EDU #6722-05S
C # 224-06
SB # 30-06

TATIANA CHARAPOVA,	:	
PETITIONER-CROSS/APPELLANT,	:	STATE BOARD OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF EDISON, MIDDLESEX COUNTY,	:	
RESPONDENT-APPELLANT.	:	

Decided by the Acting Commissioner of Education, June 20, 2006

For the Petitioner-Cross/Appellant, Wills, O'Neill & Mellk (Arnold M. Mellk, Esq., of Counsel)

For the Respondent-Appellant, Purcell, Ries, Shannon, Mulcahy & O'Neill (Rita F. Barone, Esq., of Counsel)

On August 5, 2005, Tatiana Charapova (hereinafter "petitioner"), a non-tenured teaching staff member employed as a teacher of English as a Second Language ("ESL"), filed a petition with the Commissioner of Education challenging the determination by the Board of Education of the Township of Edison (hereinafter "Board" or "Edison Board") not to offer her an employment contract for the 2005-06 school year. The petitioner claimed that her "contract ha[d] not been renewed due to reasons other than unsatisfactory job performance." Petition of Appeal, at 2. The petitioner alleged, inter alia, that the Board had discriminated against her on the basis of her national origin

and age.[1] The Board filed a motion to dismiss, contending that the petitioner had failed to file her petition within 90 days of the Board's action as required by N.J.A.C. 6A:3-1.3.

On April 3, 2006, an administrative law judge ("ALJ") recommended granting the Board's motion and dismissing the petition as untimely. The ALJ concluded that the 90-day filing period began to run when the petitioner received a letter from the Board on April 19, 2005 notifying her that she would not be offered an employment contract for the 2005-06 school year. In rejecting the petitioner's contention that the 90-day period did not begin to run until May 2005, the ALJ explained:

> …[M]uch like the petitioner in Eisenberg v. Fort Lee Bd. of Edud., Ms. Charapova has also asserted that it was not until well after the Board's final action on April 19, 2005, that she became aware of new information alerting her to the existence of an additional allegation. More specifically, she has alleged that with the passage of the new budget in May 2005, the Board "reinstated many if not all of the RIF'd personnel." She believes that the only possible explanation for her not being rehired was that the Board must have discriminated against her. However, she did not submit any documentation supporting this allegation and, even if she had, unlike the situation in Eisenberg, the fact remains that she became aware of this information not one day but rather nearly two months before the 90-day period had run its course. With approximately 60 days remaining, she had more than ample time to file her petition. Accordingly, the April 19, 2005, decision must be considered the Board's final decision amenable to review, making Ms. Charapova's petition untimely.

Initial Decision, slip op. at 7 (citation omitted).

On June 20, 2006, the Acting Commissioner[2] rejected the ALJ's conclusion that the petition was not filed in a timely manner. The Acting Commissioner concluded that,

[1] We note that, absent constitutional constraints or legislation affecting the tenure rights of teachers, local boards of education have an almost complete right to terminate the services of a teacher who has no tenure and is regarded as undesirable by the local board. Dore v. Bedminster Tp. Bd. of Ed., 185 N.J. Super. 447, 456 (App. Div. 1982).

notwithstanding the petitioner's receipt of the April 19, 2005 letter notifying her that she was not being offered an employment contract for the 2005-06 school year, the earliest she could have made allegations of discrimination was sometime during May 2005, when she became aware that similarly situated staff members were being recalled to employment while she was not. The Acting Commissioner reasoned:

> At the Board's April 18, 2005 meeting, the Board had adopted a resolution nonrenewing the contracts of no fewer than 177 nontenured staff members – approximately 95 of them certificated teachers, including petitioner and another ESL teacher. Within this context, the April 19 letter received by petitioner is clearly a "blanket" notice of the type routinely sent by boards of education during the annual budget process when reductions in staffing are anticipated, but their exact nature and extent is at that point uncertain….
>
> Although precise dates are difficult to determine, it is apparent from petitioner's papers that sometime during May she became aware of teaching positions – including ESL positions – being filled in the district, and that many teachers on the April 18 reduction in force (RIF) list were apparently being recalled; she was additionally under the impression that there had been no significant reduction in the number of ESL students. Following discussions with her colleagues, petitioner began to believe that the Board might have acted in bad faith by using the April 18 RIF as a subterfuge to mask its true, discriminatory intent: to terminate her employment because of her age and national origin. On May 23, 2005, the Board approved the assignment of 85 teaching staff members "returning from reduction in force," thus recalling a significant majority of the teachers on the April 18 nonrenewal list, including the other ESL teacher but not petitioner.
>
> Under these circumstances – even in a climate where petitioner had been experiencing difficulty with the new principal of her assigned school prior to April 2005 – the Commissioner cannot find, given the nature of petitioner's claim, that adequate notice for purposes of appeal was provided by her receipt of the Board's "blanket" nonrenewal

[2] We note that on October 16, 2006, Acting Commissioner Lucille E. Davy was confirmed as the Commissioner of Education.

> notice on April 19. Rather, the Commissioner finds that petitioner could not have made the allegations that she did prior to having at least some awareness that once the Board's budget and personnel uncertainties were settled, similarly situated colleagues were being recalled while she was not.
>
> ….[P]etitioner is entitled to appeal to the Commissioner within 90 days from the point at which she became, or reasonably should have become, aware of a possible cause of action against the district. In the present instance, the earliest that petitioner could have made the allegations that she did is sometime in early-to-mid-May….[M]oreover, even if the 90-day rule were found to have been formally triggered when petitioner received her official notice of nonrenewal, the Commissioner would also find that, under the circumstances, relaxation of the rule would be warranted.

Acting Commissioner's Decision, slip op. at 2-5 (citations and footnotes omitted).

The Acting Commissioner concluded that, since the petitioner had filed her petition within 90 days after she became aware that other staff members were being recalled to employment, the petition was timely. As a result, she denied the Board's motion to dismiss and remanded this matter to the Office of Administrative Law for proceedings on the petitioner's claim.

The Board filed an appeal to the State Board of Education, renewing its argument that the petition should be dismissed as untimely.[3]

After a thorough review of the record, we reverse the decision of the Acting Commissioner. Like the ALJ, we conclude that the 90-day period began to run when the petitioner received notice from the Board on April 19, 2005 that she was not being

[3] We note that, although the petitioner filed a pro se notice of cross-appeal to the State Board, she subsequently retained counsel, who has not pursued a cross-appeal and urges that the State Board affirm the decision of the Acting Commissioner.

offered an employment contract for the 2005-06 school year. Consequently, her petition, which was not filed until August 5, 2005, was not submitted in a timely manner.

The 90-day period for filing a petition of appeal with the Commissioner commences when a petitioner learns of facts that would enable him to file a timely claim. Kaprow v. Board of Educ. of Berkeley Tp., 131 N.J. 572 (1993). In Burd v. New Jersey Tel. Co., 76 N.J. 284, 291 (1978), cited by the Court in Kaprow, the Court reiterated that the limitations period for commencing an action begins to run when "plaintiff learns, or reasonably should learn, the existence of that state of facts which may equate in law with a cause of action." As the Court explained in Kaprow, supra, at 587:

> 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. Federal Ins. Co., 90 N.J. 108, 112, 447 A.2d 163 (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, 299 A.2d 394 (1973)).
>
> > When a plaintiff knows or has reason to know that he has a cause of action against an identifiable defendant and voluntarily sleeps on his rights so long as to permit the customary period of limitations to expire, the pertinent considerations of individual justice as well as the broader considerations of repose, coincide to bar his action. [Farrell, supra, 62 N.J. at 115, 299 A.2d 394.]
>
> Adequate notice under N.J.A.C. 6:24-1.2 should accommodate both purposes. That is, the notice requirement should effectuate concerns for individual justice by not triggering the limitations period until the tenured teachers have been alerted to the existence of facts that may equate in law with a post-RIF cause of action. See Burd v. New Jersey Tel. Co., 76 N.J. 284, 291, 386 A.2d 1310 (1978). At the same time, it should further considerations of repose by establishing an objective event

> to trigger the limitations period in order "to enable the proper and efficient administration of the affairs of government." Borough of Park Ridge v. Salimone, 21 N.J. 28, 48, 120 A.2d 721 (1956).

In Eisenberg v. Board of Education of the Borough of Fort Lee, decided by the State Board of Education, November 5, 2003, the petitioner, a non-tenured teacher, was notified by letter dated April 3, 2001 that the Ft. Lee board had determined not to renew his employment for the 2001-02 school year. On September 29, 2001, the petitioner filed a petition of appeal with the Commissioner challenging the board's action. In his petition, the petitioner asserted that he recently had become aware of the fact that he had not been "given a fair chance at reemployment." The petitioner alleged that he had learned in late June or early July that the school's former principal had told another teacher that he had received instructions from the Superintendent to make sure that he "papered" the petitioner's personnel file to justify the decision not to renew his employment. The petitioner further alleged that he had also learned at that time that positive performance evaluations were missing from his personnel file. The board filed a motion to dismiss the petition, contending that it was not filed in a timely manner. The Commissioner dismissed the petition as untimely, but the State Board reversed, explaining:

> Although the April 3, 2001 letter from the Superintendent provided the petitioner in this case with notice of the Board's action denying him reemployment for the 2001-02 school year, the information which alerted the petitioner to the existence of an allegation of intentional wrongdoing on the part of the Board in effectuating his non-renewal was not known by him until late June/early July 2001. The petitioner could not have made the same allegations prior to his becoming aware of such information. Nissman v. Board of Educ. of Long Beach Island, 272 N.J. Super. 373 (App. Div. 1994), certif. denied, 137 N.J. 315

> (1994). Under these particular circumstances, in which the petitioner alleges intentional wrongdoing on the part of the Board and the information alerting him to the existence of such alleged facts were not known by him until late June/early July 2001, we conclude that, in order to effectuate concerns for individual justice, the petition was filed in a timely manner on September 29, 2001.

Eisenberg, supra, slip op. at 6-7.

N.J.A.C. 6A:3-1.3(d) [now codified at N.J.A.C. 6A:3-1.3(i)] provided in pertinent part 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.

In the matter now before us, the petitioner is challenging the Edison Board's decision not to offer her an employment contract for the 2005-06 school year. By letter dated April 19, 2005, the Superintendent of Schools notified the petitioner that:

> The total number of positions which will be needed for the operation of the Edison Township Public Schools for the 2005-2006 school year cannot be determined at this time due to various factors, such as uncertainties with respect to the number of staff members who may be returning from various leaves of absence, enrollment trends, and financial constraints. Thus, you are hereby notified, in accordance with N.J.S.A. 18A:27-10, that you will not be offered a contract for employment by the Edison Township Board of Education for the 2005-2006 school year.

Motion to Dismiss, Exhibit A.

Notwithstanding the fact that the letter of April 19, 2005 was sent to other nontenured teaching staff members in compliance with the requirements of N.J.S.A. 18A:27-10,[4] it triggered the 90-day filing period set forth in N.J.A.C. 6A:3-1.3(d) by

[4] N.J.S.A. 18A:27-10 provides:

providing the petitioner with notice that she would not be offered employment for the following school year. Wise v. Board of Education of the City of Trenton, decided by the Commissioner of Education, September 11, 2000, aff'd by the State Board of Education, January 3, 2001 (in nonrenewal disputes, the 90-day period for filed a petition of appeal with the Commissioner is tolled from receipt of the nonrenewal notice). Since the petitioner did not file her petition with the Commissioner until August 5, 2005, more than 90 days later, determination of the timeliness of the petition turns on the petitioner's contention that the 90-day filing period did not begin to run until sometime in May 2005, when she learned that the Board had reappointed some of the other non-tenured teachers who had received nonrenewal letters in April.

In Eisenberg, the information which alerted the petitioner to the existence of an allegation of intentional wrongdoing on the part of the Board in effectuating his non-renewal – i.e., his positive performance evaluations were missing from his personnel file, and the school's former principal had told another teacher that he had received instructions from the superintendent to make sure that he "papered" the petitioner's personnel file to justify the decision not to renew his employment – was not known by him until several months after he received his nonrenewal letter. In concluding that the petitioner had filed his petition in a timely manner, the State Board

---

> On or before May 15 in each year, each nontenured teaching staff member continuously employed by a board of education since the preceding September 30 shall receive either
> a. A written offer of a contract for employment from the board of education for the next succeeding year providing for at least the same terms and conditions of employment but with such increases in salary as may be required by law or policies of the board of education, or
> b. A written notice from the chief school administrator that such employment will not be offered.

found that he could not have made the same allegations prior to his becoming aware of such information.

In the matter now before us, the petitioner challenges the fact that "[her] contract ha[d] not been renewed," Petition of Appeal, at 2, and she received notice of such action by the Board in the April 19, 2005 letter. The record reveals that the petitioner was fully aware of information which she believed demonstrated age and national origin discrimination at the time she received that letter. In fact, the petitioner had made an accusation of discrimination in March 2005, when she charged in response to an unfavorable performance evaluation by the school's principal, Gina Foxx:

> It has become necessary for me to state what I have felt for some time now. I feel strongly, however, that many of Mrs. Foxx's statements reveal an obvious bias or lack of understanding towards me and the minority students in the ESL program.

Addendum to Classroom Observation Report dated 3/7/05.

In her petition of appeal, the petitioner cited a history of occurrences which she claimed demonstrated "accent discrimination." The petitioner related:

> I believe I was discriminated against by my principal Ms. Foxx because of my accent when speaking English….Ms. Foxx used language disrimination [sic] purposefully or even unconsciously as an excuse for race and national original discrimination. She assumed that an employee with an accent is less qualified than one without accent. As a result of this assumption I was treated differently, less favorably than other employees. Sometimes code words such as "communication skills" or "professionalism" were used by Ms. Foxx to refer indirectly to my accent. Very often, my accent was assessed "off the cuff" without any documentation that Ms. Foxx used valid, objective or consistent criteria to evaluate whether or not it really affected the job performance….In a very harsh manner Ms. Foxx made multiple comments when addressing me at various times privately and in the presence of my colleagues such as

> "Listen to her", "Look at her", "You are not in your Russia. No, not in America. You are in Edison. And I am the boss here", "I promise you that I am not going to give up"….My application for citizenship is in a process and my non-citizen certificate didn't make good impression on Ms. Foxx either.

Petition of Appeal, at 2.

The petitioner also claimed in her petition that "yet another more subtle reason [for the nonrenewal of her employment] could be my age." Id. at 2. In support of that contention, the petitioner related incidents from the period of her employment with the Board in which she alleged that Ms. Foxx had treated younger staff members better than older ones.

It is evident from a review of the record, including the petition of appeal, that the petitioner could have made the same allegations on April 19, 2005, when she received notice that she was not being offered employment for the 2005-06 school year. We emphasize in that regard that the petitioner's claim is based on allegations of discriminatory treatment which had occurred prior to her receipt of that letter. The fact that the April 19, 2005 letter was given to other non-tenured teaching staff members and that some of them were subsequently reappointed a month later after the Board passed a budget does not alter the fact that the information which alerted the petitioner to the existence of a claim against the Board was fully known to her when she received notice on April 19 that she was not being offered employment for the following school year. Under these circumstances, we conclude that her petition was not filed in a timely manner.

Nor do we find relaxation of the 90-day filing period to be warranted.[5] As previously indicated, the petitioner's claim is based on information which was known to the petitioner at the time she received the April 19, 2005 letter, and that letter provided her with clear notice that she would not be offered an employment contract for the 2005-06 school year. Moreover, as the ALJ pointed out, the petitioner still had nearly two months to file a timely petition challenging the nonrenewal of her employment even after she learned in May 2005 that some other staff members had been reappointed.

Accordingly, we reverse the decision of the Acting Commissioner and grant the Board's motion to dismiss the petition. We stress in so doing that our determination is limited to the particular facts of this case. As in Eisenberg, a non-tenured teaching staff member may become aware of facts that alert him or her to the existence of a claim that would trigger a 90-day filing period subsequent to receipt of a nonrenewal letter. We have concluded, however, that such circumstances do not exist in this case.

Attorney exceptions are noted.

August 1, 2007

Date of mailing _____

[5] In exceptions filed in response to the report of our Legal Committee in this matter, the petitioner maintains that the State Board may reverse the Commissioner's determination regarding relaxation only if it concludes that the Commissioner abused her discretion. We note, contrary to the petitioner's contention, that the State Board is the ultimate administrative decision-maker and fact-finder in school matters, In the Matter of the Tenure Hearing of Tyler, 236 N.J. Super. 478, 485 (App. Div. 1989), certif. den., 121 N.J. 615 (1990); Dore v. Bedminister Tp. Bd. of Ed., 185 N.J. Super. 447, 452 (App. Div. 1982), and our review on appeal is not limited in the manner urged by the petitioner.