

C #338-96L
SB # 60-96

LINDA PETERS, :
 :
 PETITIONER-APPELLANT, :
 :
 V. :
 :
 BOARD OF EDUCATION OF THE PINE- : STATE BOARD OF EDUCATION
 LANDS REGIONAL SCHOOL DISTRICT, :
 OCEAN COUNTY, :
 :
 RESPONDENT-RESPONDENT, :
 :
 AND :
 :
 LEO F. KLAGHOLZ, COMMISSIONER OF :
 EDUCATION, :
 :
 RESPONDENT-RESPONDENT. :
 _____ :

Decided by the Commissioner of Education, August 1, 1996

Reconsidered by the Commissioner of Education, September 20, 1996

For the Petitioner-Appellant, Zazzali, Zazzali, Fagella & Nowak (Aileen M. O'Driscoll, Esq., of Counsel)

For the Respondent-Respondent Board of Education of the Pinelands Regional School District, Murray & Carr (Paul J. Carr, Esq., of Counsel)

For the Respondent-Respondent Leo F. Klagholz, Michelle L. Miller, Deputy Attorney General (Peter Verniero, Attorney General of New Jersey)

The genesis of this appeal lies in two letter decisions issued by the Commissioner of Education which, together, resulted in the complete dismissal of a

two-count petition filed by a tenured speech correctionist (hereinafter “petitioner”) pursuant to N.J.A.C. 6:24-1 et seq. By this petition, petitioner essentially sought to challenge the action taken by the Board of Education of the Pinelands Regional School District (hereinafter “Board”) to reduce her full-time position to part-time, twenty hours per week, pursuant to N.J.S.A. 18A:28-9.

In Count One of her petition, petitioner claimed that the reduction of her position on April 24, 1996 was in violation of her tenure and seniority rights. Petitioner alleged that the Board’s action was based on an invalid waiver granted by the Commissioner pursuant to N.J.A.C. 6:3A-1.1 et seq. of the requirements of the administrative code pertaining to the provision of special education.¹ Petitioner also alleged in Count One that the Board had acted improperly in requesting that waiver and that the Commissioner had improperly granted it. Petitioner sought relief in the form of reinstatement to a full-time position with back pay and emoluments from the date of the reduction in her employment.

Count Two of the petition focused on the underlying waiver granted to the Board by the Commissioner. Petitioner alleged in Count Two that the Board had not requested the waiver for the purposes authorized by N.J.A.C. 6:3A-1.1 et seq. and, further, that the Commissioner did not grant the waiver for any of these purposes. Petitioner therefore sought, in addition to reinstatement to a full-time position, a declaration from the Commissioner that the waiver was null and void.

¹ On November 1, 1995, the Board applied to the Commissioner for a waiver pursuant to N.J.A.C. 6:3A-1.5 of the program criteria set forth in N.J.A.C. 6:28-4.3 et seq. That regulation requires that speech language services for classified pupils must be provided either individually or in groups not exceeding three, N.J.A.C. 6:28-4.3(a)(1), and that supplementary instruction may not be provided in

By letter decision dated August 1, 1996, the Commissioner determined that Count Two constituted an appeal from a final determination of the Commissioner which should have been made to the State Board pursuant to N.J.A.C. 6:2-1 et seq. rather than to the Commissioner under N.J.A.C. 6:24-1 et seq. He therefore dismissed Count Two. In addition, while he found that Count One of the petition was “inextricably linked to Count Two,” the Commissioner asked petitioner to advise the Bureau of Controversies and Disputes whether she wished to proceed with Count One.

In response to this decision, petitioner advised the Commissioner that she wished to proceed with Count One, and also requested reconsideration of his dismissal of Count Two.

By letter dated September 20, 1996, the Commissioner reaffirmed his prior determination to dismiss Count Two. In addition, the Commissioner dismissed Count One, finding that because Count One was contingent on a ruling on Count Two, Count One was not yet “ripe for adjudication.”

Petitioner appealed to the State Board, seeking reversal of the Commissioner’s dismissal of her petition and a remand of the matter for a determination of the merits of her claim. Petitioner argued that dismissal of her petition was contrary to the applicable regulations and, further, that approval of the waiver in question constituted an administrative decision reviewable by the Commissioner.

In response to petitioner’s appeal, a Deputy Attorney General representing the Commissioner filed a brief on his behalf urging affirmance of the Commissioner’s determination. In her letter brief, the Deputy argued that waiver determinations made

groups exceeding five pupils. N.J.A.C. 6:28-4.3(a)(2). That waiver request was approved by the

under N.J.A.C. 6:3A-1.1 et seq. are “final determinations” which are appealable to the State Board pursuant to N.J.A.C. 6:2-1.1(a)(1). In support of her position, the Deputy relied on comments and responses made concerning N.J.A.C. 6:3A-1.1 et seq. during the regulation adoption process. Relying on the same responses, she further argued that the Commissioner’s original determination to hold Count One in abeyance until an adjudication by the State Board of Count Two was reasonable, and hence, that his subsequent decision to dismiss Count One without prejudice was appropriate.

Counsel for the Board then filed a letter response on behalf of the school district indicating that it supported the position taken by the Commissioner.²

In her reply brief, petitioner once more argued that her claim centered on alleged violations of her tenure and seniority rights and that the regulations governing appeals to the State Board are controlling of her right to appeal such tenure violations. Petitioner points out that, under the State Board’s rules, such tenure and seniority claims must first be litigated before the Commissioner as provided by N.J.A.C. 6:24-1 et seq. before being appealed to the State Board, notwithstanding the fact that underlying claims might concern, as in this case, the application of other regulations.

Petitioner subsequently requested to supplement the record with a Complaint Investigation Report issued by the Department of Education’s Office of Special Education Programs concerning the Board’s use of the waiver underlying this litigation.

The Deputy Attorney General representing the Commissioner opposed supplementation, arguing that only the dismissal of petitioner’s claim is before the State

Commissioner on March 4, 1996.

² The Board also stressed that because petitioner’s appeal was directed at action taken by the Commissioner sua sponte, it had not had the opportunity to establish a record below on Count One.

Board and that the Complaint Investigation Report is immaterial to this issue. In this respect, she argued that the lawfulness of the waiver was not before the State Board because “pertinent facts and allegations have not been pled or briefed.” She further asserted that petitioner in any event “appears to be out of time to appeal the Commissioner’s waiver grant.”³

On May 19, 1997, petitioner formalized her request to supplement the record on appeal by filing a motion pursuant to N.J.A.C. 6:2-1.9. In her motion, petitioner additionally sought to supplement the record with correspondence dated April 28, 1997 from Dr. Richard A. DiPatri, who was then Deputy Commissioner of Education.

As follows, we reverse the Commissioner’s determination to dismiss the petition in this case. We also grant petitioner’s motion to supplement the record and remand this matter to the Commissioner with direction that it be transmitted to the Office of Administrative Law for initial determination of petitioner’s claims.

Based on our review of the record developed thus far, it is clear that petitioner’s claim that her tenure and seniority rights were violated when the Board reduced her position to part-time presents a controversy arising under the school laws over which the Commissioner has primary jurisdiction pursuant to N.J.S.A. 18A:6-9. Accordingly, before the State Board of Education can properly consider the substance of petitioner’s claim pursuant to N.J.S.A. 18A:6-28, it must first be decided by the Commissioner.

Our jurisdiction over this matter emanates from N.J.S.A. 18A:6-27, which provides that any party aggrieved by any determination of the Commissioner can

³ From this perspective, petitioner’s cause of action arose on March 4, 1996, the date on which the waiver was approved, rather than April 24, 1996, the date on which the Board acted to reduce her employment.

appeal to the State Board. N.J.S.A. 18A:6-28 provides that such appeal must be taken within thirty days in the “manner prescribed by the rules of the board.” The rules implementing this statutory right of appeal are codified at N.J.A.C. 6:2-1 et seq. As petitioner correctly points out, those rules are controlling of appeals to the State Board.

Petitioner in this instance was not aggrieved by the Commissioner’s approval of the waiver involved in this case, but rather by the Board’s subsequent action in reducing her position. There is no question that such actions must be challenged by a petition of appeal to the Commissioner and litigated as provided by N.J.A.C. 6:24-1 et seq.⁴ before the matter may be brought to the State Board through an appeal made pursuant to N.J.A.C. 6:2-1 et seq. It is equally clear that the Commissioner may not dispose of such petitions without deciding the matter merely because the claim involves the application of a regulation, even when the regulation, as here, provides authority to a district board to seek a waiver of another regulation and to the Commissioner to grant such a request.

Such a construction of N.J.A.C. 6:3A-1.1 et seq. would permit a district board in cases like this to avoid administrative and judicial scrutiny of the legal propriety of actions it has taken under the authority conferred by N.J.S.A. 18A:28-9 to abolish or reduce positions held by tenured teaching staff members. Whatever discussion occurred while we were in the process of adopting N.J.A.C. 6:3A-1.1 et seq., the State Board never intended this result.

In addition, as this case well illustrates, such a result would circumvent our ability to review the exercise by the Department of Education of the authority which we

have delegated to the Commissioner as administrative officer of the Department, see N.J.S.A. 18A:4-22, to grant administrative waivers pursuant to N.J.A.C. 6:3A-1.1 and N.J.A.C. 6:3A-1.5. In this respect, we recognize that the waiver process set forth in N.J.A.C. 6:3A-1.5 does not and cannot guarantee that the effect of individual waivers will be readily ascertainable in all cases from the documentation generated by the waiver application process. See N.J.A.C. 6:3A-1.5(a)(1) through N.J.A.C. 6:3A-1.5(a)(4).

Further, although N.J.A.C. 6:3A-1.5(a)(4) requires that an application for a waiver “demonstrate that the school district’s educational community, including the district board of education, parents, administration and staff, have been informed of the proposed waiver to the specific rule through public comment and input,” we would not impose a general bar to substantive challenges to the application of the education laws on the basis of such a general notice provision. Rather, as head of the Department of Education, N.J.S.A. 18A:4-1, and given our responsibility for the general supervision of public education in New Jersey, N.J.S.A. 18A:4-10, as well as our obligation to insure that our procedures operate fairly and in conformity with the requirements of due process principles, e.g., In re Masiello, 25 N.J. 590, 601 (1958); Laba v. Board of Education of Newark, 23 N.J. 364, 382 (1957), we must judge the propriety of each substantive appeal under the particular circumstances presented to us in that case.

Again, the appeal in this case is based on the substantive claim that petitioner’s statutory rights were violated when the Board reduced her full-time position to part-time. This agency would be abrogating its responsibility were we to avoid hearing this

⁴ We note that N.J.A.C. 6:24-1.2(d) provides that a petition of appeal may name the Department of

claim on the grounds that such alleged violation of petitioner's statutory rights was based on the application of a rule adopted by the State Board to implement the education laws.

Our responsibility in this context is to assure that petitioner's claims are properly considered. To accomplish this, we remand this matter to the Commissioner with the direction that he transmit it to the Office of Administrative Law for initial determination of both Count One and Count Two of the petition.⁵ Finally, as previously stated, we grant petitioner's motion to supplement the record with documents relating to the underlying waiver so that they will be considered in the proceedings in the Office of Administrative Law. We have not, however, considered the substance of those documents in arriving at our determination herein.

Attorney exceptions are noted.

April 1, 1998

Date of mailing _____

Education or its agents as parties to disputes falling within the jurisdiction of our agency.

⁵ We note that while the Rules Governing Appellate Practice provide for an appeal as of right to the Appellate Division to review the validity of any rule promulgated by an administrative agency where there is no right of review available before any administrative agency, R. 2:2-3(a)(2), there is no similar provision in the State Board's rules relating to any actions by the Commissioner. See N.J.A.C. 6:2-1 et seq. In any event, while petitioner's claim implicates the validity of the underlying waiver, it arises from the application of N.J.A.C. 6:3A-1.1 et seq. and does not appear to be a challenge to the facial validity of that regulation.