

February 22, 1999

Dear:

Upon review of the papers filed in the matter entitled, *Edward P. Atkin v. Board of Education of the City of Elizabeth, Union County*, Agency Dkt. No. 489-10/98, I have determined to grant respondent's Motion to Dismiss the Petition of Appeal as untimely filed, pursuant to *N.J.A.C. 6:24-1.2(c)*.

This matter was opened by way of the filing of a Petition of Appeal on October 30, 1998. A deficiency in the petition was corrected by petitioner on November 16, 1998. The petition alleges that respondent violated a number of the regulations with respect to the training and mentoring of provisional teachers affecting his employment as a teacher in the Elizabeth school district. He seeks, *inter alia*, an order restoring him to employment as a teacher in the Elizabeth school district with retroactive pay to February 1, 1998, reimbursement of the mentoring fee deducted from his pay, and a directive that respondent provide him an opportunity to obtain certification and be granted tenure.

Respondent submitted its Answer to the petition on December 8, 1998. On December 23, 1998, it also submitted a Motion to Dismiss the petition based upon petitioner's failure to timely file his claim pursuant to the *N.J.A.C. 6:24-1.2(c)* because it was filed outside the 90-day limit as provided by that regulation and because it fails to state a claim upon which relief may be granted. On December 23, 1998, the parties were notified by the Director of the Bureau of Controversies and Disputes that I would exercise the authority granted me by *N.J.A.C. 6:24-1.9* to entertain the motion insofar as it related to the issue of the timeliness of the filing. Petitioner submitted his reply to respondent's motion on January 15, 1999. The record in the matter closed on January 29, 1999 upon receipt of respondent's statement in support of its motion.

Based on the papers submitted in this matter, it is undisputed that petitioner was initially employed by respondent from October 8, 1997 through December 31, 1997 pursuant to a written contract. Petitioner and respondent mutually agreed to extend the employment contract to January 30, 1998.<sup>1</sup> The Petition of Appeal was filed on October 30, 1998 some nine (9) months after petitioner's employment ended in the Elizabeth school district. Respondent argues that the petition was, at best, filed some 271 days from the date petitioner's contract expired

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<sup>1</sup> Respondent claims that the teaching position petitioner filled from October -December 1997 was a temporary opening due to the medical leave of a tenured teacher, Frank Cress, who subsequently requested an additional month's leave, which resulted in the one-month extension of petitioner's contract until January 30, 1998. Respondent further indicates that Mr. Cress returned to the position at the end of the one-month extension of his medical leave. Petitioner disputes respondent's claims regarding the status of Mr. Cress, asserting that he was not told that Mr. Cress was on medical leave but that Mr. Cress was not expected to return to the district due to his medical condition.

which is well beyond the 90-day time limitation set by *N.J.A.C. 6:24-1.2(c)*; thus, it is untimely. Of this respondent states

In *Kaprow v. Board of Educ. of Berkeley Township*, 131 N.J. 572 (1993), the Court expressly found the 90 day regulation to be valid. The Court stated that *N.J.A.C. 6:24-1.2(c)* “represents a fair and reasonably necessary requirement for the proper and efficient resolution of disputes under the school laws.” *Id.* at 582. Numerous decisions concerning this section of the Code have been litigated and the Courts have consistently held this rule is mandatory and that the ninety day time period begins to run on the date that notice is received of the action taken. See, *Nissman v. Board of Educ. of Tp. of Long Beach Island*, 272 N.J. Super. 373, (A.D. 1994), *cert. denied* 187 N.J. 315; *Wynne v. Tillery, Camden County Superintendent of Schools*, 96 N.J.A.R.2d (EDU) 995; *Conklin v. Old Bridge Township Board of Education*, 96 N.J.A.R.2d (EDU) 502; *Portee v. Newark Board of Education*, 94 N.J.A.R.2d (EDU) 381. (Respondent’s Brief at page 4)

Respondent further argues that there is no cause for relaxation of the 90-day rule, averring that the Courts have stated that the 90-day rule will only be relaxed where there is some compelling constitutional concern or other fundamental public interest beyond the parties which would warrant waiver of the rule. According to respondent, such circumstances are not present in the instant matter. Respondent further contends that even if petitioner argues he attempted to litigate his claim in another forum, the complaint must, nonetheless, be filed within any other forum within the 90-day period.

Petitioner urges that his Petition of Appeal should not be dismissed, stating that he filed a request for the New Jersey Education Association (NJEA) Legal Services Program on February 10, 1998 (Petitioner’s Exhibit 1) but he was not referred to an NJEA attorney until June 9, 1998 (Petitioner’s Exhibit 2). Moreover, the meeting with the attorney was subsequently postponed, at the attorney’s request, until July 9, 1998. Petitioner also contends that he filed a complaint with the State on March 1, 1998 concerning respondent’s failure to comply with the requirements for mentoring provisional teachers and on March 25, 1998, he made a request by certified mail to the district’s mentoring coordinator seeking a copy of the district training program for provisional teachers (Petitioner’s Exhibit 3)<sup>2</sup>. Petitioner further urges that the 90-day rule should be relaxed in cases where there is a public interest beyond the parties such as herein because, he maintains, respondent is in noncompliance with the provisions of the state’s district training program for provisional teachers.

Respondent’s reply to petitioner’s position urges that a request for legal services does not satisfy the requirements of a petition as contemplated by *N.J.A.C. 6:24-1.2(c)* and, although petitioner asserts that he filed a complaint with the State, he provided no such proof of any complaint. Moreover, respondent emphasizes that no complaint was ever served upon or received by it. Respondent further urges that if the interpretation of code as to timeliness is

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<sup>2</sup> Petitioner provides no explanation as to the circumstances of the filing of a complaint with the State.

enlarged to include requests for counsel and unsubstantiated assertions of complaints, this would render the 90-day filing requirement meaningless and it would open the floodgates of litigation.

Upon thorough consideration of this matter, I fully concur with respondent's position that the Petition of Appeal herein was untimely filed and that relaxation of the 90-day timeline is not warranted under the circumstances. The 90-day period set forth in *N.J.A.C. 6:24-1.2(c)* begins when the affected individual has received adequate notice, and, in order for the notice to be adequate, the individual must have been alerted to the existence of facts which give rise to a cause of action. *Kaprow, supra* at 586-587. Here, petitioner was employed for a specific contractual period of two months, October 30–December 30, 1997. Petitioner's employment contract was subsequently extended one month, until January 30, 1998, at which time the contract expired. Nowhere does petitioner claim that he was offered or received a promise of an offer of continued employment by respondent. Thus, given the factual circumstances herein, it was upon the expiration of his employment contract on January 30, 1998 that the 90-day timeline began.

Moreover, I do not find that the factual circumstances set forth in petitioner's pleadings, *e.g.*, his pursuit of legal services until July 1998, his request for information about respondent's training and mentoring program in March 1998 and his allegations that respondent failed to adhere to its training and mentoring program for provisional teachers and State regulations relative thereto, constitute grounds for relaxation of the 90-day rule. No substantial constitutional issues are involved in the matter nor does the matter present issues of significant public interest beyond the parties. On the contrary, I determine, as did the Commissioner in *LeMee v. Board of Education of the Village of Ridgewood, 1990 S.L.D. 663, 673*, that the greater public interest presented herein lies with the enforcement of the 90-day rule and dismissal of the petitioner's appeal as untimely.

Accordingly, for the reasons stated herein, respondent's motion to dismiss the Petition of Appeal is granted.<sup>3</sup> Notwithstanding this dismissal, however, a copy of the petition and decision are being provided to the County Superintendent of Schools for review and action, if deemed appropriate, given petitioner's assertions relative to respondent's compliance with the regulations for the training and mentoring of provisional teachers.

Sincerely,

Leo Klagholz  
Commissioner

c: John Sherry, Assistant Commissioner  
County Superintendent  
Board Secretary

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<sup>3</sup> This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A. 18A:6-27 et seq.* and *N.J.A.C. 6:2-1.1 et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.