EDU #9451-01
C # 356-02L
SB # 43-02

VICTOR EISENBERG,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF FORT LEE, BERGEN COUNTY, JOHN C. RICHARDSON, ROBERT TAGLIERI AND JOAN VOSS,	:	DECISION
RESPONDENTS-RESPONDENTS.	:	

Decided by the Commissioner of Education, October 3, 2002

Decision on motion by the Commissioner of Education, November 20, 2002

For the Petitioner-Appellant, Greenberg Traurig (Richard I. Scharlat, Esq., of Counsel)

For the Respondents-Respondents, Schenck, Price, Smith & King, LLP (Joanne L. Butler, Esq., of Counsel)

Victor Eisenberg (hereinafter "petitioner") was employed as a teacher by the Board of Education of the Borough of Fort Lee (hereinafter "Board") commencing in the 1998-99 school year. By letter dated April 3, 2001, the Superintendent notified the petitioner that the Board had determined not to renew his employment for the 2001-02 school year. By letter dated April 4, 2001, the petitioner requested a statement of reasons for his dismissal, pursuant to N.J.S.A. 18A:27-3.2, which provides that:

> Any teaching staff member receiving notice that a teaching contract for the succeeding school year will not be offered may, within 15 days thereafter, request in writing a statement of the reasons for such nonemployment which shall be given to the teaching staff member in writing within 30 days after the receipt of such request.

In a memorandum to the petitioner dated May 1, 2001, the Superintendent detailed the reasons for his non-renewal.

By letter dated May 10, 2001, the petitioner requested a meeting with the Board concerning his non-renewal, pursuant to N.J.A.C. 6:3-4.2(a). By letter dated May 31, 2001, the Superintendent informed the petitioner that the Board would hold a special private work session on June 11 to discuss his non-renewal. By letter dated June 6, counsel for the petitioner requested that the meeting be conducted in public pursuant to N.J.S.A. 10:4-2 of the Open Public Meetings Act and that it be scheduled for after the school year so that it would not conflict with exams and so that the petitioner could present witnesses. By letter dated June 7, counsel for the Board advised petitioner's counsel that the meeting had been rescheduled for July 2. The meeting was held on that date, and, by letter dated July 3, the Superintendent informed the petitioner of the Board's "final determination regarding your employment status," specifically that the Board had upheld its decision not to renew his employment.

On September 29, 2001, the petitioner filed a petition of appeal with the Commissioner of Education challenging the Board's action. In his petition, the petitioner claimed that he recently had become aware of the fact that he had not been "given a fair chance at reemployment." Petition of Appeal, at 4. The petitioner alleged that he had learned only days before his July 2, 2001 appearance before the Board that the school's former principal had told another teacher that he had received instructions from the

Superintendent to make sure that he "papered" the petitioner's personnel file to justify the decision not to renew his employment. Id. The petitioner further alleged that he had learned less than a week before the July 2 meeting that his positive performance evaluations were missing from his personnel file. Id. at 5.

The Board filed a motion to dismiss the petition, contending that it was not filed within the 90-day period set forth in N.J.A.C. 6A:3-1.3(d).[1]

In a decision issued on September 10, 2002, the Administrative Law Judge ("ALJ") denied the Board's motion. The ALJ reasoned that the petitioner had disputed his notice of non-renewal and requested a statement of reasons as well as an informal appearance before the Board after he received notice of the Board's decision not to renew his employment. Thus, she found that the 90-day period set forth in N.J.A.C. 6A:3-1.3(d) began to run after the petitioner had "exhausted his rights at the school district level and after he received the 'final determination' letter dated July 3, 2001." Order on Motion to Dismiss, slip op. at 5.

The Board sought interlocutory review of that decision from the Commissioner, and, in a letter decision issued on October 3, 2002, the Commissioner set aside the ALJ's order. In reliance on Wise v. Board of Education of the City of Trenton, decided by the Commissioner of Education, September 11, 2000, aff'd by the State Board of Education, January 3, 2001, the Commissioner concluded that the Superintendent's letter of April 3, 2001 had alerted the petitioner to the existence of facts that might

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[1] N.J.A.C. 6A:3-1.3(d) 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.

equate in law with a cause of action. He therefore concluded that the petition should have been filed by July 2, 2001, and he granted the Board's motion to dismiss the petition as untimely.

On October 29, 2002, the petitioner filed the instant appeal to the State Board. On November 20, 2002, the Commissioner denied the petitioner's request for reconsideration of his decision.

The parties also filed a series of motions with the State Board. On January 8, 2003, the Board filed a motion to supplement the record with two proposed exhibits in response to purported discrepancies in the date a statement of reasons was provided to the petitioner. Those documents are a certification of its counsel and a partial transcript of a deposition of the Superintendent during related proceedings between the parties in the Chancery Division of Superior Court. The petitioner filed a brief in opposition to that motion, along with a request for oral argument on the motion. The Board subsequently filed a second motion on July 8, 2003, seeking to supplement the record with a supplemental certification of the petitioner's former principal. The petitioner filed a brief in opposition to that motion, along with a cross-motion to supplement the record. The Board filed a brief in opposition to the petitioner's cross-motion. On September 5, 2003, the petitioner filed a motion to supplement the record with a decision rendered on August 8, 2003 during the proceedings in Superior Court and to strike a portion of the Board's brief in opposition to the petitioner's cross-motion to supplement. The petitioner filed a brief in opposition to that motion. On October 2, 2003, after the Legal Committee's report had been mailed to the parties, the Board filed a motion to supplement the record with two documents which it claimed revealed that the petitioner

had been aware of facts in May 2001 that alerted him to the existence of a claim for alleged wrongdoing by the Board. The petitioner filed a brief in opposition to that motion.

After reviewing the moving papers and responses, we deny the motions, with the exception of the Board's October 2, 2003 motion to supplement the record, which we grant. We conclude that, except for the October 2 motion, the proposed exhibits have no relevance to the sole issue on appeal, i.e., whether the petitioner filed his petition in a timely manner. N.J.A.C. 6A:4-1.9(b). We also deny the petitioner's request for oral argument on the Board's first motion to supplement as not necessary for a fair determination of that motion. N.J.A.C. 6A:4-3.2.

We stress in so doing that our denial of these motions is for purposes of the current appeal only. We pass no judgment on whether the proposed exhibits may be material to future proceedings in this matter, and our determination to deny these motions at this time does not preclude the parties from renewing them during subsequent proceedings.

Turning to the merits of the appeal, we reverse the decision of the Commissioner to dismiss the petition.

The 90-day period for filing a petition of appeal with the Commissioner of Education commences when a petitioner learns of facts that would enable him to file a timely claim. Kaprow v. Board of Educ. of Berkeley Tp., 131 N.J. 572 (1993). In Burd v. New Jersey Tel. Co., 76 N.J. 284, 291 (1978), cited by the Court in Kaprow, the Court reiterated that the limitations period for commencing an action begins to run when "plaintiff learns, or reasonably should learn, the existence of that state of facts which

may equate in law with a cause of action." As the Court explained in Kaprow, supra, at 587:

> A limitations period has two purposes. The first 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, thus preventing the litigation of stale claims. Ochs v. Federal Ins. Co., 90 N.J. 108, 112, 447 A.2d 163 (1982). The second purpose is "'to penalize dilatoriness and serve as a measure of repose'" by giving security and stability to human affairs. Ibid. (quoting Farrell v. Votator Div., 62 N.J. 111, 115, 299 A.2d 394 (1973)).
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> > 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. [Farrell, supra, 62 N.J. at 115, 299 A.2d 394.]
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> Adequate notice under N.J.A.C. 6:24-1.2 should accommodate both purposes. That is, the notice requirement should effectuate concerns for individual justice by not triggering the limitations period until the tenured teachers have been alerted to the existence of facts that may equate in law with a post-RIF cause of action. See Burd v. New Jersey Tel. Co., 76 N.J. 284, 291, 386 A.2d 1310 (1978). At the same time, it should further considerations of repose by establishing an objective event to trigger the limitations period in order "to enable the proper and efficient administration of the affairs of government." Borough of Park Ridge v. Salimone, 21 N.J. 28, 48, 120 A.2d 721 (1956).

Although the April 3, 2001 letter from the Superintendent provided the petitioner in this case with notice of the Board's action denying him reemployment for the 2001-02 school year, the information which alerted the petitioner to the existence of an allegation of intentional wrongdoing on the part of the Board in effectuating his non-renewal was not known by him until late June/early July 2001. The petitioner could not have made the same allegations prior to his becoming aware of such information. Nissman v.

Board of Educ. of Long Beach Island, 272 N.J. Super. 373 (App. Div. 1994), certif. denied, 137 N.J. 315 (1994). Under these particular circumstances, in which the petitioner alleges intentional wrongdoing on the part of the Board and the information alerting him to the existence of such alleged facts were not known by him until late June/early July 2001, we conclude that, in order to effectuate concerns for individual justice, the petition was filed in a timely manner on September 29, 2001.

Our decision is not altered by consideration of the documents included in the Board's October 2, 2003 motion to supplement, which we have granted. Those materials do not show that the petitioner had any knowledge prior to late June/early July 2001 of his allegation that the Board had "papered" his personnel file or removed his positive performance evaluations in order to justify its decision not to renew his employment.

Nor does consideration of Wise, supra, cited by the Commissioner, alter the result. Wise affirmed the proposition that exhaustion of other avenues in attempting to resolve a dispute with a district board prior to filing a petition with the Commissioner following notice of non-renewal does not toll the running of the 90-day rule. Thus, the fact that the petitioner requested a statement of reasons and an appearance before the Board after he received his notice of non-renewal would not have tolled the running of the limitations period. As the Court pointed out in Kaprow, supra, at 588:

> Kaprow's attempt to resolve his claim through negotiations with the Local Board is irrelevant. It does not negate the fact that he received adequate notice on February 23 [that his employment was being terminated as the result of a reduction in force] or does it toll the running of the limitations period.

In this particular case, however, we have concluded that the information which alerted the petitioner to the existence of facts equating with a cause of action alleging intentional wrongdoing by the Board in effectuating the non-renewal of his employment was not known by him until late June/early July 2001. Thus, the 90-day period in this instance was triggered when the petitioner became aware of that information.

We further conclude that, even if the 90-day rule was triggered when the petitioner received notice of his non-renewal in April 2001, relaxation of that rule is warranted under these particular circumstances in the interest of justice. N.J.A.C. 6A:3-1.16.

Finally, we reiterate that the motion to dismiss the petition, which was filed with the ALJ by the Board, was predicated solely on the Board's contention that the petitioner had not filed his petition in a timely manner. As previously stated, the ALJ denied that motion, finding that the petition had been timely, and the Commissioner on interlocutory review rejected the ALJ's determination and granted the motion, concluding that the petition had not been filed in a timely fashion. Thus, the only issue before us on appeal is the timeliness of the petition. As a result, we have neither addressed nor determined whether the petitioner, a non-tenured staff member, has alleged facts which, if true, would constitute a violation of constitutional or legislatively-conferred rights so as to entitle him to litigate this matter. Dore v. Bedminster Twp. Bd. of Ed., 185 N.J. Super. 447 (App. Div. 1982) (a district board has virtually unlimited discretion in hiring or renewing non-tenured teachers "absent constitutional constraints or legislation affecting the tenure rights of teachers"); Guerriero v. Board of Education of the Borough of Glen Rock, decided by the State Board of Education, February 5, 1986,

aff'd, Docket #A-3316-85T6 (App. Div. 1986). Similarly, we make no judgment with regard to the merits of the petitioner's contentions.

We therefore reverse the Commissioner's decision to dismiss the petition as untimely and remand this matter to him for such further proceedings as are necessary to resolve this matter, including a determination of whether the facts alleged by the petitioner, if true, would constitute a violation of constitutional or legislatively-conferred rights.

We do not retain jurisdiction.

Attorney exceptions are noted.

November 5, 2003

Date of mailing _____