153-23

New Jersey Commissioner of Education

Final Decision

Michael Cantatore,

Petitioner,

v.

Board of Education of the Carlstadt-East Rutherford Regional High School District, Bergen County,

Respondent.

Synopsis

Pro se petitioner, a teacher employed by the Carlstadt-East Rutherford Board of Education (Board), challenged the Board's adoption of the district's Grading Policy #2624, which has been in place – uninterrupted and unchanged – since it was established in April 2004. Petitioner alleged, *inter alia*, that Policy #2624 was modified on the Carlstadt-East Rutherford District website in February 2021, such that the policy's stated adoption date of April 2004 was falsified. The Board contended that no change has been made to the Board's Grading Policy since 2004, on the district's website or elsewhere.

The ALJ found, *inter alia*, that: there are no material facts at issue in this matter, and the case is ripe for summary decision; in order to bring a complaint to hear a controversy or dispute arising under the school laws, a person must be an interested party; *N.J.A.C.* 6A:3-1.2 defines interested person to mean a person who will be substantially, specifically, and directly affected by the outcome of a controversy before the Commissioner; the Commissioner has consistently declined to hear cases brought by petitioners who would not be affected by the outcome in a direct and meaningful way; here, the petitioner lacks standing to bring the within complaint before the Commissioner as it is students within the school district who would be impacted by the policy in question, not the petitioner; further, the petition was untimely filed under *N.J.A.C.* 6A:3-1.3(i). The ALJ concluded that the petition must be dismissed for lack of standing and untimeliness. Accordingly, the Board's motion for summary decision was granted. The petition was dismissed.

Upon review, the Commissioner concurs with the Administrative Law Judge that petitioner lacks standing and that the petition of appeal was untimely pursuant to *N.J.A.C.* 6A:3-1.3. Accordingly, the Initial Decision of the OAL was adopted as the final decision in this matter, and the petition was dismissed.

153-23
OAL Dkt. No. 05498-22
Agency Dkt. No. 112-5/22

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Respondent.

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

Upon review, the Commissioner concurs with the Administrative Law Judge that petitioner lacks standing and that the petition of appeal was untimely pursuant to *N.J.A.C.* 6A:3-1.3.

Accordingly, the Board's motion for summary decision is granted, and the petition of appeal is hereby dismissed.

IT IS SO ORDERED.[1]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: May 25, 2023
Date of Mailing: May 25, 2023

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDU 05498-22

AGENCY DKT. NO. 112-5/22

MICHAEL CANTATORE,

Petitioner,

v.

BOARD OF EDUCATION OF THE CARLSTADT-EAST RUTHERFORD REGIONAL HIGH SCHOOL DISTRICT,BERGEN COUNTY,

Respondent.

Michael Cantatore, petitioner, pro se

Kerri A. Wright, Esq., for respondent (Porzio, Bromberg & Newman, P.C., attorneys)

Record Closed: January 5, 2023 Decided: April 26, 2023

BEFORE **ELISSA MIZZONE TESTA**, ALJ

PROCEDURAL HISTORY AND STATEMENT OF CASE

Petitioner, Michael Cantatore, challenges respondent, the Board of Education of the Carlstadt-East Rutherford Regional High School District, Bergen County ("the

Board") adoption of the District's Grading Policy. Petitioner is an employee/teacher of the respondent. On July 5, 2022, this matter was transmitted to the Office of Administrative Law ("OAL") from the New Jersey Department of Education.

On July 25, 2022, pursuant to a telephone conference held with the undersigned and the parties, respondent was given leave to file a Motion for Summary Decision. On September 1, 2022, respondent filed same. On September 28, 2022, petitioner filed Opposition to the Motion for Summary Judgement. On October 11, 2022, respondent filed a Reply Brief and on October 31, 2022, petitioner filed a Reply Brief. On January 5, 2023, the final responsive papers were submitted, and the record closed.

FACTUAL DISCUSSION

The facts as set forth by respondent by way of Certification of Dario Sforza, Ed.D and attached to respondent's Brief in Support of Summary Decision as Exhibit A, are as follows:

Petitioner is a teacher and an employee of the Carlstadt-East Rutherford Regional School District Board of Education.

The Board has adopted Policy Number 2624, "Grading System" (the "Grading Policy"), which was created in April 2004. The Board's Grading Policy specifically provides that:

> The Superintendent shall develop and continually review in consultation with teaching staff members, parent(s) or legal guardians(s), and pupils, a grading program appropriate to the course of study and maturity of pupils. The final decision on any contested grade will be the responsibility of the Superintendent. A pupil classified as disabled will be graded in accordance with his/her Individualized Educational Program (IEP) or the Section 504 Plan.

The Board states that the Grading Policy has been in place, uninterrupted, since its creation in April 2004 and was the Grading Policy that was in place at the time relevant to

petitioner's claims. No changes have been made to the Grading Policy at any point in time since its creation in April 2004.

As the District's Superintendent, Dr. Sforza implements the Board's Grading Policy throughout the District. The implementation of the Board's Grading Policy is subject to flexibility and District practice. This includes the "no grade lower" practice by which there is a minimum threshold posted grade which might vary from a teacher's gradebook grade. Under this practice, a *gradebook grade* (which is reflective of the teacher's personal calculation of a student's average marking period performance in class) would warrant an automatic *posted grade* consistent with the "no grade lower" threshold number.

The "no grade lower" practice ranking has been the district's practice for over thirty years. Over the past two years, and in response to the ongoing COVID-19 pandemic, Dr. Sforza implemented the Board's grading policy in such a way that the threshold grade for the district's "no grade lower" practice was set at fifty-five (55). Under practice, the posted grades of fifty-five are automatically inputted as the lowest grade a teacher was permitted to give a student during the period covering January 1, 2021 through June 30, 2021.

Dr. Sforza made the decision to implement the Grading Policy in this manner consistent with his authority as Superintendent and in harmony with the Board's Grading Policy, which provides that "[t]he Superintendent shall develop and continually review in consultation with teaching staff members, parent(s) or legal guardian(s), and pupils, a grading program appropriate to the course of study and maturity of pupils." Difficulties facing District students as a result of the global pandemic, such as learning loss, led to the decision to implement the Grading Policy and its "no grade lower" District practice in this manner, as Dr. Sforza determined this course of action to best serve the district's students and their specific learning needs. This is not the only implementation practice enacted throughout the district in response to the COVID-19 pandemic. In fact, other practices enacted include the Road Back to Becton 1648 Restart Recover Plan 2020-2021, the Road Forward District Plan and Policy 1648, and the Safe Return to In Person

Instruction and Continuity of Service pursuant to the Federal American Rescue Plan Act, Section 2001(i)Z – 2022-2023. However, petitioner took issue only with the implementation of the Grading Policy.

A teacher was permitted to request a lower grade than the required threshold in the past few years so long as they met the requirements on a "Request for Grade Lower than fifty-five" form and appropriately justified their reasons in a short narrative and checked off the interventions implemented to assist each child to succeed. Discretion for approval/denial of a teacher's request is made by the department supervisor and supervisor of guidance. Respondent alleges that the Petitioner attempted to utilize this practice to request lower grades but did not meet the minimum requirements stated above and altered the form to suit his needs, including after he was warned not to do so.

Moreover, Dr. Sforza's wide statutory authority to implement Board policies by virtue of his position as Superintendent is also reinvigorated in myriad in other Board policies. Specifically:

- Board Policy 1230, "Superintendent's Duties", states that:

    - ". . . Function: The Superintendent shall serve as Chief Executive and Administrative Officer of the district by implementing policies established by the Board of Education and by discharging the duties imposed on his/her office by law. . . ."

    - Board Policy 2200, "Curriculum Content", created in July 2016, provides: "The Superintendent is responsible for implementing the curriculum approved by the Board."

    - Board Policy 2210, "Curriculum Development", created in April 2004, provides: " . . As educational leader of the district, the Superintendent shall be responsible to the Board for the development of curriculum and shall establish procedures for curriculum development that ensure the effective participation of teaching staff

members, pupils, the community, and members of the Board. . . ."

- Board Policy 2220, "Adoption of Courses", created April 2004, provides: "The Superintendent is responsible for the continuous evaluation of the courses of study against the educational goals of the Board and shall recommend to the Board such new or altered courses of study as are deemed to be in the best interests of the pupils of this district."

- Board Policy 2610, Educational Program Evaluation", created April 2004, provides: "The Board of Education directs the Superintendent to develop and implement a systematic plan for the continuous evaluation of the educational program against the educational goals established by this Board."

The Superintendent's intimate and extensive involvement in implementing the Board's policies, especially those which touch upon the academic performance of District students is well-documented throughout the Board's many policies.

However, Petitioner did not agree with the manner in which Dr. Sforza implemented the Board's Grading Policy in response to the ongoing COVID-19 pandemic, and thus filed a complaint with OFAC which resulted in Case #INV-010-21. OFAC's decision denied petitioner's complaint and noted that: "N.J.S.A. 18A:12-24.1(c) provides that boards of education have the authority to set policies for school districts. N.J.S.A. 18A:17-20 provides that Superintendents have the authority to implement those policies. Accordingly, the Superintendent has the authority to implement the Board's policy for its Grading System, Policy #2624."

Petitioner appealed to the Commissioner of Education the OFAC's decision because he alleges "the Board of Education never discussed and approved [an] updated" Grading Policy, and because Dr. Sforza "adopt[ed] a different policy, updat[ed] this policy on the district's website and implement[ed] it without approval of" the Board. According to Respondent, the Board's Grading Policy has not been updated. Dr. Sforza did not adopt a new policy nor update the district's website, and that implementing policies are

expressly within the realm of the Superintendent's powers pursuant to statute, regardless.

Petitioner also raised instances of "grade falsification." However, these allegations are not before the Commissioner as, per petitioner's own admission, his complaint to OFAC was "solely based on the [assertion] that Board Policy #2624 (the Grading Policy], which was adopted on April 14, 2004, was changed on the district's website . . .".[1]

In February 2022, the District had a Policy Audit conducted by Strauss Esmay. According to the cover letter sent by Strauss Esmay to the District upon completion of the audit, the audit reviewed "**existing** bylaws, **policies**, and/or regulations. . . " Emphasis added. The Strauss Esmay Policy Audit Summary page generated as a result of the audit shows that the Board's Grading Policy reviewed during the audit was Grading System Policy 2624, adopted in April 2004 -- not some new policy from February 2021 as petitioner alleges. Moreover, the Strauss Esmay audit labeled the existing Grading System Policy #2624 from 2004 as "Good" with "Update Not Needed" for being in "compliance and does not need to be revised."

It is the Board's position that no change has been made to the Board's Grading Policy since 2004, on the district's website, or anywhere else.

Cantatore argues that in February 2021, he accessed both Policy #2624 and Regulation #2624 several times and they were the same document. The next time he accessed Policy #2624, he noticed that the detailed policy was replaced by a three-paragraph policy. See Ex. 6, attached to petitioner's Opposition to Motion for Summary Decision. Cantatore alleges that policy #2624 was modified on the Carlstadt-East Rutherford District website in February 2021, while possessing a falsified adoption date of April 2004. In addition, the three-paragraph policy replaced the original detailed Grading Policy and was never approved at a Board meeting.

[1] The issue of grade falsification was not made part of the Petition that was transmitted to the OAL.

LEGAL ANALYSIS AND CONCLUSION

A party may move for summary decision under N.J.A.C. 1:1-12.5(b), which "may be rendered if the papers and discovery, which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." This Motion shares similarities with the summary judgment rule established in New Jersey Court Rules, R. 4:46-2. See Judson v. People's Bank and Trust Co. of Westfield, 17 N.J. 67, 74 (1954). Pursuant to this standard, all inferences of doubt are drawn against the movant and in favor of the party against whom the Motion is directed. Id. at 75. Here, both the respondent and the petitioner are moving parties. Summary Judgment is precluded when it is determined that "there exists a genuine issue of material fact." Brill v. Guardian Life Insurance Co., 142 N.J. 520 (1995).

Respondent argues that the Motion for Summary Decision should be granted because petitioner lacks standing. Standing is a threshold justiciability determination about whether a litigant is entitled to bring an action before a court or other tribunal. Herron v. Montclair Bd. of Educ., EDU 14067-13, Comm'r decision, (Jun. 2, 2014) (citing, Stubaus v. Whitman, 339 N.J. Super. 38, 47 (App. Div. 2001)). Restrictions on standing apply to those who initiate administrative proceedings before the Commissioner. The Commissioner has clarified through regulation as well as case law that only an "interested person," i.e., one who has standing, may initiate such proceedings. Bedminster Educ. Ass'n v. Bedminster Twp. Bd. of Educ., EDU 6720-05, Comm'r decision (June 16, 2006). "[I]n order to bring a complaint to hear a controversy or dispute arising under the school laws, a person must be an interested party." S.J. v. Mountain Lakes Bd. of Educ., EDU 7081-03, Initial Decision, (Oct. 7, 2003).

N.J.A.C. 6A:3-1.2 defines "interested person(s)" to mean "a person(s) who will be substantially, specifically, and directly affected by the outcome of a controversy before the Commissioner." Consequently, petitioners must show that they will "be affected by the outcome in a direct and meaningful way" before they may proceed in a contested case. U.K. & G.K. ex rel D.K. v. Clifton Bd. of Educ., 93 N.J.A.R.2d (EDU) 71; Kenwood

v. Montclair Bd. of Educ., EDU 8858-81, Initial Decision, (Apr. 23, 1982), adopted, Comm'r (June 14, 1982)). Thus, to have standing, a complaining party must demonstrate "some measurable amount of detrimental impact on the complaining party's personal rights." S.J. v. Mountain Lakes Bd. of Educ., EDU 7081-03, Initial Decision, (Oct. 7, 2003) (citing, Salorio v. Glaser, 82 N.J. 482, 491 (1998)).

A deficiency in standing is fatal to a petition such as the one at issue here. "The dismissal of cases brought by litigants who will not be effected by the outcome in a direct and meaningful way is required by this regulation." S.J. v. Mountain Lakes Bd. of Educ., EDU 7081-03, Initial Decision, (Oct. 7, 2003) (citing, S.R. and E.D.R. o/b/o E.D.R., Jr. v. Montague Bd. of Educ., EDU 5300-03, 201 AGEN LEXIS 583 (Oct. 3, 2001)). Thus, the Commissioner has consistently declined to hear cases brought by petitioners who would not be affected by the outcome in a direct and meaningful way. See, e.g., U.K. & G.K. o/b/o D.K. v. Clifton Bd. of Educ., 93 N.J.A.R.2d (EDU) 73 (Nov. 20, 1992) (parents objecting to discipline of someone else's child); Kenwood v. Montclair Bd. of Educ., EDU 8858-81, Initial Decision, (April 23, 1982), adopted, Comm'r (June 14, 1982), aff'd, St. Bd. (Sept. 8, 1982) (concerned citizen seeking to rewrite school attendance policy); Lobis v. Maple Shade Bd. of Educ., EDU 3630-79, Initial Decision, (June 11, 1980), adopted, Comm'r (Aug. 11, 1980), aff'd, St. Bd. (Nov. 5, 1980) (parent whose child no longer attended school complaining about quality of education received by remaining students); Delaney v. Woodbridge Bd. of Educ., EDU 382-78, Initial Decision, (Dec. 12, 1979), adopted, Comm'r (June 11, 1980) (taxpayer questioning propriety of filling job vacancies); Ricardelli v. Newark Bd. of Educ., EDU 1894-79, Initial Decision, (Sept. 26, 1979), adopted, Comm'r (Nov. 16, 1979) (taxpayer challenging legality of school board's decision to transfer personnel); G.G. v. New Providence Bd. of Educ., 1975 S.L.D. 502 (parent of high school graduate challenging attendance policy).

Petitioner here cannot make the requisite showing of standing. To illustrate, even if the Board's Grading Policy, or a modification of it, did violate some provision of the school laws or the administrative code, it is not petitioner who would be harmed -- if anyone, it would be the district students who are negatively impacted by the violative policy. As such, petitioner lacks standing just as in Herron, where the Commissioner

determined that a teacher advocating for District students who experienced academic problems, while "commendable", did "not add up to the concrete, personal stake in respondent's current actions which standing contemplates." The Commissioner further highlighted that no district student or parent had joined the petitioner in prosecuting the matter. Id. Thus, the Commissioner concluded, "there are no parties in this case with concrete interests adverse to the actions which respondent has proposed, and to which petitioner objects." Id.

I agree with the Respondent that the similarities between the circumstances at issue in Herron and the instant matter are eerily striking. Petitioner apparently has taken it upon himself to advocate on behalf of the students because he personally disagrees with the manner in which the Superintendent implemented the Board's Grading Policy. However, the result is, just as it was in Herron, then, that petitioner lacks standing. This deficiency is inexorably fatal to the instant Petition such that respondent's Motion for Summary Decision should be granted on this basis alone.

Cantatore argues that he does not lack standing because this matter involves a clear violation of N.J.S.A. 18A:12-24.1c, which provides that boards of education have the authority to set policies for school districts. However, he argues that the Board failed to adopt the three-paragraph Grading Policy #2624 that currently appears on the website. Unfortunately, Cantatore cannot and does not dispute that any District student or parent has joined him in prosecuting this matter. Nor that he has had any concrete, personal stake in respondent's alleged actions which standing contemplates. N.J.A.C. 6A:3-1.2 defines "interested person(s)" to mean "a person(s) who will be substantially, specifically, and directly affected by the outcome of a controversy before the Commissioner." Consequently, petitioners must show that they will "be affected by the outcome in a direct and meaningful way" before they may proceed in a contested matter.

Petitioner cannot make the requisite showing of standing because it is not the petitioner who would be harmed even if the Board's Grading Policy, or modification of it, did violate some provision of the school laws or the administrative code. Rather it would be the district's students who would be negatively impacted by the violative policy. I

CONCLUDE that petitioner lacks standing. Even though it has been concluded that the matter should be dismissed, and Summary Decision be granted in favor of the respondent because petitioner lacks standing, the issue of untimeliness will be addressed.

Respondent also argues that the Motion for Summary Decision should be granted because the petition is untimely. Even if petitioner had standing, the instant petition should be dismissed as untimely. N.J.A.C. 6A:3-1.3(i) provides that a "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. . ." The purpose of this 90-day rule is to "provide a measure of repose and stability" and ensure "the proper and efficient administration of the school laws" because it "gives school districts the security of knowing that administrative decisions regarding the operation of the school cannot be challenged after ninety -days." Howell Tp., Mayor of Howell and Council of Tp. of Howell v. Freehold Regional School District, EDU 2427-06, Initial Decision (Oct. 5, 2006) (citing, Kaprow v. Bd. of Educ. of Berkeley Tp., 131 N.J. 572, 582 (1993)). Accordingly, the 90-day rule serves an important and "salutary purpose of discouraging dilatoriness and providing a measure of repose in the conduct of school affairs." C.G. and R.G. v. Brick Tp. Bd. of Educ., EDU 110-06, Comm'r decision, (Mar. 24, 2006) (citing, Farrell v. Votator Division of Chemtron Corp., 62 N.J. 111, 115 (1973); Ochs v. Federal Ins. Co., 90 N.J. 108, 112 (1982); Kaprow v. Berkeley Tp. Bd. of Educ., 131 N.J. 572, 588 (1993)). For example, in Howell, the petitioners' challenge to a board policy adopted on May 10, 2004 which was filed on February 17, 2006, was dismissed as untimely. Id.

The sole basis of Petitioner's complaint to OFAC was the alleged change to the Board's Grading Policy on the District's website. According to petitioner, this change took place in February 2021. Respondent argues that even if this change did occur, which respondent denies, February 2021 is far beyond 90-days prior to the filing of the instant petition on May 25, 2022. And, even if petitioner's complaint to OFAC could be considered the date by which to measure timeliness here, the letter requesting an OFAC investigation was sent on October 12, 2021 -- six months after the alleged

February 2021 alteration. See, Certification of Weston J. Kulick, Esq., (Exhibit "A"), attached to Respondent's Brief in Support of Motion for Summary Decision**.** Whichever the measure respondent argues that the instant petition is untimely.

Cantatore argues that the response from the OFAC regarding OFAC Case #INV-010-21 was mailed on April 28th, 2022. See, Exh. #15 to petitioner's Opposition. The *pro se* petition for the appeal of OFAC Case #INV-101-21 was mailed out on May 25, 2022. See, Exh. #16 petitioner's Opposition. Thus, according to Cantatore, only twenty-seven (27) days elapsed from the day the OFAC response was received until the *pro se* petition was mailed out. I find Respondent's argument to be persuasive and factually correct as to the timing of the filing of Cantatore's Petition. Therefore, I **CONCLUDE** that the instant petition should be dismissed as untimely pursuant to N.J.A.C. 6A:3-1.3(i).

As the facts set forth above pertain to the arguments of lack of standing and untimeliness of filing, I **CONCLUDE** that there are no issues of material fact and Summary Decision should be granted in favor of respondent. There is no need to further address the argument raised by respondent pertaining to the joinder of indispensable parties.

Therefore, having reviewed both parties' submissions, I **CONCLUDE** that Summary Decision should be granted in favor of the respondent dismissing Cantatore's petition because he lacks standing and further because the petition was untimely pursuant to N.J.S.A. 6A:3-1.3(i).

ORDER

It is therefore **ORDERED** that the respondent's Motion for Summary Decision be and hereby is **GRANTED**.

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.

April 26, 2023 — **ELISSA MIZZONE TESTA**, ALJ

DATE

Date Received at Agency: April 26, 2023

Date Mailed to Parties: April 26, 2023

EMT/sej

BRIEFS RELIED ON

For Petitioner:

Petitioner's Opposition to Motion for Summary Decision

Petitioner's Opposition to respondent's Reply.

For Respondent:

Respondent's Motion for Summery Decision with Memorandum of Law and Certification of Weston J. Kulick, Esq. and attached Exhibit A and Certification of Dario Sforza, Ed.D. and attached Exhibits A-E.

Respondent's Reply to petitioner's Opposition to Motion for Summary Decision.