

VALERIE KENNY, :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE : DECISION

BOROUGH OF MOONACHIE, :

BERGEN COUNTY, :

RESPONDENT. :

SYNOPSIS

Petitioner – a tenured teacher employed by the respondent Board – contended that the Board improperly found her guilty of harassment, intimidation and bullying (HIB), as those terms are defined under *N.J.S.A.* 18A:37-14, and sought to have her personnel file expunged of any record of the HIB allegations. The Board filed a motion to dismiss in lieu of an answer, asserting the petition was not timely filed and must be dismissed pursuant to *N.J.A.C.* 6A:3-1.3(i). Petitioner filed opposition to the motion to dismiss. The ALJ subsequently converted the Board’s motion to a motion for summary decision.

The ALJ found, *inter alia*, that: there are no material facts at issue in this case, and the matter is ripe for summary decision; petitioner is a teacher in the school district; in December of 2016, petitioner was accused of bullying a student with disabilities; the matter was investigated by the school district’s Anti-Bullying Specialist, who determined that an act of HIB had occurred; this finding was affirmed by the Superintendent and the Board; petitioner was notified on January 24, 2017 that she had been found guilty of HIB; petitioner did not submit her appeal until June 2017; instead, petitioner pursued contractual grievance proceedings through the Moonachie Education Association; petitioner asserted that her petition was timely, as the 90 day period for filing her appeal began when the Board denied her grievance in March 2017. The ALJ concluded that the Board’s HIB determination was issued in January 2017, and the petitioner received proper notice thereof; however, petitioner’s appeal was not filed until June 13, 2017 – well past the regulatory timeline. Accordingly, the ALJ granted the Board’s motion for summary decision, and dismissed the petition as untimely.

Upon review, the Commissioner concurred with the ALJ that the petition must be dismissed as it was filed outside the 90-day limitation period set forth in *N.J.A.C.* 6A:3-1.3(i). Accordingly, the Initial Decision of the OAL was adopted as the final decision in this matter, and 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.

OAL DKT. NO. EDU 09284-17
AGENCY DKT. NO. 115-6/17

VALERIE KENNY, :
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 PETITIONER, :
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 V. : COMMISSIONER OF EDUCATION
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 :
 RESPONDENT. :

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. The parties did not file exceptions to the Initial Decision.

Upon such review, the Commissioner concurs with the Administrative Law Judge that the instant petition is appropriately dismissed because it was filed outside the 90-day limitation period set forth in *N.J.A.C. 6A:3-1.3(i)*. Accordingly, the Initial Decision is adopted as the final decision in this matter – for the reasons stated therein – and the petition of appeal is hereby dismissed.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: September 27, 2017

Date of Mailing: September 28, 2017

* 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

SUMMARY DECISION

OAL DKT. NO. EDU 09284-17

AGENCY DKT. NO. 115-6/17

VALERIE KENNY,

Petitioner,

v.

**BOARD OF EDUCATION OF THE BOROUGH
OF MOONACHIE, BERGEN COUNTY,**

Respondent.

Gail Oxfeld Kanef, Esq., for petitioner (Oxfeld Cohen, attorneys)

Dennis McKeever, Esq., for respondent (Sciarrillo Cornell, attorneys)

Record Closed: August 16, 2017

Decided: August 17, 2017

BEFORE **ELLEN S. BASS**, ALJ:

STATEMENT OF THE CASE

Valerie Kenny, a tenured teacher employed by the Moonachie Board of Education (the Board), contends that the Board improperly found her guilty of harassment, intimidation and bullying (HIB), as those terms are defined by N.J.S.A.

18A:37-14. She seeks a declaration that the Board acted in violation of law, and asks that her personnel file be expunged of any record of the HIB allegations. The Board replies that the petition was not timely filed, and should be dismissed pursuant to N.J.A.C. 6A:3-1.3(i).

PROCEDURAL HISTORY

The petition of appeal was filed with the Commissioner of Education on June 13, 2017. On June 27, 2017, the Board filed a Motion to Dismiss in Lieu of an Answer, per N.J.A.C. 6A:3-1.5(g). The contested case was transmitted to the Office of Administrative Law on June 29, 2017. Kenny filed a brief and certification in opposition to the motion on August 14, 2017. The Board replied to the opposition on August 16, 2017, and the record closed.¹

FINDINGS OF FACT

The salient facts are undisputed, and I **FIND**:

Petitioner is a teacher who, in December 2016, was accused of bullying a student with disabilities. The matter was investigated by the Anti-Bullying Specialist, who determined that an act of HIB had occurred. The HIB investigative report was submitted to the Superintendent of Schools on December 20, 2016, who affirmed its findings, and reported the matter to the Board. On January 19, 2017, the Board voted to affirm the decision of the Superintendent.

Kenny was notified of the Board's decision on January 24, 2017. On January 25, 2017, the Moonachie Education Association (the Association) began the process of pursuing relief for Kenny via the contractual grievance procedure, which includes four steps: I. Informal Discussion; II. Administrative Principal; III. Board of Education; and IV. Binding Arbitration. Having received no relief at the earlier stages of the process, on

¹ Since both parties submitted certifications and accompanying documents in support and opposition to the motion, I have converted it to a Motion for Summary Decision.

March 17, 2017, the Association filed a Level IV grievance, through which it sought to bring the matter to binding arbitration. On March 21, 2017, the Board advised Kenny via a letter from its Interim Business Administrator that the grievance had been denied at Level III.

ANALYSIS AND CONCLUSIONS OF LAW

The Board seeks relief pursuant to N.J.A.C. 1:1-12.5, which provides that summary decision should be rendered “if 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.” Our regulation mirrors R. 4:46-2(c) which provides that “the judgment or order sought shall be rendered if the pleadings, depositions, answers to interrogatories and admissions on file, 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 a judgment or order as a matter of law.”

A determination whether a genuine issue of material fact exists that precludes summary decision requires the 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 fact finder to resolve the allegedly disputed issue in favor of the non-moving party. Our courts have long held that “if the opposing party offers . . . only facts which are immaterial or of an insubstantial nature, a mere scintilla, ‘fanciful frivolous, gauzy or merely suspicious,’ he will not be heard to complain if the court grants summary judgment.” Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 529 (1995) (citing Judson v. Peoples Bank and Trust Co., 17 N.J. 67, 75 (1954)).

The “judge’s function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.” Brill, supra, 142 N.J. at 540 (citing Anderson v. Liberty Lobby, 477 U.S. 242, 249, 106 S. Ct. 2505, 2511, 91 L. Ed. 2d 202, 213 (1986)). When the evidence “is so one-sided that one party must prevail as a matter of law,” the trial court should not hesitate to grant

summary judgment. Liberty Lobby, supra, 477 U.S. at 251-2, 106 S. Ct. at 2512, 91 L. Ed. 2d at 214.

I **CONCLUDE** that this matter is ripe for summary decision. There are no material disputed facts that require a plenary hearing, and the Board is entitled to judgment as a matter of law. The time for filing an appeal before the Commissioner of Education is clearly set forth at N.J.A.C. 6A:3-1.3(i), which provides that a petition of appeal shall 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 . . . which is the subject of the requested contested case hearing.” Petitioners’ appeal was filed well past the regulatory timeline, and must be dismissed.

Adequate notice has been defined as notice “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.” Kaprow v. Bd. of Educ. of Berkeley Twp., 131 N.J. 572, 587 (1993). The ninety-day period for commencing an action begins to run when the “plaintiff learns, or reasonably should learn, the existence of that state of facts which may equate in law with a cause of action.” Ibid. The intent of the ninety-day rule 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. The rule furthermore exists to “penalize dilatoriness and serve as a measure of repose by giving security and stability to human affairs.” Ibid.

Kenny asserts that her claim was not triggered until the Board denied her grievance. Having not timely heard from the Board at Level III of the grievance process, on March 17, 2017, her Association filed a Level IV grievance on her behalf, having read the Board’s silence as a denial.² She thus urges that she had until June 17, 2017, to file her petition with the Commissioner. The Board replies that Kenny knew that the Board had acted to uphold its administrators’ HIB determination as early as January 2017, making this petition of appeal well out of time.

² As noted above, on March 21, 2017, the Board formally denied the grievance at Level III.

I concur with the Board, which rightly notes that under N.J.S.A. 18A:37-15(e), a local board's HIB determination, "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 issuance of the Board's decision." The Board's HIB decision here was made on January 19, 2017.

Kenny chose to challenge the Board's HIB determination through the collective bargaining agreement's grievance process at her own peril, as this was not the appeal process clearly specified by the statute. Her pursuit of the grievance procedure did not toll the ninety days in which she was required to perfect an appeal before the Commissioner. Indeed, the Commission has held that attempts to resolve a dispute in other forums do not serve to toll the statute of limitations. See Kaprow, supra, 131 N.J. at 588; see also Riley v Hunterdon Cent. Bd. of Educ., 173 N.J. Super. 109 (App. Div. 1980). A petition must be filed within ninety days of receipt of notice of Board action, and not within ninety days of "exhaustion of other avenues and mechanisms." Wise v. Bd. of Educ. of the City of Trenton, EDU 160-00, Initial Decision (July 25, 2000), adopted, Comm'r (September 11, 2000), <<http://njlaw.rutgers.edu/collections/oal/>>. In Wise, much like here, the petitioner sought reconsideration of a board decision, rather than timely appealing to the Commissioner; his appeal was dismissed.

Moreover, it is well established that the ninety-day rule is to be strictly applied. See Kaprow, supra, 131 N.J. 572; Morris-Union Jointure Comm'n v. Bd. of Educ. of the Borough of S. River, 92 N.J.A.R.2d (EDU) 453; Markulin and the Neptune Educ. Ass'n v. Bd. of Educ. of the Twp. of Neptune, 92 N.J.A.R.2d (EDU) 406. While the Commissioner has the discretion to relax the rule, this extraordinary relief has been reserved only for those situations where a substantial constitutional issue is presented or where a matter of significant public interest is involved, beyond that of concern only to the parties. N.J.A.C. 6A:3-1.16; Portee v. Bd. of Educ. of the City of Newark, 94 N.J.A.R.2d (EDU) 381, 384; Wise, supra, EDU 160-00. Petitioner's claim certainly has

import and significance to her, but no significance beyond that, making a relaxation of the rule unwarranted.

Accordingly, I **CONCLUDE** that the petition of appeal should be dismissed for failure to comply with the requirements of N.J.A.C. 6A:3-1.3(i).

ORDER

It is hereby **ORDERED** that the Board's Motion for Summary Decision be **GRANTED** and the petition of appeal **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.



August 17, 2017

DATE

ELLEN S. BASS, ALJ

Date Received at Agency:

August 17, 2017

Date Mailed to Parties:

sej
