgment papers, *i.e.*, on the last page of her brief, where she alleged that respondent “took steps to prevent Petitioner from acquiring her permanent certification, namely, by failing in its obligations to observe and evaluate Petitioner during her first year of mentoring”

In considering petitioner’s first exception, the Commissioner notes that in his procedural history in the Initial Decision, the ALJ stated that in a telephone conference on October 25, 2005: “the parties agreed that a hearing was unnecessary because the facts were not in

¹ Petitioner’s reply to respondent’s reply exceptions was not considered, as the regulations make no provision for same.

dispute, and asked that the matter be summarily decided on the briefs.” (Initial Decision at 2) [Emphasis added] Having agreed to a summary decision, it was petitioner’s burden to provide support for all claims articulated in her petition, regardless of whether the issues were addressed by respondent in its summary judgment papers.

Another difficulty with petitioner’s first exception is that it relies on an untimely claim. Setting aside the fact that it is not evident that petitioner’s allegations concerning evaluations are undisputed, the Department of Education’s regulations allow a ninety-day period for petitioning the Commissioner for redress of such matters. *N.J.A.C. 6A:3-1.3(i)*. It is undisputed that petitioner received provisional certification in March 2002. It must be assumed that by the end of that school year, June 2002 – and certainly by the end of the following school year, June 2003 – petitioner would have been aware that she was not being evaluated. Her petition to the Commissioner was, however, not filed until almost two years later. Accordingly, the Commissioner finds that petitioner is out of time to raise the issue.

Further, the question of whether respondent evaluated petitioner is tangential to the issue of whether petitioner achieved tenure in respondent’s district, and does not drive the outcome of this case. According to the record, petitioner received provisional certification on or about March 1, 2002. This is when her tenure eligibility began, because tenure eligibility does not commence until a teaching staff member is the holder of a proper certificate in full force and effect. *N.J.S.A. 18A:28-5*. With or without evaluations, petitioner would have had to have worked in respondent’s district for three years from March 1, 2002 to have achieved tenure. It is undisputed, however, that her employment was terminated before the three-year benchmark.

In her second exception, petitioner contends that the ALJ improperly failed to consider her argument that her termination from employment was a violation of public policy. In so arguing, petitioner asks the Commissioner to assume that respondent’s ‘illegal’ employment of petitioner as a substitute for six months, failure to properly evaluate her, and dismissal of her within

days of the date that her tenure could have been established was *per se* evidence of respondent's motive to "[avoid] the obligations of tenure toward its Teacher of Art," in violation of "the policies of teacher protection and security clearly established by the legislature." [No citation provided.]

At the outset, it is questionable whether the Commissioner has the jurisdiction to decide such a claim, which is not based specifically on school law. However, even assuming *arguendo* that the Commissioner has such authority, she cannot find – on the record before her – that respondent's termination of petitioner's employment was a violation of public policy.

For the reasons articulated by the ALJ, petitioner was not tenured in respondent's district. It is settled that employment contracts of non-tenured public school teachers which contain provisions for termination by either party upon a specified number of days notice may be terminated in accordance with the terms of the contract without the need to demonstrate good cause. *See, e.g., Mozier v. Board of Education of Cherry Hill Twp., Camden County*, 450 F. Supp. 742, 748 (D.N.J. 1977). It shall be optional with the board whether or not the member shall continue to perform his duties during the period between the giving of notice and the date of termination of employment thereunder. *N.J.S.A. 18A:27-9*. And, in general, a board's decision will be vacated only when it is arbitrary, capricious and unreasonable. *See, e.g., Kopera v. West Orange Board of Education*, 60 N.J. Super. 288, 294 (App. Div. 1960).

While the record does not contain a copy of petitioner's contract, no one appears to dispute the fact that the contract contained a provision allowing termination upon sixty days notice.² It is thus petitioner's burden to prove that respondent's exercise of the provision was arbitrary, capricious or unreasonable.

The Commissioner appreciates that the proximity of respondent's action to terminate petitioner's employment to the date that she might have received tenure must have greatly

² The Commissioner notes, in addition, that there is correspondence in the file, dated June 26, 2006, in which respondent avers that petitioner was given 60 days severance pay.

disappointed petitioner. However, the timing of the dismissal – in and of itself – is not sufficient support for a claim that it was arbitrary and capricious. Indeed, in *Canfield v. Board of Ed. of Pine Hill Borough*, 51 N.J. 400, 401 (1968) (adopting dissenting opinion in *Canfield v. Bd. of Edu. of Pine Hill*, 97 N.J. Super. 483, 490-93 (App. Div. 1967)), the Court upheld a board's decision to terminate a teacher's employment four days before she would have served the amount of time required for tenure status under N.J.S.A. 18A:28-5.

The Commissioner is unpersuaded by petitioner's arguments that respondent's employment of her as a substitute teacher for six months in 2001-2002, and respondent's alleged failure to evaluate her, constitute the basis for a determination that respondent was arbitrary, capricious and unreasonable in terminating her employment in February 2005.³ First, respondent's retention of petitioner for six months in spite of her lack of proper certification cannot be seen as an action that was detrimental to her. The situation could have resulted in termination of petitioner's employment and the possible withholding from respondent of State funds for the *per diem* expenses. N.J.A.C. 6A:9-5.2 (at the time, N.J.A.C. 6A:11-3.1(e)). In addition, the Commissioner cannot assume, without more, that the six-month period of substitute teaching in 2001-2002 had any connection with the termination of petitioner's employment over four years later.

Second, petitioner has made no showing of a nexus between respondent's alleged failure to monitor petitioner and the termination of petitioner's employment. It is a huge leap from the facts actually established in this case to petitioner's suggestion that respondent terminated her employment to avoid maintaining a tenured teacher of art position. Petitioner did not meet her burden to present a record that filled that gap. The Commissioner cannot find, on this record, that respondent's action was arbitrary, capricious or unreasonable.

³ The Commissioner has noted that petitioner is out of time to challenge respondent's alleged failure to evaluate her. She is also out of time to appeal her six-month employment as a substitute.

Accordingly, the Commissioner rejects petitioner's exceptions and, as stated above, adopts the Initial Decision as the Final Decision in this matter.

IT IS SO ORDERED.⁴

COMMISSIONER OF EDUCATION

Date of Decision: November 16, 2006

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⁴ 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.*