

New Jersey Commissioner of Education

Final Decision

Jennifer Ferrara,

Petitioner,

v.

Board of Education of the City of Newark,

Respondent.

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.

The threshold procedural issue in this case is whether the petition should be dismissed pursuant to the 90-day rule, *N.J.A.C. 6A:3-1.3(i)*. *Kaprow v. Bd. of Educ. of Berkeley Twp.*, 131 N.J. 572, 582 (1993). Petitioner is a tenured schoolteacher, employed by respondent since November 14, 2014. On June 22, 2022, petitioner received written notice from respondent that her salary increment for the 2022-2023 school year would be withheld because she received a "partially effective" rating on two consecutive annual performance reviews. On July 29, 2022, Petitioner received written notice of a tenure charge for inefficiency from the Board. Petitioner timely challenged the tenure charge, and the parties proceeded to an arbitration hearing. On September 18, 2023, the arbitrator concluded that petitioner's ratings of "partially effective" were influenced by petitioner's union activity, were arbitrary and capricious, and failed to adhere to the prescribed

evaluation process. On December 15, 2023, petitioner appealed the withholding of her 2022-2023 and 2023-2024 salary increments to the Commissioner of Education. After the matter was transmitted to the OAL, respondent filed a Motion for Summary Decision, and the petitioner filed opposition. The Administrative Law Judge (ALJ) requested supplemental briefs regarding relaxation of the 90-day rule.

After reviewing the written submissions and oral arguments, the ALJ granted the Board's motion for summary decision, concluding that the petition was untimely filed. The ALJ also rejected petitioner's assertion that her claim warranted relaxing of the 90-day rule, reasoning that petitioner has failed to raise a substantial constitutional issue, and that petitioner's claim has only personal significance.

In her exceptions, petitioner does not challenge the ALJ's factual findings or his legal conclusion that petitioner filed her petition well beyond the 90-day time limit. Instead, she disputes the ALJ's decision that the circumstances in the instant matter fail to warrant relaxation of the rule pursuant to *N.J.A.C. 6A:3-1.16*. Citing to the Arbitrator's Order, Petitioner reiterates that the 90-day rule should be relaxed because she has presented a substantial constitutional issue. She argues that the partially effective ratings, on which the increment withholding and tenure charge are predicated, were a result of anti-union animus, thus violating her First Amendment right to associate with a union without retaliation. In addition, petitioner asserts that relaxation of the rule is appropriate because her claim implicates a pattern of unconstitutional retaliation by the Board that extends beyond personal significance to similarly situated public employees. She cites two New Jersey Superior Court Orders to support her assertion.

In response, the Board reiterates that the 90-day rule should not be relaxed under the circumstances as petitioner failed to raise a constitutional violation in her petition. Further,

petitioner's reliance on the Arbitrator's Opinion and Award is improper given that the Arbitrator was not tasked with deciding any issue regarding the merits of the increment withholding, nor did he make any finding regarding whether petitioner's constitutional rights had been violated. The Board also contends that no substantial constitutional issue exists regarding the increment withholding and reiterates that petitioner has failed to assert claims that are novel or have significance beyond her personal employment relationship. Lastly, Respondent objects to petitioner's submission of the Superior Court Orders because those items were not considered during the hearing.

Upon review, the Commissioner concurs with the ALJ's conclusion that the petition was untimely. *N.J.A.C. 6A:3-1.3(i)* mandates that petitions shall be filed "no later than the 90th day from the date of receipt of the notice of a final . . . action by the district board of education." The 90-day limitation period "represents a fair and reasonably necessary requirement for the proper and efficient resolution of disputes under the school laws." *Kaprow*, 131 *N.J.* at 582. It "provides a measure of repose" and "gives school districts the security of knowing that administrative decisions regarding the operation of the school cannot be challenged after ninety days." *Ibid.*

Here, the ALJ correctly concluded that the 90-day period began on June 22, 2022 – when petitioner received notice of the increment withholding – and not from when the arbitrator concluded that petitioner's performance review was arbitrary and capricious. The filing period expired on September 22, 2022; however, the petition was not filed until December 15, 2023. To the extent petitioner postponed the filing of the petition in anticipation of the arbitration's outcome, the Commissioner still deems the petition untimely. The mandatory filing deadline is not subject to change based upon a petitioner's legal strategy; that would defeat the measure of repose to which school districts are entitled. *See Nissman v. Bd. of Educ. of Twp. of Long Beach Island, Ocean Cnty.*, 272 *N.J. Super.* 373, 382 (App. Div. 1994) (affirming State Board decision to dismiss petition as time

barred and explaining that while petitioner may have opted not to file a petition sooner for tactical reasons, the Board “was entitled to know within 90 days of its action whether its [decision] was going to be challenged”).

Petitioner admits that she received written notice from the Board regarding the salary increment withholding on June 22, 2022. She does not take exception to the ALJ’s conclusion regarding timeliness and instead focuses exclusively on the ALJ’s decision to not relax the 90-day rule. However, the Commissioner does not find petitioner’s exceptions to be persuasive. The Commissioner adopts the ALJ’s conclusion that petitioner presents no compelling reason or exceptional circumstances warranting relaxation of the 90-day limitation period. Further, petitioner has presented no case law in which the 90-day limitation was relaxed under *N.J.A.C. 6A:3-1.16* in circumstances similar to those at issue here.¹

Accordingly, respondent’s motion for summary decision is granted, and the petition of appeal is hereby dismissed.

IT IS SO ORDERED.²


ACTING COMMISSIONER OF EDUCATION

Date of Decision: October 8, 2024
Date of Mailing: October 9, 2024

¹ Petitioner’s inclusion of the two Superior Court orders is improper per *N.J.A.C. 1:1-18.4(c)*. Therefore, these documents were not considered.

² 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

SUMMARY DECISION

OAL DKT. NO. EDU 00940-2024

AGENCY DKT. NO. 342-12/23

JENNIFER FERRARA,

Petitioner,

v.

**BOARD OF EDUCATION OF THE CITY
OF NEWARK,**

Respondent.

Colin M. Lynch, Esq., for petitioner (Zazzali, P.C, attorneys)

Adam S. Herman, Esq., for respondent (Adams, Lattiboudere, Croot and
Herman,attorneys)

Record Closed: June 24, 2024

Decided: July 15, 2024

BEFORE **DANIEL J. BROWN** ALJ:

STATEMENT OF THE CASE

Petitioner has been employed as a schoolteacher by respondent since November 24, 2014. On December 15, 2023, petitioner filed a petition challenging the withholding of her salary increment for the 2022-2023 school year. On June 22, 2022, petitioner received written notice from respondent (Board) that her increment for the 2022- 2023

school year was going to be withheld by the Board. Is the claim time-barred? Yes. Under N.J.A.C. 6A:3-1.3(i) absent exceptional circumstances, a petitioner must file an appeal no later than the ninetieth 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 case.

PROCEDURAL HISTORY

On December 15, 2023, petitioner filed a Petition with the Commissioner of the Department of Education (Commissioner) contesting the withholding of her salary increment for the 2022-2023 school year by the Board. Petitioner alleged that the withholding of her salary increase was not based upon good cause. The withholding was based upon an annual evaluation which found that petitioner was only partially effective. Petitioner alleges that the evaluation was arbitrary and capricious.

In response to the Petition, the Board filed a Motion to Dismiss in place of an Answer on January 16, 2024, asserting that petitioner's appeal was untimely as the petitioner's challenge to the salary increment was not filed within ninety days 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 case as required by N.J.A.C. 6A:3-1.3(i). The Board argued that the latest possible time that petitioner was on notice of the withholding was September 2022, the beginning of the 2022- 2023 school year.

The Commissioner did not address the Board's Motion to Dismiss and transmitted this case to the OAL. On January 18, 2024, 2024, the OAL filed the matter as a contested case under the Administrative Procedure Act, N.J.S.A. 52:14B-1 to -15, and the act establishing the OAL, N.J.S.A. 52:14F-1 to -13, for a hearing under the Uniform Administrative Procedure Rules, N.J.A.C. 1:1-1.1 to -21.6.

On April 12, 2024, the Board filed a Motion for Summary Disposition that relied upon the same timeliness argument as the Motion to Dismiss. On June 11, 2024, petitioner filed an opposition to the Motion for Summary Disposition which argued that the

interest of justice required relaxation of the ninety-day filing requirement and that the instant appeal was timely because the ninety-day filing requirement did not start until petitioner received an arbitrator's decision dismissing related tenure charges. On May 17, 2024, the Board filed a reply brief arguing that petitioner was required to file the instant action within ninety days of June 22, 2022, the day petitioner received written notification from the Board about the increment withholding. Additionally, the Board argued that petitioner failed to establish a sufficient basis to relax the ninety-day filing requirement. Oral argument on the Motion for Summary Disposition occurred on June 11, 2024. At the conclusion of oral argument, I requested that the parties provide me with supplemental submissions regarding relaxation of the ninety-day filing requirement. On June 17, 2024, I received petitioner's submission which argued that the ninety-day filing rule should be relaxed because the Board withheld petitioner's salary increment as retaliation for petitioner's union activities. On June 24, 2024, I received the Board's submission which argued that petitioner had not established that the ninety-day filing requirement should be relaxed because petitioner had not asserted claims which are novel or compelling or that raise issues beyond those of personal significance to petitioner.

FINDINGS OF FACT

Based on the documents submitted in support of and in opposition to the Motion for Summary Decision, when viewed in the light most favorable to the non-moving party, I **FIND** the following as **FACT** for purposes of this Motion only:

Petitioner was hired as a teacher effective November 24, 2014. Between petitioner's date of hire and the withholding at issue, petitioner was given a salary increment every year on February 1. In May 2022, petitioner received a rating of partially effective on her yearly performance evaluation for the 2021- 2022 school year. This was the same rating petitioner received on her yearly evaluation for the 2020- 2021 school year. On June 22, 2022, petitioner received notice, in the form of an email and a letter from the Board that her salary increment for the 2022-2023 school year was being withheld. Petitioner's union was copied on the letter from the Board to petitioner advising that petitioner's 2022-2023 salary increment was being withheld. On July 29, 2022, petitioner received a notice of tenure charge for inefficiency from the Board. Petitioner

challenged the tenure charge in a timely manner. She filed an answer and proceeded to an arbitration hearing. Following the hearing, the arbitrator concluded that petitioner's rating of partially effective was influenced by petitioner's union activity and was arbitrary and capricious. Petitioner did not challenge the withholding of her 2022-2023 salary increment until the filing of the instant petition on December 15, 2023, almost two years after receiving notice of the withholding from the Board.

DISCUSSION AND CONCLUSIONS OF LAW

Summary decision may be granted when "the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." N.J.A.C. 1:1-12.5(b). The rule further provides that an adverse party must respond by affidavit setting forth specific facts showing that there is a genuine issue which can only be determined at an evidentiary hearing. Ibid. The OAL rule is modeled on New Jersey Court Rule 4:46-2. The New Jersey Supreme Court has explained that when deciding a motion for summary judgment under R. 4:46-2,

. . . a determination whether there exists a 'genuine issue' of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party.

[Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995).]

Here, the parties have agreed on all the facts, although they dispute their legal significance. Therefore, I **CONCLUDE** that the matter is appropriate for summary decision.

The Board argues that petitioner failed to file the instant appeal in a timely manner, and the appeal must be dismissed.

Under N.J.A.C. 6A:3-1.3(d), a party must file an appeal with the Commissioner of Education "no later than the ninetieth 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 "provides a measure of repose, an essential element in the proper and efficient administration of the school laws," giving school districts the "security of knowing" that an aggrieved party cannot challenge its actions after ninety days. Kaprow v. Board of Educ. of Berkeley Twp., 131 N.J. 572, 582 (1993).

Courts strictly construe and consistently apply the ninety-day limitation period. Kaprow, 131 N.J. at 588-89; Nissman v. Bd. of Educ., 272 N.J. Super 373, 380-81, (App. Div. 1994); Riely v. Bd. of Educ., 173 N.J. Super. 109, 112-14, (App. Div. 1980). This period begins to run when the petitioner "learn[s] from the Local Board the existence of that state of facts that would enable him to file a timely claim." Kaprow, 131 N.J. at 588-89. Indeed, the "notice of a final order, ruling or other action" is "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." Id. at 587. Notably, a petitioner need not receive official and formal notification that they may have a valid claim to begin the ninety days. Id. at 588.

The parties agree that petitioner received adequate written notice on June 22, 2022, in the form of an email and a letter from the Board, that her salary increment for the 2022-2023 school year was being withheld. Therefore, the Board argues, petitioner was required to file a petition of appeal on or before September 22, 2022, to meet the time requirements.

Petitioner contends that the time requirement in the instant appeal did not accrue until she knew or had reason to know that the withholding of her salary increment was arbitrary and capricious and was the product of retaliation for her union activity. Petitioner argues that this did not accrue until the arbitrator issued his decision on September 18, 2023. Petitioner filed the instant appeal on December 15, 2023. Petitioner argues as she filed the instant petition within ninety days of the arbitrator's decision that it was filed timely.

Here, petitioner received notice on June 22, 2022, in the form of an email and a letter from the Board, that her salary increment for the 2022-2023 school year was being

withheld. The ninety-day filing requirement flows from that notice, not from when the arbitrator concluded that petitioner's performance evaluation was arbitrary and capricious and was retaliation for petitioner's union activities. Petitioner did not challenge the Board's withholding of the salary increment until the filing of this appeal on December 15, 2023.

Thus, I **CONCLUDE** that petitioner filed her petition well beyond the required time frame.

Next, petitioner argues that the ninety-day filing requirement should be relaxed pursuant to N.J.A.C. 6A:3-1.16 as "strict adherence thereto may be deemed inappropriate or unnecessary or may result in injustice." Relaxation of the ninety-day filing requirement is reserved only for situations where the party presents a substantial constitutional issue or a matter of significant public interest beyond concern only to the parties. Portee v. Bd. of Educ. of Newark, 94 N.J.A.R.2d (EDU) 381, 384; Wise v. Trenton Bd. of Educ., EDU 160-00, Initial Decision (July 25, 2000), adopted, Comm'r Decision (September 11, 2000), aff'd, St. Bd. (January 3, 2001), <http://njlaw.rutgers.edu/collections/oal>. Petitioner asserts that this case presents the issue of the Constitutional right of a public employee to associate with a union based upon the arbitrator's conclusion that her substandard performance evaluation was in retaliation for her union activity. The Board argues that petitioner has failed to raise an issue of substantial Constitutional concern as the arbitrator did not conclude that petitioner's freedom to associate with her Union was violated. Additionally, the Board argues that petitioner has not raised a novel issue and that petitioner has raised an issue of only personal significance to her, making relaxation of the ninety-day rule inappropriate.

Here, petitioner has failed to assert a substantial Constitutional issue. Petitioner places a great deal of reliance on the arbitrator's conclusion that her performance evaluation was in retaliation for her union activity. However, the arbitrator did not conclude that petitioner raised a substantial Constitutional issue. Further, the arbitrator did not conclude that petitioner's Constitutional rights were violated. Petitioner's claim has only personal significance, making relaxation of the ninety-day rule unwarranted. If the Commissioner relaxed the filing timeframe for every harsh result, that action would

nullify the rule's salutary public policy of encouraging prompt resolution of disputes. Pacio v. Bd. of Educ. of Lakeland Reg. High Sch. Dist., 1989 S.L.D. 2060 (Comm'r July 29, 1989). Thus, I **CONCLUDE** that petitioner does not present exceptional circumstances or a compelling reason which would warrant relaxation of the ninety-day rule.

ORDER

Given my findings of fact and conclusions of law, I **ORDER** that the Board be **GRANTED** summary decision. I further **ORDER** that petitioner's Petition of Appeal be **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.

July 15, 2024

DATE



DANIEL BROWN, ALJ

Date Received at Agency:

July 15, 2024

Date Mailed to Parties:

July 15, 2024

sej