

MICHEL SALAZAR-LINDEN, :  
PETITIONER, :  
V. : COMMISSIONER OF EDUCATION  
BOARD OF EDUCATION OF : DECISION  
THE TOWNSHIP OF HOLMDEL,  
MONMOUTH COUNTY, :  
RESPONDENT. :

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#### SYNOPSIS

Petitioner claims tenure as a member of the teaching staff in respondent's school district, and contends that the Board terminated her employment in violation of the law. Respondent Board filed a motion for summary decision, based on petitioner's failure to timely file her petition.

The ALJ found, *inter alia*, that: petitioner's appeal, filed in August 2007, is time barred by *N.J.A.C. 6A:3-1.3(i)*; an April 27, 2007 letter from the Board advising petitioner that she had not been reappointed for the 2007-2008 school year marked the beginning of the 90-day period for the filing of appeals; petitioner had no tenure when she was informed that she would not be renewed; as of the date of the notice of nonrenewal, petitioner knew that the Board intended to act adversely to her interests; and there is no showing that the issue of when petitioner would have achieved tenure is of such compelling public interest or presents a novel constitutional issue that should cause a relaxation of the rule. The ALJ recommended that the petition be dismissed as untimely.

Upon a full and independent review, the Commissioner concurs with the Administrative Law Judge – for the reasons clearly presented in his decision – that petitioner's claim is time-barred and presents no compelling case for relaxation of the 90-day rule. The Initial Decision of the OAL is adopted as the final decision in this matter.

<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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March 3, 2008

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The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) - deciding on the papers respondent's motion to dismiss the petition - have been reviewed.<sup>1</sup>

Petitioner, a ten month employee, received notice in the eighth month (*i.e.* April 27, 2007) of her third academic year of service, that respondent would not offer her a contract for the next academic year. She filed a petition with the Commissioner on August 14, 2007, alleging that by the end of her 2006-2007 contract she had earned tenure rights and that respondent's decision not to rehire her was a violation of those rights.

Respondent answered with a motion to dismiss, maintaining that petitioner had failed to challenge its action in a timely fashion, pursuant to *N.J.A.C.* 6A:3-1.3(i).<sup>2</sup>

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<sup>1</sup> The Commissioner notes that petitioner's exceptions duplicate her arguments in her motion papers to the OAL, for which reason they are not separately addressed herein.

<sup>2</sup> *N.J.A.C.* 6A:3-1.3(i) provides, in pertinent part, that

The petitioner shall file a petition no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by the district board of education, individual party, or agency, which is the subject of the requested contested case hearing. (Emphasis added)

More specifically, respondent explained that on April 27, 2007, it had notified petitioner of its decision (*i.e.*, action) not to renew petitioner's contract. Petitioner did not file an appeal with the Commissioner until August 14, 2007, which was 109 days later.

In petitioner's response to the motion, she asserted that – in her case – the ninety days allowed by *N.J.A.C. 6A:3-1.3(i)* for appeals should be counted from June 30, 2007, which was the end of her contract for the 2006-2007 school year. She argued that June 30, 2007 was the date on which she allegedly attained tenure under *N.J.S.A. 18A:28-5(c)*<sup>3</sup> and, consequently, it was the date that respondent purportedly violated her rights.

Alternatively, petitioner argued that a relaxation of the 90-day limitations period for filing appeals to the Commissioner is warranted in her case. She contended that because – in her first year of employment – she had begun her duties several days before the normal starting date for a ten-month contract, a novel constitutional question is posed as to whether she had already gained tenure before the end of her third academic year of service. Such an

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<sup>3</sup> *N.J.S.A. 18A:28-5*. Requirements for tenure

The services of all teaching staff members employed in the positions of teacher, principal, other than administrative principal, assistant principal, vice-principal, assistant superintendent, and all school nurses including school nurse supervisors, head school nurses, chief school nurses, school nurse coordinators, and any other nurse performing school nursing services, school athletic trainer and such other employees as are in positions which require them to hold appropriate certificates issued by the board of examiners, serving in any school district or under any board of education, excepting those who are not the holders of proper certificates in full force and effect and school business administrators shared by two or more school districts, shall be under tenure during good behavior and efficiency and they shall not be dismissed or reduced in compensation except for inefficiency, incapacity, or conduct unbecoming such a teaching staff member or other just cause and then only in the manner prescribed by subarticle B of article 2 of chapter 6 of this Title, after employment in such district or by such board for:

- (a) Three consecutive calendar years, or any shorter period which may be fixed by the employing board for such purpose; or
- (b) Three consecutive academic years, together with employment at the beginning of the next succeeding academic year; or
- (c) The equivalent of more than three academic years within a period of any four consecutive academic years.

For purposes of this chapter, tenure in any of the administrative or supervisory positions enumerated herein shall accrue only by employment in that administrative or supervisory position. Tenure so accrued shall not extend to any other administrative or supervisory position and nothing herein shall limit or restrict tenure rights which were or may be acquired pursuant to *N.J.S. 18A:28-6* in a position in which the individual actually served. (Emphasis added)

attainment of tenure before June 30, 2007, she reasoned, would implicate a property right that demands due process and precludes a summary dismissal of her appeal for untimeliness.

Petitioner further argued that because there might be numerous other employees with circumstances similar to hers, the issue she articulated rose to a matter of public interest that would justify relaxation of *N.J.A.C. 6A:3-1.3(i)*. Finally, she contended that the dismissal of her petition would not be in the interest of justice.

Respondent urged – and the Administrative Law Judge (ALJ) agreed – that *Nissman v. Board of Educ. of the Twp. of Long Branch*, 272 N.J. Super. 373 (App. Div.), *certif. denied* 137 N.J. 315 (1994) controls the present case.

In that case, as the ALJ explained in the Initial Decision, Nissman entered into a three-year teaching contract with the Long Beach Board of Education (the Board), which contract commenced on September 1, 1987. On April 27, 1990, she received a resolution issued by the Board on April 23, 1990, directing that her employment contract – which would expire on August 31, 1990 – would not be renewed, and she would not be granted tenure. Nissman continued to work up to August 31, 1990. On that date her attorney advised the Board that she had acquired tenure and would report to work on September 1, 1990 to resume her duties. The Board responded that her contract had been terminated at the April 23 meeting and she was not to report to work.

On September 21, 1990, Nissman filed a petition with the Commissioner of Education contending that her tenure rights had been violated, and the Board moved to dismiss under the 90-day provision. She contended that the action of the Board from which she appealed and from which the 90-day period had to be calculated, ran from August 31 – when she acquired tenure and the Board denied her tenure rights – and not from the April 23rd resolution. Nissman

received a favorable determination on the 90-day issue from the Commissioner, but her petition was dismissed by the State Board of Education.

The State Board concluded that the only ‘action’ taken by the Board was the termination of Nissman’s employment by means of the April 23<sup>rd</sup> resolution. The August 31<sup>st</sup> letter in response to her attorney’s facsimile message to the Board was merely a restatement of the April 23<sup>rd</sup> action. “It did not constitute Board action or give rise to a separate cause of action.” *Nissman, supra.* at 377.

Before the Appellate Division, Nissman argued that when her tenure right ripened, the Board’s August 31 “restatement of its earlier decision not to renew her contract without terminating her while she was nontenured, became an attempt to bar a now-tenured employee from her position.” *Id.* at 378. The court held that the State Board’s determination that the only action of the Board was the April 23<sup>rd</sup> resolution was neither arbitrary nor unreasonable.

The Appellate Division found that upon receipt of the Board’s resolution, Nissman knew or should have known that she was going to be required to serve out the remaining time on her existing contract; that she would presumably complete three full years of service in the district thereby possibly earning her tenure rights under *N.J.S.A.* 18A:28-5; and that notwithstanding the foregoing, the Board had voted not to offer her continued employment or recognize her tenure rights. *Id.* at 379. Thus, the Board took adverse action toward Nissman on April 23, 1990, and as of April 27, 1990, Nissman was aware of that adverse action and all the facts necessary to conclude that her tenure rights were at issue. The time for filing an appeal began at that point.

Moreover, the court recognized that, “[a]n agency regulation that focuses on the date of the employer’s wrongful act as the accrual date for the cause of action, rather than the date on which the consequences of the act is directly felt by the employee (termination), is not inherently arbitrary or capricious.” *Id.* at 381. In support of this proposition, the court cited *Delaware State College v. Ricks*, 449 U.S. 250, 259-61, 101 S.Ct. 498, 504-06, 66 L.Ed.2d 431, 440-42 (1980), wherein the Supreme Court decided that Rick’s cause of action accrued on the date that he was denied tenure rather than on the date on which his employment terminated.

Accordingly, the Appellate Division found that although Nissman had not yet completed the three years of service under her contract at the time she received notice that her employment would not be continued, the Board’s April 23<sup>rd</sup> decision not to continue employing her was nonetheless the action that would deprive her of tenure rights. Both that action and her notice of it had transpired by April 27, 1990. Thus, as of April 27, 1990, Nissman had all that she needed to recognize that her tenure rights were at risk, and all that she needed to challenge the Board’s decision and protect her rights. It did not violate due process for the 90-day limitations period to begin on that day, even though the expiration of the period would fall on July 23, 1990, over a month before the projected completion of her three-year contract and her achievement of tenure. *Id.* at 381.

Like Nissman, Ms. Salazar-Linden characterizes her appeal as arising not from the action of non-renewing her contract, but from a denial of a tenure status that would have been acquired later than that date. But application of the *Nissman* holding<sup>4</sup> to the current case leads to the conclusion that petitioner’s receipt of the April 27, 2007 letter from the Superintendent –

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<sup>4</sup> *Nissman* is valid precedent. The published decision by the Appellate Division was not taken for review by the Supreme Court, which denied certification. It stands as binding law for cases that are on point with its facts, as is the present case.

which informed petitioner that she had not been reappointed for the 2007-08 school year – marks the date upon which the 90-day limitations period properly began. That ninety-day period ended on or about July 26, 2007, but the appeal was filed on August 14, 2007, rendering it out-of-time.

The Commissioner concurs with the ALJ's rejection of petitioner's argument that 1) because the tenure laws are complex, and 2) because she did not learn until she met with her lawyer on or about May 14 that she might have had tenure rights that would have been violated by the board's termination of her employment effective June 30, she should not have been expected to file an appeal by July 26, 2007. First, petitioner offers no legal precedent for the proposition that personal unfamiliarity with tenure laws, or the complexity of tenure laws, excuses an employee from complying with school law procedural requirements. Second, petitioner had no tenure when she was told that she was not being renewed. As of that date, she knew the Board intended to act adversely to her interests in a way that did not acknowledge present or future tenure rights. The Commissioner cannot disagree with the ALJ's determination that there is no unfairness in computing the appeal limitations period from April 27, 2007.

Finally, the Commissioner rejects, as did the ALJ, petitioner's position that *N.J.A.C. 6A:3-1.3(i)* should be relaxed on constitutional or public interest grounds. First, rather than posing a novel constitutional issue, the question of how *N.J.S.A.18A:28-5(c)* is applied to the facts of this case constitutes a red herring. Whether one posits that petitioner's tenure could have been attained on June 30, 2007, at the completion of her contract for the 2006-2007 school year, or on May 27, 2007, *i.e.*, crediting her for the 34 days that she claims to have worked prior to the official commencement of her ten-month contractual term, the fact remains that on April 27, 2007 – before any tenure attached – petitioner learned that respondent had taken action

that was inconsistent with her attainment and enjoyment of tenure rights. She had ninety days to challenge the action, but did not timely do so.

Second, a petitioner has the burden of making a showing that compelling public interests are implicated in his or her case. Neither the observation that academic supervisors perform important services, nor the unsupported speculation that hundreds or even thousands of academic supervisors might experience circumstances similar to petitioner's, rises to the level of a showing that the present case is of compelling public interest. In short, the petitioner has failed to provide a reasonable basis for relaxing the provisions of *N.J.A.C. 6A:3-1.3(i)*.

For the reasons expressed in the Initial Decision and supplemented by this final decision, the petition is dismissed for untimeliness.

IT IS SO ORDERED.<sup>5</sup>

COMMISSIONER OF EDUCATION

Date of Decision: March 3, 2008

Date of Mailing: March 3, 2008

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<sup>5</sup> 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.*