#134-07 (OAL Decision: http://lawlibrary.rutgers.edu/oal/html/initial/edu08568-04_1.html)

BOARD OF EDUCATION OF THE TOWNSHIP OF PEMBERTON, BURLINGTON COUNTY,	:	COMMISSIONER OF EDUCATION
PETITIONER,	:	DECISION
V.	:	
BOARD OF EDUCATION OF THE BURLINGTON COUNTY SPECIAL SERVICES SCHOOL DISTRICT, BURLINGTON COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

Pemberton Board of Education sought to recoup a tuition overpayment to the Burlington County Special Services District (BCSSD) for the 2000-01 school year, based on the Department of Education's January 27, 2004 recertification of such rates. Pemberton also sought return to sending local district boards of education of that amount of BCSSD's 2004-05 surplus exceeding the permissible level of 10%.

The ALJ dismissed Pemberton's petition as to recoupment of 2000-01 overpayment because he found it to be untimely, holding that Pemberton should have filed its appeal within 90 days of receiving notice of the recertified rates in February 2004. The ALJ granted the petition as to return of BCSSD's excess surplus, devising an *ad hoc* method for this purpose in the apparent belief that proposed rules had not yet been finalized by the State Board of Education.

The Commissioner adopted the Initial Decision in part, and rejected it in part. The Commissioner concurred with the ALJ that Count One of the petition was untimely filed, since Pemberton had sufficient information to protect its rights by appealing within 90 days of becoming aware of the recertified rates notwithstanding the ongoing efforts of staff to resolve the matter informally. The Commissioner did not, however, concur with the ALJ's method of returning BCSSD's excess surplus, finding that the State Board had, in fact, adopted the referenced rules in September 2006 and that the Department soon thereafter made adjustments to BCSSD's 2004-05 excess surplus consistent with them. Because Pemberton had already received the relief it sought in a manner consistent with rule and policy of the State Board, the Commissioner dismissed Count Two of the petition as moot.

April 12, 2007

OAL DKT. NO. EDU 8568-04
AGENCY DKT. NO. 278-8/04

BOARD OF EDUCATION OF THE TOWNSHIP OF PEMBERTON, BURLINGTON COUNTY,	:	COMMISSIONER OF EDUCATION
PETITIONER,	:	DECISION
V.	:	
BOARD OF EDUCATION OF THE BURLINGTON COUNTY SPECIAL SERVICES SCHOOL DISTRICT, BURLINGTON COUNTY,	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Exceptions to the Initial Decision were filed by both petitioner (Pemberton or the Board) and respondent (BCSSD); BCSSD's exceptions, however, were untimely filed and consequently not considered herein.[1] Neither party replied to the other's exceptions.

In its exceptions, Pemberton first objects to the November 5, 2005 Order of the Administrative Law Judge (ALJ)[2] dismissing Count One of the Petition, wherein the Board sought to recoup a tuition overpayment to BCSSD for the 2000-01 school year based on rates recertified by the Department of Education (Department) in January 2004. The Board contends that the ALJ erred in finding that its petition was required to be filed within 90 days of February 23, 2004 – the date it learned of the recertified rate – since Pemberton's business

[1] Pursuant to *N.J.A.C.* 1:1-18.4, exceptions were due thirteen days from the mailing date of the Initial Decision (February 21, 2007), or March 6, 2007. Respondent's exceptions dated March 6, 2007 were mailed on that date and filed on March 8, 2007.

[2] Noted in the Initial Decision at 2 and appealed at the end of the contested case pursuant to *N.J.A.C.* 1:1-14.10(j).

administrator did not become aware that the revised certification would not result in an adjustment to the Board's tuition liability for the 2004-05 school year until she received verbal notice to this effect from the Department in response to her May 19, 2004 memorandum. Moreover, Pemberton claims, even if the ALJ's deadline were to be accepted, relaxation of the 90-day rule is warranted pursuant to *Brunetti v. Borough of New Milford*, 68 *N.J.* 576, 586 (1975). The Board explains:

> The rates sought to be invoked here were those set forth in the Department's letter of January 27, 2004. When and how would this letter put Pemberton on guard that BCSSD would not apply the new rates? It wouldn't. When, then, did Pemberton find out that BCSSD would not apply the new rates? When should have Pemberton known that its rights were in jeopardy? Certainly not for the first 90 days after BCSSD got the January 27, 2004 letter. BCSSD could have challenged the new rates during this time period. In any event, BCSSD never told Pemberton about the new rates. That information came from an informal fax from a Department employee on February 23, 2004. But that fax only indicated that the new rates existed, not that BCSSD would ignore them. The February 23, 2004 fax in any event was still within the time period when BCSSD could have challenged the new rates. During this time period there could be no expectation that BCSSD would not challenge the rates, or, if no appeal was taken, that the new rates wouldn't be applied. Therefore, until April 28, 2004 (90 days after January 27), no expectation could exist that required action by Pemberton. After April 28, 2004, [Pemberton Business Administrator] Austin repeatedly tried to find out what was going on. No definitive decision was ever forthcoming: not from BCSSD, not from the County Superintendent, and not from the Department. It was not until May 19, 2004, and then on a most informal basis, that Ms. Austin and therefore Pemberton, found out that BCSSD would not apply the new rates and that a challenge to this decision, the decision not to follow the January 27, 2004 directive, should be mounted. A Petition filed on August 10, 2004 is timely. Even if it is not, the informal nature and ex parte nature of how Pemberton gathered sufficient facts to put it on guard that its rights were being adversely effected (*sic*) warrant a relaxation of the rules to permit a late filing. Count One should be reinstated. Pemberton's cross motion requiring modification of the tuition rate and reimbursement for overpayments should be granted.
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> (Pemberton's Exceptions at 3-5, quotation at 4-5)

Pemberton further excepts to the relief ordered by the ALJ as a result of his finding – on Count Two of the Board's petition – that BCSSD maintained a fund balance in

excess of 10%. On this point, the Board reiterates its arguments – summarized in the Initial Decision at 10 – with respect to rules "proposed" by the Department,[3] contending that neither the rule proposal nor the remedy crafted by the ALJ are sufficiently refined to ensure that sending districts are, in fact, fully and fairly compensated for prior tuition overcharges, and that a methodology must be devised to address "all of the concerns with the system" so as to rectify the "basic unfairness" of both its current and proposed forms. (Pemberton's Exceptions at 5-7, quotations at 7)

Upon careful review and consideration, the Commissioner adopts the Order of the ALJ finding Count One of Pemberton's appeal untimely filed, but rejects the relief ordered in the Initial Decision as to Count Two.

With respect to the question of timeliness, the Commissioner concurs with the ALJ that Pemberton should have acted to file its petition within 90 days of learning of the recertified rates on February 23, 2004. While this notice alone – as observed by the ALJ – might not necessarily alert a sending board to a cause of action against a receiving district, it cannot be overlooked that in this matter such notice was received under circumstances where: 1) the clear terms of rule and contract[4] provided for tuition adjustments to be made not later than the third year (2003-04) following the contract year in question (2000-01) and the adjustment sought by the Board in response to the recertification would need to be effectuated outside that regulatory and contractual time frame; and 2) it was evident by early-to-mid-April at the very latest – well within 90 days of February 23 – that BCSSD was taking no action of any kind toward making

[3] The rules at issue were, in fact, adopted by the State Board of Education on September 8, 2006. 38 *N.J.R.* 4178(b). Pemberton's references to the "current" form of the rule cite to its language prior to the September 2006 amendment. See Note 6 below.

[4] See *N.J.A.C.* 6A:23-3.1(f)6, 6A:23-3.4(g)-(h); see also BCSSD's Memorandum in Reply to the Opposition to Motion for Summary Judgment and in Further Support of Respondent's Application (R-6), Exhibit A (Special Education Tuition Contract Agreement for County Special Services Districts). The current rules and contract are substantially the same as those in effect during the period at issue.

the requested adjustment.[5] Under these facts, there is no question that Pemberton should have acted to protect its rights by filing an appeal within 90 days of its notice of the recertified rates – i.e., on or before May 23, 2004 – notwithstanding the persistent efforts of its Business Administrator to resolve the matter informally through BCSSD directly, and by seeking assistance from staff in the Department's Division of Finance and others. *Riely v. Hunterdon Central Bd. of Educ.*, 173 *N.J. Super.* 109 (App. Div. 1980), *Kaprow v. Board of Educ. of Berkeley Tp.*, 131 *N.J.* 572 (1993)

With respect to Pemberton's claim for refund of surplus held by BCSSD during the 2004-05 school year above the level (10%) permitted by law, the Commissioner finds this matter to be moot as a dispute between the parties in light of the State Board of Education's adoption – on September 8, 2006[6] – of rules establishing a mechanism for refund of excess surplus to sending districts, and the Department's October 20, 2006 application of that rule to 2004-05 balances for all special services districts, including BCSSD (Exhibit R-12). Given that the State Board has now spoken – as a matter of policy and law – as to how the issue raised by Count Two of Pemberton's petition is to be handled for 2004-05 and prospectively, and given that Pemberton has already been accorded the relief it sought in Count Two of its petition in a manner consistent with the State Board's directive, there is no basis on which the Commissioner can sanction a different result as recommended by the ALJ. To the extent Pemberton believes that the mechanism established by the newly adopted rule is insufficient and not responsive to its

[5] See Certification of Pat Austin (Exhibit P-1), ¶17-24 and attached Exhibits 4-8; Pemberton's Memorandum in Opposition to Motion for Summary Judgment (Exhibit P-2) at 4-5 and 7-8; and Pemberton's Responses to Interrogatories (Exhibit P-3), attached exhibits A, D and F.

[6] See Note 3 above. It appears from the record and the Initial Decision that neither Pemberton nor the ALJ realized that the "proposed" rules referenced throughout proceedings at the OAL had actually been adopted by the State Board. Additionally, while BCSSD's filings from mid-to-late December 2006 (Exhibits R-12, R-13) indicate that the Department had devised a procedure addressing the issue of excess surplus and made the requisite adjustments to the benefit of sending districts, they do not explicitly state that the proposed rules were enacted into law.

concerns, the Board's remedy lies in the rulemaking processes of the Administrative Procedure Act,[7] not in the contested case process – where the result it seeks would, in effect, cause the Commissioner to engage in improper rulemaking through her decision in this matter. *Metromedia, Inc. v. Director, Division of Taxation*, 97 *N.J.* 313 (1984).

Accordingly, for the reasons expressed herein, the Initial Decision of the OAL is adopted in part and rejected in part, and the Petition of Appeal is dismissed as untimely filed (Count One) and moot (Count Two).

IT IS SO ORDERED.[8]

COMMISSIONER OF EDUCATION

Date of Decision: April 12, 2007
Date of Mailing: April 13, 2007

[7] *N.J.S.A.* 52:14B-1 *et seq*., *N.J.A.C.* 1:30-1.1 *et seq*., *N.J.A.C.* 6A:6-1.1 *et seq*. It is noted in this regard that Pemberton did not submit comments on the proposed rules upon their publication in the *New Jersey Register*. See 38 *N.J.R.* 4178(b). Additionally, although the record shows that Pemberton was engaged in related discussions with the Burlington County Association of School Business Officials during April and June of 2004 – while the rule proposal was under consideration by the State Board prior to its publication in the *Register* – the New Jersey Association of School Business Officials' comments on the proposed rules did not address the issues raised by Pemberton. See Pemberton's Answers to Interrogatories (Exhibit P-3), ¶8 and attached exhibit L; 38 *N.J.R.* 4178(b), 4181.

[8] 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*.