

EDU #5965-04
C # 34-05
SB # 6-05

ANNE MARIE ABERCROMBIE, :
 :
 PETITIONER-APPELLANT, : STATE BOARD OF EDUCATION
 :
 V. : DECISION
 :
 BOARD OF EDUCATION OF THE CITY :
 OF ELIZABETH, UNION COUNTY, :
 :
 RESPONDENT-RESPONDENT. :
 _____ :

Decided by the Commissioner of Education, January 20, 2005

Decision on motion by the State Board of Education, May 4, 2005

For the Petitioner-Appellant, Kessler, DiGiovanni & Jesuele, LLP (Vincent
Jesuele, Esq., of Counsel)

For the Respondent-Respondent, Butler Gonzalez, LLP (David Conti, Jr.,
Esq., of Counsel)

This matter was initiated in April 2004 when Anne Marie Abercrombie (hereinafter "petitioner") filed a petition with the Commissioner seeking payment of supplementary sick leave benefits pursuant to N.J.S.A. 18A:30-2.1 for one year and restoration of 59½ sick days for which she had been charged by the Board of Education of the City of Elizabeth (hereinafter "Board").¹ Petitioner alleged that in 1999, after

¹ N.J.S.A. 18A:30-2.1 provides in pertinent part that:

Whenever any employee entitled to sick leave..., is absent from his post of duty as a result of a personal injury caused by an accident arising out of and in the course of his employment, his employer shall pay to such employee the full salary...for the period of such absence for up to one calendar year without having such absence charged to [his] annual sick

being employed by the Board for 14 years, she began to experience symptoms diagnosed as allergic rhinitis and sinusitis. Her request for a transfer was denied and on June 7, 1999, she was advised by the district's workers' compensation administrator that her claim for workers' compensation benefits was being denied.

Petitioner retained an attorney to represent her with respect to her claim for workers' compensation benefits and, on January 13, 2004, the Division of Workers Compensation determined that her illness had arisen out of and in the course of her employment with the Board. Following an appeal by the Board, the Appellate Division affirmed petitioner's entitlement to benefits under the workers' compensation law and imposed a penalty on the Board for unreasonably withholding petitioner's temporary total disability benefits.

By letter to the Board dated January 21, 2004, petitioner's attorney requested supplemental sick leave benefits pursuant to N.J.S.A. 18A:30-2.1 and restoration of the sick leave that petitioner had used when absent due to her work-related illness. By letter of March 31, 2004, the Board denied the request, and on April 5, 2004, petitioner's attorney filed a petition of appeal with the Commissioner.

Upon review of the petition and the answer, the Director of the Bureau of Controversies and Disputes requested that the parties address why the matter should not be dismissed as untimely under the State Board's decision in Verneret v. Board of Education of the City of Elizabeth, decided by the State Board of Education, 95 N.J.A.R.2d (EDU) 134, and both parties submitted memoranda regarding the issue.

leave....Any amount of salary...shall be reduced by the amount of any workmen's compensation award made for temporary disability.

After considering the arguments of the parties, the Administrative Law Judge (“ALJ”) concluded that there was no doubt that petitioner had requested the benefits she was seeking in 1999 and had been notified at that time in plain and unmistakable terms that they were denied. Therefore, reiterating that the correspondence exchanged between petitioner and the Board’s claims adjuster in 1999 constituted adequate final notice to her of the denial of any claim she might have for sick leave benefits and absent compelling reasons to relax the 90-day rule for filing a petition with the Commissioner, N.J.A.C. 6A:3-1.3(d)1 [now codified at N.J.A.C. 6A:3-1.3(i)1], the ALJ found that the petition filed in 2004 had to be dismissed as untimely for failure to file within the 90-day time limit.

The Commissioner concurred with the ALJ that petitioner’s claim was untimely. The Commissioner noted that the State Board’s decision in Verneret, supra, was clear that even if an alleged work-related injury is also the subject of a workers’ compensation action, an individual seeking to claim benefits under N.J.S.A. 18A:30-2.1 must file a petition to the Commissioner within 90 days of the district board’s action that has the effect of denying benefits to the petitioner. The Commissioner found that contrary to petitioner’s position, the fact that she did not specifically apply to the Board for benefits pursuant to N.J.S.A. 18A:30-2.1 in 1999 was of no moment. The Commissioner found in this respect that the very nature of the Board’s action served to advise petitioner that any claim she might have on the basis of an allegation that she had suffered a work-related injury was being denied. Accordingly, the Commissioner dismissed the appeal.

Petitioner appealed to the State Board, arguing that Verneret, supra, was inapplicable because in 1999, she had neither requested nor been denied supplemental sick leave benefits pursuant to N.J.S.A. 18A:30-2.1.

On May 4, 2005, the State Board directed the parties to supplement the record on appeal with a copy of any correspondence or other documents submitted by the petitioner to the Board or its claims administrator in 1999 in which she requested benefits under N.J.S.A. 18A:30-2.1 arising from the medical condition which provided the basis for this appeal, along with a copy of any documents evincing action taken by the Board to deny benefits under that statute. The responses of the parties indicated that there was no additional documentation relating to the circumstances of petitioner's claim.

After reviewing the record, we affirm the decision of the Commissioner substantially for the reasons set forth therein. In doing so, we fully agree with the Commissioner that Verneret, supra, is clear that even if an alleged work-related injury is also the subject of a workers' compensation action, an individual claiming benefits pursuant to N.J.S.A. 18A:30-2.1 must file a petition with the Commissioner within 90 days of the district board's action that has the effect of denying benefits. We also agree that when petitioner received notice in June 1999 that her absences were being considered to be the result of a personal rather than a work-related illness, and she was advised that no benefits of any kind would be paid to her under Workers' Compensation, she was on notice that the Board was not considering her absences as caused by an illness "arising out of and in the course of [her] employment" so as to entitle her to benefits under N.J.S.A. 18A:30-2.1. Petitioner could not circumvent the

time limit for filing a petition with the Commissioner by ignoring that fact and then seeking to obtain the benefits at issue almost five years later. Like the ALJ and the Commissioner, we find that nothing in the record shows circumstances warranting relaxation of the regulatory time limit for filing petitions of appeal with the Commissioner.

Roberta Van Anda abstained.

July 6, 2005

Date of mailing _____