

**IN THE OFFICE OF THE SECRETARY OF EDUCATION
COMMONWEALTH OF PENNSYLVANIA**

JEFFREY MADDEN,	:		
	Appellant	:	
		:	
v.		:	TTA No. 05-08
		:	
BOARD OF DIRECTORS PERKIOMEN VALLEY SCHOOL DISTRICT,	Appellee	:	

On June 1, 2009, Appellant, Jeffrey Madden (“Mr. Madden”) filed a Petition for Allowance of Appeal *Nunc Pro Tunc* (the “Petition *Nunc Pro Tunc*”) with the Secretary of Education (“Secretary”). The Appellee, Board of Directors of Perkiomen Valley School District (the “District”), filed a Response to the Petition on June 17, 2009. Subsequently, the parties and the appointed hearing officer agreed that the parties would file briefs supporting their respective positions. After consideration of the Petition, the Response, and the parties’ briefs, and for the reasons set forth below, Mr. Madden’s Petition *Nunc Pro Tunc* is denied.

Findings of Fact

1. On or about August 15, 2005, Mr. Madden was employed by the District as a professional employee.
2. On or about June 10, 2008, the District issued an Amended Notice of Hearing and Statement of Charges against Mr. Madden. *See Petition of Appeal filed November 3, 2008.*
3. On August 13, 2008, the District held a hearing regarding the Amended Notice of Hearing and Statement of Charges. *See Petition of Appeal filed November 3, 2008.*
4. Following the hearing, the District voted to terminate Mr. Madden’s employment with the District, effective August 14, 2008. This was conveyed to Mr. Madden by letter dated

August 18, 2008. See *Petition of Appeal filed November 3, 2008 and Exhibit "B" attached thereto.*

5. On November 3, 2008, Mr. Madden filed with the Secretary a Petition of Appeal asking that the Secretary reverse the District's decision to terminate Mr. Madden's employment.

6. On November 6, 2008, the Secretary received the District's Motion to Dismiss Petition of Appeal by which the District claimed that the Petition of Appeal was not timely filed.

7. As the result of a conference call on November 7, 2009, among counsel for the parties and the appointed hearing officer, counsel agreed to file briefs supporting their respective positions regarding the District's Motion to Dismiss.

8. Subsequently, by letter dated November 21, 2008, Mr. Madden's previous counsel, Mr. Mullaney, asked that the Petition of Appeal be withdrawn. This letter was copied to Mr. Madden.

9. By letter dated December 3, 2008, the hearing officer informed counsel for the parties that based on the request of Mr. Madden's counsel that the Petition of Appeal be withdrawn, Mr. Madden's appeal filed with the Secretary was withdrawn and the case was closed.

10. On June 1, 2009, the Secretary received the Petition *Nunc Pro Tunc* from Mr. Madden's new counsel asking that the Secretary allow Mr. Madden's appeal to be heard notwithstanding the untimely filing of his initial appeal and its subsequent withdrawal.

11. The District, on June 17, 2009, filed its response to the Petition *Nunc Pro Tunc* asking that the Secretary deny Mr. Madden's Petition *Nunc Pro Tunc*.

12. On August 3, 2009, the hearing officer informed counsel for the parties that she would accept briefs supporting their respective positions regarding the Petition *Nunc Pro Tunc*. Counsel for both parties filed briefs.

Discussion

Background

Mr. Madden was a professional employee of the District. On or about June 10, 2008, the District issued an Amended Notice of Hearing and Statement of Charges against Mr. Madden. On August 13, 2008, the District held a hearing regarding the Amended Notice of Hearing and Statement of Charges. Following the hearing, the District voted to terminate Mr. Madden's employment with the District, effective August 14, 2008. The District informed Mr. Madden of his termination by letter dated August 18, 2008. Although not raised as an issue in his original Petition of Appeal, in his brief supporting the Petition *Nunc Pro Tunc* Mr. Madden attempts to raise an issue about receipt of the termination letter and the letter's sufficiency as a notice of termination.

Mr. Madden states in his brief in support of his Petition *Nunc Pro Tunc* that "it appears the Board did not serve a written notice of discharge decision to Madden as required under 24 P.S. C.S.A. §11-1130." However, in Mr. Madden's original Petition of Appeal filed on November 3, 2008 he states that Exhibit "B" attached to the Petition is "a true and correct copy of the correspondence from the District regarding Madden's termination . . ." The Exhibit "B" attached to the original Petition of Appeal is the August 18, 2008 letter from the District to Madden informing Mr. Madden of his termination effective August 14, 2008. In addition, attached as Exhibit "A" to the District's brief in opposition to the Petition *Nunc Pro Tunc* is a

copy of United States Post Office Domestic Return Receipt signed by Mr. Madden in August 2008. Therefore, it is clear that Mr. Madden received notice of his termination.

Mr. Madden also states in his brief that the August 18, 2008 letter “lacks sufficient specificity and information to qualify as a formal notice of discharge decision as required under the applicable statutes.” However, Mr. Madden does not provide any citation to support his statement. In fact, case law supports the opposite conclusion because findings of fact and a statement of reasons do not have to accompany a school board decision when terminating a professional employee. *See, Penn-Delco School District v. Urso*, 382 A.2d 162 (Pa. Cmwlth. 1978). Thus, there is no issue about the sufficiency of the August 18, 2008 letter in notifying Mr. Madden of his termination.

Pursuant to 24 P.S. §11-1131, if a professional employee considers himself aggrieved by action of the board of school directors, he may file an appeal with the Secretary within thirty (30) days after receipt by registered mail of the written notice of the board. Thus, Mr. Madden should have filed his Petition of Appeal by September 22, 2008. However, Mr. Madden’s Petition of Appeal was not filed with the Secretary until November 3, 2008. A copy of the November 3, 2008 letter from Mr. Madden’s counsel, Mr. Mullaney, regarding the filing of the appeal was copied to Mr. Madden. *See, Exhibit “B” attached to the District’s brief.*

On November 6, 2008, the District filed a Motion to Dismiss Mr. Madden’s Petition of Appeal arguing that the Petition was not timely filed. Counsel for the respective parties agreed to file briefs supporting their respective positions about the timeliness of the filing of the Petition of Appeal. Rather than filing a brief, however, Mr. Mullaney sent a letter dated November 21, 2008, to the Secretary asking that the Petition of Appeal be withdrawn. *See Exhibit “F”*

attached to the District's brief. This letter withdrawing the Petition of Appeal was copied to Mr. Madden.

More than six (6) months after Mr. Mullaney's November 21, 2008 letter was sent to the Secretary, Mr. Madden's new counsel filed with the Secretary a Petition for Allowance of Appeal *Nunc Pro Tunc*. In support of the Petition *Nunc Pro Tunc*, Mr. Madden states, in an Affidavit dated May 27, 2009, that he only recently learned that Mr. Mullaney did not file the original Petition of Appeal until November 3, 2008 and that Mr. Mullaney had the Petition of Appeal withdrawn on November 21, 2008 without Mr. Madden's permission or knowledge. Mr. Madden also states that between August 14, 2008 and May 27, 2009, he made several inquiries to Mr. Mullaney about the status of his appeal and received no response. *See, Affidavit of Jeffrey Madden.*

However, Mr. Madden states in his brief that he made numerous phone calls to Mr. Mullaney during the months after his termination and was repeatedly told the appeal had been filed. Mr. Madden also states in his brief that after the Petition of Appeal was withdrawn, Mr. Mullaney repeatedly told Mr. Madden, in response to Mr. Madden's continuing inquiries, that the appeal was proceeding. Just as there are discrepancies with Mr. Madden's statements about receipt of the August 18, 2008 termination letter, there are discrepancies between Mr. Madden's statement that he received no responses from his inquiries to Mr. Mullaney and his statement that he was told that the appeal was filed and proceeding.

Nunc Pro Tunc

Appeal periods are jurisdictional and may not be extended as a matter of grace or mere indulgence. *West Penn Power Co. v. Goddard*, 333 A.2d 909 (Pa. 1975); *Olson v. Borough of Homestead*, 443 A.2d 875 (Pa. Cmwlth. 1982). However, Commonwealth courts have

recognized that, under extraordinary circumstances, an appeal period may be extended by a court granting equitable relief in the form of a *nunc pro tunc* appeal. *Criss v. Wise*, 781 A.2d 1156 (Pa. 2001). The decision to allow or deny such appeals is left to the discretion of the trial court. *McKeown v. Bailey*, 731 A.2d 628, 630 (Pa. Super. 1999). “More is required before such an appeal will be permitted than the mere hardship imposed upon the appellant if the request is denied.” *Id.*

According to the Pennsylvania Supreme Court, the limited exceptions for allowing an appeal *nunc pro tunc* are where the appellant proves: (1) the appeal was filed late as a result of non-negligent circumstances, either related to the appellant or the appellant’s attorney; (2) the appellant filed the notice of appeal shortly after the expiration date; and, (3) the appellee was not prejudiced by the delay. *Criss*, 781 A.2d at 1159, citing *Bass v. Commonwealth, Bureau of Corrections*, 401 A.2d 1133 (Pa. 1979). The Court further stated that “the exception for an allowance of an appeal *nunc pro tunc* in non-negligent circumstances is meant to apply only in unique and compelling cases in which the appellant clearly established that she attempted to file an appeal, but unforeseeable and unavoidable events precluded her from actually doing so.” *Criss*, 781 A.2d at 1160.

In the *Criss* case, the appellee’s counsel asked a receptionist to mail a notice of appeal from an arbitration award. The receptionist put the notice of appeal in the mailbox on December 22. The Prothonotary did not receive the notice of appeal until December 30, which was two days after the expiration of the appeal period. The Supreme Court denied the appellee’s request to file an appeal *nunc pro tunc* because delays in the U.S. mail are foreseeable and avoidable; thus, appellee’s “failure to anticipate a potential delay in the mail was not a non-negligent circumstance for which an appeal *nunc pro tunc* may be granted.” *Id.*

In the case of *In re Adoption of W.R.*, 823 A.2d 1013, 1016 (Pa. Super. 2003), the appellant failed to follow proper procedure when she filed exceptions to an order terminating parental rights rather than filing a notice of appeal within thirty days after entry of the order. The court denied the exceptions on October 30, 2001. The appellant filed a petition for allowance of appeal *nunc pro tunc* on March 19, 2002, asserting that counsel only received the October order on March 14, 2002. Finding that there was neither fraud nor the breakdown in the processes of the trial court, the Pennsylvania Superior Court followed the *Criss* holding and quashed the appeal stating that the Supreme Court “made it clear that the circumstances occasioning the failure to file an appeal must not stem from counsel’s negligence or from a failure to anticipate foreseeable circumstances.” *Adoption of W.R.*, 823 A.2d at 1016.

In the instant case, Mr. Madden asserts that he only learned in approximately May 2009 that his previous counsel had not filed an appeal to the Secretary of Education regarding his dismissal from employment by the School District until November 2008. Mr. Madden also asserts that he was not aware until approximately May 2009 that his previous counsel had withdrawn his appeal with the Secretary. Mr. Madden further states in his Affidavit that between August 14, 2008 and May 27, 2009, he made several inquiries to Mr. Mullaney about the status of his appeal and received no response. However, Mr. Madden states in his brief that he made numerous phone calls to Mr. Mullaney during the months after his termination and was repeatedly told the appeal had been filed. Mr. Madden also states in his brief that after the Petition of Appeal was withdrawn, Mr. Mullaney repeatedly told Mr. Madden, in response to Mr. Madden’s continuing inquiries, that the appeal was proceeding. In addition to Mr. Madden’s contradictory statements, Mr. Mullaney’s letter dated November 3, 2008 filing the original

Petition of Appeal and his letter dated November 21, 2008 asking that the Petition of Appeal be withdrawn were both copied to Mr. Madden.

Thus, in essence, Mr. Madden's position is that his Petition *Nunc Pro Tunc* should be permitted because his previous counsel was negligent in not timely filing his original Petition of Appeal and negligent in withdrawing his original Petition of Appeal. However, the negligence of Mr. Madden's previous counsel is not a basis upon which an appeal *nunc pro tunc* can be allowed. As stated by the Pennsylvania Supreme Court in *Criss*, under extraordinary circumstances, an appeal period may be extended by a court granting equitable relief in the form of a *nunc pro tunc* appeal. *Criss*, 781 A.2d 1156 (emphasis added). Mr. Madden has not provided evidence of any extraordinary circumstances that would support his request for an appeal *nunc pro tunc*.

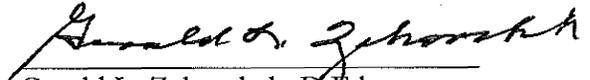
Accordingly, the following Order is entered:

IN THE OFFICE OF THE SECRETARY OF EDUCATION
COMMONWEALTH OF PENNSYLVANIA

JEFFREY MADDEN, :
Appellant :
v. : TTA No. 05-08
BOARD OF DIRECTORS PERKIOMEN :
VALLEY SCHOOL DISTRICT, :
Appellee :

ORDER

AND NOW, it is hereby ordered and decreed that Jeffrey Madden's Petition for Allowance of Appeal *Nunc Pro Tunc* is denied.


Gerald L. Zahorchak, Ed.
Secretary of Education

Date Mailed: October 19, 2009