

PATRICIA MILANO, :  
PETITIONER, : COMMISSIONER OF EDUCATION  
V. : DECISION  
BOARD OF EDUCATION OF THE :  
TOWNSHIP OF FRANKLIN, :  
SOMERSET COUNTY, :  
RESPONDENT. :

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### SYNOPSIS

Petitioner – a certified pre-school teacher employed in respondent’s district – was originally hired by Franklin Township Schools in September 2001 when the district initiated an Early Childhood Education Program. Shortly thereafter, the district entered into a contract with the Hunterdon County Educational Services Commission (HCEC) to operate its early childhood program, with the district providing the facility. Petitioner claims that respondent Board advised her that if she wanted to continue to work, she had to resign and take the HCEC job, and that she was assured that she would be retained by HCEC at the same salary and benefits. Petitioner resigned, and then was employed by HCEC – working at the Franklin Township worksite – through June 2005. Respondent Board did not renew its contract with HCEC for 2005-06, and reinstated the Early Childhood Education Program directly through the district; petitioner was re-appointed by the Board in July 2005 as a preschool teacher. Petitioner argues that she has taught continually at Kingston School in Franklin Township since 2001; that HCEC was merely a conduit for respondent Board to employ petitioner; and that she has complied with the requirements of *N.J.S.A. 18A:28-5* and has achieved tenure. The petition sought a declaration that Milano has achieved tenure. Respondent Board contended, *inter alia*, that the petition was untimely.

The ALJ rejected respondent’s arguments, finding that: the appeal was timely filed; the actions of the Board constituted a takeover of the Early Childhood Program pursuant to *N.J.S.A. 18A:28-17*; and that the petitioner did acquire tenure in respondent’s district, in September of 2004. The ALJ granted petitioner’s motion for summary decision and ordered that petitioner acquired tenure on September 2, 2004.

The Commissioner found that neither the petition’s timeliness nor the merits of the parties’ respective positions are appropriately before the Commissioner at this time. The petitioner requested no relief beyond a declaration that she had acquired tenure, and the appeal was transmitted to the OAL with the express instruction that the ripeness of petitioner’s claim be considered as a threshold issue. This not having been done, the Commissioner remanded the matter to the OAL for determination of whether petitioner has, in fact, raised a cause of action that is ripe for Commissioner adjudication.

<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>
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July 25, 2008

OAL DKT. NO. EDU 6797-06  
AGENCY DKT. NO. 286-8/06

PATRICIA MILANO, :  
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The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have exceptions by the Board of Education (Board) and petitioner’s reply thereto, both duly filed pursuant to *N.J.A.C.* 1:1-18.4.

On exception, the Board argues that the Administrative Law Judge (ALJ) erred in finding that the petition of appeal in this matter was timely filed based on the Board’s lack of formal notice to petitioner that it did not deem her tenured. Citing prior decisional law for the proposition that formal notice is not required where sufficient information has been communicated to enable the affected party to make the claim at issue, the Board renews its contention that petitioner’s own communication of January 11, 2006 (Exhibit P-3) reflects her clear understanding of the Board’s position at that point – yet she did not file her petition until August, well beyond the 90 days permitted by *N.J.A.C.* 6A:3-1.3(d). (Board’s Exceptions at 1-4) The Board also takes exception to the ALJ’s counting of petitioner’s years of service with the Hunterdon County Educational

Services Commission (the ESC) toward acquisition of tenure in the Board's district, reiterating its stance that the Board did not take over the ESC's preschool program, as is plainly required by the statute and case law relied upon by petitioner. (*Id.* at 4-5)

In reply, petitioner – in addition to asserting that, for the reasons expressed by the ALJ, her petition was, in fact, timely filed – objects to the Board pressing a claim of untimeliness at this point in proceedings. Citing state and federal decisional law precluding the raising of a statute of limitations defense at the end stage of litigation, petitioner contends that – although untimely filing was raised as an affirmative defense in the answer to the petition of appeal – the Board cannot now seek to enforce a claim it did nothing to pursue during the nearly one-and-a-half years this matter proceeded through in-person and telephone conferences among counsel and the court, exchange of discovery, and settlement discussions. (Petitioner's Reply at 1-5) Petitioner also urges rejection of the Board's stance with respect to her acquisition of tenure, relying by reference on her prior submission to the ALJ. (*Id.* at 5-6)

Upon review, the Commissioner finds that – notwithstanding the arguments of the parties and the findings and conclusions of the Initial Decision – neither the petition's timeliness nor the merits of the parties' respective positions are appropriately before the Commissioner at this time. It has long been held that the rights flowing from claimed or actual tenured status remain inchoate until an employee suffers an adverse action in alleged violation of such rights;<sup>1</sup> here, however, petitioner seeks no relief beyond a declaration that

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<sup>1</sup> See, for example, *Edison Township Education Association v. Board of Education of the Township of Edison*, 1984 *S.L.D.* 1073, 1083, aff'd by the State Board of Education, 1984 *S.L.D.* 1085, aff'd, Docket #A-2030-84T7 (App. Div. 1986); *Ellen Francey v. Board of Education of the City of Salem, Salem County*, 92 *N.J.A.R.2d* (EDU) 449, aff'd with modification by the State Board of Education, 96 *N.J.A.R.2d* (EDU) 347, aff'd 286 *N.J. Super.* 354 (App. Div. 1996); and *Doreen Barca v. Board of Education of the Township of Holmdel, Monmouth County*, Commissioner's Decision No. 200-01, decided June 22, 2001.

she has acquired tenure in the respondent's district – alleging no loss of pay, reduction in employment or deprivation of other specific benefit as a result of the facts pleaded.<sup>2</sup> For this reason, petitioner's appeal was transmitted to the OAL with the express instruction that the ripeness of her claim be considered as a threshold issue;<sup>3</sup> the Initial Decision, however, makes no findings or recommendation in this respect, nor is there any indication on record that the issue was considered by the ALJ and parties during the course of proceedings at the OAL.

Accordingly – not being satisfied that the matter is appropriately before her at this time and being loath to render what would be tantamount to an unauthorized advisory opinion – for the reasons expressed herein, the Commissioner declines to reach the findings and conclusions of the Initial Decision and remands this matter to the OAL for the requested determination of whether petitioner has, in fact, raised a cause of action that is ripe for Commissioner adjudication.

IT IS SO ORDERED.<sup>4</sup>

COMMISSIONER OF EDUCATION

Date of Decision: July 24, 2008

Date of Mailing: July 25, 2008

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<sup>2</sup> Although petitioner's brief in support of her motion for summary decision (at 6) indicates that she seeks an order crediting her with accrued sick leave and reimbursing her for certain health insurance costs in addition to declaring her tenured, no amendment was made to the petition either requesting such relief or stating the factual and legal basis for it.

<sup>3</sup> The agency transmittal form states in pertinent part: "Request threshold consideration of whether petitioner's cause of action is ripe for adjudication, since petition does not allege suffering of any loss of pay, employment or other specific benefit."

<sup>4</sup> This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L. 2008, c. 36*.