

211-01

ROBERT NADASKY, PATRICIA :
WALDVOGEL AND JAMES DOUGHERTY, :
PETITIONERS, :
V. : COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE : DECISION
TOWNSHIP OF CLARK, UNION COUNTY,
RESPONDENT. :
_____ :

SYNOPSIS

Petitioners, retired employees of the Board, contended that they should have been reimbursed for unused accumulated sick leave upon their retirement in accordance with the provisions of the collective bargaining agreement that governed their employment in the former Union County Regional High School District No. 1. The Board contended that it properly paid for accumulated sick leave upon petitioners' retirement pursuant to their collective bargaining agreement with the Board.

The ALJ concluded that the 90 day limitations period for filing petitions was applicable in this case and, because the petition was filed more than six months after petitioners received payment vouchers for accumulated sick leave from the Board reflecting a lesser amount than that to which they believed they were entitled, the ALJ concluded that the petition should be dismissed. The ALJ further concluded that relaxation of the 90-day rule was not appropriate in this case.

The Commissioner affirmed the decision of the ALJ. Initially, the Commissioner rejected petitioners' argument that their claim was statutory, and thus rendered the 90-day limitations period inapplicable. The Commissioner also rejected petitioners' contention that the limitations period had not began to run because there was no final action by the Board to trigger the limitations period, concluding that the provision of the payment vouchers constituted adequate notice of the amount of sick leave to be paid petitioners.

Finally, the Commissioner rejected petitioners' assertion that their written notices of disagreement constituted the filing of a grievance that would toll the limitations period, determining that, even if a grievance were filed, the 90-day period for filing a petition with the Commissioner would not be altered.

July 9, 2001

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The record and Initial Decision issued by the Office of Administrative Law have been reviewed. Petitioners' exceptions were timely filed pursuant to the provisions of *N.J.A.C.* 1:1-18.4.

Petitioners' exceptions aver that the Administrative Law Judge (ALJ) erred in determining that the matter should be dismissed because it was untimely filed as provided by *N.J.A.C.* 6A:3-1.3(d). In support of their position, petitioners reiterate their argument that the 90-day limitation period for filing a petition with the Commissioner is not applicable to the save harmless provisions of *N.J.S.A.* 18A:13-64. Of this, petitioners aver, *inter alia*, that:

The legislative purpose of *N.J.S.A.* 18A:13-64 is to save teachers harmless from any loss they may incur as a result of dissolution. The protection afforded by the statute takes the form of preserving rights the teachers accrued. The triggering event for preservation of those rights is the dissolution – a unique circumstance functionally unrelated to the teachers' employment, and like the situation in *Lavin*, a circumstance unrelated to teacher performance. The statute has the effect of saving rights to which the transferred teacher is already entitled, from forfeiture occasioned by circumstances beyond the teacher's control. The statutory

protection is not occasioned by services rendered or to be rendered for teaching as such. Rather, it was established by the Legislature to protect and preserve rights already accrued and threatened as a result of dissolution. As such, the limitation period is inapplicable. (Petitioners' Exceptions at 3)

Petitioners also argue that there is no evidence that the Clark Board took any action regarding their entitlement and that the only evidence is a voucher submitted to the petitioners. As such, it is petitioners' position that they did not receive timely notice of final Board action so as to invoke the 90-day limitation period. (*Id.* at 4) Citing *Kaprow, supra*, petitioners further aver that the failure of the Board to make a final decision, and to provide officially authorized notice, tolls the statute. (*Ibid.*) Moreover, petitioners contend that Article V of the contractual agreement, submitted as Exhibit B to the briefs of both the Board and petitioners,¹ has a grievance and arbitration clause which afforded aggrieved employees the opportunity to appeal from an administrative decision. Of this, petitioners argue that:

There is no question that each Petitioner objected in writing to the administrative decisions affecting their rights to pay for unused sick days at the rate and up to the maximum specified in the Regional contract. (See par. 3). Article V sets forth elaborate procedures, which are to be followed after a grievance is submitted. Those procedures contemplate several steps requiring written responses from administrative personnel, and eventually, a written answer from the Board (Step 3. e., page 9). Administrators did not follow the steps, and no official Board action was communicated to Petitioners regarding their grievance. Consequently, there was no *final* Board action communicated to Petitioners, which had the effect of triggering the limitation period prescribed in *N.J.A.C.* 6A:3-1.3(d). (Petitioners' Exceptions at 4- 5)

Lastly, petitioners argue that relaxation of the 90-day limitation period is warranted based on the totality of the circumstances in this matter and because, at the date

¹ It is noted for the record that Exhibit B submitted by both parties does not include the entire contractual agreement, only pages 24-25.

petitioners retired, the terms and conditions of employment affecting them were being negotiated. (*Id.* at 6-7)

Upon review of the record, the Commissioner agrees with and adopts as his own the findings and legal conclusions of the ALJ that the instant petition was not filed within the 90-day limitation set forth in *N.J.A.C.* 6A:3-1.3(d). In so holding, the Commissioner finds meritless petitioners' argument that the 90-day time limitation is inapplicable because their claim is a statutory entitlement, unrelated to a teacher's employment or performance, within the intendment of the Court's determination in *Lavin, supra*. Rather, the Commissioner finds the circumstances in this matter analogous to those in *Balwierzczak et al. v. Board of Education of the Township of Berkley Heights, Union County*, decided by the Commissioner December 8, 1999 (No. 407-99), *aff'd* State Board of Education May 3, 2000, a matter involving former employees of the Union County Regional High School District, who alleged that the Board of Education of Berkeley Heights, the district to which they transferred upon dissolution of the regional district, denied them their rights to the salary guide placement to which they were entitled pursuant to *N.J.S.A.* 18A:13-64. The holding in *Balwierzczak* reads in pertinent part:

The Commissioner concludes that, upon full consideration of the statute and its legislative intendment, it is undeniable that *N.J.S.A.* 18A: 13-64 was designed to operate, upon the dissolution of a regional district, as a "save harmless" provision to preserve and protect benefits earned by affected individuals by virtue of their service in such regional district. Absent rights and benefits accrued through their prior employment, *N.J.S.A.* 18A:13-64 does not operate to independently create a benefit for them. As such, petitioners' rights here are clearly distinguishable from the petitioner's right to military service credit in *Lavin*. They are not entitled to any right or benefit independent from the administration of a school system. Rather, any right or benefit to be afforded petitioners here is wholly predicated upon services they previously rendered as Regional District employees and, therefore, does not fall within the narrow prescriptions delineated in *Lavin* which might entitle them to a waiver of the mandatory filing timelines.

Consequently, [the 90-day time limitation] applies here to time bar petitioners' within claims. (Slip Opinion at 24)

The Commissioner also finds meritless petitioners' argument that the 90-day time limit is not applicable in the instant matter because they did not have final action taken by the Board. Numerous decisions concerning the 90-day time limit have been litigated and the Courts have consistently held that the rule is mandatory and that the 90-day period begins to run on the date notice is received of the action taken. *See, Kaprow, supra; Riely v. Hunterdon Central High Bd. of Ed.*, 173 N.J. Super. 109 (App. Div. 1980); *Nissman v. Bd. of Educ. of the Twp. of Long Beach Island, Ocean County*, 272 N.J. Super. 373, 380 (App. Div. 1994), *certif. denied* 137 N.J. 315 (1994). As correctly determined by the ALJ in the present matter, "[t]he 90-day limitations period begins to run when the aggrieved individual has adequate notice, which has been defined as that notice which is sufficient to inform the person affected of something that he/she has the right to know and the other party has a duty to communicate. [*Kaprow, supra*]." (Initial Decision at 10) Moreover, formality of notice is irrelevant where the goals of notice are achieved. *See, Kaprow, supra* See also *Board of Education of the Gloucester County Institute of Technology, Gloucester County, v. Board of Education of the Lenape Regional High School District, Burlington County*, decided by the Commissioner December 16, 1999 (No. 416-99), *aff'd* State Board of Education August 2, 2000, wherein the Commissioner held that formal board of education action and direct notice from the board, as opposed to actions of its designated representatives taken at its behest, are not absolute prerequisites to trigger the 90-day timeline for filing a petition. (Slip Opinion at 11-12)

Upon review of the record herein, the Commissioner finds, as did the ALJ, that because the Clark Board of Education vouchers sent to petitioners contained all pertinent information regarding the payment of accumulative sick leave, *i.e.*, the number of unused

accumulated sick days and the amount of money owing and due to each petitioner, the vouchers constituted adequate and sufficient notice to petitioners at the time they received them to trigger the 90-day time limitation for filing a petition.

Moreover, given the factual circumstances in this matter, the Commissioner finds that the petition would be time-barred under the provisions of *N.J.A.C.* 6A:3-1.3(d) even if every inference in petitioners' favor were granted to the effect that their written notification of disagreement with the amount for payment of unused sick leave constituted the filing of a grievance under the contractual agreement between the Board and petitioners, which was ignored by the Board and its administrators. Such conclusion is reached because it is well established that the fact that other proceedings may have been initiated elsewhere, such as the filing of a grievance under a collective bargaining agreement or a claim with the Public Employment Relations Commission, does not alter the 90-day time period for filing a petition with the Commissioner. *See, Bd. of Education Bernards Tp. v. Bernards Tp. Educ. Ass'n*, 79 N.J. 311, 326-327, n.4 (1979); *Riely, supra* 173 N.J. Super. at 113; *American Federation of Teachers, Local 3417 v. Board of Education of the Township of Berkeley Heights*, decided by the Commissioner November 30, 1998 (No. 530-98).

Further, upon consideration of the parties' arguments regarding relaxation of the 90-day rule, the Commissioner concurs with the Board's position and the ALJ that there is nothing within this matter which justifies relaxation of the filing requirement set forth in *N.J.A.C.* 6A:3-1.3(d). As stated in *Portee v. Newark Bd. of Ed.*, 94 N.J.A.R.2d (EDU) 381 (1994), the 90-day filing requirement has been strictly construed by the Commissioner, the State Board of Education and the Courts and, while the rule gives the Commissioner broad discretion, relaxation is reserved for limited situations wherein a compelling reason can be demonstrated for expanding

the limitation period, such as the presence of a substantial constitutional or other issue of fundamental public interest beyond that of concern only to the parties. *See also, Kaprow, supra; Nissman, supra; Morris-Union Jointure Commission v. Board of Education of the Borough of South River*, 92 N.J.A.R.2d (EDU) 453 (1992); *Markulin & the Neptune Tp. Educ. Ass'n v. Board of Education of the Tp. of Neptune*, 92 N.J.A.R. 2d (EDU) 406 (1992). Upon review of the pleadings in this matter, the Commissioner does not find that the factual circumstances presented herein constitute such grounds for relaxation of the 90-day rule. *Kaprow, supra; Balwierzak, supra; American Federation of Teachers, supra; Pacio v. Bd. of Ed. of Lakeland Regional High School District*, 1989 S.L.D. 2060.

Accordingly, for the reasons stated in the Initial Decision and herein, the Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.²

COMMISSIONER OF EDUCATION

Date of Decision: July 9, 2001

Date of Mailing: July 10, 2001

² 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.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.