232-24
OAL Dkt. No. 12759-23
Agency Dkt. No. 307-11/23

New Jersey Commissioner of Education

Final Decision

Highland Park Board of Education,
Middlesex County,

Petitioner,

v.

Deana Frayne,

Respondent.

The record of this matter, the Initial Decision of the Office of Administrative Law (OAL) and the exceptions filed by petitioner pursuant to *N.J.A.C.* 1:1-18.4 have been reviewed and considered. Respondent did not file a reply to petitioner's exceptions.

Respondent Deana Frayne was terminated from her teaching position by the Highland Park Board of Education (Board) in 2015. In 2016, Frayne filed a complaint in Superior Court, alleging in part that the termination had violated her due process rights because she was tenured and the Board had not filed tenure charges. The Hon. Travis L. Francis, A.J.S.C., dismissed the question of tenure and transferred the matter to the Commissioner for a determination as to whether Frayne earned tenure and, if so, to address her related claims. The Commissioner dismissed the matter because Frayne's claims regarding her termination were untimely pursuant to *N.J.A.C.* 6A:3-1.3(i). *Deana Frayne v. Bd. of Educ. of the Borough of Highland Park, Middlesex*

Co., Israel Soto, and Kelly Wysoczanski, Commissioner Decision No. 235-18 (Aug. 9, 2018), *aff'd*, *Frayne v. Bd. of Educ. of the Borough of Highland Park, Middlesex Co., Israel Soto, and Kelly Wysoczanski*, 2021 *N.J. Super*. Unpub. LEXIS 1143 (App. Div. June 16, 2021).

Respondent's remaining claims proceeded in Superior Court, where the parties filed cross-motions for summary judgment. Despite the Commissioner's prior ruling that Frayne's claims were untimely and the Appellate Division's affirmance of that ruling, on May 27, 2022, the Hon. Alberto Rivas, J.S.C., ordered that the Commissioner should nonetheless decide the question of whether Frayne was tenured at the time of her termination. Judge Rivas' decision was based in part on the addition to the record of the Board's May 5, 2014 meeting minutes, which stated, "I move that the Board of Education approve the recommendation of the Superintendent to appoint tenure to the following non-tenured professional[s] and reappoint them from July 1, 2014 to June 30, 2015," and included Frayne in the list of employees who were approved.

The matter was transmitted to the OAL in June 2022, with Frayne named as petitioner, but Frayne withdrew the case in October 2022. On May 24, 2023, Judge Rivas again ordered that the question of tenure be addressed, and the matter was transmitted to the OAL in July 2023, but Frayne withdrew the case in September 2023. Finally, following a November 6, 2023 Order by Judge Rivas, the case was again transmitted to the OAL in November 2023, this time with the Board named as petitioner, so that if Frayne continued to refuse to participate in the proceedings, the Board would be able to request a decision on the merits pursuant to *N.J.A.C.* 1:1-14.4(d).

The Board moved for summary decision. Frayne did not respond or otherwise participate in the proceedings. The Administrative Law Judge (ALJ) concluded that Frayne knew by

July 13, 2015 that the Board did not consider her to be a tenured employee, and by August 23, 2015, that the Board was terminating her without filing tenure charges. However, Frayne took no action within 90 days, and instead waited nearly a year to file suit in Superior Court. Based on Frayne's failure to timely assert her tenure rights, the ALJ concluded that Frayne was not a tenured teacher when she was terminated.

Initially, the Commissioner notes that, contrary to the argument that Frayne made in Superior Court, it is irrelevant that the May 5, 2014 Board meeting minutes were not a part of the record in the prior matter before the Commissioner. The 90-day limitations period established by *N.J.A.C.* 6A:3-1.3(i) applies to challenges to any action of a board of education, and it applies equally to challenges made by non-tenured and tenured teachers. Any and all claims related to Frayne's termination – including any claim that the Board should have filed tenure charges rather than proceeding with the type of termination used for non-tenured teachers – were required to be filed with the Commissioner within 90 days.

The record is clear that Frayne believed at the time of her termination that she was tenured, even though she allegedly did not have a copy of the meeting minutes. That belief is sufficient for her to have filed a petition of appeal within 90 days of her termination, but she did not do so. Moreover, even if the Commissioner were to accept that Frayne's later "discovery" of the meeting minutes would restart the limitations period, the record is also clear that Frayne was aware of the meeting minutes at least as of March 18, 2022, when discovery in the Superior Court matter concluded. Yet Frayne still failed to take any action before the Commissioner within 90 days of that "discovery."

Any claims related to her termination that Frayne may have, which are within the jurisdiction of the Commissioner, remain untimely. The addition of the meeting minutes to the record does not change the fact that Frayne knew – by July 20, 2015, at the very latest – that she was being terminated without the filing tenure charges by Board. The 90-day limitation period therefore began to run no later than that date and expired on October 19, 2015. The filing of a separate action, in a separate court, a year after her termination cannot absolve Frayne of her obligation to file any claims against the Board that are within the jurisdiction of the Commissioner within 90 days. The timeliness of a complaint under the Superior Court rules, in and of itself, has no bearing upon the timeliness of a petition under the Department of Education's regulations. *A.S., o/b/o minor child, P.P. v. Bd. of Educ. of the Pinelands Regional Sch. Dist., Ocean Cty.*, Commissioner Decision No. 411-09 (December 16, 2009). The purpose of the time limitation is, in part, to serve as a measure of repose through which a board of education can be secure, after the 90 days have elapsed, that its decisions will not be challenged before the Commissioner. *See*, *e.g.*, *Kaprow v. Bd. of Educ. of Berkeley Twp.*, 131 *N.J.* 572, 587 (1993). This requirement cannot be circumvented by the later Superior Court filing. Frayne's failure to timely file any claims related to her tenure with the Commissioner should – on its own – result in summary decision in favor of the Board.

Nonetheless, in the interest of bringing this long-running matter to a close, the Commissioner has determined to address the question of Frayne's tenure on its merits and concludes that Frayne was not tenured at the time of her termination. The record reflects that Frayne was employed by the Board from March 2009 until her termination in June 2015. However, she served as a maternity leave replacement for much of that time, which is not

counted toward the acquisition of tenure. *N.J.S.A.* 18A:16-1.1. Frayne was employed as a full-time tenure-track teacher during the 2012-2013, 2013-2014, and 2014-2015 school years.[1] On June 24 or 25, 2015, the superintendent presented Frayne with a separation agreement and told her that she was not tenured. The Board issued a *Rice*[2] notice to petitioner and, on July 20, 2015, formally rescinded its prior action with respect to Frayne's employment contract and its statement of tenure, and terminated Frayne, effective August 23, 2015.

Pursuant to *N.J.S.A.* 18A:28-5(a), an individual can only achieve tenure if they serve for the requisite period of time, which can be achieved in three different ways. First, tenure may be acquired when the teacher is employed for three consecutive calendar years, or any shorter period fixed by the employing board. *Ibid*. Frayne was not employed in a tenure-track position for three consecutive calendar years, because her tenure-track position that commenced in September 2012 was terminated prior to September 2015. Furthermore, there is no evidence that the Board established, by policy or by contract, a shorter period for its teachers to acquire

[1] Frayne served as a maternity leave replacement from March 2009 through June 2010. The record is unclear regarding petitioner's status during the 2010-2011 school year. The Board indicated in its motion for summary decision, and the ALJ indicated in the Initial Decision, both that 1) Frayne worked as a regular tenure track teacher during the 2010-2011 school year and 2) Frayne was appointed as a maternity replacement, non-tenure track for the period form October 18, 2010 to June 30, 2011. Both of these statements cannot be true. The allegation that Frayne was a tenure track teacher during the 2010-2011 school year comes only from Frayne's deposition testimony and is not supported by any documentation. However, the record includes Board meeting minutes from August 30, 2010, documenting Frayne's appointment as a maternity leave replacement. Accordingly, the Commissioner concludes that Frayne was a maternity leave replacement during the 2010-2011 school year, and therefore her employment during that time does not count towards the acquisition of tenure. However, even if Frayne was a tenure-track employee during the 2010-2011 school year, the Commissioner's conclusion remains the same, for the reasons stated below.

[2] An employee is entitled to advance notice when a board of education intends to discuss in closed session a personnel matter that could adversely affect the employee. *Rice v. Union County Reg'l High Sch. Bd. of Educ.*, 155 *N.J. Super.* 64, 73 (App. Div. 1977).

tenure. Second, tenure may be acquired when the teacher is employed for three consecutive academic years, together with employment at the beginning of the next succeeding academic year. *Ibid.* Frayne does not meet this requirement, because although she was employed for the three consecutive academic years of 2012-2013, 2013-2014, and 2014-2015, she was not employed at the beginning of the 2015-2016 academic year. Finally, tenure may be acquired when the teacher is employed for the equivalent of more than three academic years within a period of any four consecutive academic years. *Ibid.* Frayne does not meet this requirement, because she was not employed in a tenure-track position during the 2011-2012 school year. Even if the Commissioner accepted that Frayne's employment during the 2010-2011 school year was tenure-eligible, it was not in a period of four consecutive academic years with her later three years of service. The Commissioner therefore concludes that Frayne did not meet the statutory requirements regarding the length of her employment and was not tenured at the time of her termination.

In her Superior Court proceedings, incorporated into the OAL proceedings pursuant to Judge Rivas' Order, Frayne appears to have argued that the Board should be equitably estopped from denying that she had tenure because the May 5, 2014 meeting minutes state that she was approved for tenure. The Commissioner rejects this argument. The doctrine of equitable estoppel is "rarely invoked against a governmental entity." *Middletown Twp. Policeman's Benevolent Ass'n Local No. 124 v. Twp. of Middletown*, 162 *N.J.* 361, 367 (2000) (internal quotations and citations omitted). Additionally, "a governmental entity cannot be estopped from refusing to take an action that it was never authorized to take under the law – even if it had mistakenly agreed to that action." *Meyers v. State Health Benefits Comm'n*, 256 *N.J.* 94, 101

(Dec. 14, 2023). Here, the Board had no authority to declare Frayne tenured prior to her completion of the required period of service as detailed in *N.J.S.A.* 18A:28-5(a). Furthermore, as the Appellate Division noted in Frayne's prior matter, "the Board's conduct during the summer of 2015 . . . was clear that it intended to remove [Frayne] from employment." As such, Frayne had "not shown evidence of detrimental reliance; consequently, her equitable estoppel argument fails." *Frayne*, *supra*, 2021 *N.J. Super.* Unpub. LEXIS at *9. For these reasons, Frayne cannot be tenured by equitable estoppel.

Accordingly, the Commissioner concludes that Frayne was not tenured at the time of her termination.

IT IS SO ORDERED.[3]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: June 14, 2024
Date of Mailing: June 18, 2024

[3] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 12759-23
AGENCY DKT. NO. 307-11/23

HIGHLAND PARK BOARD OF EDUCATION,
MIDDLESEX COUNTY,
Petitioner,
v.
DEANA FRAYNE,
Respondent.

Eric L. Harrison, Esq., appearing for petitioner (Methfessel & Werbel, attorneys)

Deana Frayne, respondent pro se, did not appear or participate[1]

Record Closed: April 1, 2024 Decided: May 14, 2024

BEFORE **SUSAN M. SCAROLA**, ALJ (Ret., on recall):

STATEMENT OF THE CASE

On November 16, 2023, the Department of Education, Office of Controversies and Disputes (Department), transmitted this matter to the Office of Administrative Law pursuant to an order of the Hon. Alberto Rivas, J.S.C., "for a determination as to whether

[1] See procedural history.

the respondent [Deana Frayne] was tenured at the time of her termination."[2] The Department also noted that "The Superior Court has requested that Ms. Frayne's Superior Court exhibits be considered. If [the respondent] does not appear, the Highland Park Board of Education (BOE), as petitioner, may present ex parte proofs and receive an initial decision on the merits as provided in N.J.A.C. 6A:1-14.4(d)."[3]

PROCEDURAL HISTORY

Following the receipt of the transmittal at the OAL, on December 8, 2023, the respondent emailed and asked that the matter be withdrawn from the OAL. She was advised by letter dated January 9, 2024, that she could not, as she was not the petitioner.

A pre-hearing telephone conference was scheduled for January 18, 2024. The respondent failed to appear. The petitioner advised that it would be filing a motion for summary decision and did so on February 2, 2024.

The respondent was given until March 4, 2024, to respond to the motion but no response was received at the OAL.

A telephone conference was scheduled for April 1, 2024 to set a date for oral argument. Notice was provided to respondent by regular and certified mail. On April 1, 2024, the petitioner appeared for the conference, but the respondent did not. To date, no responses or exhibits have been received from the respondent.

The following background and procedural history leading to this transmittal is taken from the petitioner's motion for summary decision.[4]

1. On June 20, 2016, respondent filed a civil Complaint against Petitioner, asserting the following claims: a. (1) violation of respondent's due process rights under the New Jersey State Constitution, State statutes, and the New Jersey Civil Rights Act

[2] N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13.
[3] Presumably, the Department meant to reference N.J.A.C. 1:1-14.4(d).
[4] Exhibits attached to the motion are noted.

("NJCRA") (Counts One and Two); b. (2) violation of the Conscientious Employee Protection Act ("CEPA") (Count Three); c. (3) breach of contract (Count Four); and d. (4) detrimental reliance (Count Five). (See Harrison Cert., Exhibit A.)

2. Respondent worked as a first-grade teacher for the Highland Park Board of Education (the "Board"). She was terminated due to: (1) excessive absenteeism; (2) poor classroom performance; and (3) unprofessional communication with a parent in the course of a phone conversation in which she berated a parent for complaining about her many absences.

3. In her Complaint, respondent asserts, inter alia, that her due process and contractual rights were violated when the Board summarily terminated her. (Id. at Exhibit A.)

4. On November 18, 2016, Judge Travis Francis of New Jersey Superior Court entered an Order transferring the Complaint to the Commissioner of Education for a determination as to whether respondent earned tenure and, if she was tenured, to adjudicate all due process claims directly relevant to respondent's tenured status; the Order stayed all other claims pending the Commissioner's determination of respondent's tenure status. (See Harrison Cert., Exhibit B.)

5. The Commissioner transmitted the case to the New Jersey Office of Administrative Law, where on June 26, 2018, Hon. Jeff S. Masin, ALJ, issued an initial decision, which was later adopted as a final decision by the Commissioner, finding that: a. respondent knew "at the very latest by July 20, 2015, that the Board terminated her without invoking the process necessary to remove tenure and was treating her as one without tenure protection"; b. respondent failed to file her petition with the Commissioner in a timely manner as it was filed outside the ninety day deadline required by N.J.A.C. 6A:3-1.3(a) and (l); c. "there is no basis here for invoking the limited exceptions to the otherwise strictly enforced limitation"; d. application of the doctrine of equitable estoppel is not warranted; and e. because respondent failed to file her petition with the Commissioner in a timely manner, her tenure claim was dismissed. (See Harrison Cert., Exhibit C.)

6. The respondent appealed the Commissioner's determination that she was time-barred from asserting that she had been tenured. On June 16, 2021, the Appellate Division affirmed the Commissioner's decision. Frayne v. Bd. of Educ. of Highland Park, No. A-0268-18 (App. Div. June 16, 2021), https://www.njcourts.gov/system/files/court-opinions/2021/a0268-18.pdf.

7. The respondent's remaining claims then proceeded in Superior Court.

8. Following the close of discovery, Petitioners filed a motion for summary judgment on April 1, 2022.

9. On May 3, 2022, respondent's former counsel, Ronald J. Wronko, filed a cross-motion for partial summary judgment and an opposition to Defendants' motion for summary judgment.

10. On May 27, 2022, the Superior Court denied both motions and directed that the question of tenure be returned to the Commissioner for an adjudication on the merits, notwithstanding the Commissioner's prior determination that the Respondent was time-barred from seeking relief based on her alleged tenured status. (See Harrison Cert., Exhibit D.)

11. Judge Rivas further stayed the civil matter until the issue of tenure was resolved by the Commissioner, specifically stating as follows: "The sole issue to be presented to the Commissioner is whether [Respondent] was a tenured teacher at the time of her termination." (Ibid.) The Court clarified that "[t]he Commissioner shall not be concerned with what procedure was undertaken to terminate [Respondent], but simply whether her status was that of a tenured or non-tenured teacher when she was terminated in 2015." (Ibid.)

12. In its decision, the Court held that because the Commissioner did not previously have access to the May 5, 2014, Board meeting minutes, the Commissioner never was able to address whether respondent was a tenured teacher at the time of her termination before issuing its June 26, 2018, Order. As such, Judge Rivas found that

notwithstanding the Commissioner's determination that the respondent was time-barred from arguing that she was tenured, the Commissioner nevertheless should render a decision on whether the respondent was tenured at the time of her termination in light of the May 5, 2014, Board meeting minutes. (Ibid.)

13. Once the Commissioner received the matter, the Office of Controversies and Disputes transmitted it to the New Jersey Office of Administrative Law ("OAL") for an administrative law judge ("ALJ") to make an initial decision and recommendation, before rendering a final decision on the issue.

14. On October 7, 2022, against the petitioner's position, respondent "withdrew" the matter from the OAL, in contravention of Judge Rivas' May 27, 2022, Order.

15. Further activity ensued in Superior Court. On May 24, 2023, Judge Rivas entered an order providing the following relief: a. The respondent must either file an appeal of the May 24, 2023, Order or comply with its provisions; b. The stay previously entered by the Court remains in effect; c. The Court will submit the following question to Acting Commissioner of Education Angelica Allen-McMillan[5]: Was Deana Frayne a tenured teacher when she was terminated by the Highland Park Board of Education on or about June 23, 2015?; d. The respondent must file all the documents she believes support her position within the time frame specified by the Commissioner, who must accept and review said documents; e. Because the question set forth above involves an issue as to which documents were not previously presented to the Commissioner, the doctrine of res judicata, collateral estoppel, or issue preclusion will not apply or prevent a determination of the submitted question; and, f. The Superior Court will submit this order and statement of reasons to the Commissioner. (See Harrison Cert., Exhibit F.)

16. On June 30, 2023, respondent filed a letter with the Superior Court requesting a case management conference because counsel for the Board had emailed the director of the Office of Controversies and Disputes within the Department of Education to follow up on whether this Court's May 24, 2023 Order had been received. The Respondent

[5] The present Acting Commissioner is Kevin Dehmer.

accused the Board of "having ex-parte communications with the OAL" even though she was copied on the email to the director of the Office of Controversies and Disputes and "rerouting [the May 24, 2023] Order to the Bureau of Controversies and Disputes."

17. On July 3, 2023, the respondent filed a letter with the Court to share an email the attorney for the petitioner had written to her explaining the judicial process and interaction between the Commissioner, the Office of Controversies and Disputes, and the OAL to prevent further delays in this litigation and in which the respondent once again was implored to consult with an attorney.

18. On July 11, 2023, respondent filed a letter with the Court to advise that she "removed all correspondence from Defendants to Jennifer Simons in the Bureau of Controversies and Disputes," and to request "a Case Management Conference because the Commissioner did not refer this matter to the OAL or get in touch with her" pursuant to the May 24, 2023 Order.

19. On July 11, 2023, the Superior Court issued a memo in response to the parties' most recent correspondence, directing all parties to participate in the OAL proceedings. It also declined to schedule any other case management conferences.

20. On July 12, 2023, despite the pending stay of the matter and Judge Rivas's explicit instructions to participate in all OAL proceedings set forth in his July 11, 2023 memo, the respondent filed a letter with the Superior Court and asked for the record to include a new copy of her fully executed contract "prior to any further action being taken in this case" because the one submitted by her former counsel had been allegedly "doctored."

21. That same day, Judge Rivas entered an order providing the following relief: a. directing the respondent to comply with the requirements of the OAL with respect to scheduling and filing of materials; b. continuing the stay of the Superior Court matter until the OAL determines the question of respondent's tenure status; and, c. advising that if she fails to comply with this Court's order, it may result in dismissal of this matter.

22. On July 14, 2023, the respondent filed a motion for reconsideration of the Court's July 12, 2023 Order.

23. On July 17, 2023, the Court issued another memo in response to respondent's July 14, 2023, motion. Judge Rivas once again explained to the Respondent that the Commissioner, who has primary jurisdiction to determine tenure and due process issues, retains the authority to personally handle the adjudication of the case or refer it for a hearing before the OAL and, in this case, the Commissioner has elected to refer the case to the OAL for a determination. Judge Rivas also advised respondent that if she refuses to abide by the July 12, 2023 Order, she can appeal it with the Appellate Division or the Court will dismiss the Superior Court matter.

24. On August 12, 2023, respondent filed a motion for "judicial notice and sanctions," which petitioners opposed.

25. On September 8, 2023, the Court denied respondent's motion for "judicial notice and sanctions." In response, on September 10, 2023, the respondent requested a statement of reasons for the denial.

26. That same day, respondent withdrew the matter from the OAL, in contravention of Judge Rivas' July 12, 2023 Order.

27. On September 24, 2023, the respondent filed a motion to enter "default judgment." Respondent's motion was ultimately denied.

28. On October 12, 2023, petitioners filed a cross-motion to dismiss the Superior Court Complaint with prejudice for failure to comply with Court orders. On November 6, 2023, Judge Rivas entered an Order denying the motion "until both parties comply with the Order of May 24, 2023."

29. On November 16, 2023, the matter was transmitted to the OAL by the Commissioner "for a determination as to whether the respondent Frayne was tenured at the time of her termination." The transmittal also ordered that the respondent's exhibits

to Superior Court be considered, and that if the respondent does not appear, the petitioner Highland Park Board of Education may present ex parte proofs and receive an Initial Decision on the merits.[6]

To date the respondent has not complied with the Orders of the Superior Court to cooperate in the proceedings at the OAL: she has provided no materials or exhibits to review, nor has she participated in any telephone conferences. Accordingly, I accept the above as **FACT**.

FACTUAL DISCUSSION

The following background and the factual discussion leading to the respondent's termination are taken from the petitioner's motion for summary decision.[7]

1. Respondent Deana Frayne was a teacher for the Highland Park Board of Education (the "Board") at Irving Elementary School from March 2009 until her termination in June 2015. (See Harrison Cert., Exhibit A, ¶ 1 and Exhibit H; Tr. at 11:17–21.)

2. Respondent served as a maternity-leave replacement (non-tenure track) teacher from March 2009 until the end of the 2009–2010 school year. (Id. at Exhibit H; Tr. at 11:24–12:18.)

3. She worked as a full-time regular tenure track teacher during the 2010–2011 school year. (Id. at Exhibit H; Tr. at 12:19–13:4.)

4. On August 30, 2010, the Board appointed respondent as a full-time maternity replacement (non-tenure track) teacher from October 18, 2010, to March 25, 2011. (Id. at Exhibit I.)

[6] The May 24, 2023, and July 12, 2023, orders of Judge Rivas provide that [the respondent] must comply with the Commissioner and/or the OAL with respect to scheduling and filing of materials in order to have the question of her tenure addressed." The November 6, 2023, order again orders her to comply with the May 24, 2023, order.

[7] Exhibits attached to the motion are again noted.

5. On March 7, 2011, the Board approved respondent as a full-time maternity replacement (non-tenure track) first grade teacher, effective from October 19, 2010, to June 30, 2011. (Id. at Exhibit J.)

6. During the 2011–2012 school year, respondent filled a (non-tenure track) maternity leave position due to budget cuts. (Id. at Exhibit H; Tr. at13:10–18.)

7. Respondent worked as a full-time regular tenure track teacher during the 2012–2013, 2013–2014, and 2014–2015 school years. (Id. at Exhibit H; Tr. at 15:16–16:14.)

8. At the time of respondent's termination, Israel Soto served as the interim superintendent ("Superintendent Soto") and Kelly Wysoczanski ("Principal Wysoczanski") served as the principal of Irving Primary School. (Id. at Exhibit K, nos. 26 and 33.)

9. On May 5, 2014, the Board publicly appointed respondent to continue as a teacher during the 2014–2015 school year, describing her as tenured. (Id. at Exhibit P.)

Facts relating to the June 25, 2015, Meeting with Superintendent Soto—Respondent's Termination and Express Notice that She Was Not Tenured.

10. On June 25, 2015, Superintendent Soto presented respondent with a "separation agreement" in the presence of the union president Kimberly Crane and a union representative. (Id. at Exhibit H; Tr. at 51:23–52:13.)

11. Respondent claimed that Superintendent Soto did not tell her why he was firing her, told her that she had 24 hours to sign the separation agreement, and told her that she was not tenured. (Id. at Exhibit H; Tr. at 52:24–53:3.)

12. Ms. Crane, the president of the respondent's bargaining unit, told [the respondent] that she agreed with Dr. Soto that she was not tenured. Ms. Crane recommended that the respondent sign the agreement. (Id. at Exhibit H; Tr. at 53:8–12.) Ms. Crane also suggested that respondent speak with Nancy Grbelja from the New Jersey Education Association ("NJEA"). (Id. at Exhibit H; Tr. at 53:13–22.)

13. Dr. Soto also mailed respondent a letter on June 25, 2015, to serve as her "sixty (60) days['] notice that [her] employment with the Highland Park Board of Education will be terminated effective August 23, 2015." (Id. at Exhibit L.)

14. The letter stated as a basis for the termination that respondent's "attendance, classroom, performance and overall behavior over the past several years has been exceedingly poor." (Ibid.)

15. The letter also referenced an "incident that had occurred on or about May 12, 2015, wherein [respondent] unilaterally contacted a parent who [she] learned had complained about [her] behavior to [the] school's administration, questioned the parent as to the reason behind their complaint, made the parent feel uncomfortable and inexplicably tape recorded the conversation without notifying the parent of same." (Ibid.)

16. Dr. Soto pointed out that respondent's "conduct violate[d] Board Policy 3281, Inappropriate Staff Conduct, amongst others, as well as the expectations this administration has for the conduct of its staff." (Ibid.)

17. The following day, respondent met with Nancy Grbelja of the NJEA and expressed the view that she had acquired tenure during the 2014–2015 school year and her reappointment on May 15, 2015, for the 2015–2016 school year. (Id. at Exhibit H; Tr. at 54:1–9.)

18. Ms. Grbelja advised the respondent that she could not assist her, as she did not agree that she had acquired tenure. (Id. at Exhibit H; Tr. at 54:3–17.)

19. Ultimately, Superintendent Soto recommended respondent's termination. (Id. at Exhibit M; Tr. at 42:21–23.)

20. On July 13, 2015, the District issued respondent a Rice notice[8] alerting her to the fact that the District would be discussing her employment in executive session during the July 20, 2015, Board meeting. (Id. at Exhibit H; Tr. at 57:6–11; Exhibit N.)

21. Upon learning of the repsondent's contention that she was tenured, Dr. Soto initiated an investigation and determined that the Board's description of her as tenured in its meeting minutes was premature; in fact, she was not tenured. (Id. at Exhibit M; Tr. at 95:1–96:17.)

22. As a result of this investigation, on July 20, 2015, the Board formally rescinded the prior statement of tenure. (Id. at Exhibit O.)

The Board voted 9-0 to terminate the respondent on August 23, 2015.

In addition, no evidence was presented that the respondent appeared at the school in September at the start of the school year, under the belief that she had tenure.

The above is accepted as **FACT**.

LEGAL ANALYSIS AND CONCLUSION

I. Standards for summary decision

Under the Uniform Administrative Procedure Rules (UAPR), N.J.A.C. 1:1-1.1 to -21.6, "[a] party may move for summary decision upon all or any of the substantive issues in a contested case." N.J.A.C. 1:1-12.5(a). Such motion "shall be served with briefs and with or without supporting affidavits" and "[t]he decision sought may be rendered if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." N.J.A.C. 1:1-12.5(b). When the

[8] Rice v. Union Cty. Reg'l High Sch. Bd. of Educ., 155 N.J. Super. 64 (App. Div.1977).

motion "is made and supported, an adverse party in order to prevail must [do so] by responding affidavit set[ting] forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding." Ibid.

II. Was the respondent a tenured teacher when she was terminated by the Highland Park Board of Education on or about June 23, 2015?

The Highland Park Board of Education hired respondent to serve as a non-tenure-track first-grade maternity-leave replacement for the 2008–2009 school year. The Board continued respondent's employment in the non-tenure-track role for the 2009–2010, 2010–2011, and 2011–2012 school years. Thereafter, the Board employed respondent as a tenure-track first-grade teacher for the 2012–2013, 2013–2014, and 2014–2015 school years.

N.J.S.A. 18A:28-5(a) provides the requirements for a teacher to obtain tenure:

> The services of all teaching staff members employed prior to the effective date of P.L.2012, c.26 (C.18A:6-117 et al.) in the positions of teacher, . . . 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:
>
> > (1) Three consecutive calendar years, or any shorter period which may be fixed by the employing board for such purpose; or
> >
> > (2) Three consecutive academic years, together with employment at the beginning of the next succeeding academic year; or

> (3) The equivalent of more than three academic years within a period of any four consecutive academic years.

N.J.S.A. 18A:27-10 provides:

> On or before May 15 in each year, each nontenured teaching staff member continuously employed by a board of education since the preceding September 30 shall receive either:
>
> > a. A written offer of a contract for employment from the board of education for the next succeeding year providing for at least the same terms and conditions of employment but with such increases in salary as may be required by law or policies of the board of education, or
> >
> > b. A written notice from the chief school administrator that such employment will not be offered.

In the event such contract or notice is not forthcoming by May 15, N.J.S.A. 18A:27-11 provides:

> Should any board of education fail to give to any nontenure teaching staff member either an offer of contract for employment for the next succeeding year or a notice that such employment will not be offered, all within the time and in the manner provided by this act, then said board of education shall be deemed to have offered to that teaching staff member continued employment for the next succeeding school year upon the same terms and conditions but with such increases in salary as may be required by law or policies of the board of education.

Here, although the respondent did receive a contract of renewal by May 15, the Board shortly thereafter determined to take action against her and she became aware of the Board's position that she would not obtain tenure. As the Appellate Division succinctly summarized the facts in its June 16, 2021, decision:

> On May 5, 2015, plaintiff signed a contract with the Board to continue as a tenure track first grade teacher for the 2015–2016 school year. On June 25, 2015, before commencement

> of the 2015–2016 school year, the Board served plaintiff with a letter advising her that her employment would be terminated effective August 23, 2015.
>
> In the letter, the Board asserted plaintiff's attendance, classroom performance, and overall behavior over the past several years had been exceedingly poor. The letter also cited a parent-teacher incident where plaintiff recorded a conversation between her and a parent without that parent's consent. The letter was plaintiff's second written notice of unsatisfactory performance within thirty days.[1]
>
> In addition to the Board's June 25, 2015 letter to plaintiff, the Board also presented plaintiff a proposed "Agreement and Mutual Release," dated June 24, 2015, which offered plaintiff continuing health benefits and sixty days' worth of salary in exchange for her waiving the sixty-day termination notice period, accepting termination, and releasing any potential claims against the Board. The first page of this proposed agreement contained this relevant language:
>
> > WHEREAS Ms. Frayne is not a tenured employee of the Board pursuant to the requirements for acquiring the same as set forth in the "Teacher Effectiveness and Accountability for Children of New Jersey Act."
> >
> > [(emphasis added).]
>
> Plaintiff declined to execute the proposed agreement. Next, on July 13, 2015, the Board served plaintiff a letter advising that, "pursuant to the requirements of N.J.S.A. 10:4-12(b)(8),2 on Monday, July 20, 2015, the Board will discuss a personnel matter which could affect your employment in this school district." The Board met publicly on August 23, 2015, and in a unanimous 9-0 vote, terminated plaintiff's employment.
>
> ---
>
> [1] The June 25, 2015 letter references a May 27, 2015 letter the Board sent to plaintiff. The May 27, 2015 letter advised plaintiff that the Board was considering disciplinary action against plaintiff for reasons including but not limited to "excessive absenteeism."
>
> [Frayne v. Bd. of Educ. of Highland Park, No. A-0268-18 (App. Div. June 16, 2021), https://www.njcourts.gov/system/files/court-opinions/2021/a0268-18.pdf.]

The respondent would have had the expectation that she had acquired tenure by the action of the Board on May 5, 2015, when she signed the contract proffered by the

Board, and that, as a result, she would be considered tenured when that contract went into effect. However, shortly thereafter by letter of May 27 the respondent was put on notice that the Board did not consider her tenured, and that it was contemplating disciplinary proceedings against her. The Board then provided notice of its intentions to terminate the respondent in correspondence to her dated June 25 and July 13, 2015.

Because the respondent was aware of pending adverse action by the Board as soon as June 23, or July 13, 2015, at the latest, any tenure rights she may have acquired by signing her contract had to be asserted by her by the filing of an appeal within ninety days or they would be lost.

N.J.A.C. 6A:3-1.3(i) provides:

> 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, that is the subject of the requested contested case hearing. This rule shall not apply in instances where a specific statute, regulation, or court order provides for a period of limitation shorter than 90 days for the filing of a particular type of appeal.

The ninety-day rule is neither a procedural nicety nor discretionary. The Appellate Division wrote:

> The ninety-day rule has been strictly construed by the courts and consistently applied. See Nissman v Bd. of Educ., 272 N.J. Super. 373, 380–81 (App. Div. 1994); Kaprow v. Bd. of Educ., 131 N.J. 572, 588–89 (1993); Riely v. Bd. of Educ., 173 N.J. Super. 109, 112–14 (App. Div. 1980). This period begins to run when the petitioner "learn[s] from the Local Board the existence of that state of facts that would enable him to file a timely claim." Kaprow, 131 N.J. at 588–89. A petitioner need not receive official and formal notification that he or she may have a valid claim. Id. at 588.
>
> [Frayne v. Bd. of Educ. of Highland Park, No. A-0268-18 (App. Div. June 16, 2021), https://www.njcourts.gov/system/files/court-opinions/2021/a0268-18.pdf.]

The plaintiff in Kaprow argued that his due process rights were violated by the time limitation set forth in the administrative code, but the Court, quoting Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982), noted:

> The State may erect reasonable procedural requirements for triggering the right to an adjudication, be they statutes of limitations, or, in an appropriate case, filing fees. * * * What the Fourteenth Amendment does require, however, is "an *opportunity . . .* granted at a meaningful time and in a meaningful manner," Armstrong v. Manzo, 380 U.S. 545, 552 [85 S.Ct. 1187, 1191, 14 L.Ed.2d 62] (1985), "for [a] hearing appropriate to the nature of the case." Mullane v. Central Hanover Trust Co., 339 U.S. 306, 313 [70 S.Ct. 652, 657, 94 L.Ed. 865] (1950).
>
> [Id. at 437, 102 S.Ct. at 1158–59, 71 L.Ed.2d at 279 (some citations omitted).]

> N.J.A.C. 6:24-1.2(c) did not deprive Kaprow of his due-process rights. The ninety-day limitation period afforded Kaprow a *meaningful* opportunity to file his petition. In addition, the ninety-day limitation period represents a *reasonable* procedural requirement. It provides finality in education matters. Furthermore, the limitations period has withstood tangential review from this Court. See North Plainfield Educ. Ass'n v. Board of Educ., 96 N.J. 587, 476 A.2d 1245 (1984).
>
> [Kaprow, 131 N.J. at 588–89.]

Here, the respondent knew that the Board was contemplating disciplinary action against her within days of signing the "contract," and again by June 25, 2015. By July 13, 2015, she definitely knew that the Board did not consider her to be a tenured employee. And by the vote of the Board on August 23, 2015, the respondent knew that the Board had terminated her. Yet, the respondent took no action to protect her status as a "tenured" teacher as required by the code. She filed no appeal to the Commissioner within ninety days of knowing her tenure status was not recognized, nor did she ever file any appeal of the Board's action with the Commissioner. Rather, she waited almost one year and then filed suit in Superior Court. The question of tenure cannot be looked at in a vacuum, or as a snapshot on the day a contract is executed. It is a right that must be asserted in

the face of adverse action such as occurred here, or it is lost. The ninety-day rule is an integral part of the respondent's claim to tenure and was ignored by her.

Applying the law to the facts, I **CONCLUDE** that the respondent was not a tenured teacher when she was terminated by the Highland Park Board of Education on or about June 23, 2015. While she may have "acquired" tenure as a result of executing a contract on May 5, 2015, the respondent's inchoate right of tenure needed to be asserted by her by the filing of an appeal with the Commissioner within ninety days of becoming aware of the Board's adverse action against her, which was known as early as May 27 and definitely by June 25, 2015. She failed to do so, and, as a result, any rights she may have had to tenure were extinguished.

ORDER

I hereby **ORDER** that the respondent was not a tenured teacher when she was terminated by the Highland Park Board of Education on or about June 23, 2015.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified, or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify, or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION. Exceptions may be filed by email to ControversiesDisputesFilings@doe.nj.gov or by mail to Office of Controversies**

and Disputes, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500. A copy of any exceptions must be sent to the judge and to the other parties.

May 14, 2024
DATE

SUSAN M. SCAROLA, ALJ

Date Received at Agency: May 15, 2024

Date Mailed to Parties:

SMS/kl