

#371-15 (OAL Decision: Not available online)

CAROL FEINSTEIN AND	:	
JUNIUS CARTER III,	:	
	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	
	:	DECISION
BOARD OF EDUCATION OF THE	:	
CITY OF ENGLEWOOD,	:	
BERGEN COUNTY,	:	
	:	
RESPONDENT.	:	

SYNOPSIS

The petitioners in this matter – members of the Board of Education of the City of Englewood, elected in April 2013 – filed an appeal challenging both a July 2013 advisory opinion from the School Ethics Commission (SEC) that asserted the existence of various conflicts of interest based upon the petitioners’ current and former employment, and the alleged actions of the Board in restricting the petitioners from participating in various Board-related activities subsequent to the issuance of the SEC advisory opinion. Petitioners filed their appeal with the Commissioner in September 2013, but were notified in October 2013 that the petition was deficient as it failed to name a respondent. Subsequently, petitioners filed an amended petition on September 23, 2014 – approximately one year after filing the original petition. The Board contended that the petition was late filed, and no reasonable explanation exists that would warrant the relaxation of the 90-day limitation period for the filing of an appeal.

The ALJ found, *inter alia*, that: pursuant to *N.J.A.C. 6A:3-1.3*, an appeal must be filed within ninety days day from the receipt of the notice of a final agency action; petitioners argument that their amended petition “relates back” to the original petition, thus tolling the ninety-day rule, is without merit; on its face, the amended petition filed in September 2014 continues to be defective as it speaks only to the fact that petitioners disapprove of the Advisory Opinion of the SEC, but contains no specific allegations against the Board; and if petitioners wish to submit another petition, only alleged instances of actions taken by the Board within the previous ninety days from the filing date of the new petition may be pleaded. The ALJ concluded that the within appeal was untimely, and accordingly granted the respondent Board’s motion to dismiss. Further, the ALJ ordered that any new petition filed by petitioners must contain “specific allegations” and “essential facts” pursuant to *N.J.A.C. 6A:3-1.4*, and focus only on acts that occurred within 90 days of the petition.

Upon full consideration, the Commissioner concurred with the ALJ that the instant petition is appropriately dismissed as untimely pursuant to *N.J.A.C. 6A:3-1.3(i)*, and found that the issue raised by the ALJ in his Initial Decision regarding the sufficiency of the factual allegations within the petition – and any amendments thereto – need not be ruled upon in the final decision. Accordingly, the petition was dismissed.

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.

November 9, 2015

OAL DKT. NO. EDU 1446-15
AGENCY DKT. NO. 293-9/14

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The record in this matter, the Initial Decision of the Office of Administrative Law (OAL), and the parties’ exceptions – filed in accordance with *N.J.A.C.* 1:1-18.4 – have been reviewed.

Upon full consideration of the record and the parties’ submissions, the Commissioner concurs with the Administrative Law Judge that the instant petition is appropriately dismissed because it was filed outside the 90-day limitation period set forth in *N.J.A.C.* 6A:3-1.3(i). The regulation provides, in pertinent part: “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...which is the subject of the requested contested case hearing.”

In *Kaprow v. Board of Education of Berkeley Township*, the Supreme Court discussed the importance of the 90-day rule as a means to prevent litigation of stale claims, to penalize late claims, and to lend a sense of “security and stability to human affairs.” *Kaprow v. Bd. of Educ.*, 131 *N.J.* 572, 587 (1992). The Court further emphasized: “When a plaintiff knows

or has reason to know that he has a cause of action against an identifiable defendant and voluntarily sleeps on his rights so long as to permit the customary period of limitations to expire, the pertinent considerations of individual justice as well as the broader considerations of repose, coincide to bar his action.” *Ibid.* (quoting *Farrell v. Votator Div.*, 62 N.J. 111, 115 (1973)).

Feinstein and Carter filed a Petition of Appeal naming the Board as a respondent¹ in September 2014 - thirteen months after the alleged Board action at issue – *i.e.*, the restriction of petitioners’ participation at Board meetings² – first occurred. (Feinstein Certification in Opposition to Motion to Dismiss, ¶ 8, March 11, 2015 and Carter Certification in Opposition to Motion to Dismiss, ¶ 9-10, March 11, 2015.) Here, it is not the School Ethics Commission’s release of Advisory Opinion A13-13 that triggered the beginning of the 90-day filing period, but rather the first instance of Board action adverse to petitioners. According to petitioners’ own certifications, the alleged restriction of petitioners’ participation by the Board began in August 2013.

Petitioners deemed their September 2014 submission an “Amended Petition of Appeal” in a long overdue attempt to relate it back to a defective petition first received September 17, 2013; however, the 2013 petition was never opened or docketed, as it failed to name a respondent.³ Instead, petitioners were notified of the filing deficiency via letter from the Director of the Bureau of Controversies and Disputes dated October 7, 2013 and advised of the need to amend their petition to include a respondent. Contrary to what is asserted in petitioners’

¹ Petitioners also named Robert W. Bender, Chairperson of the School Ethics Commission, as a respondent. However, prior to transmittal of this matter to the OAL, the Commissioner granted Bender’s motion to dismiss the allegations against him for lack of jurisdiction.

² The Board denies the allegations.

³ The defective Petition took issue with the substance of Advisory Opinion A13-13, issued by the School Ethics Commission at the request of respondent Board.

exceptions, the Director had no obligation to remind counsel of the applicability of *N.J.A.C.* 6A:3-1.3(i) to these circumstances. Since the instant Petition naming the Board as a respondent was not received until almost a year after the deficiency letter was sent, it is appropriately viewed as a stand-alone, new petition without any relation back to the defective 2013 submission. *See Gringeri v. Bd. of Educ. of Ramapo-Indian Hills Reg. High Sch. Dist.*, 88 *S.L.D.* 158 (1988). Therefore, the Commissioner finds the instant Petition to be untimely.

The Commissioner further finds that petitioners failed to set forth any compelling reason for relaxation of the timely filing requirement pursuant to *N.J.A.C.* 6A:3-1.16. Although petitioners asserted before the ALJ – and again in their exceptions – that the continuing violation doctrine is applicable here, the Commissioner disagrees as the instant matter does not concern a statutory or contractual entitlement. *Bd. of Educ. of Borough of Alpha v. Alpha Educ. Ass’n*, 190 *N.J.* 34, 43-48 (2006). Furthermore, petitioners offer no explanation for the failure to amend their defective 2013 petition in a timely manner. And while petitioners’ exceptions posit that – as a matter of public policy – the voters of Englewood who elected petitioners are also suffering harm in light of petitioners’ alleged inability to participate in certain Board activities, and that, therefore, the Commissioner should be dissuaded from dismissing the petition, said argument is undercut by petitioners’ inexplicable delay in filing a petition naming the Board as a respondent. In addition, *any* person – including a concerned voter – may file a complaint with the School Ethics Commission if he or she believes that a Board member’s conduct has violated the School Ethics Act. *N.J.S.A.* 18A:12-21 *et seq.*; thus, the public is not without an appropriate remedy.

Finally, petitioners misinterpret the applicability of *N.J.A.C.* 6A:3-1.7 to the present circumstances; that regulation does not grant petitioners *carte blanche* to amend their petition at any point in time – and in complete disregard of *N.J.A.C.* 6A:3-1.3(i) – nor does it

require the Commissioner to deem dilatory amendments as “relating back” to defective petitions filed twelve months earlier.⁴ *See Gringeri, supra*, 88 *S.L.D.* 158 (1988).

Accordingly, the Initial Decision is adopted as modified, only insofar as the issue of timeliness is concerned.⁵ Consequently, respondent’s motion to dismiss is granted, and the instant Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.⁶

COMMISSIONER OF EDUCATION

Date of Decision: November 9, 2015

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⁴ Had petitioners chosen to amend the defective petition within a reasonable timeframe, the Commissioner could have exercised discretion in permitting the amendment to relate back to the original submission for purposes of determining a filing date. Nonetheless, the circumstances presented here do not warrant such a result.

⁵ Because the Commissioner has determined to dismiss the Petition of Appeal for failure to comply with *N.J.A.C.* 6A:3-1.3(i), the issue raised by the ALJ in his Initial Decision concerning the sufficiency of the factual allegations within the petition, and any amendments thereto, need not be ruled upon herein.

⁶ This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1) and applicable Appellate Division rules.