Joseph Scialabbo, Sr.,
Petitioner,

v.

Evesham Township Public School District,
Respondent.

STATE OF NEW JERSEY
DEPARTMENT OF LABOR
AND WORKFORCE DEVELOPMENT

FINAL ADMINISTRATIVE ACTION
OF THE
COMMISSIONER

OAL DKT. NO LID 1493-14
AGENCY DKT. NO. D57-13-045

Issued: January 4, 2017

The Division of Public Safety and Occupational Safety and Health (the Division), within the Department of Labor and Workforce Development, issued a determination dismissing the discrimination complaint of Joseph Scialabbo, Sr. (petitioner), on the basis that he had not met the standard for establishing an act of discrimination under N.J.A.C. 12:110-7.5. In his complaint, Mr. Scialabbo, a former maintenance worker with the Evesham Township Public School District (respondent), alleged that he had been required to perform "janitorial duties" after complaining to school district and township officials that electrical work had been performed in public schools and township-owned buildings by "non-qualified, non-certified personnel." Mr. Scialabbo also maintained that "upon continued complaints to the Mayor, school board, State DCA (Department of Community Affairs), [he] was non-renewed at [his] job as of June 30, 2013;" that is, petitioner had a one-year contract with the school district, beginning July 1, 2012, and the school district chose not to renew petitioner's contract at the end of that year. Following the Division's dismissal of petitioner's complaint, he requested a hearing, at which time the matter was transmitted to the Office of Administrative Law (OAL) for determination as a contested case. The matter was assigned to Administrative Law Judge (ALJ) Robert Bingham, II, but was later reassigned to ALJ t/a Solomon A. Metzger.

Prior to a hearing, respondent filed a motion for summary decision. Specifically, respondent maintained that petitioner could not demonstrate a prima facie case of retaliation, since "he cannot show that any motive for non-renewal relating to his alleged complaints existed." That is, respondent asserted that, "Mr. Scialabbo did not begin to specifically complain regarding the electrical work at the District until after he learned that his non-renewal was imminent." As evidence of this, respondent provided copies of the following documents:

> (1) An email from petitioner to the Evesham Township Mayor, dated May 21, 2013, in which petitioner stated, "I was told today that I have a meeting with my facilities manager tomorrow and according to sources, will be told that my contract will not be renewed for the 2014 school year," adding, "I feel that this is in direct retaliation to [sic] my speaking up about the safety issues and ethical issues that I have raised." That is, petitioner maintained in this May 21, 2013 email that during his first few months of employment, he had "brought up a few discrepancies in safety issues and concerns to my immediate supervisors." At the conclusion of the May 21, 2013 email, petitioner sought a meeting with the Township Mayor, stating, "I feel that as a tax payer, I should be afforded a few moments of your time to discuss this with you prior to me seeking legal representation in this matter."
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> (2) An email to petitioner from William Cromie, Evesham Township Manager, in response to petitioner's May 21, 2013 email to the Mayor, in which Mr. Cromie declines petitioner's request for a meeting with the Mayor, stating that the situation described in petitioner's email is "strictly an Evesham Township School District matter." In Mr. Cromie's email he also stated, "If electrical safety issues remain in Township owned facilities of which you are aware, I request you bring them to my attention so they can be immediately resolved."
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> (3) A letter from John Scavelli, Jr. Superintendent of the Evesham Township School District, to petitioner, dated May 23, 2013, stating that petitioner would not be offered employment for the 2013-2014 school year.
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> (4) A letter from petitioner to the "Board of Examiners of Electrical Workers," dated June 20, 2013, in which petitioner sets forth his complaints about electrical work performed for respondent. In that letter, petitioner states that he is also including "2 prior complaints that I sent in anonymously which I am now putting my name to."[1]

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[1] There is no evidence in the record of these alleged two prior anonymous complaints. That is to say, petitioner asserts in his June 20, 2013 letter that he is "including" the two prior anonymous complaints; however, no copies of any prior complaints appear in the record.

In further support of its motion for summary decision, respondent asserted that petitioner could "not demonstrate that the School District's legitimate non-discriminatory reasons for his termination were pre-textual." That is, respondent asserted that it had decided not to renew petitioner's contract because he had "refused to sign/return a copy of his employment agreement" and because he had "refused to accept assignment of tasks pursuant to the Shared Services Agreement [between the Evesham Township Municipal Utilities Authority and the Evesham Township School District]." As evidence of this, respondent provided the following:

> (1) The certification (sworn statement) of Richard Dantinne, Personnel Director for the Evesham Township School District, in which Mr. Dantinne states (a) "[i]n its usual procedures, Evesham Township School District does not renew the contract of employees who fail to return a signed copy of their contract from the previous term, with the exception of tenured teachers where tenure charges are then brought before a non-renewal can occur;" and (b) "[t]he maintenance workers within the Evesham Township School District routinely handle the duties of the head custodian in the head custodian's absence, including cafeteria duty."
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> (2) An Evesham Township School District form, signed by petitioner, stating the following: "Job Description: Maintenance. My signature below indicates that I have received a copy of my Job Description…and that my Supervisor has reviewed its contents with me. I certify that I am capable of performing all job duties contained in my Job Description."
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> (3) An Evesham Township School District Job Description for the position of "Maintenance Person," listing 40 separate performance responsibilities, including: #35, Assists with work "overflow" in other areas or departments when needed or assigned; and #36, Serves in the capacity of Head Custodian when assigned. The Job Description also expressly states that the list of essential functions provided therein is not exhaustive and may be supplemented as necessary.
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> (4) A letter to petitioner from Tina L. Briscione, Personnel Administrator for the Evesham Township School District, dated March 11, 2013, memorializing a February 26, 2013 meeting attended by petitioner, School District facilities management and maintenance supervisory staff, and petitioner's "ETEA representatives," during which petitioner was instructed to cease distributing his personal business card to Evesham Township employees when asked for contact information and during which petitioner indicated that he did not want to perform Township work and felt that it was unfair that other members of the maintenance department were making more money than him, to which the maintenance foreman responded that petitioner must work on Township projects as

directed and petitioner's salary and terms of employment were accepted by petitioner at the time of his hire.

(5) A copy of petitioner's unsigned employment contract.

Petitioner made no response to respondent's motion for summary decision.

The ALJ granted respondent's motion for summary decision and dismissed petitioner's discrimination complaint, explaining as follows:

> From respondent's motion papers it appears petitioner was hired as a maintenance worker, effective July 1, 2012. He had a one-year contract. On February 26, 2013, the District personnel met with petitioner to discuss ongoing concerns. Exhibits reflect that he was averse to working on Evesham Township projects to which he was assigned, though the school district and Township have a shared services agreement. Petitioner was also warned against continuing to offer Township employees his personal business card. On May 2, 2013, petitioner was informed that his contract would not be renewed. The District was dissatisfied with his performance and additionally, petitioner had not signed his prior employment contract. Although not entirely plain, it seems petitioner thought of himself as the District's electrician and was disappointed with the salary and duties of the maintenance worker title. Nonetheless, this is the job for which he was hired. On June 20, 2013, petitioner sent a letter to the Board of Examiners of Electrical Contractors expressing disquiet about electrical work within the District.
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> The burden of proof rests with petitioner, N.J.A.C. 12:110-7.5. The motion for summary decision serves the salutary purpose of screening claims that do not present fact questions for hearing and may instead be decided as a matter of law. In the absence of a response to the motion, there is no genuine fact question. The Department also transmitted its investigation file. This contains petitioner's uncertified and mostly vague assertions about discrimination and disparate treatment that cannot suffice under Brill. The only evidence of any moment is petitioner's complaint letter to the Electrical Contractors Board. Importantly, this followed notice to him of non-renewal. Without some evidence of a discriminatory motive, respondent was free to release petitioner with or without cause, Maiorino v. Schering-Plough Corp., 302 N.J. Super. 323 (App. Div. 1997).

Petitioner filed exceptions to the initial decision of the ALJ and the respondent filed a reply.

In petitioner's exceptions, he claims that there is "paperwork" he provided to ALJ Bingham, which he believes "clearly dispute[s]" respondent's assertion that it did not

renew petitioner's contract for the position of maintenance worker due to "performance related issues." Petitioner maintains that the ALJ's finding that petitioner made no response to respondent's motion for summary decision is "not true;" that is, petitioner asserts that he wrote ALJ Bingham to request an extension of time to "file an answer to said motion," but never received an answer to his request.

Respondent's reply follows:

> The November 14, 2016 decision by Judge Solomon A. Metzger should be upheld at this time. Petitioner had more than an entire year with which to file an opposition to [respondent's] motion for summary decision and he failed to do so.
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> The initial investigator, on a full investigation, found no viability to petitioner's claims. Petitioner then brought this action which was fully explored through extensive discovery. An appropriate motion for summary decision was filed by respondent. Respondent, respondent's employees, and two significant witnesses who are no longer employed by respondent waited for over a year for any opposition from petitioner or any response from the court. This matter has been decided on its merits. A review of Judge Metzger's decision reveals the court's thorough analysis of the claims and evidence.
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> In terms of the facts and legal analysis of the matter, petitioner's correspondence fails to acknowledge or address that a meeting was held during the course of his employment to discuss his refusal to perform shared service work, his inappropriate behavior in soliciting side work from shared service entities, and other requirements of his position. Most notably, and entirely ignored by petitioner, he never returned a signed copy of his employment contract. This is a job requirement and this requirement was consistently enforced by respondent. Petitioner was repeatedly reminded of this necessity and feigned ignorance each time.
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> Any grant to the petitioner of additional time to respond is unreasonable and is patently unfair to the respondent. At any point between October 16, 2015 and the receipt of this decision on November 14, 2016, petitioner could have sent a brief or any form of argument to the court. He failed to do so.
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> The further delay of a Final Decision with respect to this matter is inappropriate and does not promote justice, but rather enables the petitioner to litigate this matter on his own terms and timeline and not in accordance with the Rules of Court.

Respondent respectfully submits that both on the merits of the matter and on the procedural requirements, petitioner's claim was properly dismissed and a Final Decision should be entered dismissing such claim.

Upon de novo review of the record, and after consideration of the ALJ's initial decision, as well as the exceptions filed by petitioner and the reply to exceptions filed by respondent, I hereby accept the ALJ's findings of fact and conclusions of law as well as his recommendation that petitioner's complaint of discrimination be dismissed. First, the record clearly reflects that petitioner did, in fact, fail to file a timely response to respondent's motion for summary decision. As to petitioner's assertion within his exceptions to the initial decision of the ALJ that he had submitted "paperwork" to ALJ Bingham which establishes a dispute of material fact necessitating a hearing, I have reviewed the entire record forwarded to me by the OAL and find no trace of any submission by petitioner at any time in these proceedings which would meet the standard set forth at N.J.A.C. 1:1-12.5 for defeat by an adverse party of a supported motion for summary decision. That is, N.J.A.C. 1:1-12.5(b) states the following: "When a motion for summary decision is made and supported, an adverse party in order to prevail must by responding affidavit set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding." I agree with the ALJ's characterization of petitioner's submissions that are found within the Department investigation file, as containing "uncertified and mostly vague assertions about discrimination and disparate treatment." I think that this is an apt description of petitioner's submissions, in general. I also agree with the ALJ that, "the only evidence of any moment is petitioner's complaint letter to the Electrical Contractor's Board," which was sent by petitioner weeks after he had already been notified by respondent of the decision not to renew his contract for employment as a maintenance worker.

ORDER

Therefore, it is ordered that the discrimination complaint of Joseph Scialabbo, Sr., be dismissed.

This is the final administrative decision in this matter. Any further review should be pursued in a judicial forum.

DECISION RENDERED BY
THE COMMISSIONER, DEPARTMENT
OF LABOR AND WORKFORCE DEVELOPMENT

Aaron R. Fichtner, Ph.D., Acting Commissioner
Department of Labor and Workforce Development

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