

IN THE MATTER OF THE SUSPENSION :
OF THE TEACHING CERTIFICATE OF :
ROBERT FALCO, BOARD OF : COMMISSIONER OF EDUCATION
EDUCATION OF THE RAMAPO : DECISION
INDIAN HILLS REGIONAL HIGH :
SCHOOL DISTRICT, BERGEN COUNTY. :
_____ :

SYNOPSIS

Petitioning Board filed an Order to Show Cause to suspend the teaching certificate of respondent teacher for up to one year because he resigned from his teaching position without the requisite 60 days' notice. *N.J.S.A.* 18A:26-10. Respondent contended the Board's filing was untimely, pursuant to *N.J.S.A.* 6:24-1.2(c), as the action which triggered the running of the 90-day rule of *N.J.A.C.* 6:24-1.2(c) was his cessation of employment on February 27, 1998.

ALJ concluded that the filing limitation period commenced on the date the Board took official action on the resignation at its next regularly scheduled meeting. Consequently, the ALJ concluded that the 90-day period commenced on March 23, 1998 and ended on June 21, 1998. Therefore, the Board's petition was timely filed. Moreover, the ALJ found that even if the filing were untimely, the circumstances herein warranted relaxation of the 90-day rule as the Board's original filing was improperly submitted as a request, not an Order to Show Cause. Having reviewed the record, the ALJ concluded that the primary reason for respondent's resignation was his disagreement over the evaluation of his performance. Thus, the ALJ determined that immediate resignation was an unacceptable response and that no genuine issues of material fact existed. ALJ granted Board's Motion for Summary Decision and denied petitioner's Motion to Dismiss.

Commissioner adopted findings and determination in initial decision as his own, finding respondent's arguments with respect to timeliness of the petition without merit. Noting that the language of the applicable statute, *N.J.S.A.* 18A:26-10, clearly requires that for a cause of action to arise under its terms 1) a teaching staff member ceases to perform his duties before the expiration of the term of his employment and 2) the board does not consent to the teaching staff member's action. As such, the Commissioner determined that the "final action" contemplated by *N.J.A.C.* 6:24-1.2(c) occurred on March 23, 1998, when the Board formally resolved to reject respondent's resignation as offered and decided as a body to pursue its rights under the statute. Thus, the Board's Order to Show Cause, filed on June 16, 1998, was timely. Commissioner concurred that respondent failed to fulfill the terms of his employment with the Board and violated the law by failing to give 60 days' notice of his intent to terminate his employment without the approval of the Board. Finding such behavior to be unprofessional conduct, the Commissioner ordered respondent's certificate suspended for a period of one year as of the date of this decision. Commissioner notified State Board of Examiners of this decision.

May 24, 1999

IN THE MATTER OF THE SUSPENSION :
OF THE TEACHING CERTIFICATE OF :
ROBERT FALCO, BOARD OF : COMMISSIONER OF EDUCATION
EDUCATION OF THE RAMAPO : DECISION
INDIAN HILLS REGIONAL HIGH :
SCHOOL DISTRICT, BERGEN COUNTY. :
_____:

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. Exceptions of respondent Falco were timely filed pursuant to *N.J.A.C. 1:1-18.4*.¹ The Board requested and was granted a short extension of time within which to submit reply exceptions and filed such replies in accordance with the established timeline.

Respondent excepts to the Administrative Law Judge's (ALJ) determination that the within petition of appeal was timely, contending, as he did below, that the triggering event which commenced the running of the 90-day filing period, pursuant to *N.J.A.C. 6:24-1.2(c)*, was his resignation from his position on February 27, 1998, not the date the Board took formal action to accept such resignation. In this regard, he advances that *N.J.A.C. 6:24-1.2(c)* specifies,

[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. (Respondent's Exceptions at p. 3)

¹The Initial Decision erroneously lists respondent as *pro se* in this matter. The record, rather, confirms that he is represented by Linda Ganz Ott, Esq. (Bucceri and Pincus).

Pursuant to this regulatory provision, respondent avers:

The petitioner must be aware of the action taken by the “district board of education, **individual party** or agency” in order to trigger the ninety (90) day rule. (emphasis added.) The key to the trigger date in a matter where a board of education seeks the suspension of a teacher’s certification is when the teacher ceases to perform his or her duties, not when a resignation is accepted. Here, it is the action of the respondent that triggers the 90 day limitation period, not anything the Board does. It is the “other action” of an “individual party...which is the subject of the requested contested case hearing.” *N.J.A.C. 6:24-1.2(c)*. Therefore, it is irrelevant that a resignation can be rescinded before acceptance of that resignation by a board of education. (*Id.*)

Respondent, therefore, argues that as February 27, 1998 was the date which triggered the Board’s cause of action herein, its filing for an Order to Show Cause with the Commissioner, some 101 days after this date, is untimely and must be dismissed. (Respondent’s Exceptions at p. 5)

Respondent particularly objects to the ALJ’s finding support for her determination that the Board’s submission was timely in the letter from the Association to the Board dated March 2, 1998, which she found indicated that the parties were at that time engaged in negotiations about his resignation. In this regard, respondent urges:

The letter was not from respondent, but from the Association president. There is nothing in the letter that indicates that respondent requested such actions or that he endorsed the request by the Association. The Association was concerned about the treatment of all science department staff as well as respondent. The Association president, not respondent, asked that the letter of resignation not be submitted to the Board before an investigation was completed. This letter should have no effect on a determination of the limitations period. (Respondent’s Exceptions at p. 2)

Finally, respondent disputes the ALJ’s concluding that relaxation of the 90-day rule was warranted by the circumstances existing in this matter should the Commissioner of Education determine that the triggering event was respondent’s resignation date. (Respondent’s Exceptions at p. 5) He contends that the limitation period of *N.J.A.C. 6:24-1.2(c)* is strictly enforced, there being few exceptions to stringent compliance with the rule. Respondent proffers that this rule “is only relaxed where it would

be inappropriate, unnecessary or unjust to strictly apply it.” (Respondent’s Exceptions at p. 6) Here, he advances:

Based on February 27, 1998 as the trigger date, the petitioner had until May 28, 1998 to file its order to show cause. The ALJ notes that the petitioner incorrectly requested the suspension of respondent's certificate in an April 3, 1998 letter to the Commissioner of Education and by return letter dated April 7, 1998 petitioner was informed of the correct procedure for filing an order to show cause. I.D. at 8. This mistake is not an “exceptional circumstance” or “compelling reason” to relax the rules. I.D. at 7. There was still sufficient time to file the order to show cause before the May 28, 1998 deadline. (*Id.*)

Respondent, therefore, urges that the Initial Decision be reversed and all proceedings in this matter be dismissed with prejudice. (*Id.*)

In reply exceptions the Board advances that the ALJ correctly determined that the controversy in this matter arose on March 23, 1998, when the Board took official action on respondent’s resignation. As such, it urges, she correctly found that the Board’s Order to Show Cause, filed prior to the expiration of 90 days from this date, was timely pursuant to *N.J.A.C. 6:24-1.2(c)*. (Board’s Reply Exceptions at p. 11) In support of this position it argues that *N.J.A.C. 6:24-1.2(c)*, which specifies,

[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 *** (Emphasis added) (Board’s Reply Exceptions at p. 5),

must be read and interpreted in conjunction with *N.J.S.A. 18A:26-10*, the provision under which the within cause of action arose. *N.J.S.A. 18A:26-10* states:

Any teaching staff member employed by a board of education, who shall, *without the consent of the board*, cease to perform his duties before the expiration of the term of his employment, shall be deemed guilty of unprofessional conduct, and the commissioner may, upon receiving notice thereof, suspend his certificate for a period not exceeding one year. (Emphasis added) (*Id.*)

The Board proffers it is clear from a reasoned examination that

the final action which is the subject of the contested case herein arose when the Board took its official action on March 23, 1998. Until it

took that action there existed no case or controversy subject to the Commissioner's jurisdiction under *N.J.S.A.* 18A:26-10. The latter section specifically provides that it is only applicable where the cessation of duties is without the consent of the Board. As such, there can be no violation [of] *N.J.S.A.* 18A:26-10 where the Board consents. (*Id.*)

Consequently, the Board opines, unless and until the Board took formal action to withhold its consent to respondent's resignation, such resignation was of no effect vis-à-vis the controversy at issue here. The Board further proffers that March 23, 1998 was the first date subsequent to respondent's resignation that it was empowered to act as a body², and, as such, the within controversy arose at this time, thereby triggering the 90-day appeal period specified by *N.J.A.C.* 6:24-1.2(c). Further buttressing this position, the Board reasons, is the fact that it is well-settled law "that a resignation is of no effect and can be rescinded at any time prior to Board acceptance. *Kozak v. Board of Education of the Township of Waterford*, 1976 *S.L.D.* 633.***" (Board's Reply Exceptions at p. 6) Thus, it contends, respondent could have unilaterally rescinded his resignation up to the point of the Board's formal action. (*Id.*) It further proffers that, contrary to respondent's exception arguments, "[t]he non-final status of [his] resignation when submitted" (*id.*) is additionally evidenced by the Association's March 2, 1998 request that the Board defer action on this resignation. (Board's Reply Exceptions at p. 7) Respondent's exception disclaimer of the fact that the Association was acting on his behalf, the Board advances, 1) is clearly without support in the record, 2) was not raised below and, thus, cannot be considered (see *N.J.A.C.* 1:1-18.4(c)), and 3) is fully belied by the fact that respondent copied the Association President on his Answer to the within petition, all of which substantiate that respondent was represented by the Association from the inception of this matter. (*Id.*) It must, therefore, be concluded, it urges, that respondent has waived and is estopped from now asserting that the Association in its March 2, 1998 letter was not acting on his behalf. (*Id.*)

²It is noted that the Board's submissions below and its exceptions here report that the meeting conducted on March 9, 1998 was a "work meeting" at which no official action could be taken.

The Board next maintains that the ALJ appropriately concluded that, even if the Commissioner were to determine that the 90-day filing period commenced on the date of respondent's resignation, the circumstances of this matter warrant the relaxation of this limitation period. (Board's Reply Exceptions at p. 8) It asserts that the limitation period should be viewed in light of the statute under which the instant controversy arose, the facts existing in the matter, and with due consideration to the purpose of such limitation period, *i.e.*, "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****" and "to penalize dilatoriness and serve as a measure of repose"****. (*Id. citing Kaprow v. Board of Educ. of Berkeley Tp.*, 131 N.J. 572, 587 (1993) (citations omitted)) Here, it argues, there was no undue delay in the Board's consideration of respondent's resignation, it having acted at the first regularly scheduled meeting subsequent to the event. Almost immediately thereafter, on April 3, 1998, the Board filed a request for suspension of respondent's certificate with the Commissioner. Notwithstanding that such request was not in the form of an Order to Show Cause as is required, penalization for such an "oversight," it argues, would place form over substance. (Board's Reply Exceptions at p. 9) Consequently, the Board avows, as it acted promptly and respondent was not prejudiced, relaxation of the limitation period is appropriate here. (Board's Reply Exceptions at p. 11)

Upon his independent and careful review of the record in this matter, the Commissioner concurs with the determination of the ALJ that the within Order to Show Cause was timely filed and with her conclusion that summary decision in this matter is appropriately granted to the Board.

Initially, in considering the timeliness of the Order to Show Cause, the Commissioner observes that the quintessence of an action brought pursuant to *N.J.S.A. 18A:26-10* is that, upon the existence of certain circumstances, a board moves before the Commissioner requesting suspension of a teaching staff member's certification for unprofessional conduct. Specifically, the law provides:

Any teaching staff member employed by a board of education, who shall, without the consent of the board, cease to perform his duties before the expiration of the term of his employment, shall be deemed guilty of unprofessional conduct, and the commissioner may, upon receiving notice thereof, suspend his certificate for a period not exceeding one year.

The Commissioner finds that the language of this controlling statute is clear, concise and explicit as to the requisite conditions for a cause of action to arise under its terms, namely, 1) a teaching staff member ceases to perform his duties before the expiration of the term of his employment, **and** 2) the board does not consent to the teaching staff member's action. As such, the Commissioner cannot accept respondent's contention that the cause of action in this matter arose upon his cessation of employment on February 27, 1998, as he determines that, by its plain language, the governing provision herein additionally contemplates, as a condition precedent to the arising of a cause of action under its terms, the Board's refusal to accept respondent's resignation under the conditions proffered. That this additional component is necessary in order to initiate a cause of action here is particularly evident when due consideration is given to the fact that if, at any time prior to the Board formally acting to consider his resignation, respondent had officially rescinded such resignation as was his right to do (see *Kozak, supra*), or if the Board had, for whatever reason, accepted it as offered, no cause of action would have arisen under *N.J.S.A. 18A:26-10*. Remaining cognizant of the fact that boards of education are empowered to act only as a body and only in accordance with the laws which govern their operation (see *N.J.S.A. 18A:10-1 et seq.*), the Commissioner finds that the within Board acted with no undue delay when, at its official meeting on March 23, 1998, it resolved to reject respondent's resignation as offered and decided as a body to pursue its rights under the statute. It was, therefore, on March 23, 1998, the Commissioner determines, that the final action contemplated by *N.J.A.C. 6:24-1.2(c)* occurred, providing the Board with 90 days from that date, or

until June 21, 1998, to file its Order to Show Cause. Consequently, such submission, made on June 16, 1998, was timely.³

Moving to consideration of this matter on its merits, the Commissioner concurs with the ALJ that the grant of summary decision to the Board is appropriate under the circumstances existing here, as he is persuaded by the record before him that no genuine issue of material fact exists in this matter. (*Brill, supra*) To the contrary, the relevant facts here are uncontested, *i.e.*, respondent resigned without giving the requisite notice, and the Board did not accept his resignation as proffered. Accordingly, pursuant to *N.J.S.A.* 18A:26-10, respondent is guilty of unprofessional conduct.

The Commissioner recognizes that the governing statute in this matter does not dictate the automatic suspension of a teacher's certificate upon satisfaction of its terms but, rather, vests the Commissioner with the discretion to withhold such penalty if he feels the particular circumstances of the case so warrant. *Board of Education of Black Horse Pike Regional School District v. Mooney*, 1984 *S.L.D.* 810. In opposing the grant of summary decision here, it is noted that the respondent argued below that his medical condition is a disputed mitigating factor in connection with his resignation and, due to the discretion afforded the Commissioner in determining whether or not a penalty should be imposed for his admitted violation of law, "[t]his disputed mitigating factor is a genuine, material issue of fact to be determined by a trier of fact" and clearly precludes the grant of summary decision. (Respondent's Letter Brief, dated March 4, 1999 at p. 6) The Commissioner finds such an argument without merit, as existing case law evidences that circumstances which justify giving relief to a teaching staff member who has violated the provisions of *N.J.S.A.* 18A:26-10 are rare. See, *e.g.*, *Penns Grove-Carneys Point Board of Education v. Leinen*, 94 *N.J.A.R.* 2d (EDU) 405, 407 (even when health issues are involved); *In the Matter of the Revocation of the Teacher's*

³In light of the Commissioner's determination that the petition in this matter was timely filed, he finds it unnecessary to reach to the ALJ's initial decision discussion as to whether circumstances here warrant the relaxation of the 90-day rule.

Certificate of Jerome Finkelstein, 1960 S.L.D. 75; and *Collingswood Borough Board of Education v. Cashel*, 1988 S.L.D. 1898.

Moreover, the Commissioner finds the circumstances in this matter analogous to those which existed in *In the Matter of the Suspension of the Teacher Certificate of Lance Cronmiller*, 1970 S.L.D. 147, 148 where, after he had received expressions of dissatisfaction from a pupil and her mother, and believing that he, subsequently, failed to receive the support he expected from his colleagues and superiors, the respondent concluded that he had been placed in an untenable position which induced him to resign immediately and without notice. In ordering the revocation of this respondent's certificate for a year, the Commissioner stated:

***The provocation under which he acted, whether fancied or real, is not relevant. Whatever feelings the teacher may have had cannot constitute a valid excuse for flouting the law and unilaterally abrogating the terms of his employment. Moreover, the teacher had avenues of appeal by which he could have sought a resolution of his grievances which he failed to employ. Nor did he attempt to arrange terms under which he could be relieved of his duties, obtain an early release, or in any other way reach an agreement. Instead, he walked off the job. Under such circumstances the Commissioner can find no justification for or condonation of the teacher's actions. (at 148)

The record here indicates that respondent abruptly resigned subsequent to receiving what he perceived as a negative evaluation which he contends caused him emotional stress so affecting his health that he could not continue working. The Commissioner determines that, while it is reasonable to conclude that an individual who experiences a negative evaluation would suffer emotional stress, immediate resignation is an unacceptable response.

Accordingly, the initial decision of the OAL is affirmed for the reasons stated therein and amplified above. The Commissioner determines that Robert Falco failed to fulfill the terms of his employment with the Board and violated the law by failing to give 60 days' notice of his intent to terminate his employment without the approval of the Board. He further finds such behavior to be unprofessional conduct necessitating the suspension of his certificate for the full period of time permitted by *N.J.S.A. 18A:26-10*. It is, therefore, ordered that Robert Falco's certificate be

suspended for a period of one year as of the date of this decision. By copy of this decision, the State Board of Examiners is so notified.⁴

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

May 24, 1999

⁴ This decision, as the Commissioner's final determination in the instant matter, 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. 6:2-1.1 et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.