

# **N.J.A.C. 6A:4, APPEALS**

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## **CHAPTER 4. APPEALS**

### **SUBCHAPTER 1. GENERAL PROVISIONS**

#### **6A:4-1.1 Purpose and scope**

This chapter implements the provisions of P.L. 2008, c. 36, which removed the State Board of Education's authority to hear appeals of determinations of the Commissioner of Education, the State Board of Examiners, and the School Ethics Commission. The law instead provided that Commissioner determinations shall be deemed final agency actions and that State Board of Examiners and School Ethics Commission determinations shall be appealable to the Commissioner. The chapter establishes standards and procedures for the filing, briefing, and adjudication of appeals, and supersedes any rule with which it may be inconsistent.

#### **6A:4-1.2 Definitions**

The following words and terms shall have the following meanings when used in this chapter, unless the context clearly indicates otherwise:

“Day” means business day when the period specified is less than seven days and calendar day when the period specified is seven days or more.

“Filing” means receipt of a document, in either paper or electronic form, by an appropriate officer of the Department. Filings may be made by regular or electronic mail, or facsimile.

Parties requesting return of a stamped copy of any filing must include an extra copy of the

document, together with a self-addressed envelope stamped with sufficient postage for this purpose.

“OAL” means the Office of Administrative Law established pursuant to N.J.S.A. 52:14F-1 et seq.

“Pro se” means a person who acts on his or her own behalf without an attorney or other nonlawyer representative as permitted by N.J.A.C. 1:1, Uniform Administrative Procedure Rules.

“Representative” means an attorney or other person as permitted by N.J.A.C. 1:1, Uniform Administrative Procedure Rules, appearing on behalf of a party in proceedings governed by this chapter.

### **6A:4-1.3 Appeal of decisions**

- (a) Final Commissioner decisions, including decisions in controversies and disputes arising under the school laws pursuant to N.J.A.C. 6A:3, shall be deemed final agency actions appealable as of right to the Appellate Division of the Superior Court. Interlocutory Commissioner decisions may be appealed to the Appellate Division of the Superior Court by leave granted pursuant to applicable Appellate Division rules.
- (b) Appeals of decisions of the State Board of Examiners suspending or revoking certificates pursuant to N.J.A.C. 6A:9B-4 shall be made to the Commissioner in accordance with this chapter.
  - 1. Appeals of decisions of the State Board of Examiners denying issuance of a certificate shall proceed as contested cases in accordance with N.J.A.C. 6A:3.

- (c) Appeals of School Ethics Commission decisions finding that a school official has violated the School Ethics Act (Act), including the Code of Ethics for School Board Members, shall be made to the Commissioner in accordance with this chapter. If the official found to have violated the Act is an officer or employee of the New Jersey School Boards Association, the School Ethics Commission decision as to both violation and sanction shall be deemed final agency action appealable to the Appellate Division of the Superior Court.
1. School Ethics Commission decisions finding that probable cause does not exist to credit the allegations in a complaint, or dismissing a complaint, shall be deemed final agency actions appealable to the Appellate Division of the Superior Court pursuant to N.J.S.A. 18A:12-29.b and N.J.A.C. 6A:28-11.1.
  2. If the School Ethics Commission's underlying finding of violation is appealed, the matter shall proceed in accordance with N.J.A.C. 6A:4-2.2(b).
  3. If the School Ethics Commission's underlying finding of violation is not appealed, a sanction recommended by the School Ethics Commission for a school official other than an officer or employee of the New Jersey School Boards Association shall be reviewed by the Commissioner in accordance with N.J.A.C. 6A:28-10.12 and 6A:3-9.1.
- (d) Interlocutory orders, decisions, or actions of the State Board of Examiners or the School Ethics Commission may be appealed to the Commissioner by leave granted pursuant to N.J.A.C. 6A:4-3.4.
- (e) Requests for relief arising from decisions of the State Board of Education rendered prior to the effective date of P.L. 2008, c. 36 shall be made to the Commissioner by motion in accordance with the provisions of N.J.A.C. 6A:4-3.1.

## **SUBCHAPTER 2. PROCEDURES FOR APPEAL**

### **6A:4-2.1 Who may appeal**

- (a) Any party aggrieved by a State Board of Examiners decision suspending or revoking a certificate, or by a School Ethics Commission decision finding a violation of the School Ethics Act, may appeal to the Commissioner in accordance with this chapter.
  - 1. Any party aggrieved by a State Board of Examiners decision denying issuance of a certificate shall proceed in accordance with N.J.A.C. 6A:3.
  - 2. Any party taking exception to the recommended sanction of the School Ethics Commission but not disputing the School Ethics Commission's finding of violation shall proceed in accordance with N.J.A.C. 6A:28-10.12 and 6A:3-9.1.
- (b) Parties jointly interested in a decision or action may join in an appeal therefrom or may appeal separately.
- (c) A respondent may cross appeal as provided by N.J.A.C. 6A:4-2.2(c).

### **6A:4-2.2 Time for appeal**

- (a) Appeals of final State Board of Examiners decisions shall be filed within 30 days of the filing date of the decision being appealed.
- (b) Appeals of final School Ethics Commission decisions finding a violation of the School Ethics Act shall be filed within 30 days of the filing date of the decision being appealed.
  - 1. If a School Ethics Commission's finding of violation is appealed, the Commissioner's review of the School Ethics Commission's recommended sanction pursuant to N.J.S.A. 18A:12-29.c will be deferred and incorporated into the Commissioner's review on appeal.

- i. If a notice of appeal has been filed, pursuant to N.J.A.C. 6A:4-2.4, on or before the due date for exceptions to the School Ethics Commission's recommended sanction pursuant to N.J.A.C. 6A:28-10.12(b) (13 days from the date the School Ethics Commission's decision is forwarded to the Commissioner), exceptions need not be filed by that date but may be incorporated into the appellant's briefs on appeal.
  - ii. If a notice of appeal has not been filed, pursuant to N.J.A.C. 6A:4-2.4, on or before the due date for exceptions to the School Ethics Commission's recommended sanction pursuant to N.J.A.C. 6A:28-10.12(b) (13 days from the date the School Ethics Commission's decision is forwarded to the Commissioner), exceptions shall be filed by that date to be considered by the Commissioner in his or her review of the sanction, pursuant to (b)1 above.
- (c) A cross appeal may be taken by filing a notice of cross appeal within 10 days of service of a notice of appeal.
  - (d) Applications for leave to appeal from interlocutory orders, decisions, or actions, or for cross appeal if leave to appeal is granted, shall be made within the time provided by N.J.A.C. 6A:4-3.4.

### **6A:4-2.3 Computation of time**

- (a) A State Board of Examiners or School Ethics Commission decision shall be deemed filed three days after the date of mailing to the parties.
- (b) In computing any period of time fixed by this chapter, the day of the act or event from which the designated period begins to run is not to be included. The last day of the period computed is to be included, unless it is a Saturday, Sunday, or legal holiday, in which

event the period runs until the end of the next day that is not a Saturday, Sunday, or legal holiday.

- (c) Filings received after the close of business (4:15 P.M.) shall be deemed filed on the next business day.

#### **6A:4-2.4 Notice of appeal**

- (a) An appeal or cross appeal shall be made by serving a copy of the notice of appeal or cross appeal upon all other parties, providing a copy to the State Board of Examiners or School Ethics Commission as the case may be, and filing the original with the Commissioner c/o the Director, Office of Controversies and Disputes, New Jersey State Department of Education, 100 River View Plaza, P.O. Box 500, Trenton, New Jersey 08625-0500, Attention: Appeals.

1. A notice of appeal or notice of cross appeal shall set forth the name of the party taking the appeal and his or her address or that of his or her representative, if represented, and the names of all other parties. A notice of appeal or notice of cross appeal also shall specifically designate the decision appealed from, or such part as appealed from.
2. Each notice of appeal shall be signed by the representative of record representing the party taking the appeal or signed by the party if the party is appearing pro se.
3. Each notice of appeal shall include an appended copy of the decision being appealed, including the initial decision issued by the OAL, if any.
4. Each notice of appeal shall include an appended proof of service on all other parties. The notice of appeal also shall indicate a copy of the notice has been provided to the State Board of Examiners or the School Ethics Commission as the case may be.



- (b) Proof of service shall be in one of the following forms:
1. An acknowledgement of service indicating the date of service and the address at which each party was served and signed by the representative or the representative's designee for each party, or signed and acknowledged by the party himself or herself;
  2. An affidavit of the person making service that is sworn or affirmed to be true in the presence of a notary public or other person authorized to administer an oath or affirmation and that indicates the date of service and the address at which each party was served;
  3. A certification indicating the date of service and the address at which each party was served and meeting the requirements of New Jersey Court Rules at R. 1:4-4(b); or
  4. A copy of the appellant's receipt for certified mailing or delivery by messenger to each party. The return receipt card ("green card") is not required for proof of service by certified mailing.
- (c) An appeal or cross appeal shall be considered filed upon receipt of notice of appeal by an appropriate officer of the Department.

#### **6A:4-2.5 Record on appeal**

- (a) The record on appeal shall include all papers and exhibits, including audio and video recordings, on file with the State Board of Examiners or School Ethics Commission; all entries as to matters made on the record; any stenographic transcript; and all papers filed with the Commissioner.
1. Upon notice of appeal, the State Board of Examiners or School Ethics Commission shall certify the record and remit it to the Commissioner within 15

days of receipt of the notice of appeal. The record shall be remitted to the Commissioner with a statement of items comprising the record and the statement shall be served on each party to the appeal at the same time.

- (b) A party who questions whether the record fully and truly discloses what occurred in the proceedings below shall apply on motion to the State Board of Examiners or the School Ethics Commission to settle the record. The Commissioner, on a party's motion, may review such determination or, at his or her discretion, may direct correction of the record.
- (c) If it appears, at any time during an appeal's pendency, that evidence unadduced in the proceedings before the State Board of Examiners or the School Ethics Commission may be material to the issues on appeal, the Commissioner may order, on a party's motion or at his or her discretion and on terms he or she deems appropriate, the record on appeal be supplemented by the taking of additional evidence and the making of findings of fact thereon by the State Board of Examiners or School Ethics Commission.

#### **6A:4-2.6 Filing and service of briefs, motions, and applications**

- (a) One copy of all briefs, motions, and applications filed pursuant to this chapter shall be served on all parties. Proof of such service, in conformity with N.J.A.C. 6A:4-2.4(b), shall be appended to the original brief, motion, or application filed with the Commissioner.
- (b) Appeals filed pursuant to this chapter shall be considered without oral argument.

#### **6A:4-2.7 Time for filing and service of briefs**

- (a) Except as otherwise provided by this chapter, the appellant shall serve and file a brief in support of the appeal within 20 days after the appeal has been filed. The respondent shall

serve and file an answer brief within 20 days after service of the appellant's brief. The appellant may serve and file a reply brief within 10 days after service of the respondent's brief.

- (b) If a cross appeal is taken, the party first appealing shall serve and file an appeal brief within 30 days of notice of the cross appeal. Within 30 days thereafter, the cross-appellant shall serve and file a brief in support of the cross appeal, which shall include an answer to appellant's brief. The appellant may file a reply brief within 10 days thereafter.
- (c) Failure to meet the filing deadline for an appeal brief or brief in support of a cross appeal may be viewed as a failure to perfect the appeal or cross appeal and may result in dismissal of the appeal or cross appeal.
- (d) If a respondent fails to meet the filing deadline for an answer brief, the record may be closed and the Commissioner may consider the matter on the record before him or her.

#### **6A:4-2.8 Contents of briefs**

- (a) The cover of each formal brief filed pursuant to this chapter shall contain the following information:
  - 1. The Commissioner's name and the Commissioner's docket number for the action;
  - 2. The caption of the action;
  - 3. The designation of the parties in the action before the Commissioner;
  - 4. The title of the document and the designation of the party for whom it is filed; and
  - 5. The name and office address of the representative of record and the names of any attorneys "of counsel" or "on the brief" or the name and address of the party submitting the brief if appearing pro se.
- (b) All formal briefs shall be typed double spaced and plainly legible.
- (c) All briefs shall be bound or stapled.

- (d) Each formal brief filed by an appellant shall contain the following material under distinct titles, arranged in the following order:
1. A table of contents, including the point headings to be argued;
  2. If the appeal raises questions concerning educational policies, a concise and specific statement of the policies;
  3. A concise procedural history, including a statement of the proceeding's nature and a reference to the order, decision, or action appealed or sought to be reviewed;
  4. A concise statement of the facts material to the issues on appeal supported by references to the record and transcript. The statement shall be in the form of a chronological narrative summarizing all pertinent evidence, but shall not be a summary of all evidence adduced at hearing, witness by witness; and
  5. The legal argument for the appellant, under appropriate point headings, distinctively printed or typed, into as many parts as there are to be argued.
- (e) All briefs shall be dated and signed by the party submitting the brief, if appearing pro se, or by the representative of record, if the party is represented.
- (f) All briefs shall strictly preserve the anonymity of any minor who is a party to or witness in the matter by means such as using initials in place of the minor's name.
- (g) In lieu of filing a formal brief in accordance with (d) above, the appellant may file a letter brief. Letter briefs may be typed either single or double-spaced. Letter briefs shall conform with the requirements of this section, except for provisions expressly applicable only to formal briefs. No cover need be annexed, provided the information required is included in the heading of the letter.
- (h) Respondent's answer brief shall conform to the requirements of this section, but shall include a counter-statement of facts only if respondent disagrees with the statement of facts in appellant's brief.
- (i) A brief in support of a cross appeal shall conform to the requirements of this section.

- (j) Appellant's reply brief shall conform to the requirements of this section.

#### **6A:4-2.9 Length of briefs**

- (a) Initial briefs of parties, if formal briefs, shall not exceed 40 pages exclusive of tables of contents and appendices.
- (b) Letter briefs and reply briefs shall not exceed 15 pages.
- (c) Page limits may be relaxed only by leave of the Commissioner.

#### **6A:4-2.10 Appendices**

- (a) An appeal brief or brief in support of a cross appeal shall include an appendix containing as the first item the appealed decision, including any decision issued by the OAL, and parts of the record, including evidentiary exhibits or portions, upon which the appellant or cross-appellant relies, or upon which it should reasonably be assumed the respondent will rely in meeting the issues raised. If answers to interrogatories are included in the appendix, a copy of the interrogatories also shall be included.
- (b) All appendices shall be bound or stapled with pages arranged in clearly designated numerical order.

#### **6A:4-2.11 Extensions of time for briefs**

- (a) With the consent of all parties, requests for extensions of time for the filing of briefs will be granted upon request.
- (b) Requests for extensions of time without the consent of all parties may be granted only by leave of the Commissioner.

## SUBCHAPTER 3. MOTIONS

### 6A:4-3.1 General provisions

- (a) Every motion shall be accompanied by a brief that conforms to the requirements of either N.J.A.C. 6A:4-2.8(d) or (g). The brief shall explain clearly the nature of the action, the relief sought by the moving party, and why the moving party is entitled to the relief sought.
- (b) Every brief shall include as an attachment any School Ethics Commission or State Board of Examiners decision or order granting or denying the relief sought or challenged, and portions of the record upon which the moving party either relies or should reasonably assume the opposing party will rely.
- (c) Each motion shall be accompanied by an affidavit setting forth fully the factual basis upon which the motion is based.
- (d) The moving party shall serve one copy of the moving papers on all other parties and shall file the original with the Commissioner.
- (e) Except as provided in N.J.A.C. 6A:4-3.5, an opposing party shall have 10 days after service of the moving party's papers to serve and file papers in opposition. The opposing party's brief shall explain clearly the grounds for opposition, annexing any papers relied on that were not included in the moving party's appendix. If no opposing brief is filed, the Commissioner may consider the motion unopposed.
- (f) Except by leave of the Commissioner, supporting and answering briefs shall not exceed 15 pages, exclusive of table of contents and appendix.

### **6A:4-3.2 Motion to participate as amicus curiae**

- (a) A motion for leave to participate as amicus curiae may be made to the Commissioner in accordance with N.J.A.C. 6A:4-3.1. The motion shall state with specificity the applicant's identity, the issue intended to be addressed, the nature of the public interest therein, and the nature of the applicant's special interest, involvement, or expertise with respect thereof.
- (b) In ruling on a motion for leave to participate as amicus curiae, the Commissioner shall consider whether the moving party's participation will assist in the resolution of an issue of public importance, whether the moving party's interest is sufficiently different from that of any party to add measurably and constructively to the scope of the case, and whether the moving party's inclusion may give rise to confusion, prejudice to a party, or undue delay in proceedings. A decision granting the motion shall fix a briefing schedule.
- (c) An amicus curiae who has been granted leave to participate in a case before the State Board of Examiners or the School Ethics Commission may file, without seeking further leave, a brief and appear in an appeal to the Commissioner of the decision or order entered therein.

### **6A:4-3.3 Motion for stay of a decision of the State Board of Examiners**

- (a) A motion to stay a State Board of Examiners' determination pending determination of an appeal to the Commissioner shall be made first to the State Board of Examiners.
  - 1. Motions shall be made to the State Board of Examiners concurrent with or subsequent to the filing of a notice of appeal to the Commissioner, together with a supporting affidavit and proof of service on each party.

- (b) If the motion is denied by the State Board of Examiners, a motion for stay may be made to the Commissioner in accordance with N.J.A.C. 6A:4-3.1. If the motion is granted by the State Board of Examiners, a motion to dissolve the stay may be made to the Commissioner in accordance with N.J.A.C. 6A:4-3.1. The motion shall include as an attachment the State Board of Examiners' decision granting or denying a stay, along with the State Board of Examiners' decision from which a stay was sought, including the initial decision, if any, issued by the OAL.
- (c) The motion and affidavit filed in accordance with N.J.A.C. 6A:4-3.1 shall set forth fully the portion of the State Board of Examiner's decision from which a stay or dissolution of a stay is sought, the factual basis on which the motion is founded, and the reason(s) why the motion should be granted.
- (d) Any party opposing the motion shall file, and shall serve within 10 days of service of the motion, an answering affidavit in the same manner, setting forth the reason(s) why the motion should be denied.
- (e) The motion shall be reviewed by the Commissioner in accordance with N.J.A.C. 6A:4-4.1(b).

**6A:4-3.4 Motion for leave to appeal an interlocutory order, decision, or action**

- (a) Motion for leave to appeal an interlocutory order, decision, or action of the State Board of Examiners or the School Ethics Commission shall be made by filing a motion for leave to appeal to the Commissioner within five days after the action or service of the interlocutory decision or order.
- (b) Motions for leave to appeal shall conform to the requirements of N.J.A.C. 6A:4-3.1, except a brief in support of the motion also shall include the merits of the issue(s) sought to be appealed.



- (c) The respondent's answer shall be filed within 10 days of service of the motion and may raise issues by way of cross appeal. If such issues are raised, the moving party shall file an answer to the issues on cross appeal within 10 days of service of the answer.

**6A:4-3.5 Emergency relief in matters on appeal**

- (a) Applications for emergency relief shall be made by motion conforming to the requirements of N.J.A.C. 6A:4-3.1. Opposing parties shall be given reasonable opportunity under the circumstances to file papers in response to an application for emergency relief.
- (b) Applications for emergency relief shall be considered on an expedited basis and shall be reviewed in accordance with N.J.A.C. 6A:4-4.1(b).

**6A:4-3.6 Motion for clarification and/or reconsideration of a decision of the Commissioner on appeal**

- (a) A motion for clarification and/or reconsideration of a Commissioner's decision rendered pursuant to this chapter shall be served and filed within 10 days after the Commissioner files his or her decision. The motion shall conform to the requirements of N.J.A.C. 6A:4-3.1 and shall include a copy of the decision for which clarification and/or reconsideration is sought.
- (b) Motions for reconsideration shall be entertained based solely upon the following:
  - 1. Claim(s) of mistake, provided that disagreement with the outcome of a decision, or with the analysis upon which it is based, shall not constitute "mistake" for purposes of this section;

2. Newly discovered evidence likely to alter the outcome of a matter, if the evidence could not have been discovered previously by due diligence;
  3. Newly ascertained misrepresentation or other misconduct of an adverse party, if the misrepresentation or misconduct could not have been known previously; or
  4. Reversal of a prior judgment on which the present matter is based.
- (c) Motions for clarification shall be considered based upon necessity as specifically demonstrated in the papers submitted with a motion.
- (d) The filing of a motion for clarification or reconsideration, in and of itself, shall not relieve the parties from compliance with any judgment or order of the Commissioner.

#### **SUBCHAPTER 4. REVIEW AND DECISION**

##### **6A:4-4.1 Standard of review**

- (a) In determining appeals from decisions of the State Board of Examiners or the School Ethics Commission pursuant to this chapter, the Commissioner shall ascertain whether the decision is supported by sufficient credible evidence in the record and shall not disturb the decision unless the appellant has demonstrated the State Board of Examiners or the School Ethics Commission acted in a manner that was arbitrary, capricious, or contrary to law.
- (b) In determining motions for stay or emergency relief, the Commissioner shall apply the following standards, pursuant to *Crowe v. DeGioia*, 90 N.J. 126 (1982):
1. The moving party will suffer irreparable harm if the requested relief is not granted;
  2. The legal right underlying the moving party's claim is settled;

3. The moving party has a likelihood of prevailing on the merits of the underlying claim; and
4. When the equities and interests of the parties are balanced, the moving party will suffer greater harm than the respondent will suffer if the requested relief is not granted.

#### **6A:4-4.2 Settlement and withdrawal**

- (a) An appellant may withdraw an appeal at any time prior to issuance of the Commissioner's decision, whereupon the Commissioner shall discontinue all proceedings and notify all parties accordingly.
- (b) An appeal may be settled at any time prior to issuance of the Commissioner's decision, provided the parties shall notify the Commissioner of any proposed settlement and shall set forth the full settlement terms for the Commissioner's review and approval.
  1. If a district board of education is party to an appeal, any proposed settlement shall indicate, by signature of the district board of education attorney or inclusion of a district board of education resolution authorizing settlement, the district board of education has consented to the settlement terms.
  2. A proposed settlement shall not include terms that restrict access to records or information deemed public by law or that require disclosure of information protected by law from disclosure.

#### **6A:4-4.3 Commissioner's decision**

- (a) Commissioner determinations rendered pursuant to this chapter shall be embodied in a written decision and shall be deemed final agency actions appealable to the Appellate Division of the Superior Court.
- (b) The Commissioner's decision shall be mailed to all parties or their representatives of record and shall be deemed filed three days after the date of such mailing.

**6A:4-4.4 Relaxation of rules**

- (a) The rules of this chapter shall be construed to secure a just determination, simplicity of procedure, fairness in administration, and elimination of unnecessary delay. Unless otherwise stated, any rule not reflecting a statutory requirement or an applicable rule of administrative procedure may be relaxed by the Commissioner, in his or her discretion, if strict adherence to the rule is deemed inappropriate or unnecessary or would result in injustice.
- (b) Briefing on appeals and motions shall be in accordance with this chapter. If the Commissioner deems it necessary to expedite proceedings or protect the interests of the parties, the Commissioner may modify time schedules or direct additional submissions at his or her discretion or by leave upon motion of a party.