

PATRICIA ASCOLESE, :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE : DECISION

TOWNSHIP OF NORTH BERGEN, :

HUDSON COUNTY; GEORGE SOLTER, :

SUPERINTENDENT; AND STEVEN :

SOMICK, BUSINESS ADMINISTRATOR, :

RESPONDENTS. :

SYNOPSIS

Petitioner filed the within appeal in January 2017, claiming entitlement to additional reimbursement for unused vacation and sick time of her deceased husband, a former teacher and Assistant Superintendent for the respondent Board. Mr. Ascolese retired from the Board’s employ in January 2012, and was thereafter reimbursed by the Board for his accumulated leave time based on a mutually agreed upon number of days and the terms of Mr. Ascolese’s last employment contract with the school district, the gross amount of which totaled \$74,553.92 – paid out in two checks, one in 2012 and the other in 2013. Mr. Ascolese died in December 2014, sixteen months after the last reimbursement check was cashed. Petitioner subsequently filed her appeal on January 25, 2017. The Board filed a motion to dismiss, contending that the appeal was filed beyond the 90-day time limitation set forth in *N.J.A.C. 6A:3-1.3*. Petitioner opposed the motion.

The ALJ found, *inter alia*, that: the petitioner’s appeal was filed in January 2017, significantly beyond 90 days from any of the three dates that should have triggered notice of the Board’s final determination regarding Mr. Ascolese’s retirement benefits; the Board asserted that the petitioner should have taken action to appeal the Board’s determination of retirement benefits within 90 days of cashing the second reimbursement check in 2014, yet failed to file the instant petition for another three years; the veracity of petitioner’s assertion that Mr. Ascolese never consented to the leave time calculation that the Board memorialized in a memorandum bearing Mr. Ascolese’s signature – and her denial that the signature was actually her husband’s – cannot be entertained because the petition was filed far too late to be viable; there is no merit in the petitioner’s claim that a Board memorandum dated December 26, 2016 is the appropriate triggering event, as this communication was merely a responsive letter to the petitioner providing her with requested documentation; and the relaxation of the 90 day rule is not warranted in this matter. The ALJ concluded that the petition must be dismissed as untimely pursuant to *N.J.A.C. 6A:3-1.3*.

Upon review, the Commissioner agreed with the findings and conclusion of the ALJ, and adopted the Initial Decision as the final decision in this matter. The petition 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.

December 27, 2017

OAL DKT. NO. EDU 2353-17
AGENCY DKT. NO. 19-1/17

PATRICIA ASCOLESE,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE	:	DECISION
TOWNSHIP OF NORTH BERGEN,	:	
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SUPERINTENDENT; AND STEVEN	:	
SOMICK, BUSINESS ADMINISTRATOR,	:	
	:	
RESPONDENTS.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed, as have the exceptions filed pursuant to *N.J.A.C.* 1:1-18.4 by the petitioner, Patricia Ascolese, and the North Bergen Board of Education’s (Board) reply thereto.

This matter involves a claim by the petitioner that she is entitled to additional reimbursement for the unused vacation and sick time of her deceased husband, Vincent Ascolese, a former teacher and Assistant Superintendent for the Board. The Administrative Law Judge (ALJ) found that the petition of appeal was untimely under *N.J.A.C.* 6A:3-1.3(i) because it was filed well beyond 90 days from several dates that triggered notice of the Board’s final determination regarding Mr. Ascolese’s retirement benefits. The ALJ also found that relaxation of the 90-day rule is not warranted in this matter.

In her exceptions, the petitioner argues that the ALJ incorrectly applied the 90-day rule because in fact, none of the trigger dates identified by the ALJ were final Board action. The petitioner asserts that the Board never adopted a board resolution that authorized the Board to expend funds to compensate Mr. Ascolese for his accrued time after he retired in January of 2012. In addition to no formal resolution, the trigger dates utilized by the ALJ were also inconsistent

with the notice requirement outlined in the 90-day rule. To that end, the ALJ erred in finding that the cashing of the checks that Mr. Ascolese received in 2012 (\$10,000.00 gross amount) and 2013 (\$64,553.92 gross amount) triggered notice of a claim under the 90-day rule because there was no explanation that the payments represented an accounting of the unused accumulated leave sum. Even assuming – as the ALJ did – that the petitioner knew the checks were for reimbursement of leave time, there was no indication that they were payment in full.

The petitioner also argues that the ALJ incorrectly concluded that the letter received by Mr. Ascolese on August 13, 2014, detailing the Board's continued effort to calculate Mr. Ascolese's contractual entitlement, was a trigger for the 90-day rule. The letter unambiguously indicates that the Board had yet to determine the total amount that was due to Mr. Ascolese for his unused time. Finally, the petitioner claims that the ALJ incorrectly concluded that the Board's decision to give the petitioner Mr. Ascolese's personnel file on April 5, 2015 – which included correspondence concerning his accumulated leave time – was the third triggering event of the 90-day rule. Nothing in the file contained a final determination of unused sick and vacation leave time. Therefore, the petitioner contends that the petition of appeal is not untimely.

The petitioner also maintains that the ALJ incorrectly applied the standard for summary decision because she failed to consider facts in the light most favorable to the petitioner. The ALJ also wrongfully granted summary decision before allowing additional discovery to determine if the 90-day rule was implicated and, if it was, whether the rule should be relaxed. In her exceptions, the petitioner discusses several examples of factual findings made by the ALJ that she argues are arbitrary, capricious or unreasonable.

In reply, the Board contends that the ALJ properly dismissed the petition in accordance with the 90-day rule. First, the Board states that a formal board resolution is not necessary to trigger the 90-day rule because a resolution is not required in order for a board of

education to reimburse a retired employee for unused leave time. Moreover, despite the petitioner's claims to the contrary, the ALJ identified the factual findings that were not in dispute to properly determine whether the petition was barred by the 90-day rule.

The Board also indicates that at the OAL it argued that the last possible date for triggering the 90-day rule was the acceptance by Mr. Ascolose of the second check for the payout of his unused leave time in July, 2013. Yet the ALJ took a much more expansive approach and set three different possible trigger dates, the last of which was April 5, 2015 – when the Board turned over Mr. Ascolese's personnel file to his family. Giving the petitioner the benefit of every doubt, the ALJ still found that the petition was filed after the running of the last conceivable trigger date. The Board stresses that the petition was filed five years after Mr. Ascolese retired; three and a half years after the final payment was made for his unused leave time; over two years after Mr. Ascolese died; and almost two years after the latest possible trigger found by the ALJ. Additionally, notwithstanding Mr. Ascolese's illness, the ALJ properly found that there was no compelling constitutional concern of fundamental public interest that existed which would compel the ALJ to relax the 90-day rule.

Upon review of the record in this matter, the Commissioner concurs with the ALJ's determination – for the reasons stated in the Initial Decision – that the petition of appeal was time barred under *N.J.A.C. 6A:3-1.3(i)*. The Commissioner likewise concurs that petitioner has failed to set forth any compelling reason to relax the timely filing requirement.

Pursuant to *N.J.A.C. 6A:3-1.3(i)*, a petition must be filed “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 by the Board in its exceptions, the ALJ gave the petitioner the benefit of the doubt with respect to the latest possible date triggering the notice of the Board's final decision

concerning Mr. Ascolese's remaining unused leave time. The Board made the last payment to Mr. Ascolese for his unused leave time in July, 2013,¹ and the Board provided the family with Mr. Ascolese's personnel file in April, 2015. Certainly the petitioner was on notice at that juncture that the Board had made a final determination related to Mr. Ascolese's accrued leave time. Yet the petition of appeal seeking additional unreimbursed leave funds was not filed by the petitioner until January 27, 2017. The Commissioner is not persuaded that the exceptions submitted by the petitioner dictate a different result. The objections identified in the exceptions essentially raise arguments that the ALJ took into account in determining that the petition should be dismissed as untimely.

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

IT IS SO ORDERED.²

COMMISSIONER OF EDUCATION

Date of Decision: December 27, 2017

Date of Mailing: December 27, 2017

¹ Subsequent to his retirement on August 30, 2012, the Board issued two checks totaling a gross amount of \$74,553.92 in reimbursement for Mr. Ascolese's unused leave at the time of his retirement. During the 2009-2012 school years, Mr. Ascolese was also paid for unused vacation days that accrued during those respective years. Mr. Ascolese's salary for the 2011-2012 school year was \$240,325.00. The details of the various payments made to Mr. Ascolese are outlined in the Certification of Steven Somick, the Board's Business Administrator.

² This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L. 2008, c. 36*. (*N.J.S.A. 18A:6-9.1*).



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 02353-17

AGENCY DKT. NO. 19-1/17

PATRICIA ASCOLESE,

Petitioner,

v.

NORTH BERGEN BOARD OF EDUCATION,

Respondent.

Gary M. Lachman, Esq., for petitioner

Kevin Hanly, Esq., for respondent, North Bergen Board of Education

Record Closed: August 9, 2017

Decided: September 27, 2017

BEFORE **IRENE JONES, ALJ:**

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, Patricia Ascolese, filed a petition on January 27, 2017, with the State Board of Education seeking to determine the retirement benefits of her deceased husband, Vincent Ascolese, a former teacher and Assistant Superintendent for the North Bergen Board of Education. The petition sought additional reimbursement for alleged “unused vacation and sick leave” time. An answer to the petition was filed by the respondent on February 14, 2017. The respondents to this matter are the North

Bergen Board of Education (NBBOE, the Board, or the District), George Solter and Steven Somick (collectively the respondents).

On February 1, 2017, the matter was transmitted to the Office of Administrative Law for a fair hearing as a contested case. The matter was assigned to ALJ Leslie Celentano and Joan Bedrin-Murray. Subsequently the case was reassigned to the undersigned.

On March 15, 2017, the respondents moved to discuss this matter on the basis that the petition was filed outside of the ninety-day rule. On or about April 23, 2017, petitioner filed letter brief in opposition to the Motion

FACTS

I **FIND** the following **FACTS** to be undisputed, thus they are adopted as the **FACTS** herein:

1. Vincent Ascolese (Ascolese) was employed by the District from 1973 until his retirement on January 6, 2012.
2. Ascolese was initially hired as a teacher. He subsequently became an Assistant Superintendent for Business. During this tenure Ascolese was also the football coach.
3. As an Assistant Superintendent, Ascolese was not required to “punch in” using a time clock, but was allowed to keep his own attendance record that were later recorded by the attendance office.
4. The Board’s leave policy provided for ten sick days and five personal days, annually. Unused personal days could be accumulated and converted into “sick” time. Vacation days were based on the position held and subject to a longevity adjustment.

5. Prior to the 1995-1996 school year, District employees were given the option of accumulating unused vacation or being paid for the time at the end of the fiscal year. (Certification of Steven Somick.)
6. Beginning in 1995-1996, the vacation policy changed to require that unused vacation days were to be paid at the end of each fiscal year. Thus, in 1996 Ascolese was paid for his unused vacation days and this practice continued until he retired. (Certification of Steven Somick.)
7. In 2007 the law changed and capped unused sick time to maximum payout of \$15,000. Current employees were grandfathered in and allowed to retain prior accumulated unused sick leave time. The effective date of the new law June 8, 2007. (Certification of Steven Somick.)
8. An employee could receive the greater of the two: accumulated sick days or \$15,000. (Certification of Steven Somick.)
9. As of June 8, 2007, Ascolese had 465 unused sick, personal, and vacation days.
10. Also at that time, Ascolese's employment contract ran from July 1, 2006, to June 30, 2009. If the contract dates were to be used to determine accumulated sick leave, Ascolese had 495 sick days. (Certification of Steven Somick.)
11. Prior to the commencement of the 2009-2010 school year, Ascolese was diagnosed with cancer and was unable to perform his duties as Assistant Superintendent. Ascolese continued to perform his duties as a football coach, thus he remained employed with the District by using unused sick, personal, and vacation days until his retirement in early 2010. (Certification of Steven Somick.)
12. Before his retirement, Ascolese met with the District's general counsel periodically to discuss his leave time. This meeting occurred after his diagnosis. On March 25, 2010, the general counsel sent Ascolese a memorandum that he had 495 days of accumulated leave time. The memorandum further confirmed that Ascolese planned to take 76 sick days commencing on March 8, 2010, school year or June 30, 2010.
13. Subsequently, Ascolese confirmed in writing that he agreed with the accumulated leave time and that he would take seventy-six sick days. Further, he noted that

he would use vacation time for the rest of the 2010 calendar year. (Exhibit 1, Certification of Steven Somick.)

14. Ascolese did not return to school on January 1, 2011, but instead he used sick time for January 1, 2011, to July 31, 2011. As of July 30, 2011, Ascolese had 184 days left and notified the Board that he would retire on January 6, 2012. (Exhibit 3 Certification of Steven Somick.)
15. Prior to reimbursing Ascolese for his accumulated leave time, the District Business Administrator (BA) met with him and advised him that he would be paid \$74,553.92 for his leave time. Ascolese agreed to the number of days and that his contract would be used to determine the amount of the payout. (Certification of Steven Somick.)
16. On August 30, 2012, the District sent Ascolese a net check for \$8,564.62. The check was cashed on the same day. (Certification of Steven Somick.)
17. On July 11, 2013, the District sent Ascolese a net check for \$48,127.35 which cleared the bank on July 22, 2013. (Certification of Steven Somick.)
18. Ascolese died on December 3, 2014, sixteen months after the last reimbursement check was cashed. At no time prior to January 30, 2017, did Mrs. Ascolese contest the amount of his reimbursement. (Certification of Steven Somick.)
19. On June 8, 2007, Ascolese's salary was \$208,900.
20. Patricia Ascolese is the wife of the decedent and the petitioner herein. She avers that her husband worked for the District for thirty-nine years and never missed a day of work, even after his diagnosis of prostate cancer. Indeed, he would report to work after his treatments at Holy Name Hospital in Hackensack, N.J. (Certification of Patricia Ascolese.)
21. Petitioner denies that the signature on Exhibit 2 is her husband's signature.
22. Petitioner received a letter from Kevin Hanley, Esq. dated August 13, 2014, regarding the calculation of her husband's sick days. (Certification of Patricia Ascolese.)
23. Petitioner filed this petition on January 25, 2017.

DISCUSSION, FINDINGS AND CONCLUSIONS

Petitioner seeks supplemental reimbursement for alleged unused sick and vacation leave time. Respondent counters that a petitioner failed to comply with the ninety-day limitation period as set forth in N.J.A.C. 6A:3-1.3(i) and therefore this appeal much be dismissed. N.J.A.C. 6A:3-1.3(i) provides:

[t]he 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, which is the subject of the requested contested case hearing.

Thus, Title 6A provides that a petitioner may challenge the action of a board of education by filing a petition conforming to the requirements of N.J.A.C. 6A:3-1.4. The Code further provides for a limitation of action with respect to the initiation of a contested case for the Commissioner's determination of a controversy or dispute arising under the school laws.

Generally speaking, a limitation of action serve two salutary purposes which our Supreme Court discussed in Ochs v. Federal Insurance Company, 90 N.J. 108, 112 (1982). It noted therein, that the initial purpose 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." Second, is to "penalize dilatoriness and serve as a measure of repose." Id. at 112 (quoting Farrell v. Votator Div. of Chetron Corp., 62 N.J. 111, 115 (1975)).

Subsequently, in Kaprow v. Berkeley Township Board of Education, 131 N.J. 572, 588 (1993). the Court affirmed the validity of the ninety-day rule as applied to school law cases (then codified as N.J.A.C. 6:24-1.2(c)) There, the Court held that N.J.A.C. 6:24-1.2(c) represents a fair and reasonable-necessary requirement for the proper and efficient resolution of disputes under the school laws. The Court concluded that even an unofficial, informal note from respondent's secretary to the petitioner stating that two positions had been created and filled was sufficient to trigger the start of

the ninety-day period. The Court stated that the time limitation, while arguably short, provides a “measure of repose, an essential element in the proper and efficient administration of the school laws.” Id. at 582. In addition, the limitation period gives school districts the security of knowing that the administrative decisions regarding the operation of the school cannot be challenged after ninety days. Ibid.

In the instant matter, respondent asserts that the triggering action of petitioner occurred when petitioner cashed his second reimbursement check in 2014, three years before the instant petition was filed.

Petitioner rebuts by contending that the District has taken five and one-half years to state its position regarding petitioner’s retirement benefits. Notably, petitioner’s answer to said motion is silent on the checks that were received and cashed by her before her husband’s demise and some three years before this petition was filed.

In her certification, petitioner vehemently denies that her husband took any sick leave or that he consented to leave time as specified in the memorandum setting forth his accumulated sick and leave time. Indeed, petitioner denies that it is her husband’s signature on the memorandum or that he prepared same.

However, I **FIND** that the veracity of these contentions can’t be entertained unless the petition is viable. Initially, it must be emphasized that not only did petitioner fail to file a timely claim after cashing the checks in 2012 and 2013, which I **FIND** to be the first trigger, she also failed to file a claim even after the respondent’s counsel sent her a letter dated August 13, 2014, that referenced her husband accumulated sick and vacation leave time. I **FIND** that letter to be the second trigger.

I **FIND** that the third trigger occurred on April 5, 2015, when the Board delivered the decedent’s personnel file, which included memorandum and correspondence concerning his accumulated sick and vacation leave time.

In each of the aforementioned instances, petitioner failed to file a petition within 90 days of the triggering action. I **FIND** no merit to the petitioner’s claim that the Board

memorandum of December 26, 2016, which provided copies of the “termination” checks of August 31, 2012, and June 30, 2013, as well as a copy of his June 8, 2017, employee contract is a triggering event. Rather, the memorandum is simply a responsive letter to the petitioner providing the requested documentation.

The ninety-day requirement is to be strictly construed and is mandatory. Wise v. Bd. of Educ. of the City of Trenton, EDU 160-00, Comm’r (September 11, 2000), aff’d, State Board of Educ. (January 3, 2011), <http://njlaw.rutgers.edu/collections/oal/>. A petitioner must file a petition within ninety-days from a notice of adverse action. Adequate notice is notice that 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. Ibid. In Amiparo Bishop v. Piscataway Board of Education, OAL Dkt. No. EDU 13897-10, the ALJ concluded that an Order approving a workers’ compensation settlement constituted sufficient notice so that the ninety-day limitation began to run. There, the petitioner did not file a claim until three and half years later. Here, the decedent and the petitioner received vacation sick leave checks in 2012, 2013. Given the largess of the checks, it is inexplicable that they were not aware that it was for reimbursement of his leave time.

I am mindful that Vincent Ascolese was ill; however, I **FIND** that this reason standing alone does not constitute sufficient cause for relaxation of the ninety-day rule. Put simply it is not a compelling constitutional concern or fundamental public interest issue.

Accordingly, I **CONCLUDE** that the petition herein should be dismissed for failure to comply with the ninety-day rule as set forth in N.J.A.C. 6A:3-1.3(a).

ORDER

Therefore, for the aforementioned reasons, the respondent's Motion to Dismiss is hereby **GRANTED** and this matter is **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, P.O. 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.



September 27, 2017

DATE

IRENE JONES, ALJ

Date Received at Agency:

September 27, 2017

Date Mailed to Parties:

sej