

ADAM FITZGIBBONS,¹ :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

NEW JERSEY STATE BOARD OF : DECISION

EXAMINERS, :

RESPONDENT. :

SYNOPSIS

Petitioner appealed the determination of the respondent State Board of Examiners (SBE) that he had not met the requirements, as set forth in *N.J.A.C. 6A:9B-8.3(a)(5)*, for issuance of a Teacher of Physical Education Certificate of Eligibility (CE). Specifically, petitioner had not passed the mathematics section of the Basic Skills Assessment of the Praxis exam. Petitioner contended that he qualified for the CE because, at the time he submitted his application in April 2015, the Basic Skills Assessment was not a requirement for a certificate of eligibility, as that requirement did not go into effect until September 2015. The SBE argued that although petitioner’s application for certification was initiated in April 2015, the requirements for the CE he sought were not completed until after the Basic Skills Assessment requirement was added in September 2015; accordingly, petitioner failed to meet the regulatory requirements for issuance of the certificate he sought. The SBE filed a motion to dismiss in lieu of an answer.

The ALJ found, *inter alia*, that: when petitioner filed his application for a CE in April 2015, only the Physical Education Content Knowledge portion of the Praxis exam was required, as was a college degree; petitioner did not meet these two requirements until after he initiated his application; petitioner received his bachelor’s degree in December 2015, and passed the Physical Education Content portion of the Praxis in January 2016; in September 2015, certification requirements were expanded to include successfully completing the Basic Skills Assessment on the Praxis II exam; this test requires an applicant to demonstrate competency in reading, writing and mathematics; petitioner has been unable to pass the mathematics section of this assessment; the SBE’s denial of petitioner’s application for a CE was consistent with applicable law; per the Commissioner’s decision in *Gueli v. New Jersey State Board of Examiners*, Commissioner Decision No. 76-18, issued March 8, 2018 – which found that an application is evaluated in accordance with the regulations in effect when the application becomes complete – the SBE’s determination regarding petitioner is consistent with *N.J.A.C. 6A:9B-5.3(b)*; the SBE’s interpretation of relevant regulatory language is consistent with regulatory intent, which is to rigorously vet applicants for certification; an administrative agency’s interpretation of its own regulations is entitled to substantial weight; and petitioner’s contention that he is disabled, and was denied an accommodation regarding the Praxis requirement, is without merit. The ALJ dismissed the petition.

Upon review, the Commissioner adopted the Initial Decision of the OAL as the final decision in this matter, for the reasons expressed therein. The petition was dismissed.

<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>

November 2, 2018

¹ The Initial Decision improperly captioned the petitioner as Brian Fitzgibbons.

ADAM FITZGIBBONS,² :
PETITIONER, :
V. : COMMISSIONER OF EDUCATION
NEW JERSEY STATE BOARD OF : DECISION
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_____:

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions filed pursuant to *N.J.A.C.* 1:1-18.4 by petitioner, and the reply thereto filed by the New Jersey State Board of Examiners (Board).

By way of background, petitioner challenges the denial of his application for a Teacher of Physical Education Certificate of Eligibility. In its decision on March 7, 2018, the Board denied petitioner’s application because he did not meet the requirements of *N.J.A.C.* 6A:9B-8.3; specifically, he had not passed the mathematics section of the Basic Skills Assessment of the Praxis exam. Petitioner argued that his application should be evaluated by the regulations in effect at the time he submitted his application in April 2015. At that time, the mathematics Praxis was not required for a certificate of eligibility, as that requirement did not go into effect until September 2015. Pursuant to *N.J.A.C.* 6A:9B-5.3(b), the Board “shall issue the appropriate certificate upon the candidate’s completion of all certification requirements in effect at the time the Office receives the application.” However, *N.J.A.C.* 6A:9B-5.3(b) also states that “[a]n application shall be deemed filed with the Office when it and all required supporting documentation has been received.” The Administrative Law Judge (ALJ) found that petitioner’s application was not complete in April 2015, because he did not earn his bachelor’s degree until December 2015; further, he did not pass the physical education component of the Praxis until

² The Initial Decision improperly captioned the petitioner as Brian Fitzgibbons.

January 2016. As such, his application was not considered filed until well after September 1, 2015, when a passing score on the Basic Skills Assessment became a requirement. As petitioner has not yet passed the mathematics portion of the Praxis, the ALJ found that the Board acted consistent with the regulations and dismissed the petition.

In his exceptions, petitioner argues that he should be granted a certificate because he has met all of the requirements that were in effect at the time the Board received his initial application. Petitioner contends that pursuant to *N.J.A.C. 6A:9B-5.3(b)*, the Board must review petitioner's application based on completion of the requirements that were "in effect at the time the Office receives the application." If the application is evaluated based on the requirements at the time the application is completed, then it renders the statement meaningless. Petitioner maintains that the statement in *N.J.A.C. 6A:9B-5.3(b)* that the application "shall be deemed filed with the Office when it and all required supporting documentation has been received" is not inconsistent with the former statement, as the requirements differentiate between when the application is "received" and "filed."

Additionally, petitioner argues that the ALJ failed to accept petitioner's contention that the Board "converted" his application to a Teacher of Physical Education Certificate of Eligibility from his initial Teacher of Health and Physical Education Certificate of Eligibility. He disputes the Board's argument that it does not convert applications and that petitioner had filed a second application in December 2015. Petitioner also points out that the ALJ failed to address his argument that he should be exempted from taking the mathematics section of the Praxis examination due to the neurocognitive/learning issues set forth in a letter from his doctor.

In reply, the Board maintains that the ALJ correctly found that petitioner did not meet the requirements for a certificate of eligibility. Although petitioner argues that he now meets all of the certification requirements that were in effect at the time he submitted his application in April 2015, the Board points out that the ALJ appropriately found that petitioner did not meet the requirements until he earned his degree and passed the physical education exam, both of which occurred after September 1, 2015. The Board agrees with the ALJ that petitioner's interpretation of

N.J.A.C. 6A:9B-5.3(b) “would render much of the regulatory language superfluous.” (Respondent’s reply at 4). The Board maintains that the ALJ relied on applicable case precedent, *i.e.*, *Gueli v. New Jersey State Board of Examiners*, Commissioner Decision No. 76-18, March 8, 2018, which examined *N.J.A.C.* 6A:9B-5.3(b) and found that an application is evaluated in accordance with the regulations in effect when the application becomes complete. Additionally, with respect to petitioner’s argument that he was entitled to a testing accommodation, the Board argues that petitioner never requested an accommodation. Further, the letter that he submitted from petitioner’s doctor seeks to exempt him from taking exams altogether, rather than a testing accommodation.

Upon review, the Commissioner agrees with the ALJ that petitioner has not met the requirements for a Teacher of Physical Education Certificate of Eligibility as to date he has not submitted a passing score on the mathematics section of the Basic Skills Praxis. The Commissioner further concurs that petitioner’s initial application was not complete until his degree was conferred in December 2015, and he passed the physical education component of the Praxis in January 2016. Accordingly, as petitioner met those requirements after September 1, 2015, he must comply with the new standards that went into effect on that date, as an application is not considered filed until all supporting documentation is received – including “coursework, degree, tests, fees, GPA, and all certificate rules pursuant to *N.J.A.C.* 6A:9B-8 through 13.” *N.J.A.C.* 6A:9B-5.3(b); *see Gueli, supra* (finding that petitioner’s application was not deemed filed until after she submitted the oath of allegiance, rather than when she initiated the application, so she was required to meet the heightened GPA requirements that went into effect before her application was complete).

The Commissioner does not find petitioner’s exceptions to be persuasive. *N.J.A.C.* 6A:9B-5.3(b) indicates that “[a]n application shall be deemed filed with the Office when it and all required supporting documentation has been received.” When this is read together with the statement that a certificate will be issued upon completion of all requirements “in effect at the time the Office receives the application,” it is clear that the regulation intends for an application to be evaluated by the regulations in effect when a completed application is received. Additionally, whether the Board

“converted” petitioner’s application or whether petitioner submitted a second application is immaterial. Regardless of whether petitioner’s initial application was submitted before or after September 1, 2015, it is uncontroverted that the application was not complete until well after that date. As such, petitioner was required to pass the Basic Skills Assessment of the Praxis; as he has not yet passed the mathematics section of this mandated test, he cannot receive a Teacher of Physical Education Certificate of Eligibility. Finally, the Commissioner does not have jurisdiction over whether the Board’s action violates the Americans with Disabilities Act, 42 *U.S.C.* § 12101 *et seq.*, as his authority is limited to controversies and disputes arising under New Jersey school laws. *N.J.S.A.* 18A:6-9.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter – for the reasons expressed therein – and the petition is hereby dismissed.

IT IS SO ORDERED.³

COMMISSIONER OF EDUCATION

Date of Decision: November 2, 2018

Date of Mailing: November 2, 2018

³ 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

MOTION TO DISMISS

OAL DKT. NO. EDU 09483-18

AGENCY DKT. NO. 77-4/18

BRIAN FITZGIBBONS,

Petitioner,

v.

NEW JERSEY STATE BOARD OF EXAMINERS,

Respondent.

Nicholas Poberezhsky, Esq., for petitioner (Caruso Smith Picini, attorneys)

Kerry Soranno, Deputy Attorney General, for respondent, State Board of
Examiners (Gurbir S. Grewal, Attorney General of New Jersey, attorney)

Record Closed: August 3, 2018

Decided: August 8, 2018

BEFORE **ELLEN S. BASS**, ALJ:

STATEMENT OF THE CASE

Petitioner, Adam Fitzgibbons, challenges the denial of his application for a Teacher of Physical Education Certificate of Eligibility by the State Board of Examiners (the Examiners). The Examiners reply that Fitzgibbons failed to meet the regulatory requirements for issuance of this certificate. N.J.A.C. 6A:9B-8.3(a)(5).

PROCEDURAL HISTORY

Fitzgibbons filed a petition of appeal with the Commissioner of Education (the Commissioner) on April 2, 2018. A Motion to Dismiss, in lieu of an Answer, was filed by the Examiners on June 18, 2018, and the contested case was transmitted to the Office of Administrative Law (OAL) on June 20, 2018. Fitzgibbons opposed the Motion on July 17, 2018. The Examiners replied via letter brief on August 3, 2018, at which time the record closed.

FINDINGS OF FACT

The Examiners' Motion is filed in accordance with N.J.A.C. 6A:3-1.5(g), which permits the filing of a Motion to Dismiss, in lieu of an Answer. In ruling on a Motion to Dismiss

[t]he judge considers whether all the evidence together with all legitimate inferences therefrom could sustain a judgment in favor of the party opposing the motion. The judge is not concerned with weight, worth, nature or extent of the evidence. The judge must accept all the evidence supporting the party defending against the motion and accord that party the benefit of all inferences that can reasonably and legitimately be deduced therefrom. If reasonable minds could differ, the motion must be denied.

[37 New Jersey Practice, Administrative Law and Practice § 5.19, at 259-60 (Steven Lefelt, Anthony Miragliotta & Patricia Prunty) (2d ed. 2000).]

Accordingly, for purposes of the Motion, the facts alleged by the petition will be deemed admitted. I **FIND** as follows:

Fitzgibbons is a Teacher's Assistant who has been employed by the Hudson County Schools of Technology for approximately thirteen years. On or about April 27, 2015, he submitted an application to the Examiners for a Teacher of Health and Physical Education Certificate of Eligibility. In April 2015, when Fitzgibbons filed his

application, only the Physical Education Content Knowledge portion of the Praxis Examination was required. The applicant also was required to hold a college degree. Fitzgibbons did not meet these two requirements until after he initiated his application. He received a bachelor's degree from Kean University in December 2015. He passed the Physical Education Content portion of the Praxis on January 9, 2016. After April 2015, the certification requirements were expanded to include successfully completing the Basic Skills Assessment on the Praxis II Examination. This part of the Praxis asked an applicant to demonstrate competency in reading, writing and mathematics. Fitzgibbons has been unable to pass the mathematics section, having last sat for the Praxis on October 1, 2016.

Fitzgibbons asserts that his April 2015 application was at some later point "converted to a Teacher of Physical Education Certificate of Eligibility" application. The Examiners reply that they do not "convert" applications, and assert that Fitzgibbons filed two separate applications, one in April 2015 and another in December 2015. The April application was denied both because Fitzgibbons had not yet received a college degree, and because he had not passed the mathematics Praxis. The Examiners shared paperwork that reflects the filing of an application by Fitzgibbons in December 2015, which was accompanied by the requisite fee. While he had obtained his college degree by the time this later application was filed, Fitzgibbon still had not passed the Praxis, and his application was again denied.

On April 24, 2017, Fitzgibbons communicated via counsel with Dr. Robert Higgins, Secretary of the State Board of Examiners, and asked that the Examiners grant his application for a Teacher of Physical Education Certificate of Eligibility. Judith Cifone, Manager of Certification and Induction, replied that Fitzgibbons could file an appeal of the denial of his application; he did so on or about October 18, 2017. Included with the appeal was a letter from Dr. Brett J. Prince of Neurobehavioral Rehabilitation Associates, in support of Fitzgibbons' argument that he suffers from a disability, and that the Americans with Disabilities Act (ADA) thus requires that he be exempted from the examination as an accommodation. That letter is dated May 13, 2017.

The Examiners met on March 1, 2018, considered the arguments of Fitzgibbons' counsel, and again denied Fitzgibbons' application. This appeal followed. The eligibility requirements for the Teacher of Physical Education Certificate of Eligibility are as set forth at N.J.A.C. 6A:9B-8.3. It is uncontroverted, and I **FIND**, that presently Fitzgibbons has met all certification requirements other than achieving a passing score on the mathematics portion of the Praxis.

CONCLUSIONS OF LAW

The issue presented by this appeal is “whether the decision [by the Examiners to deny Fitzgibbon’s application] is consistent with the applicable statutory and regulatory provisions.” Walder v. State Bd. of Exam’rs, EDU 08530-14, Initial Decision (November 10, 2014), aff’d with mod., Comm’r (December 29, 2014), <<http://njlaw.rutgers.edu/collections/oal/>>. Fitzgibbons carries the burden of demonstrating by a preponderance of the credible evidence that he is entitled to the certification he seeks. Farrar v. State Bd. of Exam’rs, EDU 13763-08, Initial Decision (April 27, 2010), aff’d, Comm’r (July 26, 2010), <<http://njlaw.rutgers.edu/collections/oal/>>. I **CONCLUDE** that the Examiners’ decision was consistent with applicable law and thus, must be upheld.

All agree that Fitzgibbons met the regulatory requirements for issuance of the controverted certification, with the exception of that contained at N.J.A.C. 6A:9B-8.3(a)(5). The regulation states that “[a]fter September 1, 2015 [a candidate for certification must] achieve a minimum score established by the Department on a Commissioner-approved test of basic reading, writing and mathematics skills...” The date upon which his application was deemed “received” thus becomes critical to Fitzgibbons, who relies upon N.J.A.C. 6A:9B-5.3(b), as follows:

The Board of Examiner shall issue the appropriate certificate upon the candidate’s completion of all certification requirements in effect at the time the Office receives the application...[a]n application shall be deemed filed with the Office when it and all required supporting documentation has been received.

The submissions of the parties suggest a factual issue regarding whether Fitzgibbon's application was "received" before or after September 1, 2015. But, this factual dispute is not material to my decision. If the application at issue is the one initiated in December 2015, then clearly the requirement that Fitzgibbons pass the mathematics Praxis was in place. And if we accept that the only relevant application was the one initiated in April 2015, the Commissioner's decision in Gueli v New Jersey State Board of Examiners, EDU 06766-17, Initial Decision (January 24, 2018), aff'd, Comm'r (March 8, 2018), <<http://njlaw.rutgers.edu/collections/oal/>>, disposes of Fitzgibbons' contention that this application was "received" by the Examiners, as that term is intended by the regulation, before September 1, 2015.

Focusing on the phrase "all certification requirements in effect at the time the Office receives the application," Fitzgibbons urges that the mathematics Praxis requirement was not in effect in April 2015 when he initiated his application; accordingly, he is excused from this requirement. The Examiners reply that an application is not deemed "received" until all supporting documentation is on file with the Examiners. Fitzgibbons' application was not complete until after September 2015; indeed, he did not pass the physical education component of the Praxis until January 2016, nor earn his bachelor's degree until December 2015.

Gueli presents analogous facts. The petitioner there initiated the process for a Teacher of Elementary Education Certificate of Eligibility on August 30, 2016. Her application was not deemed complete until the Examiners received an Oath of Allegiance form on September 29, 2016. Prior to September 1, 2016, the applicable regulation permitted an applicant with a GPA between 2.50 and 2.75 to satisfy the GPA requirement by exceeding a passing score on an appropriate subject matter test by ten percent or more. But after September 1, 2016, an applicant had to achieve a cumulative GPA of at least 2.75 to qualify for certification. Gueli's GPA was 2.58; since her application was deemed complete in late September 2016, and not as of the date of initial filing, the Commissioner upheld the Examiners' decision that Gueli did not qualify for a Certificate of Eligibility.

The decision in Gueli is consistent with well-accepted concepts of regulatory interpretation. An administrative regulation is subject to the same canons of construction as a statute. In re N.J.A.C. 14A:20-1.1, 216 N.J. Super. 297, 306 (App. Div. 1987). A **regulation** should be “construed in accordance with the plain meaning of its language . . . and in a manner that makes sense when read in the context of the entire **regulation.**” Medford Convalescent and Nursing Ctr. v. DMAHS, 218 N.J. Super. 1, 5 (App. Div. 1985); see also Jablonowska v. Suther, 195 N.J. 91, 105 (2008).

Fitzgibbons asserts that his application was “received” by the Examiners in April 2015, but his interpretation would render much of the regulatory language superfluous. Indeed, the regulation indicates that “[a]n application shall be deemed filed...when it and all supporting documentation has been received.” This latter phrase, when read in conjunction with the earlier part of the regulation, makes it plain that Fitzgibbons’ argument is without merit. His April 2015 application was not “received” until it was complete; by then, the mathematics Praxis had become a requirement. I **CONCLUDE**, per the decision in Gueli, that the Examiners’ determination that Fitzgibbons failed to meet the requirements for issuance of a Certificate of Eligibility is consistent with the requirements of N.J.A.C. 6A:9B-5.3(b). I moreover **CONCLUDE** that the Examiners’ interpretation of the relevant regulatory language is consistent with the regulatory intent, which is to rigorously vet applicants for certification. An administrative **agency’s interpretation of its own regulations** is entitled to substantial weight. Allen v. PFRS, 233 N.J. Super. 197, 207 (App. Div. 1989).

Finally, Fitzgibbons urges that he was entitled to an exemption from the Praxis due to a disability. He claims that denying him an accommodation violates the Americans with Disabilities Act, (ADA), 42 U.S.C. § 12101 et. seq. The Commissioner of Education is without jurisdiction to consider claims arising under this Federal law. The Commissioner’s jurisdiction is defined by statute and is limited to “controversies and disputes arising under the school laws.” N.J.S.A. 18A:6-9. For this reason, I **CONCLUDE** that this claim must be dismissed.

And even assuming, for argument’s sake, that the Commissioner could address the ADA claim, the Examiners correctly point out that Fitzgibbons’ application did not

contain a request for an exemption or other accommodation; that request came only later, after his application was denied. Indeed, the letter from his physician post-dates the denial of his application. Nor did he ask for any accommodations during the administration of the Praxis; indeed, he passed all sections of the test, but for mathematics, without any accommodations. I **CONCLUDE** that Fitzgibbon's contention that he was denied a requested accommodation has no support in the factual record and must be dismissed.

ORDER

Based on the foregoing, it is hereby **ORDERED** that the Board of Examiners' Motion to Dismiss is **GRANTED** and the petition of appeal is **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.

August 8, 2018



DATE

ELLEN S. BASS, ALJ

Date Received at Agency:

August 8, 2018

Date Mailed to Parties:

sej