

ELLEN MUENCH, :
PETITIONER, :
V. : COMMISSIONER OF EDUCATION
NEW JERSEY DEPARTMENT OF : DECISION
EDUCATION, STATE BOARD OF :
EXAMINERS, :
RESPONDENT. :

SYNOPSIS

Petitioning candidate for teacher certification appealed the Board of Examiners' determination that she could not seek employment as a provisional teacher for an additional year following two "insufficient" ratings pursuant to *N.J.A.C.* 6A:9-17.18(d). The Board held that, because petitioner's appeal had already been considered pursuant to *N.J.A.C.* 6A:9-17.18(a) – where it was found to have been untimely filed in a decision previously upheld by the Commissioner – it could not additionally proceed under *N.J.A.C.* 6A:9-17.18(d).

The ALJ recommended dismissal of the petition, concurring with the Board's interpretation of the operative rule. The ALJ found that the two provisions in question were mutually exclusive on their face, and that petitioner was entitled to appeal to the Board under one or the other of such provisions, but not both.

The Commissioner adopted in part, and reversed in part, the Initial Decision. The Commissioner fully concurred with the ALJ's (and Board's) interpretation of *N.J.A.C.* 6A:9-17.18, but did not agree that the petition should be dismissed as a result. The Commissioner found that – given the particular facts of this matter – the Board's application of the rule so as to foreclose petitioner from any opportunity for appeal placed form over substance, rendering it unreasonable under the circumstances. The Commissioner remanded the matter to the Board for consideration of the merits of petitioner's appeal pursuant to *N.J.A.C.* 6A:9-17.18(d).

<p>This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.</p>

January 1, 2007

OAL DKT. NO. EDU 08369-06
AGENCY DKT. NO. 283-8/06

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The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. No exceptions were filed by the parties.¹

Upon review, the Commissioner has determined to adopt in part and reject in part the Initial Decision of the OAL, concurring with the Administrative Law Judge (ALJ) in his analysis of the regulation at issue, but disagreeing that such analysis should result in dismissal of the petition under the particular circumstances here presenting.

As a preliminary matter, the Commissioner notes that her prior decision with regard to petitioner’s appeal to the Board of Examiners (Board) has already held the Board to have acted lawfully in dismissing petitioner’s appeal pursuant to *N.J.A.C.* 6A:9-17.18(a), rejecting petitioner’s arguments as to good cause for relaxation of the clear regulatory filing

¹ Counsel for petitioner did submit a short letter to the Commissioner “taking exception” to the Initial Decision’s contention (at 3) that he “never actually addresses the [Board of Examiners’] argument***that the plain language of the regulation forecloses a petition under (d) where, as here, a petition has been brought under (a),” countering that his October 18, 2006 brief – to which he refers the Commissioner – “clearly addresses this issue.” However, because this letter includes no indication of the requisite service on either the Board of Examiners or the Administrative Law Judge, the Commissioner does not consider petitioner to have filed exceptions pursuant to *N.J.A.C.* 1:1-18.4. (Parenthetically, the Commissioner notes that petitioner’s October 18, 2006 brief is part of the record of this matter, but was not mentioned by the ALJ in his recitation of sources relied upon for argument, Initial Decision at 2.)

deadline, as well as her allegations of constitutional infirmity in the notice of this deadline provided to her by the State. (*Ellen Muench v. New Jersey State Department of Education, State Board of Examiners*, decided by the Commissioner April 12, 2006, slip opinion at 1-6) That decision went on, however, to note that neither the Board nor the ALJ had considered petitioner's invocation of *N.J.A.C.* 6A:9-17.18(d) or its applicability to her situation, and petitioner's appeal was consequently remanded to the Board specifically to address "the application of *N.J.A.C.* 6A:9-17.18(d) or, if the Board determines that *N.J.A.C.* 6A:9-17.18(d) may not be applied,***articulation of the reasons therefor." (*Id.* at 6-7) On remand, the Board again determined to deny petitioner's appeal, articulating its reasons as directed by the Commissioner:

The Board noted that the two appeal provisions of *N.J.A.C.* 6A:9-17.18(a) and (d) are mutually exclusive. In fact, 6A:9-17.18(d), specifically states, in relevant part: "Candidates who receive a recommendation of 'disapproved' or two recommendations of insufficient,' *and who do not contest the certification recommendation pursuant to (a) above* may petition the Board of Examiners for approval of an additional opportunity to seek provisional employment." (Emphasis added.) Your client chose to appeal her second insufficient rating in the PTP program under 6A:9-17.18(a) and the reviewable issues of her appeal were fully litigated and decided. Accordingly, the provisions of 6A:-17.18(d) are unavailable to her. The fact that she may have included language citing both provisions in her initial letter of appeal does not alter the clear language of the regulation which provides appellants with alternative remedies, not supplementary ones. If Ms. Muench was seeking different relief, she should have informed the Board of Examiners of her choice prior to its initial review of her case. Her appeal is therefore dismissed in its entirety. (Board of Examiners Letter Decision of July 25, 2006, at 2)

In her appeal of this second denial, petitioner challenges – as matters of both law and fundamental fairness – the Board's interpretation of the operative rule. Petitioner contends that a candidate for certification "should not have to choose between these two remedies when each might apply to her circumstances," explaining that:

Under the interpretation sought by the State, someone in [petitioner's] shoes might never have any aspect of her case heard on the merits. Here, the Board of Examiners refused to consider her application under subparagraph (a) on the merits, because it was late. However, at the time that she made her appeal under such paragraph (a), she had no way of knowing whether the Board [would] hear her appeal on the merits. The regulations allow the Board might waive the sixty (60) day appeal deadline. [Petitioner] had no way of knowing whether or not the Board would waive that deadline. Accordingly, she had no factual basis for deciding whether subparagraph (d) might be a more appropriate avenue of relief.

Under the State's interpretation, despite numerous briefs, appeals and hearings before an Administrative Law Judge, we have reached the point in this case where no decision-maker or tryer (*sic*) of fact has ever bothered to hear [petitioner's] case on the merits. In light of all of the facts that have been previously set forth in our papers, this seems patently unfair. We are not dealing with an individual who violated some law, abused some child or engaged in some horrific conduct. [Petitioner] had a few less than stellar evaluations that can easily be explained by the facts set forth in her papers. Unfortunately, no one in the State has ever considered those facts, because the State has chosen to stand behind a strict, technical interpretation of the regulation that relieves them from ever having to do so. In my humble opinion, a citizen in the position of [petitioner] deserves better. (Petitioner's October 18, 2006 Brief in Reply to Board's Brief in Support of Motion to Dismiss, at 1-2)

The Commissioner rejects petitioner's view of the rule at issue, instead endorsing the ALJ's (and Board's) interpretation that sections (a) and (d) of *N.J.A.C. 6A:9-17.18* are mutually exclusive on their face,² so that recipients of "disapproved" or two "insufficient" ratings for their period of employment under provisional certification may appeal to the Board of Examiners under either (a) or (d) – but not both. As recognized by the ALJ, the two provisions are intrinsically separate and distinct: Under (a), the candidate *disputes* the employing district's assessment of his or her performance and initiates an adversarial proceeding before the Board seeking to disprove the district's rating, while under (d), the candidate *concedes* deficient performance but seeks the Board's permission for an additional period of provisional employment through a nonadversarial demonstration of why he or she is likely to be successful if

² The Commissioner, like the ALJ, bases her analysis on the rule language existing at the time of petitioner's appeal (Initial Decision at 2, Note 1).

the requested opportunity is granted.³ As the ALJ further suggests, there is nothing in the rule to suggest that a candidate for certification may come before the Board alleging that a negative provisional rating was unwarranted, and then – that challenge having failed for whatever procedural or substantive reason – return for a “second bite of the apple” with the inherently inconsistent claim that he or she does not dispute the assessment but can show that circumstances warrant a further opportunity to succeed. Nor is the Board’s (and ALJ’s) interpretation unfairly “strict” and “technical” as claimed by petitioner; procedural rules are a necessary and accepted fixture of appeal proceedings of all kinds, and would be rendered meaningless if they could be disregarded solely because their reasonable application in a particular situation results in loss of a claimant’s opportunity for hearing on the merits.

Adopting the ALJ’s (and Board’s) interpretation of *N.J.A.C. 6A:9-17.18*, however, does not end the inquiry in this matter. The Commissioner differs with the ALJ’s conclusion that the Board is entitled – on the basis of the referenced rule – to have its decision declining to hear petitioner’s appeal under section (d) upheld by the Commissioner.

The letter of appeal submitted to the Board on behalf of petitioner on November 24, 2004 begins as follows:

This firm represents Ellen Muench. We write pursuant to *N.J.A.C. 6A:9-17.18* to appeal a second “insufficient” recommendation received by Ellen Muench from the Perth Amboy Board of Education. We seek relief from the Board for the issuance of a Standard Certificate to Ellen Muench, or in the alternative, an opportunity to seek further employment as a provisional teaching staff member. In addition, we ask that the Board relax its sixty-day requirement for “good cause” pursuant to *N.J.A.C. 6A:9-17.18(c)*. If the Board does not deem “good cause” to exist, we seek relief pursuant to *N.J.A.C. 6A:9-17.18(d)* to provide Ellen Muench with an opportunity to seek provisional employment, because the facts below establish clearly and convincingly that she will succeed if granted the opportunity. Lastly, we ask for interim and immediate relief, allowing the

³ While the Commissioner concurs with the ALJ that the rule is clear on its face, she also notes that this reading is supported by the agency summary published with the rule at proposal level on October 6, 2003 (35 *N.J.R.* 4352, 4360-61).

petitioner to return to her teaching position with the Rahway Board of Education, pending the Board's consideration of the relief sought herein. We set forth below the facts and circumstances that justify the relief requested.

However – notwithstanding its expressly subordinate invocation of section (d), its initial self-characterization as an appeal of the “insufficient” rating received from the Perth Amboy Board of Education, and its request for one of the two outcomes specifically associated with rating disputes under section (a), *i.e.*, issuance of a standard certificate or, alternatively, an opportunity for a further year of provisional teaching – the entire substance of petitioner's five-page, single-spaced letter and its numerous appended exhibits consists of explication of the extenuating circumstances leading to her substandard performance, both in her first year of provisional teaching in the New Brunswick school district and in her second year in Perth Amboy. Not once does she even suggest – let alone directly allege or attempt to show as required by *N.J.A.C. 6A:9-17.18(a)1-4* – that the rating she received from Perth Amboy did not reflect her actual performance. Thus, while her letter of appeal mischaracterized its own nature and requested a preferred relief – issuance of a standard certificate – available only to appellants disputing their receipt of an adverse rating, petitioner was, in fact, asking the Board's consideration based entirely on the contention that her concededly insufficient performance was due to circumstances beyond her control and that she would now succeed if allowed to continue in employment: precisely the type of appeal contemplated by section (d) of the operative rule, which did not – at the time of petitioner's submission – have a deadline for filing as did section (a).

Given the confusion as to intent and procedure evident in petitioner's good faith letter of appeal – and the magnitude of the consequences flowing from a second “insufficient” rating to a candidate for teacher certification – the Commissioner cannot accept the Board's

categorical rejection of petitioner's invocation of *N.J.A.C.* 6A:9-17.18(d) when, upon the Board's receipt of her appeal, petitioner had neither been advised of the need nor given the opportunity to make a choice between sections (a) and (d) of the rules and "[inform] the Board of Examiners of [such] choice prior to its initial review of her case." (Board of Examiners Letter Decision, *supra*) Under these circumstances – where the Board effectively made the necessary choice *for* petitioner, without her knowledge and in a manner that foreclosed her from any possibility of hearing on the merits – the Commissioner finds the Board's July 25, 2006 decision denying petitioner's section (d) appeal to have placed form over substance to an extent that rendered it unreasonable under the circumstances, and thus, susceptible to reversal on review.

Accordingly, for the reasons expressed herein, the Initial Decision of the OAL is adopted with respect to its interpretation of the operative rule, but rejected as to its dismissal of the petition. This matter is remanded to the Board of Examiners for consideration of the merits of petitioner's appeal pursuant to *N.J.A.C.* 6A:9-17.18(d).

IT IS SO ORDERED.⁴

COMMISSIONER OF EDUCATION

Date of Mailing: January 9, 2007

Date of Decision: January 9, 2007

⁴ This decision 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.* 6A:4-1.1 *et seq.*