

STATE OF VERMONT

SUPERIOR COURT  
Windsor Unit

CIVIL DIVISION  
Docket No. 562-11-15 Wrev

ELIZABETH FEINBERG,  
Plaintiff

v.

REBECCA HOLCOMBE,  
Defendant

DECISION  
Motion To Dismiss (#1)

The State of Vermont, on behalf of Rebecca Holcombe, moves to dismiss this Rule 75 request for review of governmental action as untimely. The Plaintiff is represented by Stefan Ricci, Esq. and the Defendant is represented by Assistant Attorney General Michael O. Duane.

Rule 75 provides in relevant part that

The time within which review may be sought shall be as provided by statute, except that if no time limit is specified by statute, the complaint shall be filed within 30 days after notice of any action or refusal to act of which review is sought unless the court enlarges the time in accordance with Rule 6(b), and, in the event of a failure to act, within six months after expiration of the time in which action should reasonably have occurred.

V.R.C.P. 75(c). Although Rule 75(c) provides time limits for filing an action, the time limits are not jurisdictional. *Alger v. Department of Labor & Industry*, 2006 VT 115, ¶ 14, 181 Vt. 309.

The Defendant argues that the Plaintiff's action is untimely because she is seeking review of a decision made by the Agency of Education on June 30, 2015, and this action was not filed until November 20, 2015, beyond the thirty-day limitation in Rule 75(c). The Plaintiff argues that she is seeking review of the Agency's "failure to act" in response to her October 8, 2015 letter, for which there is a six-month limitation.

A motion to dismiss "should not be granted unless it is beyond doubt that there exist no facts or circumstances that would entitle [the complainant] to relief." *Powers v. Office of Child Support*, 173 Vt. 390, 395 (2002) (citations omitted). Here, the Defendant's motion turns on whether the June 30, 2015 letter was a final, appealable decision, whether the parties continued to negotiate after the letter was issued, and whether the October 8, 2015 letter was a "pro forma exchange of letters" insufficient to support Rule 75 review under *Fyles v. Schmidt*, 141 Vt. 419, 421 (1982).

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The court concludes that the October 8, 2015 letter was not a *pro forma* document intended only for the purpose of prolonging the time period for filing a Rule 75 action. Its content shows that it was a highly substantive request seeking specific action on the part of a governmental agency on the basis of both factual and legal grounds that may not have been brought to the agency's attention prior to June 30, 2015. Therefore, the outcome is not controlled by *Fyles*.

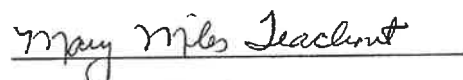
There are other aspects of the communications that are unclear as well. For example, the June 11, 2015 letter that was sent directly to Ms. Feinberg indicated by its terms that an investigation was beginning, and invited her involvement. The June 30, 2015 letter went to an attorney for Vermont NEA. The relationship between Ms. Feinberg and the NEA attorney is not clear, so the court cannot conclude on the present record that the letter constituted proper formal notice to Ms. Feinberg sufficient to commence a thirty-day period. Moreover, it does not clearly state that the investigation, referenced in the June 11, 2015 letter, has been concluded. It does not appear from the filings that the agency ever addressed the substantive issues set forth in the October 8, 2015 letter.

While mindful of the need to ensure that persons aggrieved by governmental decisions should not be able to trigger a new 30-day period by simply writing a new letter, in this case, for the reasons set forth in the preceding paragraph, the court cannot conclude that dismissal is warranted under the *Powers* standard.

The motion to dismiss is therefore denied.

If the parties have not submitted a stipulated proposed pretrial scheduling order by May 10, 2016, a status conference will be scheduled.

Dated in Woodstock, Vermont this 25th day of April, 2016.

  
Mary Miles Teachout  
Superior Court Judge

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