

#441-08 (OAL Decision: Not yet available online)

ALBERT ZIEGLER, :  
 :  
 PETITIONER, : COMMISSIONER OF EDUCATION  
 :  
 V. : DECISION  
 :  
 BOARD OF EDUCATION OF :  
 THE CITY OF BAYONNE, :  
 HUDSON COUNTY, :  
 :  
 RESPONDENT. :

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SYNOPSIS

Petitioner – formerly a tenured teacher in the district who previously challenged his termination and in 2005 prevailed on appeal to the State Board, subsequently being awarded back pay covering the 1998-1999 through 2002-2003 school years – now contends that he was entitled to employment within the scope of his certification for the 2003-2004 through 2007-08 school years based on a Teacher of the Handicapped endorsement obtained in February 2002 during the litigation process, and that this cause of action did not arise until the Commissioner issued a final decision in September 2007 on the matter of his entitlement to back pay as a result of the State Board’s decision. *Albert Ziegler v. Board of Education of Bayonne*, Commissioner’s Decision No. 360-07R, decided September 17, 2007. Respondent Board argued that the petition was time barred.

The ALJ found that: the petitioner had notice of his tenure rights as of July 2005, when the State Board decided that he had been wrongfully terminated in 1999; petitioner should have known of the 2003 reduction in force (RIF) no later than August 2007 when the Initial Decision on Remand regarding back pay was issued; petitioner knew or should have known at that time that his rights could have been violated after the 2003 RIF with regard to his Teacher of the Handicapped endorsement, and that he would have had until November 2007 to file his appeal; and the instant petition was filed in December 2007 and is therefore untimely. The ALJ granted the respondent Board’s motion to dismiss the appeal.

The Commissioner adopted the Initial Decision of the OAL with modification, agreeing that the appeal must be dismissed as untimely filed, but finding that the petitioner had knowledge of the requisite facts to make his claim at the very latest by December 2006, when the respondent Board filed a brief in the prior proceeding on remand which clearly articulated its position that petitioner could not have been employed in the district after June 30, 2003 because all positions for which he was certified were either eliminated or held by more senior teachers.

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.

November 3, 2008

OAL DKT. NO. EDU 3007-08  
AGENCY DKT. NO. 384-12/07

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The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have petitioner’s exceptions and the reply/cross-exception of the Board of Education (Board) filed pursuant to *N.J.A.C.* 1-18.4 and 1-18.8.

In his exceptions, petitioner contends that the Administrative Law Judge (ALJ) erred in dismissing his appeal, reiterating his arguments to the effect that he had no cause of action until he received from the Commissioner a “favorable ruling on the extent of his employment in the first case between the parties,” any litigation prior to that time being groundless and purely speculative. (Petitioner’s Exceptions at 2-4, quotation at 3; see also Brief in Response to the Board’s Motion to Dismiss at 4–9) Petitioner also asserts that the Board is not alleging an inability to defend itself in this matter due to passage of time, and that the Board would suffer no more harm in being held liable for back salary at this point than it would have if petitioner’s claim had been filed sooner. (*Ibid.* at 1) Finally, petitioner objects to the ALJ’s failure to address the State Board of Education’s decision in *Darren Ressler v. Board of Education of the Township of Saddle Brook, Bergen County*, Decision No. 66-96,

decided February 4, 1998, which, according to petitioner, supports his position by establishing that until it is determined that a teacher should have been employed at the time of receiving an additional endorsement, that teacher has no claim to employment based upon it. (*Ibid.* at 4-5)

In reply, the Board likewise reiterates its arguments before the ALJ, stressing the applicability of the 90-day rule, the customary strictness of its enforcement, and the fact that the Commissioner has already recognized, at page 5 of her September 17, 2007 decision, that petitioner could have made the present claim during the prior proceeding, but did not. (Board's Reply at 1-5) The Board additionally rejects petitioner's reliance on *Ressler, supra*, asserting that 1) the State Board's decision does not speak to whether the statute of limitations commences only upon issuance of the Commissioner's decision; and 2) the State Board has elsewhere held that notice is adequate for purposes of triggering a limitations period where a petitioner has been alerted to the existence of facts which he or she has a right to know and the respondent has a duty to communicate, and which may equate in law with a cause of action. (*Ibid.* at 4-5, citing *Board of Education of the Gloucester County Institute of Technology v. Board of Education of the Lenape Regional High School District, Burlington County*, State Board Decision No. 6-00, decided August 2, 2000, affirming in pertinent part Commissioner's Decision No. 416-99, decided December 16, 1999, relying upon *Kaprow v. Bd. of Ed. of Berkeley Township*, 131 N.J. 572, 589 (1993))

On cross-exception, the Board further contends that – although correctly dismissing the petition as untimely filed – the ALJ erred in finding that petitioner's cause of action arose with the Initial Decision in the prior matter. According to the Board, petitioner was obliged to file any claim for reemployment within 90 days of the Board's failure – based on its position that there was no currently available teaching assignment for which petitioner was

qualified – to reinstate him following the July 6, 2005 decision of the State Board of Education finding him entitled to reemployment; in November 2005, the Board asserts, petitioner certainly knew he was not being reemployed and understood that he had a potential claim under his second endorsement, since he asked – as part of discovery in the prior proceeding – about persons employed by the Board as Teachers of the Handicapped as well as Industrial Arts Teachers, and in January 2006 received written confirmation of the tenure and seniority status of all teaching staff members who were teaching industrial arts, skilled trades and vocational-technical courses.” (Board’s Reply at 5-8, citing *Berlinda Love v. Board of Education of the City of Trenton, Mercer County*, Commissioner’s Decision No. 283-02, decided July 26, 2002)

Upon review, for the reasons and with the modification set forth below, the Commissioner concurs with the ALJ that petitioner’s appeal must be dismissed as untimely filed.

Without question, petitioner became entitled to reinstatement and back pay upon issuance of the State Board of Education’s July 6, 2005 decision finding that – notwithstanding the Commissioner’s December 22, 2003 decision to the contrary – he had been improperly dismissed from his tenured employment in 1999. At the time of the State Board’s ruling, such entitlement appeared limited to positions encompassed within the skilled trades endorsement held by petitioner at the time of his dismissal, since it is by now well established that the recall rights of tenured teaching staff members upon a reduction in force do not extend to endorsements acquired subsequent to the reduction – as is the case here with petitioner’s endorsement as Teacher of the Handicapped, which he acquired in February 2002. During the proceedings on remand directed by the State Board to ascertain the amount of back pay due petitioner, however, the Board took the position that petitioner was entitled to no pay after the end of the 2002-03 school year, since he could not have remained employed by the Board following a reorganization

during which the courses to which he could have been assigned under his skilled trades endorsement were either eliminated or assigned to more senior teachers – in effect, contending that, had petitioner continued in his position as the State Board found he should have, he would have been subject to a subsequent reduction in force that ended his employment with the district. Because petitioner had, by the time of such reduction, acquired his additional endorsement as Teacher of the Handicapped – the acquisition of which the Board was by this time well aware – this position was tantamount to a denial of any entitlement under petitioner’s second endorsement to positions held by nontenured teachers.

Under these circumstances, the Commissioner concurs with the ALJ that petitioner’s obligation with respect to the filing of any claim for the 2003-04, 2004-05, 2005-06 or 2006-07 school years arose upon his awareness that the Board considered his entitlement to any type of employment in the district to have ended after 2002-03. Like the ALJ, the Commissioner sees no need for petitioner, in order to make such a claim, to have awaited final adjudication of the back pay matter or a specific determination by the Commissioner that petitioner’s second endorsement could be implicated in vindicating the rights flowing from the State Board’s July 6, 2005 decision finding him entitled to employment and/or preferred eligibility from February 1999 onward.<sup>1</sup>

However, the Commissioner does not agree with the ALJ’s reckoning of petitioner’s cause of action from the August 2, 2007 Initial Decision in the prior matter and finds instead that petitioner had knowledge of the requisite facts to make his claim at the very latest on December 8, 2006 – the filing date of the Board’s brief in the prior proceeding on remand, which clearly and explicitly (at 16-18) articulated the Board’s position based upon a factual and

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<sup>1</sup> In this regard, the present matter is distinguishable from *Ressler, supra*, where the claimant had previously been found to have no entitlement to reemployment at all.

procedural record that was more than sufficient to give notice to petitioner that the Board might be violating his rights with respect to his second endorsement. Additionally, while the 2007-08 school year arguably presented petitioner with a new cause of action, the Board's failure to recall him for that year would have been apparent – quite apart from the Board's preceding actions and previously expressed position – well before the end of the 2006-07 school year. Thus, for all the years at issue in this matter, as ultimately concluded by the ALJ, an appeal filed on December 14, 2007 falls well beyond the 90-day limitation period established by rule.<sup>2</sup>

Accordingly, for the reasons set forth therein and above, the Commissioner adopts the Initial Decision of the OAL with modification, and dismisses the petition of appeal.

IT IS SO ORDERED.<sup>3</sup>

#### COMMISSIONER OF EDUCATION

Date of Decision: November 3, 2005

Date of Mailing: November 5, 2008

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<sup>2</sup> In so holding, the Commissioner finds in this matter no exceptional circumstance, compelling reason or other sufficient basis that would warrant exercise of her authority to relax the 90-day rule pursuant to *N.J.A.C.* 6A:3-1.16. As noted in *Nancy T. Snow v. Board of Education of the Township of Moorestown, Burlington County*, Commissioner's Decision No. 144-07, decided April 20, 2007, such authority is rarely invoked unless strict adherence to the rule would be inappropriate or unnecessary or would result in injustice, or where the Commissioner finds the presence of a substantial constitutional issue or other issue of fundamental public interest beyond that of concern only to the parties themselves. (Citing *Pacio v. Lakeland Regional High School District*, 1989 *S.L.D.* 2060, 2064; *DeMaio v. New Providence Board of Education*, 96 *N.J.A.R.* 2d [EDU] 449, 453.)

<sup>3</sup> This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, c. 36.