

New Jersey Commissioner of Education

Final Decision

R.P., on behalf of minor child, S.P.,

Petitioner,

v.

Board of Education of the Westwood Regional School District, Bergen County, Jill Mortimer, Frank Connelly, Heather Goffe, Michael Kenduck, Chris Mello, Dan Vivino, Shelley Laforgia, Margaret Montenare, and Andrew Phillips,

Respondents.

Synopsis

Petitioner appealed a May 2, 2023 final decision by the respondent Board which confirmed that acts of harassment, intimidation, and bullying (HIB) had been perpetrated against his minor son at Westwood Regional High School on October 4 and October 5, 2022. Petitioner’s appeal, which was filed on November 6, 2023, sought financial damages from the Board in addition to the discipline imposed upon the students involved in the HIB incidents. The Board filed a motion to dismiss, contending that the petition was submitted more than 90 days after the issuance of the final decision in this matter and is therefore untimely pursuant to *N.J.A.C. 6A:3-1.3(i)*.

The ALJ found, *inter alia*, that: the timeline of events in this case is effectively undisputed; pursuant to *N.J.A.C. 6A:3-1.16*, petitioner’s appeal was required to be filed no later than July 31, 2023, which was 90 days from the issuance of the Board’s final decision in the HIB matter; however, petitioner’s appeal was not filed until November 6, 2023, after his attorney perfected the submission by providing proof of service to the Board; even if the appeal had been marked “FILED” on the date it was received by the Department of Education’s Office of Controversies and Disputes, i.e., August 9, 2023, it was still received beyond July 31, 2023; and there is insufficient evidence to demonstrate that the ninety-day deadline as delineated in *N.J.A.C. 6A:3-1.16* should be relaxed. Accordingly, the ALJ granted the Board’s motion to dismiss and ordered the petitioner’s appeal dismissed.

Upon review, the Commissioner concurred with the ALJ that the petitioner’s appeal was untimely filed. Accordingly, the Initial Decision was adopted as the final decision in this matter, and the petition of appeal 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.

180-24
OAL Dkt. No. 14011-23
Agency Dkt. No. 219-8/23

New Jersey Commissioner of Education
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Board of Education of the Westwood
Regional School District, Bergen County,
Jill Mortimer, Frank Connelly, Heather Goffe,
Michael Kenduck, Chris Mello, Dan Vivino,
Shelley Laforgia, Margaret Montenare, and
Andrew Phillips,

Respondents.

The record of this matter, the Initial Decision of the Office of Administrative Law (OAL), the exceptions filed by the petitioner pursuant to *N.J.A.C. 1:1-18.4*, and the Board's reply thereto, have been reviewed and considered.¹

In this matter, petitioner challenges the May 2, 2023 harassment, intimidation, and bullying (HIB) determination made by the Westwood Regional School District Board of Education (Board) regarding HIB actions perpetrated by five Westwood Regional High School students against petitioner's minor child on October 4 and October 5, 2022.

Petitioner, through his attorney, mailed the petition of appeal on July 28, 2023; it was received by the Office of Controversies and Disputes (C&D), which processes petitions on behalf

¹ Petitioner filed a sur-reply to the Board's reply, which was not considered by the Commissioner as sur-replies are not permitted under the applicable regulations.

of the Commissioner, on August 9, 2023. That same day, C&D emailed petitioner's attorney to inform him that he must provide proof that the petition was served on the Board and the full names of petitioner and his minor child. No response was received, and a follow-up email was sent by C&D to petitioner's attorney on August 28, 2023, advising petitioner's attorney that the petition would not be processed until C&D received proof of service and the full names of the parties. Again, no response was received, and a formal deficiency notice was emailed and mailed to petitioner's attorney on October 2, 2023. Petitioner's attorney mailed the proof of service and names of the parties on October 27, 2023, and it was received by C&D on November 6, 2023.

Following the Board's motion to dismiss, the Administrative Law Judge (ALJ) concluded that the petition of appeal was untimely pursuant to *N.J.A.C. 6A:3-1.3(i)*. The ALJ found that the petition of appeal was due by July 31, which was 90 days after the Board's disclosure of its HIB determination. However, the petition was not received by C&D until August 9. Furthermore, the petition was deficient and, despite being notified of same, petitioner's attorney did nothing to address the deficiency until C&D advised on October 2 that the matter would be automatically closed if proof of service was not provided by October 31. The ALJ noted that petitioner's attorney did not send the proof of service until October 27, and purportedly did so "By Priority Express Mail," although no such service is offered by the United States Postal Service (USPS), and the mailing included no tracking information or proof of delivery. When C&D finally received the proof of service on November 6, 188 days had passed since the Board's determination, and 89 days had passed since petitioner's attorney was first notified of the deficiency in the original filing. The ALJ found that "this was not timely under any

interpretation of ‘timely submitted’.” Initial Decision at 16 (internal citation omitted). Finally, the ALJ concluded that there was no basis to relax the 90-day deadline. Accordingly, the ALJ granted the Board’s motion to dismiss the petition.

In his exceptions, petitioner argues that mail sent on July 28 should have been received the Department of Education (DOE) by July 31, and that if the DOE did not receive the appeal until after that date, there must have been some sort of delay by the USPS or a backlog at the DOE, for which petitioner should not be held responsible. Petitioner contends that the August 2023 email notices sent by C&D did not provide a deadline to provide proof of service and, when a deadline was ultimately given, petitioner complied with it.

In reply, the Board urges the Commissioner to adopt the Initial Decision in its entirety and to dismiss the petition of appeal as untimely.

Upon review, the Commissioner concurs with the ALJ that the petition of appeal was untimely filed. Initially, the record demonstrates that petitioner’s original submission was untimely. Although petitioner asserts that his mailing of July 28 should have been received by July 31, the fact remains that the petition must be filed by the due date and filing means “receipt . . . by an appropriate officer of the Department,” as provided for in *N.J.A.C. 6A:3-1.2*. Mailing a petition via regular mail on a Friday, when it must be received by Monday, risks running afoul of the deadline. Petitioner could have availed himself of faster mail services to ensure receipt by July 31, or taken advantage of the recommended option to file by electronic mail, which is permitted by *N.J.A.C. 6A:3-1.2*, but he neglected to do so.²

² Indeed, C&D’s website clearly indicates that “it is strongly encouraged that all filings and general correspondence be submitted electronically.” See <https://www.nj.gov/education/cd/> (last visited April 10, 2024).

Furthermore, petitioner's original submission was deficient, such that even if it had been received by July 3, it would not have been filed on that date. *N.J.A.C. 6A:3-1.3* clearly requires that a petitioner must file proof of service along with the petition and supporting materials. In the absence of proof of service, a petition is not "filed." There is no dispute here that petitioner failed to provide proof of service with his original filing.³ The petition was filed by petitioner's counsel, who should have been well aware of the regulatory requirements; proof of service is not a requirement unique to the DOE or the administrative dispute resolution process. Moreover, petitioner offers no explanation for his failure to respond to communications from C&D regarding the deficiency for almost three months.⁴

The Commissioner rejects petitioner's argument that by failing to list a specific deadline in its communications, C&D was invoking *N.J.A.C. 6A:3-1.16* and was relaxing the rules for proof of service. To the contrary, all communications from C&D indicated that the petition would not be processed until proof of service was received.

Nor is this matter similar to *T.R. and T.R. v. Bd. of Educ. of the Bridgewater-Raritan Reg. Sch. Dist.*, Commissioner Decision No. 269-13 (decided July 22, 2013). In *T.R.*, a deficient petition was received by the DOE within 90 days of the date of the decision at issue, and the DOE notified the petitioners that if the deficiencies were timely corrected, that date would be deemed the filing date of the appeal. Here, the original petition was not received within 90 days of the date of the decision at issue. Furthermore, in this matter, C&D did not indicate to petitioner that timely correction of the deficiency would affect the filing date of the petition.

³ The original submission also failed to provide petitioner's name and the name of the child on whose behalf the petition was filed, which is required by *N.J.A.C. 6A:3-1.4*.

⁴ The emails were sent to the email address listed on petitioner's attorney's letterhead, and there has been no assertion that the emails were not received.

Additionally, under no circumstances can 89 days from first notice to filing of the proof of service be considered a timely correction. Finally, the petitioners in *T.R.* were *pro se*, and therefore were afforded more leeway, while the petition in this matter was filed by an attorney.

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

IT IS SO ORDERED.⁵



ACTING COMMISSIONER OF EDUCATION

Date of Decision: May 6, 2024

Date of Mailing: May 8, 2024

⁵ This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

DISMISSAL

OAL DKT. NO. EDU 14011-23

AGENCY DKT. NO. 219-8/23

R.P., ON BEHALF OF MINOR CHILD, S.P.,

Petitioner,

v.

**WESTWOOD REGIONAL SCHOOL DISTRICT
BOARD OF EDUCATION, BERGEN COUNTY,
MORTIMER, JILL; CONNELLY, FRANK; GOFFE,
HEATHER; KENDUCK, CHRIS MELLO; VIVINO, DAN;
LAFORGIA, SHELLEY; MONTENARE, MARGARET;
SPELDA, THOMAS**

Respondents.

Darius Marzec, Esq., and **Joshua Neil Rubin**, Esq., for petitioner (Marzec Law Firm,
P.C., attorney)

Jessika Kleen, Esq., for respondent (Machado Law Group, attorneys)

Record Closed: January 29, 2024

Decided: February 22, 2024

BEFORE **MATTHEW G. MILLER**, ALJ:

STATEMENT OF THE CASE

Petitioner, R.P., the parent of minor child S.P., has challenged the decision made by the respondent, Westwood Regional School District Board of Education, Bergen County, et al. (respondent or Board), concerning its determination of a harassment, intimidation and bullying (HIB) complaint made against non-party students that was brought per N.J.S.A. 18A:37-13.2 et seq. (the Anti-Bullying Bill of Rights Act).

PROCEDURAL HISTORY

On October 4 and 5, 2022, five students at Westwood High School are alleged to have hacked S.P.'s Google Classroom account and posted "slurs based on religion, race, disability, sexual orientation, gender and national origin" directed at multiple individuals and groups. On December 28, 2022, petitioner filed a Notice of Claim¹ with respondent concerning this occurrence (and others) and were advised by letter dated January 6, 2023, that an HIB investigation had been instituted by the District.

On February 1, 2023, the District advised petitioner that an HIB violation had been found and that the following measures had been taken; "Student Counseling, Student Conference, and Parent Conference." On March 1, 2023, petitioner notified respondent "that they were exercising their right to have the claim considered by the Board of Education."

On April 27, 2023, petitioner met with the Board of Education and on May 2, 2023, respondent's Final Decision on the HIB complaint was emailed to R.P. On July 28, 2023, petitioner sent its appeal of the determination to all parties via regular mail. The appeal was marked as "received" by the Department of Education's Office of Controversies and Disputes (OC&D) on August 9, 2023. That same day, OC&D emailed petitioner's counsel and notified him that the petition was deficient. A follow-up email was sent by OC&D to counsel on August 28, 2023. A formal deficiency notice was then sent to counsel by the

¹ Apparently, a claim filed per N.J.S.A. 59:1-1, the New Jersey Tort Claims Act.

Department of Education (DOE) on October 2, 2023. On October 27, 2023, petitioner responded to the October 2, 2023, email, providing the missing documentation and forwarding same “By Priority Express Mail.” The appeal was then noted to be filed as of November 6, 2023.

The DOE acknowledged the November 6, 2023, filing of the appeal petition on November 13, 2023, and on December 5, 2023, a Motion to Dismiss in Lieu of Answer was filed by respondent. That filing was acknowledged by the DOE on December 6, 2023, and the Department transmitted this matter to the Office of Administrative Law (OAL) on December 12, 2023, for a hearing as a contested case. N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

On or about December 15, 2023, petitioner filed opposition to the Motion to Dismiss, and submitted additional opposition on January 9, 2024. An initial conference was held on January 18, 2024, and on January 29, 2024, respondent filed a reply brief, at which time the record closed.

FACTUAL BACKGROUND

The basic facts and nature of the case are not in dispute. S.P. was a student at Westwood High School when on October 4 and October 5, 2022, five students are alleged to have utilized his Student Identification Number to gain control of his Google Classroom account and thereafter posted “hateful speech in [his] name to other students and to S.P.’s teachers, including, but not limited to religious, ethnic, and gender slurs.” (Exhibit P-C.)

On December 28, 2022, petitioner reached out to respondent and was advised that an HIB investigation had already been opened per N.J.S.A. 18A:37-13.2. Ultimately, the petitioner was advised by letter dated February 1, 2023 that it had been determined the five students had indeed committed acts of HIB and that the remedial actions taken had been “Student Counseling, Student Conference, and Parent Conference.” (Exhibit P-A.)

Following the receipt of that letter, petitioner exercised his right per N.J.S.A. 18A:37-15(b)(6)(d), for a hearing before the Westwood Board of Education. Following that hearing, on May 2, 2023, the District emailed petitioner a letter advising of the Board's final determination to uphold the original finding. The letter also advised petitioner of his right to appeal the decision and the time frame in which to do so. (Exhibit P-B.)

MOTION

Respondent has filed a Motion to Dismiss the appeal of the HIB determination, arguing that petitioner failed to comply with the ninety-day time limit encoded in N.J.A.C. 6A:3-1.3(i) to appeal the actions taken by it concerning the HIB complaint.

If respondent prevails on this motion, it is argued that the merits of the case are never reached and that the appeal must be dismissed.

Petitioner opposes the motion for reasons that will be set forth below and argues that his appeal was timely served.

I emphasize that the decision on this motion should not be interpreted as a reflection that any conclusions have been reached concerning the underlying merit of petitioner's claims.

LEGAL ARGUMENTS

RESPONDENT:

Respondent argues that petitioner failed to comply with the ninety-day time limit encoded in N.J.S.A. 18A:37-15(b)(6)(e) and N.J.A.C. 6A:3-1.3(i) to appeal the result of the HIB investigation and that per N.J.A.C. 1:1-1.3(c), this statutory requirement cannot be relaxed or disregarded.

More specifically, it is argued that from May 2, 2023 (the acknowledged day that petitioner was advised of the Board's final decision), it took 188 days, until November 6,

2023, for the appeal to be filed and that petitioner unduly and unjustifiably delayed the filing despite having multiple opportunities to correct the initial deficiency.

Respondent further argues that case law supports its position that a deficient filing does not toll the ninety-day deadline. T.R. ex rel. E.R. v. Bridgewater-Raritan Reg'l Sch. Dist., 2013 N.J. AGEN LEXIS 523 (July 22, 2013); DeMario v. State Bd. of Exam'rs, 2012 N.J. AGEN LEXIS 192 (April 17, 2012), aff'd, Comm'r (May 11, 2012).

PETITIONER:

Petitioner argues that his appeal was filed and served on timely basis, "on or before July 31, 2023," and was therefore compliant with the timing dictates of N.J.A.C. 6A:3, et seq.

Petitioner noted:

On August 9, 2023, the NJDOE acknowledged by email that it had received Petitioners' Petition of Appeal That email acknowledgment was three months before the date on which Respondents contend that Petitioners filed their Petition of Appeal, i.e., November 6, 2023. Resp. Ltr., second page, first full paragraph. In other words, the District claims that Petitioners did not file their Petition of Appeal until three months after the NJDOE acknowledged that it had received that very petition.

Petitioner claims that by forwarding the appeal to the OAL, the DOE was acknowledging that the appeal was timely filed and cites the same cases as respondent in support of his position.

TIMELINE

Perhaps the best way to understand the issues raised by this motion is to create a timeline from the onset of the events in question to the disclosure of the results of the HIB investigation by the school on February 1, 2023, and through the forwarding of the matter to the OAL. There is no real dispute as to the timeline below.

10/04/22 & 10/05/22—Incident(s) occur.

12/28/23—Filing of “Notice of Claim” by petitioner.

01/06/23—Westwood superintendent confirms investigation has been instituted.

02/01/23—Letter from superintendent to R.P. conveying results of the HIB investigation.
(Exhibit P-A.)

03/01/23—Petitioners advise the BOE that they are asserting their right to a hearing.

04/27/23—Petitioners appear with counsel before the BOE meeting concerning the HIB investigation.

05/02/23—BOE final decision emailed to R.P. by superintendent. (Exhibit P-D.)

07/20/23—S.P. appeal dated. (Exhibit P-C.)

07/28/23—S.P. appeal sent to all parties via regular mail.² (Exhibit P-F.)³

07/31/23—Ninety days from May 2, 2023.

08/09/23—Appeal marked as “Received” by the OC&D.⁴ (Exhibit P-D.)

08/09/23—Email from the OC&D to petitioner’s counsel:

We have received the petition of appeal filed in the above captioned matter. Please provide proof that the petition was served on the Board of Education. Following receipt, your petition will be processed. Additionally, please provide the full names of petitioner and his child.

² July 28, 2023, was a Friday.

³ Counsel’s certification of service was supplied as part of Exhibit P-F.

⁴ Ninety-nine days from May 2, 2023.

[Exhibit P-D.]

08/28/23—Email from the OC&D to petitioner’s counsel “following up” on the August 8, 2023, email and advising that the petition would not be processed “until we receive proof of service.” (Exhibit C-A.)

10/02/23—Deficiency notice sent to petitioner by DOE, noting that proof of service and the name of the petitioner and child have still not been provided and that

[t]his matter will not move forward until the deficiencies listed above have been resolved. If the required documents are not received by October 31, 2023, this matter will be deemed withdrawn, and no further action will be taken.

There is a notation that the “Document filed by XX Petitioner” and an Agency Docket No. had been assigned. (Exhibit P-E.)

10/27/23—Petitioner responds to the October 2, 2023, deficiency notice “By Priority Express Mail” and provides the missing documentation/information. (Exhibit P-F.)

11/06/23—Appeal petition noted by the DOE to be filed.⁵ (Exhibit P-G.)

11/13/23—Acknowledgement of November 6, 2023, filing of the Petition of Appeal by DOE. (Exhibit P-G.)

12/05/23—Motion to Dismiss in Lieu of Answer filed by respondent.

12/06/23—Acknowledgement of December 5, 2023, motion filing by DOE.

12/12/23—Matter forwarded to the OAL by the DOE.

⁵ 188 days from May 2, 2023.

LAW AND ANALYSIS

The regulation concerning appeals is N.J.A.C. 6A:3-1.3(i), which reads as follows:

Filing and service of petition of appeal - 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* that is the subject of the requested contested case hearing. This rule shall not apply in instances where a specific statute, regulation, or court order provides for a period of limitation shorter than 90 days for the filing of a particular type of appeal.

[Emphasis added.]

This rule (along with others in this chapter of the Administrative Code) can be “relaxed or dispensed with by the Commissioner, in the Commissioner’s discretion, in any case where a strict adherence thereto may be deemed inappropriate or unnecessary or may result in injustice.” N.J.A.C. 6A:3-1.16.

Specifically, as to the filing of HIB appeals, N.J.S.A. 18A:37-15(b)(6)(e) reads as follows:

at the next board of education meeting following its receipt of the report pursuant to subparagraph (c) of paragraph (6) of this subsection, the board shall issue a decision, in writing, to affirm, reject, or modify the superintendent’s decision. The board’s decision may be appealed to the Commissioner of Education, in accordance with the procedures set forth in law and regulation, *no later than 90 days after the issuance of the board’s decision*

[Emphasis added.]

Further, per N.J.A.C. 1:1-1.3(c):

Statutory procedural requirements shall not be relaxed or disregarded except when permitted by the controlling Federal or State statutes.

In the realm of “failure to timely appeal” cases, the complexity of the issues here is more limited than usual. Most importantly, there is no dispute that May 2, 2023, is the date that petitioner received notice of the final determination on the HIB complaint and was further made aware of the ninety-day deadline in which to final an appeal of same.

Further limiting the scope of this decision is petitioner’s argument that the deadline was met, not that the ninety-day time limitation should be relaxed.

As a baseline and before delving into the facts of the case, the purposes of the ninety-day limitation were reviewed in the seminal case of Kaprow v. Board of Education of Berkeley Township, 131 N.J. 572 (1993):

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)).

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.]

[Kaprow, 131 N.J. at 586–87.⁶]

⁶ See also R.H. ex rel. Minor Child v. Bd. of Educ. of Hackettstown, 2022 N.J. AGEN LEXIS 299 (Feb. 17, 2022).

In support of their respective positions, both parties cite the same cases: DeMario and T.R.

DeMario v. State Board of Examiners, 2012 N.J. AGEN LEXIS 192, concerned the appeal of a denial of an application for principal and business administrator endorsements. The pro se petitioner had received the respondent's final determination on December 10, 2009, and had filed his appeal on or about March 2, 2010 (day 81). On March 4, 2010, the Bureau of Controversies and Disputes acknowledged receipt of the appeal, but notified DeMario that it was procedurally deficient and listed what needed to be done to make it compliant, which included providing proof of service on each respondent. He was advised that if the deficient materials were "timely submitted," March 2, 2010, would be deemed to be the filing date. DeMario, 2012 N.J. AGEN LEXIS 192 at *4-6.

On June 1, 2010, DeMario forwarded an amended petition to the Board which was filed on June 7, 2010, and a motion to dismiss from the respondent followed almost immediately. The matter was then transmitted to the OAL as a contested case. Id. at *1-2.

DeMario argued that he was confused and had multiple communications with the Bureau as to whether he should utilize an attorney but was never told of the time urgency of the supplying of the requested materials. He claimed that because he "was following advice of the Bureau regarding submissions and schedules," the ninety-day rule should have been relaxed. Id. at *9.

The judge held that there was no compelling reason to relax the ninety-day rule. It was determined that the March 4, 2010, letter was clear as to what materials needed to be supplied in order for the appeal to be considered complete and that while the exact meaning of the phrase "timely submitted" was not defined, "the fact is that DeMario did not submit a proper petition of appeal until approximately three months after the applicable ninety-day rule expired. Under any interpretation of 'timely submitted,' DeMario failed to cooperate." Id. at *17.

In T.R., an HIB case, it was found that the petitioners received the final determination from the Board on August 31, 2012, and filed their petition on November 27, 2012 (day 88). They were advised by letter dated November 29, 2012, that the filing was deficient, but that if the materials were “timely submitted, November 27, 2012 will be deemed the filing date.” It is undisputed that the additional materials were received by the Board on December 6, 2012. T.R., 2013 N.J. AGEN LEXIS 523 at *3–4.

Comparing the case to DeMario, the Commissioner found that while he had waited three months to correct the petition’s deficiencies, T.R. had “cur(ed) the deficiencies in a few days,” which was determined to be quickly enough to be considered timely submitted. T.R. at *8. Therefore, he found that “the holding in DeMario . . . is not relevant to a determination of timeliness in the case at bar.” Id. at *8–9.

While petitioner claims that the nature of the documentary deficiencies in this case pale in comparison to those in DeMario and T.R., he ignores the timing issue, which clearly does not inure to his benefit. Petitioner tries to distinguish DeMario by noting that DeMario’s initial “appeal” was only a “letter purporting to be an Appeal,” while here, the appeal was much more detailed and in a more professional format. A similar argument is made concerning T.R.

However, neither of those cases (either in the Initial Decision⁷ or Final Decision) mentioned the scope of the appeal deficiencies. Rather, they focused exclusively on how quickly those deficiencies were addressed. In fact, in T.R., they were described as “various deficiencies” and there was no indication that their nature had any impact on the outcome of the case. T.R., 2013 N.J. AGEN LEXIS 523 at *1. In both cases, the petitioners were advised as to what specific issues needed to be addressed and were provided a general timeframe as to how quickly it had to be done for the appeal to be considered “filed” as of the date of receipt. There, as here, the initial appellate filing was not rejected as if it had never been sent. Rather, on all three occasions, the petitioner was told to correct deficiencies and if they did so in a timely manner, the deadline issue would not come into play.

⁷ T.R. ex rel. Minor Child, E.R. v. Bd. of Educ. of the Bridgewater-Raritan Reg’l Sch. Dist., Somerset Cnty., 2013 N.J. AGEN LEXIS 116 (June 6, 2013).

It should also be noted that the “relation back” doctrine was explicitly rejected in DeMario, where the Commissioner undertook a detailed analysis of Gringeri v. Board of Education of the Ramapo-Indian Hills Regional High School District, 1988 S.L.D. 158. That case involved a pro se petitioner who filed “a document entitled ‘Petition.’” He was advised that the document was insufficient on three separate occasions before finally filing a perfected petition fifty-five days after the original non-compliant filing and 128 days following the Board’s final action. The respondent filed a motion for summary decision, which was granted. DeMario, 2012 N.J. AGEN LEXIS 192 at *12–17.

The administrative law judge (ALJ) in Gringeri explained:

While a liberal approach with respect to amendments to petitions is a principle which often is followed, it cannot and should not be used to overcome deficiencies which are patent on their face. Cf., F. Bogart v. Board of Education of East Orange, OAL DKT. EDU 6245-82 (Jan. 26, 1983), aff’d Commissioner of Education (March 14, 1983).

[Gringeri, 1988 S.L.D. at 166.]

As in Gringeri, the ALJ in DeMario saw no reason to relax the ninety-day rule, and the argument that the late submission “was simply a ‘perfected’ pleading which relates back to his earlier submissions” was soundly rejected. DeMario, 2012 N.J. AGEN LEXIS 192 at *14 (citing Gringeri, 1988 S.L.D. at 166).

As noted above, the ninety-day deadline can be “relaxed or dispensed with by the Commissioner, in the Commissioner’s discretion, in any case where a strict adherence thereto may be deemed inappropriate or unnecessary or may result in injustice.” N.J.A.C. 6A:3-1.16.

However, in exploring the case law surrounding the relaxation of the ninety-day rule, it becomes very apparent, very quickly, that the courts do not look indulgently on same. Kaprow involved the termination of a tenured assistant superintendent effective

June 30, 1981. After a rather complicated series of events involving RIF⁸ rights and the “re-creation” of assistant superintendent positions years later, Kaprow filed a petition with the Commissioner on August 1, 1988, asserting a claim to one of the re-created positions. He amended that petition on December 16, 1988, to assert, for the first time, that the 1981 RIF was improper and had been made in bad faith. Kaprow, 131 N.J. at 576–78.

In the face of a partial victory for Kaprow in the underlying OAL case, the Commissioner dismissed the petition, finding, in part, “that the bad-faith claim was untimely instead of unsupported.” That decision was affirmed by the State Board of Education, which found that the August 1, 1988, petition “was time barred by the ninety-day limitations period of N.J.A.C. 6:24-1.2(c),” and the Appellate Division affirmed the Board’s decision. Id. at 579.

While no explicit argument has been made that the ninety-day deadline should be extended, a review of the case law would have quashed that assertion in any event. This issue was explored in detail in my case of R.H. ex rel. Minor Child v. Board of Education of the Town of Hackettstown, 2022 N.J. AGEN LEXIS 299 (Feb. 17, 2022), from which this portion of the decision liberally borrows.

There are a multitude of reported court and administrative cases that explore this issue, one of the most cited being Pacio v. Board of Education of Lakeland Regional High School District, 1989 S.L.D. 2060.

In Pacio, a terminated high school teacher filed an action well past the ninety-day deadline. While the case discusses multiple issues,⁹ in granting the respondent’s motion for summary decision, the ALJ noted the strict standard applied by the Commissioner in relaxing that deadline. It would only happen;

⁸ Reduction in force.

⁹ Including the “statutory entitlement” argument which is not applicable here. In essence, this argument concerns a request for an exception to the deadline in cases where the petitioner is seeking a denied benefit to which they were statutorily entitled. Kaprow at 584–85; see also Lavin v. Hackensack Bd. of Educ., 90 N.J. 145 (1982); Polaha v. Buena Reg’l Sch. Dist., 212 N.J. Super. 628 (App. Div. 1986).

[w]here a substantial constitutional issue was presented, where judicial review is sought of an informal administrative determination, and where a matter of significant public interest is involved.

[Pacio, 1989 S.L.D. at 2063 (citations omitted); see also Morris-Union Jointure Commission v. Bd. of Educ. of S. River, 92 N.J.A.R.2d (EDU) 453 (1992); Balwierczak v. Bd. of Educ. of Berkeley Heights, 1999 N.J. AGEN LEXIS 707 (Dec. 16, 1998).]

The bar can also be relaxed “when strict adherence would possibly result in an injustice.” Grompone v. State-Operated Sch. Dist. of Jersey City, 1999 N.J. AGEN LEXIS 786 (Dec. 20, 1999) at *17, aff’d, 2000 N.J. AGEN LEXIS 1634 (February 28, 2000), aff’d, 2000 N.J. AGEN LEXIS 1635 (August 2, 2000).

Morris-Union also confirmed that “it is petitioner’s burden to show that it will suffer injustice if the 90-day rule is strictly enforced.” 92 N.J.A.R.2d (EDU) at 471. Further, “the fact that application of the rule may result in the dismissal of a meritorious claim does not warrant relaxation of the rule.” K.B. v. Bd. of Educ. of Rancocas Valley Reg. High Sch. Dist., 2002 N.J. AGEN LEXIS 52 (March 1, 2002), at *43–44.

Cases where the rule is relaxed are extremely rare and involve circumstances much different than those presented here, and even then, after the decision in some of these cases, that rule has been tightened. See Bey v. Bd. of Educ. of Newark, 1993 N.J. AGEN LEXIS 164 (March 5, 1993).

While in Bey the rule was relaxed in a case involving the delinquent filing of an appeal involving the Board’s failure to recommended tenure charges against “a teaching staff member who had been accused of misusing, mismanaging, and possibly misappropriating school funds entrusted to him in his capacity as school treasurer,”¹⁰ the judge saw this case as unique since the prior cases discussed in the decision

ha[ve] dealt with an individual concern of the involved petitioner only, such as a refusal to re-employ. None of these

¹⁰ Id. at 44.

precedents dealt with concerns that could affect a wider spectrum of the public.

[Bey, 1993 N.J. AGEN LEXIS 164 at *44.]

Other “relaxation” cases involved a student expulsion where a pro se parent’s timely appeal was technically deficient (J.N. v. Elizabeth Bd. of Educ., 2005 N.J. AGEN LEXIS 814 (July 8, 2005)) and where illegal conduct was being alleged against the respondent, when that conduct was discovered after the expiration of the ninety days (Eisenberg v. Fort Lee Bd. of Educ., 2008 N.J. AGEN LEXIS 45 (Jan. 9, 2008)).

In analyzing the effectively uncontested timeline of events in this case, I **CONCLUDE** that there is no real question that the appeal was filed past the ninety-day deadline. In fact, even if the original appeal had not been deficient, I **FIND** that petitioner had likely already missed the deadline.

Counsel has certified that the original appeal was “served . . . by First Class Mail” Friday, July 28, 2023. (Exhibit P-F.) That is eighty-seven days post-notification. With July 29 & July 30 being a weekend, in order to be timely filed, it HAD to have been received on Monday, July 31, 2023. Instead, it was marked as “received” by OC&D on August 9, 2023 (Day 99). Therefore, irrespective of any deficiencies, it was already late.

Then, when counsel was advised of the deficiencies later that day and then reminded of same on August 28, nothing was done. It was only after the October 2, 2023, Notice of Deficiency was sent that any action was taken and that did not even occur until Friday, October 27, 2023, and even *then*, when facing automatic dismissal on October 31, 2023, the response was purportedly sent “By Priority Express Mail” with no proof of service or tracking.¹¹ (Exhibit P-F.)

In its November 13, 2023, letter, the DOE acknowledged receipt of the now-compliant appeal on November 6, 2023. (Exhibit P-G.) This is a full 188 days since

¹¹ The United States Postal Service offers “Priority Mail Express” and “Priority Mail.” It does not offer a service called “Priority Express Mail.” <https://www.usps.com/ship/mail-shipping-services.htm> (last accessed February 1, 2024.)

petitioner received notice of respondent's final determination and eighty-nine days from when petitioner was first advised of the deficiency in the original filing. As noted in DeMario, this is not timely "[u]nder any interpretation of 'timely submitted.'" DeMario, 2012 N.J. AGEN LEXIS 192 at *17.

Ultimately, I **FIND** that there is insufficient evidence to demonstrate that the ninety-day deadline as delineated in N.J.A.C. 6A:3-1.16 should be relaxed. While the petitioner sets forth a litany of allegations about and violations by respondent in his appeal, the only issue before the OAL is a very basic one that is limited to a single event (albeit taking place over two days) in which a single person was the victim, which led to a single HIB complaint. Further, the appeal itself is limited to a single issue; the adequacy of the disciplinary actions taken against the perpetrators following the finding that an act of HIB had occurred.

While petitioner's other grievances against respondent may well be justified and encompass conduct that affected more than just S.P., the correct forum to adjudicate same is not in the administrative arena, but rather likely in a trial court. There is simply no broad public interest or grave injustice in and concerning the disciplinary decision by respondent concerning a single HIB complaint and with no constitutional issues having been articulated, there is nothing to justify an extension of the deadline or a denial of respondent's motion.

FINDINGS AND CONCLUSIONS

Given the totality of the evidence, I **FIND** that petitioner's appeal was not filed until November 6, 2023.

I further **FIND** even if the appeal had been marked as "FILED" on the date it was received by OC&D (August 9, 2023), it was still received outside of the ninety-day appellate deadline.

I further **FIND** that even if the August 9, 2023, appeal had been timely, petitioner failed to “timely submit” corrections to the deficiencies it had been advised of that day until November 6, 2023.

I therefore **CONCLUDE** that petitioner’s appeal was filed out of time in violation of N.J.A.C. 6A:3-1.3, and I further **CONCLUDE** that petitioner has supplied insufficient evidence to demonstrate that the rule should be relaxed per the dictates of N.J.A.C. 6A:3-1.16.

ORDER

Based on the foregoing, it is hereby **ORDERED** that respondent’s motion to dismiss petitioner’s appeal be and is hereby **GRANTED**, and;

It is hereby **ORDERED** that petitioner’s appeal be and is hereby **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.

February 22, 2024

DATE



MATTHEW G. MILLER, ALJ

Date Received at Agency:

February 22, 2024

Date Mailed to Parties:

February 22, 2024

sej

APPENDIX

EXHIBITS

FOR COURT:

- C-A Email from OC&D to petitioner “following up” on the August 9, 2023, email (August 28, 2023)

FOR PETITIONER:

- P-A Letter to petitioner advising of the result of the HIB investigation (February 1, 2023)
- P-B Letter to petitioner, final determination of HIB investigation (May 2, 2023)
- P-C Appeal Petition
- P-D Email from OCD to petitioner (August 9, 2023)
- P-E Deficiency Notice (October 2, 2024)
- P-F Response to Deficiency Notice (October 27, 2023)
- P-G Letter from DOE to parties (November 13, 2023)

FOR RESPONDENT:

None