

JUDY A. MAZZEO, :
PETITIONER, :
V. : COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE : DECISION
TOWNSHIP OF BARNEGAT,
OCEAN COUNTY, :
RESPONDENT. :

SYNOPSIS

Petitioner contends that the respondent failed to assign her the duties of a principal, as required by an earlier Commissioner’s Decision ordering respondent to reinstate the petitioner to the position of principal to rectify an illegal reassignment in violation of her tenure rights. Respondent filed a Motion to Dismiss based on untimely submission of the petition.

The ALJ found that respondent’s action in appointing petitioner as a principal — but failing to assign her to a school, failing to change her duties and causing her to report to the middle school principal as she had done during the earlier reassignment that violated her tenure rights — was adequate notice to trigger the 90-day limitations period for filing petitions, pursuant to *N.J.A.C.* 6A:3-1.3(i). Petitioner’s reassignment to a principal position without commensurate responsibilities occurred on August 23, 2004, following adjudication and an initial decision ordering her reinstatement as principal; the instant petition was filed on June 15, 2005. The ALJ, therefore, found that the petition was not filed in a timely manner, and concluded that the respondent is entitled to the granting of its Motion to Dismiss.

The Commissioner adopts the ALJ’s decision with modification to the timeline for determining what constitutes an untimely filing in this matter, establishing the estimated date of receipt of the original Commissioner’s decision as the accrual date. Additionally, the Commissioner notes that petitioner was advised that enforcement of agency orders may be sought in Superior Court pursuant to R. 4:67-6, and any petitioner choosing that avenue of remedy is not constrained by the 90-day rule if the case is later transferred by a Superior Court judge to the Commissioner for clarification of issues requiring administrative expertise. Because petitioner appealed directly to the Commissioner in this matter, she was bound by the procedural rules in *N.J.A.C.* 6A:3-1.3, including the 90-day rule. Accordingly, the Commissioner adopts the decision of the ALJ, and dismisses the petition for failure to timely file.

<p>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.</p>

OAL DKT. NO. EDU 4561-05
AGENCY DKT. NO. 151-6/05

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The record of this matter, the Initial Decision of the Office of Administrative Law (OAL) and the parties' exceptions have been independently reviewed.

From 1994 to 2002, petitioner was employed by the respondent district in the dual assignment of Principal/Basic Skills Supervisor. In June, 2002, she was reassigned to the position of "Director of Special Projects." It is undisputed that the reassignment switched petitioner from a position in which she had tenure rights to a position in which she did not have tenure rights.

Petitioner appealed the reassignment to the Commissioner, and the matter was adjudicated in the OAL, under docket number EDU 8384-02, by means of stipulated facts and briefs in lieu of a hearing. On December 23, 2004 the Commissioner adopted the administrative law judge's (ALJ) initial decision dated May 27, 2004, ordering that respondent reinstate petitioner to the position of principal, with back pay, benefits and emoluments.

The parties agree that respondent “reassigned” petitioner back to the position of principal on August 26, 2004, and that petitioner was notified of the reassignment by letter dated September 7, 2004. This was before the Commissioner’s final decision was issued. However, the petitioner was not assigned to any school as a principal, but was rather kept in the same office she had been in as Director of Special Projects, performing the same duties and reporting to the same middle school principal. There is no record of petitioner taking any action to challenge respondent’s course of action (or inaction) until April 13, 2005.

On or about April 13, 2005, petitioner filed a motion with the Bureau of Controversies and Disputes (the Bureau) seeking substantive enforcement of the Commissioner’s December 23, 2004 order requiring her return to the position of principal, and alleging that respondent had complied only nominally with the Commissioner’s mandate. The Bureau advised petitioner, by letter dated April 21, 2005, that motions to enforce orders of the Commissioner are properly brought before the trial division of Superior Court. *R. 4:67-6*. In the alternative, the Bureau explained that if the issues raised by petitioner in the motion required determinations by the Commissioner, she would have to file a petition of appeal conforming to the requirements of *N.J.A.C. 6A:3-1.3* and *N.J.A.C. 6A:3-1.4*.

Petitioner apparently decided that the issues for which she sought a determination required the Commissioner’s expertise. Accordingly, she filed a petition, dated June 7, 2005, which was received by the Bureau on June 15, 2005. On June 23, 2005, respondent submitted a motion to dismiss the petition as untimely. More specifically, respondent asserted that petitioner had failed to file her petition within the ninety day period set forth in *N.J.A.C. 6A:3-1.3(i)*. The matter was transmitted to the OAL and assigned docket number EDU 4561-05.

In her response to the motion to dismiss, filed with the Bureau on June 30, 2005 and with the OAL on July 29, 2005, petitioner claimed -- citing no authority -- that the ninety day rule does not apply because she is challenging an attempt by respondent to circumvent the requirements of the Commissioner's decision and the rights involved therein. Petitioner stated: "At issue are not only the rights of the petitioner but the effectiveness of the decision making authority of the Commissioner." Petitioner's letter dated July 27, 2005, in response to respondent's motion.

No affidavits or certifications were submitted by the parties in connection with the motion to dismiss, but the ALJ found that "the essential facts in this matter may be gleaned from reviewing the petition and from the arguments of the parties, and are not disputed." Initial Decision at 2. His "factual discussion" included most of the facts set forth above, and was not challenged by the parties' exceptions.

In his legal analysis, the ALJ referred to *Kaprow v. Board of Educ. of Berkeley Tp.*, 131 N.J. 572 (1993), in which the Court explained that the 90-day rule for filing petitions with the Commissioner of Education is within the broad delegation of power the Commissioner received from the legislature to prosecute controversies, *id.* at 582, and creates the repose necessary for the efficient administration of the school laws. *Ibid.* The *Kaprow* Court also approved of the regulatory focus on the date that petitioners receive written or actual notice of the board of education's wrongful act as the accrual date for a cause of action, as opposed to the date a petitioner feels the consequences of the wrongful act or receives formal notice of same. *Id.* at 588-89. See also, *Nissman v. Board of Educ. of Tp. Of Long Beach Island, Ocean County*, 272 N.J. Super. 373 (App. Div. 1994), *certif. den.* 137 N.J. 315 (1994).

Comparing the present case to *Kaprow*, the ALJ determined that respondent's failure to assign petitioner to a school, change her duties or eliminate her obligation to report to the same middle school principal, was adequate notice of respondent's adverse action and, thereby, petitioner's cause of action. Initial Decision at 5. Thus, he concluded that the 90-day rule was triggered on August 23, 2004. Initial Decision at 6. Consequently, he reasoned, the petition filed on June 15, 2005 was untimely. *Ibid.*

In her exceptions, petitioner continues to assert that the 90-day rule does not apply to the present case. She draws a distinction between contesting the Commissioner's decision of December 23, 2004, which she agrees would trigger the 90-day rule, and seeking compliance with same. Petitioner's exceptions at 2. In fact, petitioner maintains that her appeal does not rest upon an action of respondent, but rather upon an unfolding of every day assignments and duties during the course of the school year. *Ibid.*

The Commissioner is constrained to adopt, with some modifications, the ALJ's decision that petitioner did not meet the time requirements for pursuing her claim. *N.J.A.C.* 6A:3-1.3 (a) states, in pertinent part, that "[t]o initiate a contested case for the Commissioner's determination of a controversy or dispute arising under the school laws, a petitioner shall prepare a petition of appeal . . .," and *N.J.A.C.* 6A:3-1.3(i) directs petitioners to file their petitions "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." As stated above, the phrase "receipt of the notice of a final order, ruling or other action by the district board of education" has been interpreted in case law to mean even an informal awareness of adverse action by a board of education or other party.

The Commissioner agrees with the ALJ that petitioner would have been aware by early September 2004 that she was not given the principalship of an actual school, and that she was still reporting to the same middle school principal. These are adverse actions by respondent. However, it was not until the end of December 2004 that the Commissioner issued a decision ordering petitioner's reinstatement. Before that decision and order, any "appeal" by petitioner would have been premature and uncognizable. In other words, notwithstanding the fact that it appeared in September 2004 that respondent was not reinstating petitioner to full status as principal, respondent was not legally required to do so until it received the Commissioner's December 23, 2004 order. In light of the December holiday break, the likelihood that respondent would have seen the order before January 3, 2005 was small.

Thus, the 90-day limitations period should be deemed triggered on or about January 3, 2005. This is when respondent was obligated to reinstate petitioner to a principalship, and this is when petitioner should have paid heed to whether respondent assigned her a school and allowed her to perform the kind of duties she had performed previously as a principal. She had until April 4, 2005 to file a petition to bring before the Commissioner any disagreements she had concerning respondent's actions. The Commissioner does not agree with petitioner that respondent's failure to comply with the December 23, 2004 order could not be characterized as adverse action. Further, the Commissioner concludes that 90 days was enough time for petitioner to ascertain that the duties respondent assigned to her after January 3, 2005 were not compliant with the December 23, 2004 order, and that the assignment of those duties was an adverse action. Unfortunately, petitioner's first filing with the Bureau was on April 13, 2005, nine days past the deadline.

As mentioned *supra*, petitioner was advised by the Bureau in a letter dated April 21, 2005, that litigants may file motions for enforcement of agency orders in Superior Court, pursuant to *R. 4:67-6*. If a petitioner chooses that remedy, and his or her case is later transferred by a Superior Court judge to the Commissioner for clarification of issues which require administrative expertise, the 90-day rule does not apply. *Paul Metzger v. Board of Education of the Township of Willingboro*, 93 *N.J.A.R.* 2d 548, Initial Decision May 13, 1993, Final Agency Decision June 22, 1993, p.7. For instance, a Superior Court judge could, arguably, in a case such as the present one, have transferred the matter to the Commissioner for a determination as to whether petitioner's current duties are indeed not amenable to characterization as principal's duties. The arrival of the case at the Commissioner's office in such a scenario would not be subject to the 90-day rule.

Petitioner, however, appealed directly to the Commissioner for relief from an alleged wrong. She was consequently required to go forward in accordance with the procedural rules in *N.J.A.C.* 6A:3-1.3, including the rule concerning a limitations period, but did not. Accordingly, and for the reasons set forth above, the Commissioner adopts the decision of the ALJ and his order granting respondent's motion to dismiss the petition.

IT IS SO ORDERED*

ACTING COMMISSIONER OF EDUCATION

Date of Decision: September 29, 2005

Date of Mailing: September 30, 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.*