#312-05 (OAL Decision http://lawlibrary.rutgers.edu/oal/html/initial/edu01805-04_1.html)

ENRICO CIAMILLO, JR.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION DECISION
BOARD OF EDUCATION OF THE BOROUGH OF RIDGEFIELD, BERGEN COUNTY,	:	
RESPONDENT.	:	
_____	:	

SYNOPSIS

Petitioner, currently a Guidance Counselor in the Ridgefield Schools, alleged that he acquired tenure in the position of Guidance Consociate Teacher -- a position that carried an appropriate salary plus a stipend for extra services -- and that the Board unlawfully reduced his salary as the result of abolishing this position effective September 1, 2003. The Board maintained that petitioner's claim is time barred pursuant to the 90-day limitation embodied in N.J.A.C. 6A:3-1.3, and that petitioner had ample and appropriate notice upon which to file his claim in a timely fashion but failed to do so.

The ALJ found that: the petitioner's claim is subject to the 90-day limitation; there is no compelling reason or exceptional circumstance to warrant relaxation or waiver of the 90-day rule; the petitioner received adequate notice that he would not be appointed to the Guidance Consociate position and would not receive the remuneration previously associated with that position; and petitioner's failure to timely file his petition bars both retroactive and prospective relief. The ALJ rejected petitioner's contention that the matter involves a continuing violation; declined to address the merits of petitioner's claims in view of the above; and dismissed the petition.

Upon a thorough and independent review, the Commissioner concurred with the findings of the ALJ, and adopted the decision of the OAL as the Final Decision in this matter. In so doing, the Commissioner declined to exercise his discretion to relax the 90-day rule, citing no constitutional issue or compelling public interest beyond the concern of the petitioner. The Commissioner emphasized that, contrary to petitioner's exception argument, the 90-day rule is applicable to alleged claims of tenure violation. In addition, the Commissioner noted that, in any event, the petitioner made no showing that the Board's reduction-in-force action was a tenure violation.

OAL DKT. NO. EDU 1805-04
AGENCY DKT. NO. 461-12/03

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BOARD OF EDUCATION OF THE BOROUGH OF RIDGEFIELD, BERGEN COUNTY,	:	
RESPONDENT.	:	
	:	

The record in this matter, the Initial Decision of the Office of Administrative Law (OAL), and petitioner's exceptions have been thoroughly and independently reviewed. After considering the facts and applicable law, the Commissioner is constrained to adopt the Initial Decision.

The underlying facts in this case are not disputed. Petitioner holds certifications as a teacher (art), school social worker, guidance counselor, guidance director, and principal and supervisor. He began employment for respondent in 1994 as a guidance counselor, and has continued working in the Ridgefield schools to the present. Under the terms of a contract between respondent and the Ridgefield Education Association, guidance counselors must work for two weeks each summer.

In 1996-1997 petitioner accepted a position with the "unrecognized title" of "Guidance Consociate Teacher." The job description for Consociate teacher required an administrative certificate with a supervisor endorsement, and tenure in that position would be earned under the legal title of "Supervisor." The salary was to be the appropriate step on the

teachers' salary guide plus a stipend. The position of "Consociate Teacher" was listed in "Extra Service Guides" (annexed, *inter alia*, to the 1995-1996, 1996-1997 and 2001-2004 contracts between respondent and its employees), which set forth negotiated amounts payable to employees performing various "extra" positions. Thus, petitioner's annual salary notices from the 1996-1997 school year through the 2003-2004 school year showed petitioner's base salary as per petitioner's placement and step on the salary guide, and separately set forth the amount of remuneration petitioner was to receive for summer work and for extra work as a Consociate Teacher.

For the school years beginning in 1996, 1997, 1998, 1999, 2000, 2001 and 2002, petitioner did the extra work of Consociate Teacher, in addition to his guidance position. The extra consociate work in 1996-1997 brought petitioner $4,084 over his "contractual" salary of over $76,500. In 1997-1998 the stipend for consociate work was $4,235; in 1998-1999, $4,396; in 2002-2003, $6,061, bringing his total remuneration for that year to $96,334.

Petitioner was not reappointed to the Guidance Consociate Teacher position for the 2003-2004 school year. An "Annual Salary Notice to Tenure Personnel" dated April 29, 2003 and received by petitioner in May 2003 shows that for the 2003-2004 school year petitioner's contractual salary would be $90, 694, representing his step on the salary guide plus $4,319 for two weeks of summer work. The reduction in pay from 2002-2003 to 2003-2004 represented primarily the absence of any stipend for consociate work.

On May 7, 2003 the high school principal, Dr. Robert Jack, met with petitioner and explained that economic restraints caused him to conclude that the consociate position would not be viable for the coming school year. They met again on May 13, 2003. Dr. Jack advised petitioner that cost efficiencies mandated by the diminution of the district's magnet school

program (and the associated special education funding) had been the basis of his recommendation not to renew petitioner's consociate work.

Petitioner acknowledges that sometime in May 2003 he received the annual salary notice that revealed the elimination of the consociate work. The Administrative Law Judge (ALJ) found that petitioner admitted "that he knew no later than June 15, 2003 that he was not going to be the Guidance Consociate Teacher." (Initial Decision at 9)

As a result of an administrative reorganization, the duties of Guidance Consociate Teacher were incorporated into the Vice-Principal's job. Respondent has not subsequently appointed any other individual to the position of Guidance Consociate Teacher, and has stipulated that petitioner has tenure/seniority rights to the position. Petitioner has not disputed that the reorganization was driven by economic reasons, or argued that the reorganization was a sham or perpetrated in bad faith.

Petitioner filed his appeal on December 11, 2003.

Allegations by petitioner to which respondent does not subscribe are as follows. Petitioner contends that at their May meetings Dr. Jack told petitioner that the departure of the district superintendent would allow petitioner to be reinstated to the consociate work during the summer of 2003. Petitioner also maintains that at the school prom in June 2003, members of the respondent board of education told him they would correct the situation. Petitioner says he relied upon these statements and consequently did not realize that he was not reappointed until September 15, 2003, the date of his first paycheck. Petitioner also noted that he did not know of any other consociate whose salary was reduced.

Petitioner also suggested that the consociate position was not an "extra service" position. He testified that it was not posted in the same manner that other extra service positions

were posted, he never received a separate extra-service contract, and his last consociate appointment had not been acted upon at the June 11, 2002 meeting of the respondent board of education. (Initial Decision at 11) He also opined that extra service payments were made quarterly and were not pensionable, while he received payment on a biweekly basis and all his income was reported for pension purposes. (*Ibid.*)

On cross examination petitioner conceded that he did not know whether there had been job postings that he had not seen, that he did not know whether the respondent Board might have acted upon his last consociate position at a meeting other than the one on June 11, 2002, and that he was not actually familiar with the regulations regarding pensionable income. (*Ibid.*)

The ALJ found that petitioner's appeal of respondent's action was time barred, and determined that it was consequently unnecessary to reach the merits of petitioner's claim of tenure violation. In his exceptions, petitioner argues that since respondent conceded that petitioner had tenure in the position of Guidance Consociate Teacher, the ALJ should have first determined whether respondent violated petitioner's tenure rights and then decided "whether tenure rights are subservient to the 90-day rule." (Petitioner's Exceptions at 2)

Citing no authority, petitioner contends that the 90-day rule does not apply to alleged tenure violations. In the alternative, petitioner maintains that even if the 90-day rule applies to appeals of alleged tenure violations, that rule should be relaxed in petitioner's case because of the alleged "assurances" of reinstatement from the principal, Mr. Jack, and certain Board members, and because he did not know until his first paycheck that his salary had been lowered.

The Commissioner finds no merit in petitioner's exceptions. The question of whether petitioner has tenure in the position of Guidance Consociate Teacher is not

determinative of the applicability of the 90-day rule. Assuming, *arguendo*, that petitioner has such tenure, he was none-the-less obliged, under *N.J.A.C.* 6A:3-1.3(d), to "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." (Initial Decision at 13) S*ee, e.g., Gordon v. Passaic Twp. Bd. Of Educ.*, 1985 *S.L.D.* 1929, *aff'd.* No. A-3294-84T7 (App. Div. May 27, 1986) (unreported), *certif. den.* 105 *N.J.* 534 (1986) (the statute of limitations specified in *N.J.A.C.* 6:24-1.2 [predecessor of *N.J.A.C.* 6A:3-1.3] applies to claims . . . which allege the violation of tenure or seniority rights).

The event which triggers the limitations period is the petitioner's receipt of adequate notice of the Board's action, *i.e.,* notice that is "sufficient to inform an individual of some fact that he or she has a right to know and that the communicating party has a duty to communicate." *Kaprow v. Bd. of Educ. of Berkeley Twp.* , 131 *N.J.* 572, 587 (1993). Petitioner received an official written communication in May 2003 that he was not reappointed to the consociate position and that his salary would be lowered. No subsequent written notice was produced that contradicted same. Thus, the period of limitations began in May 2003 and ended in August 2003.

Further, petitioner's statement that he did not know that the Board's action had not been "corrected" until he received his first paycheck seems disingenuous. Clearly, as of the first day of school in September, petitioner knew that he was not performing consociate work, and would thus not be paid for it. In all likelihood, December 11, 2003, the day petitioner filed, was more than 90 days after the first day of school in September 2003. In any event, as the ALJ stated, "[t]he 90-day clock begins to tick once notice of the final order, ruling or other action is

given, and not when the injury is felt by the petitioner." (Initial Decision at 14, citing *Nissman v. Bd. of Educ. of the Twp. of Long Beach Island*, 272 *N.J.Super.* 373, 379-81 (App.Div.), *certif. den.* 137 *N.J.* 315 (1994). Not even settlement negotiations negate the receipt of adequate notice or toll the running of the limitations period. *Kaprow, supra,* 131 *N.J.* at 588.

The Commissioner also notes that this controversy arose in the context of a reduction in force (RIF). It is undisputed that the Guidance Consociate Teacher position was eliminated for economic reasons, and no one else was subsequently given the position. *N.J.S.A.* 18A: 28-9 allows such a RIF. While *N.J.S.A.* 18A:28-12 entitles petitioner to be on a preferred eligibility list for reemployment if the position is restored, petitioner has no statutory right to retain the salary he had before the RIF. In any event, if petitioner wished to challenge the effects of the RIF upon him, he was required to do so within the 90-day period. *Kaprow, supra,* 131 *N.J.* at 585-586 (Rights resulting from RIFs in the local school districts do not constitute a statutory entitlement; the limitations period of *N.J.A.C.* 6:24-1.2(c) [*N.J.A.C.* 6A:3-1.3], therefore, applies).

Finally, for the reasons set forth in pages 23-25 of the Initial Decision, the Commissioner declines to exercise his discretion, under *N.J.A.C.* 6A:3-1.16, to relax the 90-day rule. In May 2003 the petitioner had the information he needed to challenge respondent's action. In this matter there is no constitutional issue or compelling public interest beyond the concern of the petitioner. *Bogart v. Bd. of Educ. of the City of East Orange*, OAL DKT. EDU 6245-82 at 4 (January 26, 1983), *adopted*, Commissioner March 14, 1983. Nor has there been any showing that respondent acted in bad faith, as was found in *New Jersey School Boards Ass'n. v. Bd. of Educ. of the Twp. of Wyckoff*, Agency Dkt. No. 281-9/99 (Commissioner, February 3, 2000),

where, for six years, the respondent had not forwarded to petitioner the dues that were deducted from employee paychecks for the express purpose of transmittal to petitioner.

Accordingly, the Initial Decision of the OAL is adopted and petitioner's appeal is hereby dismissed.

IT IS SO ORDERED*

ACTING COMMISSIONER OF EDUCATION

Date of Decision: August 31, 2005

Date of Mailing: August 31, 2005

* 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.*