

CHRISTOPHER CONCATO, :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE : DECISION

RIVER DELL REGIONAL SCHOOL :
DISTRICT, BERGEN COUNTY, :

RESPONDENT. :

SYNOPSIS

In October 2016, the petitioner – a tenured industrial arts teacher employed in the respondent Board’s school district prior to a Reduction in Force (RIF) in May 2016 – filed an appeal contending that the Board violated his tenure and seniority rights when he was dismissed during the RIF, while three positions for which he is qualified were then filled by teachers with less seniority. The Board filed a motion to dismiss, contending that the petitioner’s appeal was untimely filed under *N.J.A.C. 6A:3-1.3(i)*. Petitioner opposed the motion, arguing that the ninety-day limitation period for the filing of an appeal should toll from September 2016, when he first became aware of the newly created positions which had been filled with less senior employees.

The ALJ found, *inter alia*, that: there are no material facts at issue here, and the matter is ripe for summary decision; the issue for determination here is what constitutes a “final order, ruling or other action” under the ninety-day rule; in this case, the Board asserted that the date petitioner was terminated by the RIF, on May 11, 2016, represents the final action from which the ninety-days must toll; this argument, however, is inconsistent with case law such as *Kaprow v. Board of Education of Berkeley Tp.*, 131 *N.J.* 572 (1993), which found that the tolling date was not the date of the RIF, but the later date upon which an individual was appointed to the position to which Kaprow claimed entitlement; here, the final action that serves as the basis for petitioner’s appeal is the assignment to three teachers to the disputed teaching positions, which occurred on June 7, 2016; the petition in this matter was not filed until October 12, 2016. The ALJ determined that the petition was filed outside of the limitations of the “90-day” rule. Accordingly, the Board’s motion to dismiss was granted.

Upon comprehensive review, the Commissioner found that: the ALJ erroneously dismissed the petition as time barred under *N.J.A.C. 6A:3-1.3(i)*; summary decision is not appropriate at this stage of the case because there are material facts in dispute as to when petitioner had adequate notice that teaching staff members with less seniority were assigned to positions that petitioner sought in the wake of the RIF. Accordingly, the matter was remanded to the OAL for further proceedings to allow a determination as to when the petitioner had the adequate notice contemplated by *Kaprow, supra*.

<p>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.</p>

December 18, 2018

CHRISTOPHER CONCATO, :
PETITIONER, :
V. : COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE : DECISION
RIVER DELL REGIONAL SCHOOL :
DISTRICT, BERGEN COUNTY, :
RESPONDENT. :

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, Christopher Concato, and the River Dell Board of Education’s (Board) reply thereto.¹ In this matter, the petitioner alleges that his tenure and seniority rights were violated when he was dismissed due to a reduction in force while three teaching positions were filled by individuals with less seniority. The Administrative Law Judge (ALJ) found that the petition of appeal was untimely filed under *N.J.A.C.* 6A:3-1.3(i), and as a result, the ALJ granted the Board’s motion to dismiss.

In his exceptions, the petitioner maintains that the ALJ erroneously granted the Board’s motion to dismiss. The petitioner contends that the ALJ rightfully concluded that “in determining when the ninety-day rule begins to accrue, it is necessary to consider when the final action of the respondent occurred and when the petitioner received adequate notice of that action.” However, the ALJ’s determination of the trigger date in this instance is flawed, unreasonable and unsupported by the evidence in the record. The ALJ found that an email that was sent to the “HS Teaching Staff @ River Dell High School” on June 6, 2016, stating that the teaching schedule for

¹ The petitioner filed a reply to the Board’s reply exceptions. *N.J.A.C.* 1:1-18.4 does not allow for a reply to reply exceptions, therefore, the petitioner’s submission was not considered.

the 2016-2017 school year would be available on June 7, 2016, provided notice to the petitioner that the Board had assigned three teachers to positions that were contested by the petitioner. The petitioner emphasizes that at the time the June 6, 2016 email was sent to the River Dell High School staff and faculty, the petitioner was a teacher at the middle school and there is no evidence that this information was sent to the middle school teachers. Petitioner has stated in his certification that he did not receive any communication from the Board regarding the assignments and it was not until the beginning of the school year in September 2016 that he learned that there were less senior, tenured staff assigned to teach new classes that he was entitled to teach. Thereafter, the petitioner timely filed the petition of appeal on October 12, 2016, well within the ninety-day time requirement.

Petitioner stresses that *N.J.A.C. 1:1-12.5(b)* states that summary disposition is only appropriate when there is no issue of material fact challenged and the moving party should prevail as a matter of law. Further, the ALJ is required to view the competent evidence in the light most favorable to the non-moving party. *Brill v. Guardian Life Insurance Co.*, 142 N.J. 520, 539-40 (1995). Here, the petitioner's certification reveals that he had no knowledge of the June 6, 2016 email and related assignments: he had no way of knowing which staff accepted positions, or whether the other staff had less seniority than he did, until his own investigation in September 2016. As such, the ALJ erred when he accepted the facts outlined in the Board's motion to dismiss without any further hearing. The petitioner also contends that where there is a reduction of force (RIF) and the potential entitlement to future positions, the trigger date for purposes of the 90-day rule does not commence on the date of the RIF, but instead, when the petitioner becomes aware of the newly created positions and the appointment of someone else to those positions. Therefore, the Initial Decision should be rejected and the material facts that remain unresolved

regarding what notice the petitioner received – and the sufficiency of the notice – should be resolved at a hearing so that all the issues in this case can be fairly adjudicated.

In reply, the Board argues that the material facts indisputably demonstrate that the petitioner's claim was filed outside the ninety-day limitation period, and therefore the ALJ properly concluded that the Board's motion to dismiss should be granted. In his exceptions the petitioner contends that his certification states that "he did not receive any communication from the Board regarding these assignments;" however, that is not accurate. Instead, the petitioner's certification simply avers that in mid-September he learned for the first time that non-tenured and less senior tenured staff were assigned to the new classes. The facts clearly establish that the assistant principal of the River Dell Regional High School notified the teaching staff on June 6, 2016 that the schedules for the 2016-2017 school year would be available the next day. Even though the petitioner was a teacher in the middle school, the master teaching schedule for all teachers in the District was available on June 7, 2016 for any teacher to review at any time in the main office. The petitioner should have known at that point which teachers were assigned to teach courses which he claimed an entitlement to teach.

Furthermore, the petitioner's union representative who was investigating facts relative to the petitioner's tenure and seniority claims engaged in communications with the District's Superintendent. Specifically, on July 6, 2016, the Superintendent provided petitioner's union representative with the Board resolution approving the courses in dispute and the teachers assigned to teach those courses during the 2016-2017 school year. Thus, the petitioner had notice and knowledge of the information provided to his union representative, and he should have at least filed his petition within ninety days after receipt of the requisite notice on July 6, 2016, but he failed to do so. The petitioner's claim that he did not possess the necessary information upon which to base a claim until September 2016 is also inconsistent with his action the prior school

year, when he filed a petition challenging the Board's decision to reduce him from a full-time teaching position to a part-time teaching position. Within 10 days after petitioner received notice of the 2015 RIF, he filed a petition of appeal challenging the Board's action and asserted his entitlement to teach 22 courses.² Finally, the Board maintains that the cases cited by the petitioner in his exceptions do not stand for the premise for which they are asserted. Therefore, the Board argues that the Initial Decision should be adopted as the final decision in this matter.

Upon a comprehensive review of the record, the Commissioner finds that the ALJ erroneously dismissed the petition of appeal as time barred under *N.J.A.C.* 6A:3-1.3(i). Pursuant to *N.J.A.C.* 1:1-12.5(b), a motion for summary decision³ may be granted if the papers and discovery, together with any supporting affidavits, show there is no genuine issue of material fact and that the moving party is entitled to prevail as a matter of law. A determination regarding 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 disputed issue in favor of the non-moving party. *Brill, supra*, 142 *N.J.* at 529. The Commissioner finds summary decision is not appropriate at this stage of the case because there are material facts in dispute as to when the petitioner had adequate notice that the newly created classes were assigned to teaching staff members with less seniority.

Under *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

² The other matter referenced in the Board's exceptions is *Christopher Concato v. Board of Educ. of the River Dell Regional School District, Bergen County*, Commissioner Decision No. 54-17 (decided February 13, 2017), *aff'd*. Appellate Division (August 14, 2018).

³ The same standard is applied in administrative proceedings for a motion to dismiss and a motion for summary decision. Both motions seek to resolve a case without a plenary hearing.

hearing.” Guidance as to what constitutes notice sufficient to trigger the running of this regulatory provision was provided by the Supreme Court in *Kaprow v. Board of Education of Berkeley Tp.*, 131 N.J. 572 (1993). The “notice of a final order, ruling or other action” of the Board contemplated by the rule 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* at 587.

In this case, the ALJ determined that the petitioner had adequate notice of the Board’s final action on June 7, 2016, and therefore the October 12, 2016 petition of appeal was filed outside the 90-day limitations period. The ALJ found – based upon an email sent from the assistant principal of the River Dell High School to high school staff on June 6, 2016 – that the petitioner had notice on June 7, 2016 of the assignment of teaching staff to the newly created positions. The June 6, 2016 email provided notification that the teaching schedule for the 2016-2017 school year would be available on June 7, 2016. Importantly, at the time of the email, the petitioner was not a teaching staff member at the high school; rather, petitioner was a middle school teacher. Moreover, the Board presented no evidence to indicate: that middle school teachers also received the email; that the petitioner ever received the email; or that the petitioner was aware that the master teaching schedule was available on June 7, 2016.

The Board also maintains that the petitioner’s union representative and the Superintendent exchanged emails in June and early July of 2016 regarding the newly created positions, and that this exchange provided the petitioner with sufficient notice to trigger the limitations period. Again, based upon the evidence submitted by the Board with the motion to dismiss, there is no definitive indication as to whether the union representative was acquiring information on the petitioner’s behalf or whether the union representative provided the petitioner with any notice of the exchange. On the other hand, in response to the Board’s motion to dismiss,

the petitioner submitted a certification stating that in mid-September 2016, he learned for the first time that less senior tenured staff were assigned to newly created classes that the petitioner claims he is eligible to teach. When viewing the competent evidentiary material in the light most favorable to the petitioner, the non-moving party, it cannot be found that the petitioner had the requisite notice of the Board's action in June 2016. Based on the limited information presented in connection with the motion to dismiss, petitioner's certification was uncontroverted. Therefore, before this matter can be dismissed on procedural grounds, the record needs to be further developed to determine when the petitioner had the adequate notice contemplated by *Kaprow, supra*, that the newly created classes were assigned to less senior teaching staff members.⁴

Accordingly, the Commissioner hereby remands this matter to the OAL for further proceedings consistent with the concerns set forth above.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: December 18, 2018

Date of Mailing: December 18, 2018

⁴ The Commissioner is in accord with the ALJ's conclusion that the tolling date in this matter is not the date of the RIF as the Board's action that is being challenged is the violation of the petitioner's tenure and seniority rights through the appointment of less tenured staff members to positions that the petitioner alleges he is entitled to.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 16480-16

AGENCY DKT. NO. 276-10/16

CHRISTOPHER CONCATO,

Petitioner,

v.

RIVER DELL REGIONAL SCHOOL DISTRICT

BOARD OF EDUCATION BERGEN COUNTY,

Respondent.

Alfred F. Maurice, Esq., for Petitioner (Springstead & Maurice, attorneys)

Rodney T. Hara, Esq., for Respondent (Fogarty & Hara, attorneys)

Record Closed: August 20, 2018

Decided: September 21, 2018

Before: **LELAND S. MCGEE**, ALJ (Ret., on recall):

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Christopher Concato (Petitioner or Concato) was a teacher employed by the River Dell Regional Board of Education (Respondent or the Board). Answering Certification of Christopher Concato (Pet'r Cert.) ¶ 2. Concato holds several teaching certifications, including the relevant certification for teacher of industrial arts. Id. at ¶ 6. He has worked

for the River Dell Board since February 25, 2002, as an industrial arts teacher and he eventually received tenure and began accruing seniority. Id. at ¶¶ 5, 8.

On October 12, 2016, he filed an appeal to the Commissioner, arguing that his tenure and seniority rights were violated when he was dismissed due to a reduction in force (RIF) while three teaching positions were filled by individuals with less seniority. Id. at ¶ 5. On May 10, 2016, the Board passed a Resolution abolishing twenty percent of the industrial arts teachers at River Dell Middle School effective July 1, 2016. Certification of Patrick J. Fletcher in Support of Respondent's Motion to Dismiss Petition of Appeal (Fletcher Cert.) ¶ 16.

Patrick J. Fletcher (Fletcher), the Superintendent of Schools for the River Dell Regional School District, stated that the classes in controversy are cyber-education classes named Computer Systems and Networking and SUPA Cyber Security, and they were created at a board meeting on November 16, 2015. Supplemental Certification of Patrick J. Fletcher in Support of Respondent's Motion to Dismiss Petition of Appeal (Supplemental Fletcher Certification) ¶¶ 6, 7. Those classes required assigned teachers to have a certification in science and mathematics respectively. Id. at ¶ 9. The creation of those classes was published during the public River Dell Board meeting on November 16, 2015, and the positions were posted on the publicly accessible River Dell District website on February 9, 2016. Id. at ¶¶ 8, 10. Later, on June 7, 2016, three tenured teachers holding the required certifications were assigned to those positions, and those assignments were disseminated via email to all faculty. Id. at 7:21. Fletcher also provided documentation of these classes and the teachers who filled them to Raymond E. Skorka (Skorka) who is Concato's field representative for the New Jersey Education Association. Ibid.

Concato states that he first discovered that the positions had been created in the summer of 2016. Concato Certification ¶ 4. He discovered which teachers had been assigned to those classes in September 2016. Id. at ¶ 5. Thereafter, on October 12, 2016, that discovery, Concato filed his appeal. On October 26, 2016, the matter was transmitted to the Office of Administrative Law (OAL) pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13, where it was filed on October 28, 2016.

On April 12, 2017, Respondent filed this Motion to Dismiss and on April 27, 2017, Petitioner filed an Answer to the Motion. On May 11, 2017, Respondent filed a Reply to the Answer and on August 14, 2018, submitted supplemental information in support of his position.

ARGUMENTS

The Board seeks dismissal of Petitioner's appeal pursuant to N.J.A.C. 6A:3-1.3(i), which states that any appeals must be filed within ninety days of the final order, ruling or action that gives rise to the petition. In determining when the ninety-day rule begins tolling, the River Dell Board argues that "it begins to run when a petitioner learns of facts that would enable him or her to file a timely claim." Br. in Supp. of Resp't Mot. to Dismiss Pet. of Appeal (Resp't Br.) at 11 (citing Kaprow v. Bd. of Educ. of Berkeley Twp., 131 N.J. 572, 588-89 (1993) (motion to dismiss granted because petitioner filed appeal five months after receiving notice)). Respondent also argues that "informal awareness of adverse action" is sufficient to fulfill the ninety-day rule's notice requirement. Mazzeo v. Bd. of Educ. of Twp. of Barnegat, EDU 4561-05, Initial Decision (August 18, 2005), modified, Comm'r (September 29, 2005), <http://njlaw.rutgers.edu/collections/oal/>.

The Board goes further, arguing that the 90-day rule has been adhered to strictly and that exceptions occur only when the petitioner can "identify any substantial constitutional issue or fundamental public interest beyond that of concern to petitioners themselves." E.G.M. ex rel. J.M. v. Bd. of Educ. of Mahwah, EDU 02119-13 (April 9, 2013), adopted, (Comm. Ed. May 21, 2013), <http://njlaw.rutgers.edu/collections/oal/>.

Finally, Respondent argues that the ninety-day rule begins to accrue at the time of the "initial action" suggesting that the date of the initial action is the date that Concato was notified of the RIF. Id. at 22 (citing Meyer v. Wayne Twp. Db. of Educ., 1984 S.L.D. 1849, rev'd, 1986 S.L.D. 3094, 3099 (St. Bd. March 5. 1986), aff'd, (App. Div. September 24, 1987)).

In his Answer, Concato argues that the ninety days should begin tolling when “he first became aware of the newly created position and the appointment of someone else to it.” Br. in Supp. of Pet’r Answer to Resp’t Mot. to Dismiss (Pet’r Br.) 4 (citing Gordon v Bd. of Educ. of the Twp. of Passaic, 1985 S.L.D. 1929, St. Bd. (March 6, 1985)). More specifically, he suggests that the final action taken by the River Dell Board was the appointment of individuals who are less entitled to the position. Id. at 5 (citing Beshaw v. Bd. of Educ. of Borough of Oakland, A-3958-97T5, slip op. at 4 (App. Div. Mar. 23, 1999)). Because he had no actual knowledge of the appointments until September 2016, Concato argues that petition he filed on October 12, 2016, is well within the 90-day limit. Id. at *9.

Furthermore, Concato argues that the Board should have provided him with notification that the positions were available pursuant to N.J.S.A. 18A:28-12., which he asserts should have been sent to him.

In response, the Board argues that by any calculation of the tolling date established by the facts, Concato’s petition falls outside of the ninety-day rule, and they provide evidence demonstrating that the classes had been created on November 16, 2015; and were published on the school website on February 9, 2016. Resp’t Reply Br. to Pet’r Answer to Resp’t Mot. to Dismiss (Resp’t Reply Br.) 13-14; Supplemental Fletcher Certification ¶ 13. Respondent argues that because these dates happened prior to Concato’s RIF, the tolling date should be May 11, 2016. Resp’t Reply Br. 15-16. Furthermore, Respondent provided documents regarding the classes and the teachers who filled them to Skorka on June 6, 2016, is additional notice that places Concato’s application beyond the limit. Id. at 17.

DISCUSSION

Defining “final order, ruling or other action”

The ninety-day rule reads that:

The 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. This rule shall not apply in instances where a specific statute, regulation or court order provides for a period of limitation shorter than 90 days for the filing of a particular type of appeal.

[N.J.A.C. 6A:3-1.3(i).]

In calculating the limitations period under the ninety-day rule, the focus is on “the date of the employer’s wrongful act as the accrual date for a cause of action,” not “the date on which the consequences of the act [are] directly felt by the employee.” Nissman v. Bd. of Educ. of Long Beach Island, 272 N.J. Super. 373, 381 (App. Div. 1994). In Nissman, on April 23, 1990, the Board of Education of the Township of Long Beach Island decided that Nissman’s contract would end on August 31, 1990. Id. at 375. The Appellate Division affirmed the State Board of Education’s holding that the ninety-day period began to run on the date of the decision not on the date the contract ultimately expired. Id. at 382.

Kaprow provides another example of a final action that is analogous to the instant case. Kaprow was the only tenured assistant superintendent in the school district when he was affected by a RIF on June 31, 1981. Kaprow, 131 N.J. at 576. On February 23, 1988, Kaprow became aware that, in violation of his tenure rights, two assistant superintendent positions had been filled by other individuals on September 9, 1986, and July 1, 1987. Id. at 577. Kaprow filed a petition on August 1, 1988, to assert those rights after failing to reach a settlement during negotiations with the district. Id. at 578. The Supreme Court of New Jersey found that the final action of the State Board was the appointment of nontenured individuals to the positions the petitioner was claiming. Id. at 588.

Furthermore, both actions and omissions by the Board may begin the tolling of the 90 days. Mazzeo, EDU 4561-05. In Mazzeo, the petitioner filed to enforce a prior ruling reinstating her to principal that was issued on December 23, 2004. Ibid. The Commissioner of Education determined that the respondent likely received the order on January 3, 2005, and their subsequent failure to reinstate the petitioner “on or about that date” was the final action that triggered the ninety-day rule. Ibid.

Applying these standards in the instant case, it is possible to determine which actions by the River Dell Board should be considered the final action for the purpose of Concato's petition. The River Dell Board asserted that the date Concato was terminated by the RIF on May 11, 2016, was the focus of the controversy. Resp't Br. 22. However, this is inconsistent with case law, such as Kaprow, which determined that the tolling dates were later alleged violations of tenure and seniority rather than the date of the RIF. Specifically, Kaprow cited the appointment of the individual to the position, not the creation and subsequent failure to appoint the petitioner to those positions as the action that violated Kaprow's tenure. Kaprow, 131 N.J. at 588. Rather, the final action that serves as the basis for Concato's petition is the assignment of the three teachers to the disputed teaching positions, which occurred on June 7, 2016. Supplemental Fletcher Certification 7:21.

Defining Notice

To satisfy the statute, the notice required by the regulation:

must be 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. See Burns v. West Am. Corp., 137 N.J. Super. 442, 446 (Dist. Ct. 1975). Moreover, adequate notice under the regulation must be sufficient to further the purpose of the ninety-day limitations period. See Apex Roofing Supply Co. v. Howell, 59 N.J. Super. 462, 467 (App. Div. 1960). A limitations period has two purposes. The first 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. Ochs v. Fed. Ins. Co., 90 N.J. 108, 112 (1982). The second purpose is "to penalize dilatoriness and serve as a measure of repose" by giving security and stability to human affairs. Ibid. (quoting Farrell v. Votator Div., 62 N.J. 111, 115 (1973)).

[Kaprow, 131 N.J. at 587.]

In Kaprow, the Court found that the ninety-day rule did not begin tolling until the petitioner received informal information regarding those positions and their appointees,

and the Court refused to establish a higher notice standard. Id. at 588-89. Kaprow's claim was found to be outside the ninety-day limit. Id. at 589.

Providing a more concrete example, the Appellate Division, affirming decisions by the OAL and the State Board, found that an announcement made during a faculty meeting regarding the appointments to contested positions was considered adequate notice to begin the ninety-day rule. Beshaw, A-3958-97T5, slip op. at 4. Beshaw, after she had been affected by a RIF, filed a petition on January 19, 1996, claiming that the Oakland Board of Education violated her tenure rights by assigning non-tenured teachers to two classes. Id. at 1-2. The OAL dismissed her claim, finding that the meeting, which took place on September 5, 1995, provided adequate notice, and the Appellate Division agreed, finding that Beshaw was "provided sufficient information to alert [her] as to her qualifications to teach the courses." Id. at 5. Furthermore, the Appellate Division found that using the faculty meeting as the tolling date provided for "the necessity for repose in administering school affairs" as required in the wake of Kaprow. Id. at 4.

In the case at bar, on June 7, 2016, the assignment of the three teachers to the contested classes were announced to all teachers via an email that included the full teaching schedule for the 2016-2017 academic year. Supplemental Fletcher Certification ¶21. That email acts as an analogue to the faculty announcement in Beshaw and should be considered sufficient notice for beginning the ninety-day limit.

Concato asserts that actual knowledge is required for the ninety-day limit to begin tolling. Pet'r Br. 9. However, there is little support for this assertion in law. The regulation simply requires "notice," and per Kaprow, that notice need not be formal. Kaprow, 131 N.J. at 588.

Relaxing the 90-day rule

There are times where the ninety-day rule may be relaxed. In particular, the limit may be extended in "cases involving (1) important and novel constitutional questions; (2) informal or ex parte determinations of legal questions by administrative officials; and (3) important public rather than private interests which require adjudication or clarification."

Brunetti v. Borough of New Milford, 68 N.J. 576, 586 (1975). Concato does not attempt to argue that his case requires an extension under any of these grounds, and as such, there is no reason to consider relaxing the ninety-day rule in this case.

Summary Decision

Under the New Jersey Uniform Administrative Procedure Rules, a party may move for summary decision regarding all or any substantive issues in a case. N.J.A.C. 1:1-12.5(a). Motions for summary decision may be granted if the papers and discovery, together with any supporting affidavits, show there is no genuine issue of material fact and that the moving party is entitled to prevail as a matter of law. N.J.A.C. 1:1-12.5(b). A motion for summary decision is almost identical to the standard used for summary judgment under the New Jersey Rules of Court, which provides that summary judgment should be granted 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 judgment or order as a matter of law. An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences there from favoring the non-moving party, would require submission of the issue to the trier of fact.

[R. 4:46-2(c).]

In Brill v. Guardian Life Insurance Company of America, 142 N.J. 520, 536 (1995), the New Jersey Supreme Court further refined the standard for summary decision with this analysis: “whether the evidence presents a sufficient disagreement to require [a hearing] or whether it is so one-sided that one party must prevail as a matter of law.” Thus, a court should deny a motion for summary judgment only where the party opposing the motion has come forward with evidence that creates a genuine issue of material fact. Id. at 529. The Brill Court stated:

A determination whether there exists a “genuine issue” of material fact that precludes summary judgment requires the motion 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 alleged disputed issue in favor of the non-moving party. 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.’

[Id. at 540 (quoting Anderson v. Liberty Lobby, 477 U.S. 242, 251-52 (1986)).]

The Brill standard contemplates that the analysis performed by the trial judge in determining whether to grant summary judgment should comprehend the evidentiary standard to be applied to the case or issue if it went to trial. “To send a case to trial, knowing that a rational jury can reach but one conclusion, is indeed worthless and will serve no useful purpose.” Brill, 142 N.J. at 541.

For a party opposing summary decision to prevail, that party must file a responding affidavit setting forth specific facts demonstrating the existence of a genuine issue that can only be determined by an evidentiary proceeding. Ibid. The opposing party must demonstrate, moreover, that the disputed issue of fact is material to the adjudication. See Frank v. Ivy Club, 120 N.J. 73, 98 (1990). The genuinely disputed material fact must be essential to the decision in the case. Ibid. In addition, the opposing party must establish the issue with competent evidential materials. Robbins v. Jersey City, 23 N.J. 229, 240-41 (1957). “Bald allegations or naked conclusions” are insufficient to warrant an evidentiary hearing. J.D. ex rel. D.D.H. v. N.J. Div. of Developmental Disabilities, 329 N.J. Super. 516, 525 (App. Div. 2000). If the opposing party fails to raise a material factual issue with competent proofs, then the issue should be resolved on summary decision. Frank, 120 N.J. at 98-99.

A contested case can be summarily disposed of before an ALJ without a plenary hearing in instances where the undisputed material facts indicate that a particular disposition is required as a matter of law. In re Robros Recycling Corp., 226 N.J. Super. 343, 350 (App. Div.), certif. denied, 113 N.J. 638 (1988). A summary decision must be based on an examination of the totality of circumstances, mitigating and aggravating factors, adequate factual findings and conclusions of law. Ibid.

CONCLUSION

In determining when the ninety-day rule begins to accrue, it is necessary to consider when the final action of the respondent occurred and when the petitioner received adequate notice of that action. In the instant case, the date for both the action and notice is the same. On June 7, 2016, the River Dell Board assigned three teachers to the positions that are contested by Concato. Supplemental Fletcher Certification ¶ 21. However, Concato did not file his petition until October 12, 2016. Concato Certification ¶ 5. That filing occurred 127 days after the date of action and notice, placing Concato's petition outside of the ninety-day time limit by 37 days and therefore barring Concato from pursuing relief in this action.

For the foregoing reasons I **CONCLUDE** that Respondent's Motion to Dismiss should be granted because Petitioner's claim was filed outside of the limitations of the "90-day" rule.

ORDER

For the foregoing reasons it is hereby **ORDERED** that Respondent's Motion to Dismiss is hereby **GRANTED**.

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 21, 2018
DATE



LELAND S. MCGEE, ALJ

Date Received at Agency:

September 21, 2018

Date Mailed to Parties:
LSM/lr
