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STATE BOARD OF EDUCATION

Notice of Action on Petition for Rulemaking

N.J.A.C. 6A:3-5.1 Filing of written charges and certificate of determination

N.J.A.C. 6A:3-5.2 Format of certificate of determination

Petitioner: Christine Gillespie

Take notice that on May 2, 2012, the New Jersey State Board of Education received a petition for rulemaking from the above petitioner requesting that the State Board of Education repeal the rules pertaining to the Charges Under Tenure Employees Hearing Act, pursuant to N.J.A.C. 6A:3-5.1(b)4 and 6 and (c)8 and 9, and N.J.A.C. 6A:3-5.2(a)1 and 3, as a result of numerous alleged violations of State, Federal, and constitutional law. The petitioner is requesting that the State Board of Education fulfill its responsibility under N.J.S.A. 18A:4-15 to implement the Tenure Employees Hearing Law set forth at N.J.S.A. 18A:6-11 as written and mandated by the New Jersey Legislature and repeal the *ultra vires*, unconstitutional, and void *ab initio* agency rules, and enforce the legislative rules. The petitioner also requests that the legislative rules which have implemented N.J.S.A. 18A:6-11 for several decades, as it applies to all tenured employees, be set free of *ultra vires* interpretive rules which ride “piggy-back” on these legislative rules to allow discriminatory, illegal denial of tenure rights of tenured employees in State-operated school districts. The petitioner states that there is no authority granted in the identified statutes that permits tenure due process rights to be denied tenured employees of State-operated school districts. The petitioner also states that the Department of Education's failure to be able to identify any specific authority for its rulemaking rendered its action void *ab initio* and a violation of the New Jersey Administrative Procedure Act, N.J.S.A. 52:14B-4(a)(2), which requires the specific legal authority under which the rule adoption is authorized.

The petitioner further states that the agency rules violate nearly a dozen statutes in Title 18A, the United States and the New Jersey Constitutions, the Administrative Procedure Act, and the Employer-Employee Relations Act, N.J.S.A. 34:13A-1 to 30.

In accordance with applicable law, the Department concluded its review and determined that no repeal or amendments to the current regulations are warranted. Petitioner requests that the State Board of Education rules - specifically, N.J.A.C. 6A:3-5.1(b)4, (b)6, (c)8, and (c)9 and N.J.A.C. 6A:3-5.2(a)1 and 3 - be amended to remove reference from those rules to the State district superintendent in the tenure hearing process as it relates to State-operated school districts. Petitioner made the same requests in a petition for rulemaking submitted to the State Board Office in April 2006. The petitioner now states that her previous request challenged the rules on the ground of noncompliance with procedural requirements pursuant to N.J.S.A. 52:14B-4(d), and

that the present challenge is brought pursuant to N.J.S.A. 52:14B-4(f) (the general statutory provision setting forth the procedure for petitioning an agency to adopt a new rule or amend or repeal an existing rule) - allegedly because of "numerous violations of state, federal, and constitutional law. . ." It is clear, however, from the New Jersey Superior Court Appellate Division opinion affirming the State Board of Education's decision which denied the petitioner's 2006 request for amendment of the rules that the same substantive arguments she advances herein were also raised and addressed in the earlier petition. See *Gillespie v. Department of Education*, 397 N.J. Super. 545 (App. Div. 2008), certif. den. 195 N.J. 420 (2008).

The power to determine whether probable cause exists and to certify tenure charges in State-operated districts was given to the State district superintendent by the New Jersey Legislature in 1987 when it enacted legislation authorizing the creation of State-operated school districts. The 1987 legislation has been amended by P.L. 1995, c. 179, P.L. 2005, c. 235, and P.L. 2007, c. 16, and currently authorizes the State Board of Education to issue an administrative order placing a school district under "partial state intervention" or "full state intervention," based upon evaluation of the district's performance in five categories: "instruction and program; personnel; fiscal management; operations; and governance." N.J.S.A. 18A:7A-10. Pursuant to the takeover legislation, the State district superintendent has "the power to perform all acts and do all things that the Commissioner deems necessary for the proper conduct, maintenance and supervision of the schools in the district." N.J.S.A. 18A:7A-35.e. The State district superintendent may, in a school district under full state intervention, "sue in the district's corporate name and likewise submit to arbitration and determination disputes and controversies in the manner provided by law." N.J.S.A. 18A:7A-39. Most notably, "the State district superintendent of schools shall, subject to the approval of the Commissioner or his designee, make all personnel determinations relative to employment, transfer and removal of all officers and employees, professional and non professional..." N.J.S.A. 18A:7A-42.a(3). The Appellate Division specifically referenced that statutory provision in its opinion as authority for the regulatory provisions in question which it described as probably not required because the superintendent's authority "is directly and obviously inferable from the plain language of the statutes. . ." *Gillespie v. Department of Education*, *supra*, at 555. If the regulatory provisions the petitioner requests the State Board to amend were to delete any reference to the State district superintendent, nothing in the process would change. The State district superintendent would still be responsible for determining probable cause for tenure charges to go forward and for certifying the charges to the Commissioner. The statutory provisions make it quite clear that in State-operated districts "[t]he board of education shall have only those rights and powers and privileges of an advisory board." N.J.S.A. 18A:7A-47a. See, for example, *In the Matter of the Tenure Hearing of Robbie MacDowell, State Operated School District of the City of Paterson, Passaic County*, Commissioner Decision, May 2, 1996, addressing this issue and decided before the adoption of the rules in question: "The legislation further delegates to superintendents in state-operated school districts the powers and authority previously granted to the local school board. '***[T]he State district superintendent shall have the power to perform all acts and do all things consistent with law necessary for the proper conduct, maintenance and supervision of the schools in the district.' N.J.S.A. 18A:7A-35e. This includes the express power to make all personnel determinations relative to all officers and employees of the district. N.J.S.A. 18A:7A-42a(3). Thus, it is clear that the State District Superintendent appointed for the district has the statutory authority to certify tenure charges against a teaching staff member." *Ibid.* at 18.

It is the Legislature which is responsible for determining how tenure charges should be processed in State-operated districts, and there is no way to change that by rulemaking. As the Appellate Division has previously held, the rules merely implement the legislation. Therefore, the petitioner's request is denied.