

New Jersey Commissioner of Education

Final Decision

Pablo Olivera,

Petitioner,

v.

Board of Education of the City of Newark,

Essex County,

Respondent.

Synopsis

Petitioner – a tenured teacher – challenged the respondent Board’s withholding of his salary increment for the 2022-2023 school year. Petitioner had received a summative performance evaluation with a rating of “ineffective” in June 2022. The Board subsequently notified petitioner, by letter dated June 22, 2022, that his salary increment would be withheld for the following school year due to “inefficiency”. On September 22, 2022, the Newark Teachers Union filed a grievance on behalf of petitioner, which the Board denied on December 7, 2022. Petitioner filed the within appeal with the Commissioner on March 3, 2023. The Board filed a motion to dismiss in lieu of an answer.

The ALJ found, *inter alia*, that: petitioner’s appeal was not filed within 90 days of the Board’s decision as required by *N.J.A.C. 6A:3-1.3(i)*; the Board’s letter notifying petitioner of his increment withholding, dated June 22, 2022, provided adequate notice of petitioner’s right to file a petition with the Commissioner as it informed him that the Board had taken action, described that action, and clearly stated that the petitioner’s inefficiency was the reason for the action; petitioner’s argument that the denial of his grievance in December 2022 should trigger the 90-day rule is without merit as case law indicates that the filing of a grievance does not toll the limitations period under *N.J.A.C. 6A:3-1.3(i)*; and the circumstances of this case do not warrant relaxation of the 90-day rule. Accordingly, the ALJ granted the Board’s motion to dismiss the petition.

Upon review, the Commissioner, *inter alia*, concurred with the ALJ’s findings and conclusions and adopted the Initial Decision as the final decision in this matter. In so doing, the Commissioner found unavailing the petitioner’s argument that he was not aware that his work performance was the sole reason his increment was withheld, as he had received an evaluation of “ineffective” shortly before receiving notice from the Board that he would not receive a salary increment for 2022-2023. The petition of appeal 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.

208-23
OAL Dkt. No. 02749-23
Agency Dkt. No. 56-3/23

New Jersey Commissioner of Education

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Board of Education of the City of Newark,
Essex County,

Respondent.

The record of this matter, the Initial Decision of the Office of Administrative Law (OAL), and the exceptions filed by petitioner pursuant to *N.J.A.C. 1:1-18.4* have been reviewed and considered.¹

On June 22, 2022, the Newark Board of Education (Board) notified petitioner that his salary increment would be withheld for the 2022-2023 school year. On September 22, 2022, the Newark Teachers Union filed a grievance on behalf of petitioner, which the Board denied on December 7, 2022. Petitioner filed a petition of appeal with the Commissioner on March 3, 2023. The Administrative Law Judge (ALJ) granted the Board's motion to dismiss, concluding that the petition was not filed within 90 days of the Board's decision as required by *N.J.A.C. 6A:3-1.3(i)*. The ALJ found that the June 22, 2022 letter provided adequate notice of petitioner's right to file a petition with the Commissioner because it informed petitioner that the Board took action, described the action, and clearly stated the reason for the action as petitioner's inefficiency. The

¹ Respondent's reply to petitioner's exceptions was not timely filed and was therefore not considered.

ALJ rejected petitioner's argument that the denial of his grievance should trigger the 90-day rule, citing to case law indicating that the filing of a grievance does not toll the limitations period. Finally, the ALJ found that the circumstances did not warrant relaxation of the 90-day rule.

In his exceptions, petitioner argues that the June 22, 2022 letter failed to provide him with adequate notice of his rights under the law. Petitioner takes issue with the fact that the letter did not inform him of his right to appeal to the Commissioner or that such an appeal was his sole recourse to challenge the withholding of his increment. Petitioner contends that he reasonably believed that the Board considered disciplinary factors beyond the quality of his work performance and that the June 22 letter was not sufficiently informative to dispel this notion. According to petitioner, it was not until he received the December 7, 2022 letter that he was notified by the Board that his increment was withheld for ineffective work performance pursuant to *N.J.S.A. 18A:29-14*. Petitioner argues that the ALJ improperly concluded that the June 22 letter in no way suggested that there might have been another reason for the increment withholding, because "inefficiency" is a vague term subject to multiple interpretations.

Upon review, the Commissioner concurs with the ALJ that the June 22 letter provided adequate notice to petitioner and triggered the start of the 90-day limitations period. While petitioner argues that he was unaware that his work performance was the sole cause of his increment being withheld, he was or should have been well aware that his work performance was an issue for the Board, because he had received an evaluation of "ineffective" shortly before receiving the June 22 letter regarding his increment.² If petitioner believed that discipline may have

² The Commissioner notes that petitioner has not provided any certification or testimony regarding what facts he was aware of or what he believed at the time he received the June 22 letter. The petition of appeal, which includes a verification signed by petitioner that the facts contained therein are true to the best of his knowledge, does not include any representations related to this issue. And, while petitioner's lack of awareness was an argument made in his opposition to the Board's motion to dismiss, that filing contains no certification from

been the true reason for his increment being withheld, he could have pursued that claim before the Public Employee Relations Commission (PERC). Notably, *N.J.A.C. 6A:3-1.3(i)* specifically provides that when an increment withholding dispute has been submitted to PERC for a determination of whether the withholding was predominantly disciplinary in nature and PERC determines that it was predominantly for reasons of teaching performance, the teacher must file a petition of appeal with the Commissioner within 90 days of PERC's decision. This rule acknowledges that proceedings before PERC and the Commissioner may be related and provides a reasonable and appropriate timeline for petitioners to navigate the two avenues for seeking relief. If petitioner had pursued a claim with PERC, he could have 1) obtained a decision that the withholding was predominantly disciplinary, as he allegedly believed, and therefore been in the right forum to pursue his challenge or 2) obtained a decision that the withholding was predominantly for reasons of teaching performance, in which case he would have had 90 days from the date of that decision to appeal to the Commissioner. But petitioner failed to pursue a PERC claim, and he cannot now avoid the consequences of his strategy by circumventing the 90-day rule.

Petitioner's reliance on *T.W., on behalf of M.W. v. Bd. of Educ. of the Freehold Regional High School District*, EDU 11522-18, Initial Decision (Feb. 14, 2019), *adopted*, Commissioner Decision No. 81-19 (Mar. 27, 2019) is misplaced. In *T.W.*, petitioner contacted the Interim Executive County Superintendent (ECS) when her child's guidance counselors indicated that he could not attend a program at Mercer County Technical Schools (MCTS). The ECS responded and indicated that

petitioner. The certification by petitioner's attorney – which itself verges on argument rather than being a straightforward recitation of facts – is insufficient to determine petitioner's awareness or understanding. However, even accepting for purposes of this decision that petitioner believed the withholding was disciplinary in nature, the Commissioner's conclusion does not change.

Freehold Regional would not be required to pay tuition for M.W.'s attendance at MCTS.³ Freehold Regional's Director of Guidance and Operations later issued a letter that "serve[d] as formal notice" that the district would not pay tuition. The ALJ concluded that the letter from the ECS was not the triggering event for the start of the 90-day timeline. Perhaps based on his misunderstanding that the earlier letter was sent by the district's superintendent rather than the ECS, petitioner contends that his situation is analogous to that of *T.W.*, and that the more formal December 7 letter, not the June 22 letter, is the triggering event for the limitations period. However, these cases are not analogous. In *T.W.*, the letter from the ECS was not a decision by the board of education that could trigger the start of the limitations period. Here, the June 22 letter was a decision by the Board.

Petitioner's reliance on *Salaam v. Bd. of Educ. of the City of Irvington*, EDU 13483-10, Initial Decision (May 16, 2012), *adopted*, Commissioner Decision No. 264-12 (June 25, 2012) is similarly misplaced. In *Salaam*, the petitioner sent the board of education a request for reimbursement of legal fees. Receiving no response from the board, petitioner filed a petition of appeal, which the board moved to dismiss because it was filed five months after the criminal charges for which reimbursement was sought had been dismissed. The ALJ concluded that there was no violation of the 90-day rule, because the board had failed to respond to the demand letter. Here, petitioner attempts to analogize the *Salaam* demand letter to a letter sent by petitioner's attorney to the Board on August 11, 2022, inviting the Board to negotiate a settlement and indicating that an Unfair Labor Practice claim would otherwise be filed. However, these cases are not analogous. The board of education's failure to respond to the demand letter in *Salaam* meant that there was no decision by the board that triggered the commencement of the 90-day timeline. Without that triggering

³ Petitioner's exceptions refer to this letter as being from "the superintendent," apparently meaning the superintendent of the school district. However, an ECS is an employee of the Department of Education, not any local school district.

event, the petition of appeal was not untimely. Here, the Board had made its decision to withhold petitioner's increment and communicated that decision to petitioner. Therefore, the event triggering the running of the limitations period had occurred.

As the ALJ noted, neither petitioner's attempt to negotiate with the Board nor his filing of a grievance⁴ toll the 90-day limitations period. *Giannetta v. Bd. of Educ. of Egg Harbor*, Commissioner Decision 147-05 (April 25, 2005); *Kenny v. Bd. of Educ. of the Borough of Moonachie*, EDU 9284-17, Initial Decision (Aug. 17, 2017), *adopted*, Commissioner Decision No. 286-17 (Sept. 27, 2017). The Commissioner also agrees with the ALJ that there are no circumstances present that warrant the relaxation of the 90-day rule.

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

IT IS SO ORDERED.⁵


ANGELINA ALLEN McMILLAN, Jd.S.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: July 12, 2023
Date of Mailing: July 13, 2023

⁴ The Commissioner notes that September 22, 2022, is 92 days after June 22, 2022, such that even the grievance was untimely.

⁵ This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A. 18A:6-9.1*. Under *N.J.Ct.R. 2:4-1(b)*, a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

DISMISSING THE PETITION

OAL DKT. NO. EDU 02749-2023

AGENCY DKT. NO. 56-3/23

PABLO OLIVERA,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY

OF NEWARK, ESSEX COUNTY,

Respondent.

Nicholas Poberezhsky, Esq., for petitioner (Caruso Smith Picini, attorneys)

John J.D. Burke, Esq., for respondent (Antonelli, Kantor, Rivera, attorneys)

Record Closed: April 19, 2023

Decided: June 2, 2023

BEFORE **SUSANA E. GUERRERO, ALJ:**

STATEMENT OF THE CASE

Petitioner Pablo Olivera (Olivera or petitioner), teacher employed by the Board of Education of the City of Newark (the Board or respondent), challenges the withholding of his salary increment for the 2022–2023 school year. Respondent filed a motion to dismiss in lieu of an Answer.

PROCEDURAL HISTORY

Petitioner filed a Petition of Appeal with the Commissioner of Education on or around March 3, 2023, and the Commissioner transmitted the matter to the Office of Administrative Law, where it was filed as a contested case on March 24, 2023. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13.

A prehearing conference was held on April 12, 2023, approximately two days after the petitioner filed an opposition to the respondent's motion to dismiss. Respondent filed a reply to the opposition on April 19, 2023.

FINDINGS OF FACT

Based on the submissions presented, and the uncontroverted background facts, I **FIND** the following **FACTS**:

Olivera is a tenured teacher who has been employed by the Board for approximately twenty-five years. In or around June 2022, Olivera received an "ineffective" summative evaluation rating. On or around June 22, 2022, the Board notified Olivera that his salary increment would be withheld for the 2022–23 school year due to "inefficiency."

On or about August 11, 2022, Olivera's attorney submitted a letter of representation to the Board's Senior Associate Counsel informing that he had been retained to file an Unfair Labor Practice (ULP) claim with the Public Employment Relations Commission (PERC) against the Board to appeal the withholding of the salary increment. In the letter, counsel asserts that Olivera was in fact effective, that the Board lacked just cause to impose this discipline, that the Board failed to provide the necessary support, that he was "set up to fail," and that Olivera was retaliated against by being involuntarily transferred. Counsel for Olivera indicated: "If you believe that there is a reasonable possibility of settling this matter via a reduction of the discipline imposed against Mr. Olivera, please call my cell . . . at your earliest convenience. Otherwise, please confirm

that you will agree to accept service of the ULP on behalf of [the Board].” The Board did not respond to the August 11, 2022 letter.

On or about September 22, 2022, the Newark Teachers Union filed a grievance on behalf of Olivera, challenging the withholding of the salary increment for the 2022–2023 school year. By letter dated December 7, 2022, the Board informed petitioner’s counsel that it had received the Level 3 Grievance and that the Grievance was denied pursuant to Article III of the Agreement between the Board and the Newark Teachers Union “because, without limitation, the increment withholding was based on inefficiency; and is therefore not arbitrable.” Citing to N.J.S.A. 18A:29-14, the Board concludes that it is “well-established that an increment withheld for inefficiency must be appealed to the Commissioner of Education and cannot be subject to arbitration.”

Petitioner asserts in his Petition, dated March 3, 2023, that the Board’s withholding of the salary increment was “an overtly severe penalty for which it lacked just cause to impose; that the ‘ineffective’ summative evaluation rating was not properly procured; and that the imposition of such discipline constituted an arbitrary and capricious act.”

The Board subsequently filed a Notice of Motion to Dismiss in lieu of an Answer to the Petition, on or around March 23, 2023, asserting that the Petition should be dismissed because it was filed out of time.

LEGAL ANALYSIS AND CONCLUSION

In its motion, the Board asserts that the Petition should be dismissed because it was filed more than ninety days from the date petitioner received notice of the Board’s decision freezing his salary increment for the 2022–2023 school year. The petitioner argues that the motion to dismiss should be denied because, he asserts, it was not the June 22, 2022 letter that triggered the ninety-day period, but the December 7, 2022 notice denying Olivera’s grievance, and petitioner, therefore, filed this appeal in compliance with the ninety-day rule. He also asserts that the June 22, 2022 letter did not give Olivera adequate notice of his right to file a petition with the Commissioner because it does not make clear that inefficiency was the sole reason for the withholding of his increment. The

petitioner also argues that even if it is determined that the June 22, 2022 letter constitutes sufficient notice of a final action by the Board, the Petition should still be accepted as timely due to exceptional circumstances and/or good cause. According to the petitioner, these circumstances include the Board's failure to respond to or even acknowledge receipt of the August 11, 2022 letter, and the fact that the grievance was filed with the Board on September 22, 2022, which was within ninety days of issuing said notice.

N.J.A.C. 6A:3-1.3(i) provides that, regarding the filing and service of a petition of appeal with the Commissioner of Education:

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, that 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.

...

2. Pursuant to N.J.S.A. 18:29-14¹ and 34:13A-27.d,² where an increment withholding dispute has been submitted to the Public Employment Relations Commission for determination of whether the withholding was predominately disciplinary and the Commission determines that the withholding was predominantly for reasons of teaching performance, the teaching staff member's petition shall be filed within 90 days of notice of the Commission's decision, or of the final judicial decision in any appeal from the decision of the Commission, whichever is later.

...

[emphasis added.]

¹ N.J.S.A. 18A:29-14 provides, in part: "Any board of education may withhold, for inefficiency or other good cause, the employment increment, or the adjustment increment, or both, of any member in any year by a recorded roll call majority vote of the full membership of the board of education. It shall be the duty of the board of education, within 10 days, to give written notice of such action, together with the reasons therefore, to the member concerned. The member may appeal from such action to the commissioner under rules prescribed by him. The commissioner shall consider such appeal and shall either affirm the action of the board of education or direct that the increment or increments be paid"

² N.J.S.A. 34:13A-27 provides, in part: "If there is a dispute as to whether a . . . withholding of an increment of a teaching staff member is disciplinary, the commission shall determine whether the basis for the . . . withholding is predominately disciplinary If the commission determines that the basis for a transfer is predominately disciplinary, the commission shall have the authority to take reasonable action to effectuate the purpose of this act."

Here, the Petition was filed on March 3, 2023. Although the petitioner asserts that it was the December 7, 2022 notice denying Olivera’s grievance that should trigger the ninety-day rule, and not the June 22, 2022 letter, I do not agree. I also disagree with the petitioner that the June 22 letter failed to provide Olivera adequate notice of his right to file a petition with the Commissioner because it does not make clear that inefficiency was the sole reason for the withholding of his increment. The June 22, 2022 letter, sent to the petitioner on Board letterhead, clearly informs him that the Board took official action at its meeting on June 1 to withhold his salary increment for the 2022–2023 school year, and it expressly states that the reason for the Board’s action to withhold the salary increment “was inefficiency.” In no way does the letter suggest that there may be another reason for the increment withholding. On its face, the June 22, 2022 letter informed the petitioner that the Board took action, it describes the action taken by the Board, and it clearly states the reason for the Board’s action. I, therefore, **CONCLUDE** that the June 22, 2022 letter constitutes adequate notice of a final action by the Board, and that it triggered the running of the ninety-day period.

In extraordinary cases, the ninety-day limitation may be relaxed to allow for an appeal filed outside the ninety-day window. See Nancy T. Snow v. Board of Education, EDU 6404-06, final decision, (April 20, 2007), <https://njlaw.rutgers.edu/collections/oal/final/edu6404-06.pdf> (Commissioner may “relax [the] rule under exceptional circumstances or if there is a compelling reason to do so Such authority, however, is rarely invoked unless strict adherence to the rule would be inappropriate, unnecessary or where injustice would occur . . . or where the Commissioner finds the presence of a substantial constitutional issue or other issue of fundamental public interest beyond that or concern only to the parties themselves”).

Petitioner’s appeal was filed about 254 days after he received notice of the Board’s action, which is well beyond the ninety-day filing period set forth in N.J.A.C. 6A:3-1.3(i). Olivera argues that the ninety-day rule should be relaxed due to exceptional circumstances, including the Board’s failure to timely respond to the August 11, 2022 letter, and because the Board did not confirm the “apparent exclusivity” of Olivera’s alleged ineffectiveness as a basis for the increment withholding until the denial of his

grievance in December 2022. The petitioner also cites to the doctrine of unclean hands to justify a relaxation of the ninety-day rule here.

I am not persuaded by the petitioner's argument that exceptional circumstances, or even good cause, exists to relax the ninety-day rule here. First, the petitioner's August 11, 2022 letter to the Board, advising of the filing of an unfair labor practice claim and seeking a reduction of the discipline imposed, in no way tolls the ninety-day period, and I am not persuaded that the Board's failure to respond to this letter warrants a relaxation of the ninety-day rule. See, e.g., Thomas Lygate v. Board of Education, EDU 2660-07, final decision, (March 17, 2008), <https://njlaw.rutgers.edu/collections/oal/final/edu2660-07.pdf>. Despite the petitioner's argument, the Board did not act in such a deleterious manner that would excuse the petitioner from its obligation to file its appeal within the required ninety days. The petitioner's filing of the grievance on September 22, 2022 also does not toll the limitations period. See Kenny v. Bd. of Educ. Borough of Moonachie, EDU 9284-17, adopted, Comm'r (Sept. 27, 2017) (rejecting the notion that the ninety-day rule was tolled by filing of the grievance and noting that "the Commissioner has held that attempts to resolve a dispute in other forums do not serve to toll the statute of limitations.") Only an appeal filed with the Commissioner stops the ninety-day countdown. I **CONCLUDE** that the petitioner has failed to demonstrate exceptional circumstances that would warrant a relaxation of the ninety-day rule here.

Having reviewed the Board's motion and supporting documents, and the petitioner's opposition to the motion, and having considered the applicable law, I **CONCLUDE** that the Petition must be dismissed as it was filed well beyond the ninety-day limitation imposed by N.J.A.C. 6A:3-1.3(i), and because no extraordinary circumstances exist to warrant a relaxation of this limitation.

ORDER

It is hereby **ORDERED** that the motion to dismiss the Petition filed by the Board is **GRANTED**, and that the Petition be 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, PO 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.

June 2, 2023
DATE


SUSANA E. GUERRERO, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

jb