314-17

STEVEN LE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF UNION, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

On August 16, 2017, petitioner – a taxpayer and former member of the Union Township Board of Education (Board) – filed a petition and motion for emergent relief seeking to enjoin the Board from spending an approximate $5,000,000 balance that remained unspent after a 2013 school renovation project. Petitioner contended that the funds in question had been transferred to an undesignated capital account in violation of applicable law and regulations. The Board argued that its actions were in all respects compliant with the law, and further asserted that the petition must be dismissed as untimely pursuant to *N.J.A.C.* 6A:3-1.3(i). A hearing was held in this matter on September 6, 2017, after which the record was closed.

The ALJ found, *inter alia*, that: the petitioner failed to meet the standard required for emergent relief under *Crowe v. DeGioia*, 90 *N.J.* 126 (1982), codified at *N.J.A.C.* 6A:3-1.6, as he was unable to demonstrate a likelihood of success on the merits; further, as a threshold matter, the petitioner filed his appeal out of time, as he was aware as early as January 2017 that the Board was taking official action regarding the remaining capital reserves from the school renovation project, yet failed to file an appeal until August 2017; and petitioner's argument that the ninety day rule should be relaxed in the "interests of justice" is without merit. Accordingly, the ALJ denied the petitioner's motion for emergent relief and granted the Board's motion to dismiss the petition as untimely.

Upon review, the Commissioner concurred with the findings and conclusions of the ALJ, and found the petitioner's exceptions to be without merit. Accordingly, the Initial Decision was adopted as the final decision in this matter, and the petition was dismissed.

October 23, 2017

OAL DKT. NO. EDU 12190-17
AGENCY DKT. NO. 191-8/17

STEVEN LE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF UNION, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed as have the exceptions filed pursuant to *N.J.A.C.* 1:1-18.4 by the petitioner, Steven Le. The petitioner filed a petition of appeal and a request for emergent relief seeking to enjoin the Union Township Board of Education (Board) from spending approximately $5,000,000 in funds that remained unspent after a 2013 school renovation project at the Central Five Jefferson School (Jefferson Project). The petitioner alleges that the funds were transferred to an undesignated capital account in violation of the applicable statutory and regulatory provisions. *N.J.S.A.* 18A:7G-5o; *N.J.A.C.* 6A:26-4.6(c). The Administrative Law Judge (ALJ) found that the petitioner did not meet his burden of establishing a right to emergent relief under *Crowe v. DeGioia*, 90 *N.J.* 126 (1982), and codified at *N.J.A.C.* 6A:3-1.6. The ALJ also determined that the petition of appeal was untimely filed under *N.J.A.C.* 6A:3-1.3(i) and, as a result, the ALJ granted the Board's motion to dismiss.[1]

Upon review, the Commissioner concurs with the ALJ – for the reasons set forth in the Initial Decision – that petitioner has failed to demonstrate entitlement to emergent relief pursuant to *Crowe*, *supra* and *N.J.A.C.* 6A:3-1.6. The Commissioner is also in accord with the ALJ's determination that the petition of appeal was time barred under *N.J.A.C.* 6A:3-1.3(i).

[1] In response to the petitioner's motion for emergent relief the Board filed a motion to dismiss.

N.J.A.C. 6A:3-1.3(i) prescribes that an appeal to the Commissioner must be filed "no later than the 90th day from the date of the 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 hearing." The 90-day rule "provides a measure of repose, an essential element in the proper and efficient administration of the school laws." *Kaprow v. Board of Education of Berkeley Tp.*, 131 *N.J.* 572, 582 (1993). In this case, even if the most lenient trigger date is utilized, it is clear that the petition was not timely filed. At three separate Board meetings – held on January 17, April 25 and April 26, 2017 – the Board took official action regarding the remaining capital reserve funds from the Jefferson Project. [2] Yet, the petitioner did not file the petition until August 16, 2017, 113 days after the April 26, 2017 Board action.

It is well recognized that the Commissioner may exercise her authority under *N.J.A.C.* 6A:3-1.16 to relax the application of the 90-day rule "where strict adherence thereto may be deemed inappropriate or unnecessary or may result in injustice." *Ibid.* "Exceptions to the 90-day rule should be granted sparingly, and only where there exist compelling circumstances to justify enlargement or relaxation of the time limit." *Sarah Dickerson v. Board of Education of the Township of Pittsgrove, Salem County*, OAL Dkt. No. EDU 8679-09 (Decided March 16, 2004) *aff'd Commissioner* (May 3, 2004) (citations omitted). In his exceptions, the petitioner maintains that the 90-day period should be relaxed because the proper expenditure of public funds is an issue of paramount public importance and the public is always harmed when a school board does not act with the requisite transparency regarding it expenditures of funds. The petitioner also contends that it is extremely important to proceed on the merits of the appeal based upon the Board's inability to justify its contradictory explanations regarding the amount of

[2] The remaining Jefferson Project funds were also the subject of various meetings and discussions during the petitioner's tenure as a Board member between January 5, 2016 and December 30, 2016.

remaining bond proceeds from the Jefferson Project. Finally, the petitioner argues that the ALJ failed to adequately explain why the timely filing requirement should not be relaxed in this case.

Despite his claim to the contrary, the Commissioner finds that the petitioner has failed to present any exceptional circumstances that might justify a finding that strictly adhering to the 90-day rule would result in injustice. *Kaprow v. Board of Education of Berkeley Tp.*, 131 *N.J.* 572, 590 (1993); *N.J.A.C.* 6A:3-1.16. As the ALJ stated in the Initial Decision, the petitioner is a former Board member and, as such, was well aware of the transfer of funds as early as January 2017; he is not certainly not "an ill-informed or unsophisticated tax payer." Moreover, all of the Board's decisions in connection with the use and transfer of the remaining funds from the Jefferson Project have been made at public meetings and in consultation with the Board's auditors. Further, the Board has already awarded contracts and issued purchase orders using funds from the capital reserve that were allocated from the Jefferson Project. As set forth in *Kaprow*, *supra*, the "limitations period gives school districts security in knowing that administrative decisions regarding the operation of the school cannot be challenged after 90 days." *Kaprow*, *supra*, at 542. Therefore, the petitioner has not demonstrated that there is a compelling reason to relax the 90-day filing requirement, and an injunction preventing the use of the funds at this late juncture would adversely impact ongoing school projects.

Accordingly, the Initial Decision is adopted as the final decision in this matter and the petition of appeal is dismissed.

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: October 23, 2017
Date of Mailing: October 25, 2017

[3] 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).

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO EDU 12190-17
AGENCY REF NO. 191-8/17

STEVEN LE,
Petitioner,
v.

BOARD OF EDUCATION OF THE TOWNSHIP OF UNION, UNION COUNTY.
Respondent.

Christopher K. Harriott, Esq., for Petitioner (Florio, Kenny, Raval, attorneys)

Paul E. Griggs, Esq., for Respondent (Sciarrillo, Cornell, Merlino, McKeever & Osborne, attorneys)

Record Closed: September 6, 2017 Decided: September 6, 2017

BEFORE **THOMAS R. BETANCOURT**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, Steven Le, a taxpayer and resident of Union Township, filed a verified petition and motion for emergent relief with the Commissioner of Education (the

Commissioner) on August 16, 2017. Le seeks to enjoin the Union Township Board of Education (the Board) from spending an approximate $5,000,000 balance that remained unspent after a 2013 school renovation project. He contends that these funds were transferred to an undesignated capital account in violation of the applicable statute and regulations. N.J.S.A. 18A:7G-5(o); N.J.A.C. 6A:26.4.6(c). The Board replies that its actions were in all respects compliant with law. It additionally asks that the petition be dismissed as untimely. N.J.A.C. 6A:3-1.3(i).

The matter was transmitted to the Office of Administrative Law (OAL) as a contested case August 22, 2017. Oral argument took place on September 6, 2017, at which time the record closed.

FINDINGS OF FACT

The underlying facts are as set forth in the verified complaint and certification filed In opposition to the application, and I **FIND**:

Le is a former member of the Board and a taxpaying resident of Union Township. He served on the Board from September 16, 2014 until December 31, 2014, and again from January 5, 2016 through December 31, 2016. The petition of appeal concerns moneys initially raised and allocated for a renovation project at Central Five Jefferson School. This project was the subject of a 2010 referendum, which was approved by the voters and authorized expenditures not to exceed $23,972,072. Funding sources included $12,000 from capital reserves; $5,259,907 from a state grant; and, $6,712,165 from the issuance of bonds. The work took place in 2013 and came in under budget; some $5,078,252 remained unspent. It is these remaining moneys that are at issue, and that Le contends are now being improperly budgeted by the Board.

Le recounts that as late as December 15, 2015; the subject funds had not been released, but were the subject of Board discussion. He related ongoing attempts during the subsequent year to determine when and if the project punch-list had been completed; and what moneys remained in which account, to include moneys raised via the sale of bonds. On January 14, 2016, Le asked the Business Administrator, Manuel Vieira, for clarification. Vieira replied that the bond account had been exhausted. While Le appears to question the veracity of that reply, he offers no concrete evidence that it was either inaccurate or insecure. Indeed, Le himself avers that a dispute about punch list and moneys owed lingered until May 10, 2016, when the matter was finally resolved via a settlement with the contractor. It appears that in 2016 Le participated, as a Board member, in Finance Committee meetings where the controverted funds were discussed. Le alludes to a lack of candor by the Board, but his claims remain allusions, and nothing more.

In stark contrast, the Board offered correspondence from its auditors confirming that the moneys raised via the sale of bonds had been fully expended for the Jefferson School project, and thus were not transferred to its general capital account. Via letter dated February 12, 2016, auditors Suplee, Clooney and Company confirmed that only $165 remained in the bond account and stated that "the $165 would be canceled against the unissued bonds." The some $5,000,000 remaining after the project was completed represented moneys from the capital reserve, which the auditors directed "would be transferred back to the capital reserve account." At a December 2016 meeting, at which Le was a member of the Board and present, the Board's new auditor, Nisivoccia LLP, explained again that the controverted sum would be reverting back to the capital account. Le expressed no concerns and asked no questions at that meeting.

On January 17 2017, at a regularly scheduled public meeting, the Board transferred unexpended appropriations in the amount of $4,800,000 to the undesignated capital reserve account. On April 25, 2017, the Board transferred

$305,918.68 from the Jefferson School project account to the undesignated capital reserve account. April 26, 2017, the Board withdrew $5,000,000 and transferred it to the Capital Outlay account. All these actions took place via formal public resolution. Thereafter, and in reliance upon the advice of its auditors, the Board approved contracts with vendors selected via the formal bidding process for renovation projects at Union High School. The Board urges that granting the relief sought by this petition would force it to breach its duly entered contracts with these vendors, resulting in financial liability, and the possibility that the repairs to the high school will not be completed in time for opening of school.[iv] Indeed, the contract for the high school renovations was awarded on June 13, 2017, and is more than fifty percent complete.

A letter dated August 9, 2017, from its auditors again confirmed the correctness of the Board's action in transferring the controverted funds. Nisivoccia LLP explained that guidance issued by the Department of Education entitled "Combined School District, Charter School and Renaissance School Audit Program" makes clear that "any unexpended transferred capital outlay and/or capital reserve funds remaining after completion of the school facilities project must be returned to the capital reserve account…"

LEGAL ANALYSIS AND CONCLUSION

In accordance with N.J.A.C. 1:1-12.6, emergency relief may be granted "where authorized by law and where irreparable harm will result without an expedited decision granting or prohibiting some action or relief connected with a contested case…" My determination in this matter is further governed by the standard for emergent relief set forth by our Supreme Court in Crowe v. DeGioia, 90 N.J. 126 (1982).

[iv] The School opened for the current school year on September 5, 2017.

The New Jersey Supreme Court has set forth a four-prong test for determining whether an applicant is entitled to emergent relief. Crowe v. DeGioia, 90 N.J. 126, 132-34 (1982) (enumerating the factors later codified at N.J.A.C. 6A:3-1.6(b)).

The four factors ("the Factors") include:

> 1. The petitioner will suffer irreparable harm if the requested relief is not granted;
>
> 2. The legal right underlying petitioner's claim is settled;
>
> 3. The petitioner has a likelihood of prevailing on the merits of the underlying claim; and
>
> 4. When the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted.
>
> [N.J.A.C. 6A:3-1.6(b).]

The moving party bears the burden of proving each of the Crowe elements "clearly and convincingly." Waste Mgmt of N.J. v. Union County Util. Auth., 399 N.J. Super. 508, 520 (App. Div. 2008).

I **CONCLUDE** that petitioner cannot meet its burden under the Crowe v. DeGioia standard.

Petitioner cannot demonstrate a likelihood of success on the merits of his claim. As a threshold matter, it appears that the petition is untimely filed. The time for filing an appeal before the Commissioner of Education is clearly set forth at N.J.A.C. 6A:3-1.3(i), which provides that a petition of appeal shall be filed "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." Petitioner's appeal was filed well past the regulatory timeline.

Adequate notice has been defined as notice "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). The ninety day period for commencing an action begins to run when the "plaintiff learns, or reasonably should learn, the existence of that state of facts which may equate in law with a cause of action." Ibid. The intent of the ninety day rule is to stimulate litigants to pursue a right of action within a reasonable time, so that the opposing party may have a fair opportunity to defend. The rule exists to "penalize dilatoriness and serve as a measure of repose by giving security and stability to human affairs." Ibid. Moreover, it is well established that the ninety day rule is to be strictly applied. See Kaprow, supra; Morris-Union Jointure Comm'n v. Bd. of Educ. of the Borough of S. River, 92 N.J.A.R. 2d, (EDU) 453; Markulin and the Neptune Educ. Ass'n v. Bd. of Educ. of the Twp. of Neptune, 92 N.J.A.R. 2d, (EDU) 406. This record offers no excuse or justification for the delay in perfecting Le's claim. He had notice that the controverted funds were being transferred to the capital account as early as January 2017. Nor is Le an ill-informed or unsophisticated local taxpayer. He has served on the Board himself and is ostensibly up to date on Board affairs.

Further, at oral argument, counsel does not dispute that the petition was not timely filed. Rather, counsel argued that the ninety day rule should be relaxed in the interests of justice.

Nor, based on the record developed for the emergent application does it appear that the facts will support Le's claim. He relies on N.J.S.A. 18A:7G-5(o), which states:

> In the case of a school facilities project of a district other than an SDA district, any proceeds of school bonds issued by the district for the purpose of funding the project which remain unspent upon completion of the project shall be used by the district to reduce the outstanding principal amount of the school bonds.

The Board agrees that it would have been obliged to use unspent bond proceeds to reduce its bond debt, but urges, persuasively, that the money at issue was not

generated by the sale of bonds. It buttresses that assertion with letters from two auditors.

Le likewise cites N.J.A.C. 6A:26-4(c) in support of the proposition that the moneys at issue, including capital reserve moneys, were improperly returned to the capital account. But Nisivoccia LLP shared guidance from the Department of Education that confirms that "unexpended transferred capital outlay and/or capital reserve funds remaining after completion of the school facilities project must be returned to the capital reserve account…" This is precisely what the Board did. It is thus clear that the law is not settled in petitioner's favor.

Moreover, a balancing of the equities requires denial of the application for relief. While Le argues that harm will come to the taxpayers if further spending of the controverted funds is not enjoined, the record reveals that just the opposite is true. In good faith reliance on its auditors, the Board has committed to using these moneys to make repairs to district facilities. Clearly, the public, and most especially the children of Union, will be harmed if their schools cannot open in a timely fashion this month; and, if moneys better directed toward staff salaries, books, and other instructional materials, are used to compensate vendors for potential breach of contract claims. It is noteworthy that the Board entered into a contract for the high school repairs on June 13, 2017, again via public resolution, but Le waited over two months to challenge the Board's decision; a challenge he now characterizes as an emergency.

Finally, harm is irreparable when there can be no adequate after the fact remedy in law or in equity; or where monetary damages cannot adequately restore a lost experience. Nabel v. Board of Education of the Township of Hazlet, EDU 8026-09 (June 24, 2009); Tomlin v. Lower Cape May Regional Board of Education, EDU 4952-09. This is a dispute only about the allocation of money, nothing more. Were Le to prevail at a plenary hearing, an order directing the Board to reallocate moneys in its budget will afford him, and the public, the relief he seeks.

Accordingly, I **CONCLUDE** that the request for emergent relief be **DENIED**; and, I further **CONCLUDE** that respondent's motion to dismiss the petition be granted.

ORDER

Based upon the foregoing, it is hereby **ORDERED** that Petitioner's request for emergent relief is **DENIED**; and,

It is further **ORDERED** that Respondent's cross motion to dismiss is **GRANTED**, and the petition is **DISMISSED**.

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, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

September 6, 2017

DATE

THOMAS R. BETANCOURT, ALJ

Date Received at Agency:

Date Mailed to Parties:

db

APPENDIX

List of Moving Papers

For Petitioner:

Verified Petition

Motion for Emergent Relief

Brief in support of request for emergent relief

For Respondent:

Brief in opposition to motion for emergent relief

Certification of Gregory E. Brennan

Certification of Manuel E. Vieira

Certification of Paul E. Griggs

Notice of Cross Motion to Dismiss