

New Jersey Commissioner of Education
Final Decision

Michael Ettz,

Petitioner,

v.

New Jersey Department of Education, Office of
Student Protection,

Respondent.

Synopsis

On June 24, 2019, petitioner appealed the determination of the respondent, New Jersey Department of Education, Office of Student Protection (OSP), that he is permanently disqualified from public school employment. Petitioner was disqualified as the result of a guilty plea in 2017 to a charge of third degree assault by auto, in violation of *N.J.S.A. 2C:12-1(c)(2)*. Respondent filed a motion to dismiss the petition.

The ALJ found, *inter alia*, that: *N.J.A.C. 6A:3-1.1* et seq. sets forth the rules of procedure for the filing of petitions with the Commissioner of Education to hear and decide controversies and disputes arising under school laws in accordance with *N.J.S.A. 18A:6-9*; in the instant matter, petitioner pled guilty to a third-degree assault by auto on September 22, 2017; petitioner was notified by letter from the respondent on March 2, 2018 that based on his guilty plea, he was permanently disqualified from employment in any educational institution under the supervision of the Department of Education; the March 2, 2018 letter further notified petitioner of the timeline for challenging the accuracy of his criminal history record; petitioner's attorney at the time confirmed receipt of the March 2, 2018 letter in a writing dated March 15, 2018, and indicated that petitioner challenged his disqualification; respondent replied to petitioner's attorney on March 16, 2018 by letter which included instructions on how to file a formal appeal with the Commissioner of Education pursuant to *N.J.A.C. 6A:3*; petitioner failed to file such formal appeal until June 24, 2019. The ALJ concluded that petitioner's appeal is time barred under *N.J.A.C. 6A:3-1.16*; further, petitioner's related but separate matter regarding an Order to Show Cause from the State Board of Examiners did not toll the running of the ninety-day limitations period for the filing of a petition of appeal. Accordingly, the ALJ granted the respondent's motion to dismiss.

Upon review, the Commissioner concurred with the findings of the ALJ and adopted the Initial Decision of the OAL as the final decision in this matter. The petition was dismissed.

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.

January 14, 2020

New Jersey Commissioner of Education

Final Decision

Michael Ettz,

Petitioner,

v.

New Jersey Department of Education, Office of
Student Protection,

Respondent.

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. The parties did not file exceptions to the Initial Decision.

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 petitioner has failed to present any exceptional circumstances that might justify a finding that strictly adhering 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. Accordingly, the Initial Decision is adopted as the final decision in this matter and the petition of appeal is dismissed.

IT IS SO ORDERED.¹

COMMISSIONER OF EDUCATION

Date of Decision: January 14, 2020

Date of Mailing: January 14, 2020

¹ 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

DISMISSAL

OAL DKT. NO. EDU 11396-19

AGENCY DKT. NO. 148-6/19

MICHAEL ETTZ,

Petitioner,

v.

**NEW JERSEY DEPARTMENT OF EDUCATION,
OFFICE OF STUDENT PROTECTION,**

Respondent.

Edward W. Cillick, Esq., for petitioner (Cillick & Smith, attorneys)

Jaclyn M. Frey, Deputy Attorney General, for respondent (Gurbir S. Grewal,
Attorney General of New Jersey, attorney)

Record Closed: October 22, 2019

Decided: December 16, 2019

BEFORE **KELLY J. KIRK, ALJ:**

STATEMENT OF THE CASE

Petitioner Michael Ettz, a teacher, appeals the determination of respondent, New Jersey Department of Education, Office of Student Protection (OSP), that he is disqualified from public school employment.

PROCEDURAL HISTORY

On June 24, 2019, petitioner filed a Verified Petition with the Commissioner of Education, with a copy to the OSP² and the Attorney General of New Jersey. On July 12, 2019, respondent requested an extension of time to respond to the Verified Petition. On August 5, 2019, the respondent filed a Motion to Dismiss with the Bureau of Controversies and Disputes (Bureau) of the Department of Education (Department). The Department transmitted the contested case to the Office of Administrative Law (OAL), where it was filed on August 16, 2019. Review of the file revealed that petitioner had not filed a response to the respondent's Motion to Dismiss. A telephone conference was held on September 6, 2019, and petitioner was given until October 7, 2019, to file opposition to the motion to dismiss, and respondent was given until October 21, 2019, to file a reply. Petitioner filed opposition on October 8, 2019, and respondent filed a reply on October 21, 2019.

FACTUAL DISCUSSION AND FINDINGS OF FACT

The documents attached to the transmittal, including the Verified Petition, and Motion to Dismiss reflect the following:

On September 22, 2017, petitioner pled guilty to third-degree assault by auto in violation of N.J.S.A. 2C:12-1(c)(2) in Bergen County Superior Court. By letter dated March 2, 2018, the Department's Criminal History Review Unit (CHRU)³ notified petitioner that it had received information concerning a conviction or charge pending for a disqualifying crime or offense documented on his criminal history record, and attached the record as "Addendum: A." The March 2, 2018, letter also stated, in pertinent part, the following:

Pursuant to state statutes, you are permanently disqualified or ineligible for employment or service as a school board member/trustee in any position with a school or other educational institution under the supervision of the

² Formerly known as the Criminal History Review Unit (CHRU).

³ Now known as the Office of Student Protection (OSP).

Department of Education or with a contracted service provider under contract with said school or educational facility. You have 14 days from the date of this written notice to challenge the accuracy of your criminal history record. You must submit documentation from the respective courts to support your claim of an error in the criminal record. If the crime or offense can be expunged and the period of time required by statute has passed, you may re-apply for school employment upon completion of that process.

. . .

NOTE: IF YOUR CRIMINAL HISTORY RECORD IS ACCURATE OR YOU DO NOT FILE A CHALLENGE OF YOUR DISQUALIFICATION OR INELIGIBILITY AND YOU HOLD A TEACHING CERTIFICATE, THE OFFICE OF LICENSURE & ACADEMIC CREDENTIALS WILL BE NOTIFIED. THE NOTICE OF DISQUALIFICATION OR INELIGIBILITY WILL BE REVIEWED BY THE STATE BOARD OF EXAMINERS AND MAY RESULT IN PROCEEDINGS AGAINST YOUR CERTIFICATION.

By letter dated March 15, 2018, petitioner's attorney, Jill Horowitz, Esq, of Cillick & Smith, confirmed petitioner's receipt of the March 2, 2018, letter. Petitioner was incarcerated at that time. The March 15, 2018, letter also stated, in pertinent part:

On behalf of Mr. Etz, we are contesting the accuracy of the criminal history information set forth in Addendum A to your letter. Specifically, the employment information is incorrect and the accurate conviction is set forth in the Judgement of Conviction attached hereto.

Please be advised that we specifically challenge Mr. Etz's disqualification and/or ineligibility.

The attached Judgement of Conviction & Order for Commitment reflected the final charge as "ASSAULT BY AUTO/VESSEL SBI VIOL 39:4-50 OR 4-50.4A," statute "2C:12-1C(2)," third degree, and a sentence of New Jersey State Prison for four years.

By letter dated March 16, 2018, the Department's CHRU notified petitioner's attorney, Jill Horowitz, Esq. of Cillick & Smith, as follows:

I am acknowledging receipt of your correspondence of March 15, 2018 regarding an appeal of Mr. Ettz's ineligibility for public school employment. To file a formal appeal with the Commissioner of Education pursuant to N.J.A.C. 6A:3, you must also copy the Bureau of Controversies and Disputes at the Department of Education and the Office of the Attorney General. A copy of these rules may be requested from the Bureau of Controversies and Disputes at (609) 376-9079, or accessed on the Department of Education website at <http://www.state.nj.us/education/code/current/title6a/chap3.pdf>.

By letter dated August 9, 2018, the Department's Office of Controversies and Disputes notified petitioner's attorney, Jill Horowitz, Esq. of Cillick & Smith, as follows:

We are in receipt of your letter dated March 15, 2018 that was just forwarded to our office from the Department of Education, Criminal History Review Unit, in which it appears that you challenge Michael Ettz's disqualification from public employment.

In order to initiate a contested case before the Commissioner, a petitioner must comply with the rules set forth in N.J.A.C. 6A:3-1.1 et seq. These rules require submission of a petition in the form as described at N.J.A.C. 6A:3-1.4:

- Name, address, telephone number and, if available, fax number of petitioner and respondent;
- The specific allegation(s), and the facts supporting them, which constitute the basis of the controversy;
- A statement of the relief which the petitioner is seeking; and
- Signature of petitioner, or his/her attorney, if applicable.

Additionally, the petitioner must write or type the statement contained in N.J.A.C. 6A:3-1.4 attesting to the truthfulness of the allegations set forth in the Petition of Appeal. The statement must be signed by the petitioner and notarized.

Finally, the petitioner must serve a copy of the petition on each respondent and must submit to the Office of Controversies and Disputes, with the Petition of Appeal, proof that each respondent was served. **Please be advised that, in the case of a State respondent, such as the New Jersey Department of Education, Criminal History Review Unit, N.J.A.C. 6A:3-1.3(j) requires service of the petitioner on**

the Attorney General of the State of New Jersey, Department of Law and Public Safety, Division of Law, P.O. Box 112, Trenton, NJ 08625-0112, Attention: Education Section. That proof may be in any one of the following forms:

. . .

Papers are to be submitted to the following address: Commissioner of Education, c/o Director of Office of Controversies and Disputes, New Jersey State Department of Education, P.O. Box 500, Trenton, NJ 08625. With the prior permission of the Office of Controversies and Disputes and up to a limit of 10 pages, a petition may also be faxed to (609) 292-4333, with the hard copy to follow by mail.

For further information, including sample forms, you may wish to visit the Department of Education website at www.state.nj.us/education. At the top of the page, click on the grey letter "C," and then click on the "Controversies and Disputes" link. If you have procedural questions after visiting the site, you may contact the Office of Controversies and Disputes at (609) 376-9079.

The CHRU was copied on the August 9, 2018, letter.

On June 24, 2019, petitioner's attorney, Edward W. Cillick, Esq. of Cillick & Smith, filed the "Verified Petition from Adverse Underlying Action by The Criminal History Review Unit (CHRU) Of The Department of Education." Thereafter, the OSP filed the Motion to Dismiss in lieu of an answer.

LEGAL ANALYSIS AND CONCLUSION

N.J.A.C. 6A:3-1.1 et seq. sets forth the rules of procedure for the filing of petitions with the Commissioner of Education to hear and decide controversies and disputes arising under school laws in accordance with N.J.S.A. 18A:6-9. N.J.A.C. 6A:3-1.1(a). N.J.A.C. 6A:3-1.1 et seq. does not apply to appeals of decisions or interlocutory decisions of the State Board of Examiners suspending or revoking teaching certificates or interlocutory decisions of the State Board of Examiners, which appeals and requests must be made pursuant to the provisions of N.J.A.C. 6A:4. N.J.A.C. 6A:3-1.1(d).

To initiate a contested case for the Commissioner's determination of a controversy or dispute arising under the school laws, a petitioner must prepare a petition of appeal conforming to the requirements of N.J.A.C. 6A:3-1.4 and serve such petition upon each respondent, together with any supporting papers the petitioner may include with the petition. N.J.A.C. 6A:3-1.3(a). The petitioner then must file, in accordance with N.J.A.C. 6A:3-1.3(h), proof of service on each respondent, the telephone numbers (and fax numbers and e-mail addresses where available) of the petitioner and each respondent, and the original petition and supporting materials, if any, with the Commissioner c/o the Director, Office of Controversies and Disputes, New Jersey Department of Education, 100 River View Plaza, P.O. Box 500, Trenton, New Jersey 08625-0500. N.J.A.C. 6A:3-1.3(a).

A respondent must serve an answer upon the petitioner within twenty days after receipt of the petition, unless a shorter period is required by statute, regulation, or court order, or directed by the Commissioner due to the emergent nature of a matter. N.J.A.C. 6A:3-1.5(a). However, respondent is not precluded from filing a motion to dismiss in lieu of an answer to a petition, provided that such motion is filed within the time allotted for the filing of an answer. N.J.A.C. 6A:3-1.5(g).

The OSP filed a motion to dismiss and argues that the petitioner's appeal is time-barred and should be dismissed pursuant to N.J.A.C. 6A:3-1.3(i), which states:

The petitioner shall file a petition no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by the district board of education, individual party, or agency, which is the subject of the requested contested case hearing. This rule shall not apply in instances where a specific statute, regulation or court order provides for a period of limitation shorter than 90 days for the filing of a particular type of appeal.

In Kaprow v. Board of Education, 131 N.J. 572, 583 (1991), the New Jersey Supreme Court discussed the ninety-day limitation period, and determined that such period "represents a reasonable procedural requirement," provides "finality in education matters," and has withstood tangential review. Additionally, the court opined:

Adequate notice must be sufficient to inform an individual of some fact that he or she has a right to know and that the communicating party has a duty to communicate. Moreover, adequate notice under the regulation must be sufficient to further the purpose of the ninety-day limitations period. A limitations period has two purposes. The first is to stimulate litigants to pursue a right of action within a reasonable time so that the opposing party may have a fair opportunity to defend, thus preventing the litigation of stale claims. The second purpose is “to penalize dilatoriness and serve as a measure of repose” by giving security and stability to human affairs.

[Kaprow, 131 N.J. at 587 (citations omitted).]

In Kaprow, the petitioner attempted to resolve his claim through negotiations with the Board. However, the Supreme Court found that such attempt did not negate that he had received adequate notice on a date certain, nor did it toll the running of the limitations period. Similarly, in the present matter, petitioner contends that after receipt of the March 2, 2018, letter from the CHRU and after his attorney’s March 15, 2018, letter, petitioner was served on or about April 8, 2018, with an Order to Show Cause by the Board of Examiners seeking to revoke his teaching certificate. Petitioner also contends that he properly responded to the Order to Show Cause and admitted that he pleaded guilty to assault by auto, but denied that he was disqualified from public employment. Petitioner further contends that the Board of Examiners entered an Order, dated May 17, 2019, revoking petitioner’s teaching certificates, and “indicated it was compelled to treat his conviction as a disqualifying offense because there was no record that he challenged the findings of the CHRU based on the finding of disqualification and the additional circumstances.” Accepting petitioner’s representation as to the contents of the Board of Examiners’ Order, the Board of Examiners correctly pointed out that there was no record that petitioner had challenged the findings of the CHRU. Petitioner omits from his opposition any mention of the March 16, 2018, letter from the CHRU to petitioner’s attorney, which letter referenced N.J.A.C. 6A:3, which regulations detail the rules of procedure for an appeal and limit the time to file an appeal to ninety days. Instead, petitioner states only that “counsel never received a letter dated August 9, 2018 as referenced by the [respondent]” and “[i]n fact, the letter was addressed to Jill Horowitz who had left our office earlier in the year.” While the August 9, 2018, letter may have been addressed to Jill Horowitz, Esq., it was addressed to her at Cillick & Smith, at the

office's current address, and there was no explanation provided for why the mail would not have been opened by Cillick & Smith if the attorney was no longer with the office. Nevertheless, even if petitioner's attorney had never received the August 9, 2018, letter, there was no explanation as to why an appeal was not filed in accordance with the March 16, 2018, letter, and even absent any letter, the petitioner still has an obligation to comply with applicable regulations.

Petitioner also argues that respondent is mistaken in its belief that the appeal was not properly filed within ninety days. In support of its argument that the appeal was timely filed petitioner relies upon the March 15, 2018, "challenge to the disqualification" having been filed thirteen days after the March 2, 2018, letter. However, petitioner's March 15, 2018, letter did not comply with the requirements set forth in the applicable regulations, and there were multiple subsequent letters notifying petitioner that the March 15, 2018, letter was not a proper appeal. Yet, a proper appeal of the CHRU determination still was not filed. In further support of the argument that petitioner properly appealed the CHRU determination, petitioner improperly relies upon arguments alleged to have been made to the Board of Examiners in connection with its revocation of petitioner's teaching certificates – an entirely separate action.

Notwithstanding the foregoing, petitioner also argues that if it is determined that there was not strict compliance with the ninety-day time period that N.J.A.C. 6A:3-1.16 should allow for relaxation of the rules. Specifically, N.J.A.C. 6A:3-1.16 states:

The rules in this chapter shall be considered general rules of practice to govern, expedite and effectuate the procedure before, and the actions of the Commissioner in connection with, the determination of controversies and disputes under the school laws. Where such rules do not reflect a specific statutory requirement or an underlying rule of the OAL, they may be relaxed or dispensed with by the Commissioner, in the Commissioner's discretion, in any case where a strict adherence thereto may be deemed inappropriate or unnecessary or may result in injustice.

The circumstances herein provide no basis to dispense with the ninety-day time period. The CHRU—not the Board of Examiners—sent petitioner a letter on March 2,

2018, and sent petitioner's attorney a letter on March 16, 2018, regarding the disqualification. Petitioner was on notice of the action being taken by the CHRU and after it appeared that petitioner intended to appeal, the CHRU's March 16, 2018, letter stated that to file a formal appeal pursuant to N.J.A.C. 6A:3, petitioner must also copy the Bureau of Controversies and Disputes and the Attorney General of New Jersey. Yet, petitioner has no documentation that even a copy of the March 15, 2018, letter, much less a formal appeal, was ever filed with the Bureau of Controversies and Disputes or the Attorney General of New Jersey. Additionally, the Bureau of Controversies and Disputes' August 9, 2018, letter stated that to initiate a contested case before the Commissioner, petitioner would have to comply with the rules at N.J.A.C. 6A:3-1.1 et seq. and a copy of the petition would have to be served on the Attorney General of New Jersey. Yet, petitioner again has no documentation that a formal appeal was ever served on the Attorney General, for the respondent CHRU, within ninety days. Instead, the within appeal was not filed until June 24, 2019. The related but separate matter of the Order to Show Cause from the Board of Examiners did not toll the running of the ninety-day limitations period within which petitioner was to file a petition of appeal relative to the March 2, 2018, letter, and there is no basis to disregard "a reasonable procedural requirement," more than a year after petitioner was put on notice of the adverse action and further put on notice that a formal petition had to be filed in accordance with the regulations.

Based upon the foregoing, I **CONCLUDE** that Ettz's Verified Petition is time-barred and should be dismissed.⁴

⁴ Since the appeal is time-barred, the OSP's additional argument as to an alleged failure to advance a cause of action is not addressed herein.

ORDER

It is hereby **ORDERED** that respondent's Motion to Dismiss be **GRANTED**, and that Ettz's Verified Petition be **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, P.O. 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 16, 2019
DATE



KELLY J. KIRK, ALJ

Date Received at Agency:

December 16, 2019

Date Mailed to Parties:

mm