

OAL Dkt. No. EDU 5782-18
Agency Dkt. No. 62-3/18

New Jersey Commissioner of Education
Final Decision

John McAllister and James Gallagher,

Petitioners,

v.

Board of Education of the Borough of
Stone Harbor, Cape May County,

Respondent.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed.¹

Upon such review, the Commissioner concurs with the Administrative Law Judge's determination that the petition of appeal was time-barred under *N.J.A.C.* 6A:3-1.3(i). Additionally, the petitioners have failed to present any exceptional circumstances that might justify a finding that a strict adherence to the 90-day rule would result in injustice. *Kaprow v. Board of Education of Berkeley Tp.*, 131 *N.J.* 572, 590 (1993); *N.J.A.C.* 6A:3-1.16.² Accordingly, the petition of appeal is hereby dismissed.

IT IS SO ORDERED.³

COMMISSIONER OF EDUCATION

Date of Decision: January 23, 2020

Date of Mailing: January 24, 2020

¹ The record does not include a transcript from the hearing held at the OAL on October 24, 2019. Further, the petitioners filed untimely exceptions without requesting an extension; therefore, such exceptions were not considered.

² Since the petition of appeal was untimely filed, it was not necessary to evaluate whether the Stone Harbor Board of Education's decision was arbitrary, capricious or unreasonable.

³ This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36. (*N.J.S.A.* 18A:6-9.1).



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 05782-18

AGENCY DKT. NO. 62-3/18

**JOHN McALLISTER AND JAMES,
GALLAGHER,**

Petitioners,

v.

**BOARD OF EDUCATION OF THE
BOROUGH OF STONE HARBOR,
CAPE MAY COUNTY,**

Respondent.

John McAllister and **James Gallagher**, petitioners, pro se

James R. Birchmeier, Esq., for respondent (Birchmeier & Powell, LLC, attorneys)

Record Closed: October 24, 2019

Decided: December 9, 2019

BEFORE **JOHN S. KENNEDY**, ALJ:

STATEMENT OF THE CASE

Petitioners, John McAllister and James Gallagher, challenge respondent's, Borough of Stone Harbor Board of Education (the Board) decision to approve the Chief School Administrator's (Superintendent) contract at a Board of Education meeting convened on November 8, 2017.

PROCEDURAL HISTORY

The original petition of appeal was filed with the Department of Education on March 15, 2018. The Department of Education transmitted the matter to the Office of Administrative Law (OAL), where it was filed on April 23, 2018. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. A hearing was conducted on October 24, 2019, and the record closed on that date.

FACTUAL DISCUSSION

On November 8, 2017, the Board voted to rescind the contract of the Superintendent for the period of July 1, 2015, through June 30, 2018, and approve the Superintendent's contract for the period of July 1, 2017, through June 30, 2021. Petitioners were both sitting Board members at the time of the vote and both voted against the action. After the November 8, 2017, Board meeting, petitioners requested a legal opinion from the Board's solicitor to advise whether the action taken was legally permissible. At the next meeting convened on December 13, 2017, the Board's solicitor provided an opinion that the action in question was valid and legally binding. The Board also obtained legal opinions from two additional law firms that contracted to perform various functions for the Board. All three law firms opined that the Board had authority to take the action. (R-2.) In February 2018, petitioners made an inquiry with the Department of Education to determine if the Board had authority to make the changes to the Superintendent's employment contract. On February 27, 2018, petitioners were instructed by the Assistant Commissioner of Field Services, Robert Bumpus (Bumpus) to file a petition of appeal through the Division of Controversies and Disputes at the Department of Education. The petition was mailed from Cape May, New Jersey on March 13, 2018, and received at the Division of Controversies and Disputes on March 15, 2018.

Testimony

John McAllister testified on his own behalf. No attorney for the board of education attended the November 8, 2017 meeting. When the Superintendent's contract was presented to the Board, a motion to go into executive session was made but did not pass. The Board president gave notification in October 2017, that he was not seeking reelection. McAllister feels that the new contract was an attempt by administration to bind the future Board because it was uncertain if the new Board member would support the new contract. The Board attorney did attend the December 13, 2017, meeting and gave the opinion that the Board's action was permissible under the law. The new contract was approved by the Board by a 4-2 vote on November 8, 2017, and no new vote was taken at the December 2017, Board meeting. At the time McAllister received instructions from Bumpus to file the petition, he was unaware that the petition was required to be filed within ninety-days.

James Gallagher also testified on his own behalf and agreed with the testimony of McAllister. Gallagher was concerned why the Board had to take action on the Superintendent's contract in November 2017, if her current contract was not set to expire until June 2018.

Mark Matreale next testified on behalf of petitioners. He was elected to the school board in November 2017, but did not take office until the Board reorganization in January 2018. The Board decision on November 8, 2017, effected his ability to be involved in the decision making process and bound the incoming Board to the new superintendent contract. He was never provided an opportunity to obtain information regarding the new contract.

Linda Fiori testified on behalf of the board. She is now and has been at all times relevant the Business Administrator/Board Secretary for the Board. Stone Harbor and Avalon entered into a shared services agreement wherein they would share the business administrator and the superintendent. All students attend kindergarten through fourth grade in Stone Harbor and fifth through eight grades in Avalon. The current Superintendent began in 2012. In April 2017, the teachers renegotiated their contract

with the Board. It was determined at that time that certain benefits were included in the teacher contract that were not included in the Superintendent's contract. Fiori advised the Superintendent of this and the Superintendent negotiated new contract terms with the Board's personnel committee. The contract revisions were reviewed by the New Jersey School Boards Association (NJSBA) and the county superintendent. The county superintendent is required to sign off on all new and revised contracts proposed between board of educations and their superintendents. The county superintendent approved the proposed contract and Fiori placed a version of the proposed contract on the Board's computer system. The Superintendent's current contract had a term from 2015 through June 30, 2018. The new Superintendent contract had a start date of July 1, 2017, to be consistent with the newly ratified teacher contract. As a result, the motion made at he November 8, 2017, meeting rescinded the currently existing Superintendent contract and approved the new contract retroactively to July 1, 2017. Fiori was not involved in the contract negotiations between the Superintendent and the Board's personnel committee.

Stacey Tracy next testified on behalf of the board. She has been the Superintendent for both Avalon and Stone Harbor School Boards since 2012. Prior to 2012, Ms. Tracy was the Shared Curriculum Supervisor for both districts since 2005. In April 2017, she was advised by Fiori that the benefits for the teachers had changed as a result of the negotiations to their new contract. The county superintendent advised her at that time that it was permissible to open her contract and make changes. She contacted the personnel committee which consisted of the president and vice president of both the Stone Harbor and Avalon Boards. While they were in agreement that changes should be made to the Superintendent's contract in April 2017, a personnel committee meeting was not conducted until September 2017, as the committee members had seasonal obligations that made it difficult to meet during the summer.

The county superintendent approved the new contract terms in a letter, dated October 26, 2017, (R-7) and after a few minor revisions were made, a second time on November 8, 2017. (R-8.) With her consent, discussion regarding the contract were conducted in public session at the Board meeting on November 8, 2017. McAllister asked for clarification as to weather a lame duck board can take action that will essentially bind the future Board, so Tracy contacted all three of the attorneys that represent the Board.

All three attorneys rendered the decision that the Board action approving her new contract was permissible. She was not concerned that her new contract would not pass under the new Board. The timing of the Board action was a result of when the Board received approval from the county superintendent.

Based on the testimony of the witnesses and examination of the documentary evidence, I FIND the forgoing as **FACTS**.

LEGAL ANALYSIS AND CONCLUSION

The Board asserts that the petition should be dismissed as a matter of law. The Board took action on the Superintendent's contract at its November 8, 2017, Board meeting. The petition was received at the Department of Education on March 15, 2018, more than ninety-days from the Board action and in violation of N.J.A.C. 6A:3-1.3(i). The ninety-day rule has been strictly followed and applied almost without exception. The rule may be relaxed, however, under exceptional circumstances or if there is a compelling reason to do so. M.N. & E.Y. o/b/o K.N. v. State Operated Sch. Dist. Of Jersey City, OAL Dkt. No. EDU 11136-03 (June 17, 2004), aff'd (Comm. Ed. July 2004). Petitioners assert that they were instructed by the Assistant Commissioner of Field Services, Robert Bumpus (Bumpus) to file a petition of appeal through the Division of Controversies and Disputes at the Department of Education. That instruction did not occur until February 27, 2018. McAllister concedes that at the time of filing the petition, he was unaware of the ninety-day rule.

It is well settled that a petition of appeal before the Commissioner must be brought within ninety-days of receipt of "notice of a final order, ruling or other action by the board which is the subject of the contested case." N.J.A.C. 6A:3-1.3(i). The ninety-day limitation period begins to run once a petitioner learns of the facts that would enable the filing of a claim. Kaprow v. Board of Ed. Of Berkeley Twp., 131 N.J. 572 (1993). In this case, the day that petitioners learned of the facts that would enable the filing of the petition was November 8, 2017. Therefore, the ninety-day limitation period would have expired on February 6, 2018. Even if, as petitioner argues, the facts that would enable the filing of

the petition were not known until December 13, 2017, (the date the Board received the legal opinions from the three law firms) the ninety-day limitation period would have expired on March 13, 2018. Petitioners concede that the petition was placed in the mail on that date and not received and filed by the Department of Education until December 15, 2018, ninety-two-days after the December 13, 2017, Board meeting and 122-days after the Board approved the new contract. There has been no evidence presented during this hearing that shows any exceptional or compelling circumstances to relax the ninety-day rule that has consistently been strictly enforced. See Dreher v. Jersey City Bd. Of Ed., 1987 S.L.D. 1706 aff'd. 1988 S.L.D. 2439 (St. Bd. 1988) (petition filed only two days after the timeline expired was dismissed as untimely); Taylor v. Bd. Of Ed. Of Twp. Of Hardyston, OAL Dkt. No. EDU 1049-05, Agency Dkt. No 366-10/04 (petition filed one week after the timeline expired was dismissed as untimely); Kaprow v. Board of Ed. Of Berkeley Twp., 131 N.J. 572 (1993) (petition filed two weeks after the timeline expired was dismissed as untimely). Therefore, I **CONCLUDE** that the petition filed in this matter is time-barred since it was not filed within the ninety-day limitation period.

It should be noted that petitioners have not meet their burden to show that the actions of the Board were arbitrary and capricious. Where there is room for two opinions, action is not considered arbitrary or capricious when exercised honestly and upon due consideration, even though the court may believe that an erroneous conclusion has been reached. Bayshore Sewerage Co. v. Dep't of Env't'l Prot., 122 N.J. Super. 184, 199 (App. Div. 1973). Petitioners argue that the Board action was inappropriate because the Commissioner has ruled that a "lame duck" board is only empowered to act in certain circumstances and cannot appoint administrators or other employees to positions in which no vacancy exists. Nowak v. Bd. of Ed. Of Borough of Manville, 1976 S.L.D. 43. Nowak does not bind the action taken by this Board. Here, the Board voted to rescind and grant a new contract to the Superintendent retroactive to July 1, 2017. If the Board had acted to award a new contract that did not take effect until after the new Board was formed in January 2018, that would be a case where Nowak would control. The full Board took action on the Superintendent contract. This contract was previously approved by the county superintendent as well as the NJSBA. After the vote and because of the question presented by petitioners as to whether the Board had authority to approve the contract, administration obtained a legal opinion from three law firms. All three agreed

that the action taken was permissible under the law. Based on the above, I **CONCLUDE** that petitioners have not met their burden of demonstrating that the action taken by the full Board on November 8, 2017, was arbitrary, capricious and unreasonable, and that the petition of appeal must be dismissed.

ORDER

It is hereby **ORDERED** that the Board's decision to approve the Chief School Superintendent contract at a Board's meeting convened on November 8, 2017, is **AFFIRMED** and the petition of appeal is **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.

December 9, 2019
DATE



JOHN S. KENNEDY, ALJ

Date Received at Agency:

Date Mailed to Parties:

JSK/dm

APPENDIX

LIST OF WITNESSES

For petitioners

James Gallagher

John McAllister

Mark Matreale - current School Board Member

For respondent

Linda Fiori – Business Administrator/Board Secretary

Stacey Tracy – Superintendent/Chief School Administrator

LIST OF EXHIBITS

For petitioner

P-1 Initial Decision in EDU 03062-16

For respondent

R-1 November 8, 2017, email from McAllister

R-2 Legal Opinions

R-3 Shared Service Agreement between Avalon BOE and Stone Harbor BOE,
dated November 2017

R-4 Minutes of November 8, 2017, School Board Meeting

R-5 Board Secretary notes of November 8, 2017, School Board Meeting

R-6 Minutes of December 13, 2017, School Board Meeting

R-7 Letter, dated October 26, 2017, from County Superintendent approving
employment contract

- R-8 Letter, dated November 8, 2017, from County Superintendent approving employment contract
- R-9 Employment contract approved on November 8, 2017