

#71-08

CENTRAL JERSEY SOUTH OFFICIALS ASSOCIATION,	:	
	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
	:	
V.	:	DECISION
	:	
NEW JERSEY STATE INTERSCHOLASTIC ATHLETIC ASSOCIATION,	:	
	:	
RESPONDENT.	:	
_____	:	

SYNOPSIS

The Central Jersey South Officials Association (CJSOA) filed a Petition of Appeal seeking reversal of the final decision of the New Jersey Interscholastic Athletic Association (NJSIAA) denying its application for certification as an NJSIAA-approved basketball officials' association.

The CJSOA contended that NJSIAA's decision was made on a basis (determination of need) lacking authorization in law and without according CJSOA its right to due process. NJSIAA countered that the denial was consistent with applicable NJSIAA rules and represented a lawful discretionary determination of the Association's Executive Committee.

The Commissioner upheld the NJSIAA's decision and dismissed the appeal, finding that: NJSIAA did not engage in improper rulemaking; CJSOA's application received fair and proper consideration; NJSIAA did not act in an arbitrary, capricious or unreasonable manner in denying CJSOA's application; and CJSOA was not denied due process in this matter.

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.
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February 13, 2008

AGENCY DKT. NO. 239-8/07

CENTRAL JERSEY SOUTH OFFICIALS ASSOCIATION,	:	
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NEW JERSEY STATE INTERSCHOLASTIC ATHLETIC ASSOCIATION,	:	
	:	
RESPONDENT.	:	
_____	:	

For Petitioner, Richard D. Cordry, Esq. (George T. Kotch, P.C.)

For Respondent, Steven P. Goodell, Esq. (Herbert, Van Ness, Cayci & Goodell)

This matter came before the Commissioner of Education on August 24, 2007, through the filing of a petition of appeal by the Central Jersey South Officials Association (CJSOA). In its petition, the CJSOA sought reversal of the final decision of the New Jersey State Interscholastic Athletic Association (NJSIAA) denying its application to become a “certified chapter of the NJSIAA,” contending that the NJSIAA made this determination without authorization in law and without according the CJSOA its right to due process. Following the CJSOA’s correction of technical deficiencies in its petition, submission of the record on appeal, and receipt of the NJSIAA’s Answer to the Petition, the parties were directed to proceed with briefing in accordance with *N.J.A.C. 6A:3-7.3*. The CJSOA’s brief was duly submitted, and the record before the Commissioner closed on November 2, 2007, upon timely filing of the NJSIAA’s responsive brief.

## OPERATIVE FACTS

1. On January 25, 2007, CJSOA legal counsel and founding member George T. Kotch, Esq. wrote to NJSIAA Assistant Director Larry White applying for certification of the CJSOA as an NJSIAA-approved “basketball chapter” beginning with the 2007-08 school year. He represented that CJSOA’s assignor (Mr. Anthony Celentano) had previously learned from Mr. White that “there was not a formal document but the procedure for ‘Approval of Officials Chapter’ was outlined in the official’s handbook, page one (1), and that was the beginning of the process.” (Record on Appeal, Item 3)

2. The 2006-07 NJSIAA Handbook (at 115) includes a chapter entitled “NJSIAA Minimum Requirements for Review of Officials’ Chapters,” which is replicated in the official’s handbook (at 1). That chapter in its entirety states as follows:

1. The chapter must provide evidence of officiating experience of its membership, noting league, conference, or levels of competition and years of service.

2. The chapter must provide a list of their (*sic*) duly elected officers and membership.

3. The chapter must provide a copy of their (*sic*) Constitution and Bylaws for review by the NJSIAA.

4. The chapter must agree to grant the NJSIAA the final authority for testing, training, and evaluating procedures adopted by the chapter.

5. The chapter must provide an outline of their (*sic*) testing, training, and evaluating procedures for certification of prospective and present members. All members must pass an annual written examination, as approved by the NJSIAA.

6. The chapter must agree to comply with all the provisions of the Constitution, Bylaws, and Rules and Regulations of the NJSIAA; decisions of the Executive Committee of the NJSIAA; and the tenets of agreements effected by the Officials’ Councils and the NJSIAA.

7. The Executive Committee may approve the certification of officials and/or officials’ chapters in all sports; and the minimum requirements for testing, training and evaluating all officials.

3. Subsequent to its initial communication and in accordance with the understanding set forth at No. 1 above, the CJSOA provided the

NJSIAA with: a roster of its members, noting their years of experience and highest level of officiating; a listing of schools, leagues and special events to which the CJSOA had provided services; the CJSOA constitution and bylaws; a list of CJSOA officers; and the CJSOA's application form outlining the training/qualification process for membership in the CJSOA. (Record on Appeal, Items 5 through 8)

4. In a series of subsequent communications between CJSOA officials and NJSIAA Assistant Director White, the latter identified additional information needed before the application could be considered; the former provided what they believed to be responsive submissions. (Record on Appeal, Items 9 through 13 and 18)

5. On May 4, 2007, NJSIAA Assistant Director White wrote to the member schools of its Colonial Valley Conference (CVC) and Burlington County Scholastic League (BCSL), advising them of the CJSOA's application, and requesting that they complete and return by May 18, 2007 an accompanying survey so as to enable the NJSIAA to determine if there was a need for a new NJSIAA-affiliated basketball officials' association. In making this request, Mr. White referenced an unnamed 1995 decision of the Commissioner of Education upholding NJSIAA's determination not to approve a new basketball association because, among other reasons, insufficient need had been demonstrated. (Record on Appeal, Item 16) The CJSOA contends that it had no prior knowledge of this survey. (Petition of Appeal, ¶7)

6. On May 8, 2007, the CJSOA president wrote to the recipients of the NJSIAA survey, objecting to the manner in which the NJSIAA characterized the CJSOA's application and offering its own perspective to the surveyed schools. (NJSIAA's Reply Brief at 6, citing to Record on Appeal, Item 19)

7. Twenty-two (22) survey responses were received (Record on Appeal, Item 17), representing all member schools in Mercer County and 11 out of 19 member schools in Burlington County. (NJSIAA's Reply Brief at 5)

8. On May 21, 2007, Assistant Director White wrote to CJSOA Assignor Celentano to advise him that NJSIAA staff would be recommending against Executive Committee approval of the CJSOA's application at the committee meeting to be held on June 6, 2007, which the CJSOA was invited to attend for purposes of addressing the committee and answering any questions it might have; by copy of the letter, representatives of NJSIAA's currently affiliated basketball officials' associations serving Mercer and Burlington counties

(Central Jersey Board 193 [Board 193] and Camden Board 34 [Board 34]) were also invited to appear. The reasons given by Mr. White for his recommendation included: the lack of need for an additional basketball officials' association; survey results indicating that member schools were happy with existing services; a roster of CJSOA members that was significantly less substantial than represented (107), due to a large number of cadets (23) and several officials (51) who currently belonged to an existing association that did not permit dual membership; and satisfaction with the current arrangement on the part of the four schools served by the CJSOA's assignor. (Record on Appeal, Item 2) The CJSOA contends that this communication was "the very first time" it was informed that review of its application would be based on a demonstration of need. (Petition of Appeal, ¶9)

9. On June 6, 2007, the NJSIAA Executive Committee met as scheduled. Representatives of the CJSOA – including its legal counsel, president and assignor – appeared before the committee and spoke in favor of the CJSOA's application, countering adverse arguments and additionally requesting an adjournment on grounds that they did not have sufficient time in which to respond to the NJSIAA's requirement for a showing of need as indicated in Assistant Director White's May 21 letter. Representatives of Board 193 and Board 34 stated their view that current arrangements were satisfactory to them and to the NJSIAA's member schools, and expressed concern about the quality and impact of a third organization; NJSIAA Assistant Director White and the Board 193 representative also expressed concern about a significant portion of the current CJSOA membership being a "break-off" or "splinter" group of Board 193 – individuals utilized by the CJSOA assignor, who had failed in a bid to become the assignor for Board 193 – rather than a new group of officials. (The Board 193 representative additionally raised a question about whether many of CJSOA's purported "members" had even agreed to be represented as such.) Following presentations, inquiry and debate, the committee was not persuaded by the CJSOA's request for a continuance, and voted 23-6 (with one abstention) to deny the application. (Record on Appeal, Item 1) The instant appeal then ensued, the CJSOA's petition having been filed on August 24, 2007.

#### THE CJSOA'S POSITION ON APPEAL

The CJSOA first challenges the validity of the NJSIAA's reliance on a showing of need, contending that nothing in the NJSIAA's authorizing statute (*N.J.S.A. 18A:11-3*) or in the NJSIAA Constitution and Bylaws requires – or even

identifies – that such a showing must be made in order for an officials’ organization to be recognized as a chapter of the NJSIAA. (Petitioner’s Brief at 3-5) According to the CJSOA, the NJSIAA treated the “need” standard as though it were a rule – which it *cannot* be because it was not published and filed with the Secretary of State as required by the New Jersey Supreme Court in precedent cited within *Merry Heart Nursing & Conv. Home v. Dougherty*, 131 N.J. Super. 412 (1974), at 418. (*Id.* at 5) Moreover, the CJSOA continues, the survey used by the NJSIAA to ascertain need was not even a useful instrument for this purpose, in that it failed to provide critical information about the CJSOA and stated neither the CJSOA’s reasons for seeking NJSIAA chapter certification nor the benefits that would result from such certification. As a consequence, according to the CJSOA, the survey responses constituted “not a bench mark showing of a lack of a need (*sic*), but...rather a lackluster confirmation that the school districts were okay with the services that they had received thus far.” (*Id.* at 5)

The CJSOA further contends that its due process rights were violated by the NJSIAA, first in the association’s failure to inform CJSOA that a showing of need would be required for its application to be approved, and then in failing to allow the CJSOA an opportunity to obtain evidence once the “need” standard was made apparent. Asserting that it is fundamental to due process for a rule to be known to those to whom it applies – and for affected individuals/organizations to have a reasonable opportunity to timely respond to the rule’s application – the CJSOA notes that it was not informed of the “need” standard until five months after it filed its initial application and that there were only 16 days between Assistant Director White’s May 21, 2007 letter and the Executive Committee meeting of June 6, 2007. (Petitioner’s Brief at 6-7)

To remedy these deficiencies, the CJSOA concludes, the Commissioner must either overturn the decision of the NJSIAA and grant the CJSOA's application, or send the application back to the NJSIAA Executive Committee for a new determination after the CJSOA has been given sufficient time to gather evidence demonstrating the need for an additional officials' association. (Petitioner's Brief at 7)

### THE NJSIAA'S POSITION ON APPEAL

By way of background, the NJSIAA's brief instructs as follows: One of the NJSIAA's chief tasks – originating from the requirement in its Constitution for uniformity in the arrangements and control of high school athletic contests – is to see that such contests are appropriately officiated, thus requiring it to ensure that there are a sufficient number of competent, trained officials in each sport in each region of the state. The NJSIAA achieves this end by entering into standard three-year contracts (“affiliation agreements”) with independent associations of officials in particular sports, which must at a minimum meet the requirements established by NJSIAA regulations (Handbook at 115; Officials' Handbook at 1). Once an officials' association enters an affiliation agreement with the NJSIAA, its members can be hired during the term of the agreement as independent contractors by NJSIAA member schools to officiate varsity interscholastic athletic competitions, and either party may terminate the agreement on six months' notice.<sup>1</sup> In accordance with the afore-cited NJSIAA regulation, the decision to enter into an affiliation agreement with a particular officials' association is left to the discretion of the Executive Committee. The committee will typically decline to so enter if there is no

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<sup>1</sup> The NJSIAA notes that members of unaffiliated officials' associations are still free to provide referees and umpires for forms of competition other than high school varsity, such as recreation leagues, summer leagues, and middle school, college and university competitions.

need for an officials' association in a given area or if recognizing a new association would cause problems with currently contracted associations – as occurred in 1995 when the committee determined not to enter into an agreement with an applicant basketball officials' association, in a decision upheld by the Commissioner. *New Jersey Basketball Officials' Association v. NJSIAA*, decided August 24, 1995 (Record on Appeal, Item 15) (NJSIAA's Reply Brief at 2-4)

With particular respect to the CJSOA application, the NJSIAA states that it currently has affiliation agreements with two officials' associations covering the Mercer-Burlington County region: 1) Central Jersey Board 193, which covers high school basketball games in Mercer and recreational games in Burlington, has “a full complement of officials” and has “no problem providing officials for NJSIAA member schools;” and 2) Camden Board 34, which provides officials for contests in Camden, Salem, Gloucester and Burlington Counties and is likewise “fully staffed,” with “no problem providing basketball officials to schools in Burlington County” – for which it has 92 registered officials. (NJSIAA's Reply Brief at 4-5) The NJSIAA further opines that: 1) based on the results of the survey indicated under Operative Facts above (page 2, No. 3), the officiating needs of its member schools in the region are being met and there are no problems with the existing associations; 2) although the CJSOA assignor – who in March 2006 unsuccessfully sought to be elected assignor for Board 193 – is utilized by four high schools in Northern Burlington County, he assigns to those games officials who are members of affiliated officials' associations, such as Boards 193 and 34; and 3) fifty-one officials listed on the roster of CJSOA are actually members of Board 193, which prohibits dual membership. (*Id.* at 5-6)



In response to the CJSOA's arguments on appeal, the NJSIAA counters that it is not a State agency and its rules and regulations are not required to be promulgated pursuant to the Administrative Procedure Act, citing *B.C. v. Bd. of Ed. of the Cumberland Regional School District*, 220 N.J. Super. 214, 235 (App. Div 1987); rather they have been approved by the Commissioner of Education pursuant to N.J.S.A. 18A:11-3. (NJSIAA's Reply Brief at 2, 9). The regulation at issue,<sup>2</sup> the NJSIAA contends, is therefore fully valid, and under it (at ¶7), the NJSIAA Executive Committee is clearly vested with the discretion to approve, or not approve the certification of officials' chapters meeting the stated (at ¶1-6) minimum requirements for consideration. The existence of these threshold requirements, the NJSIAA continues, does not preclude the committee from considering other relevant factors, provided it does so in a reasonable manner – as the Commissioner expressly found it to have done in *New Jersey Basketball Officials' Association, supra*. According to the NJSIAA, the decision to accept or reject an application is, in effect, a decision on whether or not to enter into a contract with an association, which has no “right” to be recognized by the NJSIAA notwithstanding that it qualifies for consideration. Moreover, the NJSIAA states, to the extent that the CJSOA takes issue with the survey of affected schools conducted by the NJSIAA, the results were more than sufficient to inform the Executive Committee that member schools were satisfied with the status quo; more importantly, the survey results were but one factor in the committee's decision. (NJSIAA's Reply Brief at 8-10, referencing Record on Appeal, Items 1-2)

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<sup>2</sup> Quoted in full under Operative Facts above, page 2, No. 2.

The NJSIAA further counters that it did, in fact, provide the CJSOA with all of the due process to which it was entitled. Even though the CJSOA had no protectable right at stake, the NJSIAA asserts, the NJSIAA accorded it both advance notice and opportunity to be heard by the decision-making body – the two fundamental elements of due process. (Citing *Jamgochian v. New Jersey State Parole Board*, 394 N.J. Super. 517, 533 (App. Div. 2007), itself citing *Goss v. Lopez*, 419 U.S. 565, 579 (1975).) The NJSIAA points out that the CJSOA was aware in early May that NJSIAA staff were surveying member schools to determine the need for an additional affiliate association; in fact, the CJSOA contacted those same schools on May 8 on its own behalf in response to the survey. The NJSIAA also observes that written notice of the NJSIAA staff’s recommendation to the Executive Committee was mailed to the CJSOA on May 21, sixteen days prior to the committee meeting; there, at a hearing recorded and transcribed by a certified court reporter, the CJSOA was represented by counsel and had the opportunity, prior to the committee’s consideration and vote, to present argument – including lengthy statements by its president and assignor – as well as cross examine witnesses. To the extent that the CJSOA contends that 16 days was insufficient time for it to prepare a showing of need, the NJSIAA asserts, such time frame was more than adequate to enable the CJSOA to prepare a presentation appropriate for an executive hearing – particularly where the CJSOA had notice of NJSIAA staff concerns, and of a survey intended to gauge need – at least a month before the June 6 meeting.<sup>3</sup> (NJSIAA’s Reply Brief at 10-12)

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<sup>3</sup> By way of illustrative example, the NJSIAA contrasts the 16 days accorded here with the 10-day periods associated with its own Controversies Committee when functioning in a quasi-judicial capacity, and with applications for development under the Municipal Land Use Law (*N.J.S.A.* 40:55D-12).

## DETERMINATION

Upon careful review and consideration, the Commissioner determines to uphold the decision of the NJSIAA and dismiss the CJSOA's appeal.

The NJSIAA is a voluntary association of public and nonpublic schools, organized pursuant to *N.J.S.A.* 18A:11-3, to oversee athletics for its member schools in accordance with a constitution, bylaws, rules and regulations approved by the Commissioner of Education and adopted annually by member schools, for which they become school policy enforceable by the NJSIAA.

It is well-established that the Commissioner's scope of review in matters involving NJSIAA determinations is appellate in nature. *N.J.S.A.* 18A:11-3; *Board of Education of the City of Camden v. NJSIAA*, 92 *N.J.A.R.* 2d (EDU) 182, 188. That is, the Commissioner may not overturn an action by the NJSIAA in applying its rules, absent a demonstration by the petitioner that the Association applied such rules in a patently arbitrary, capricious or unreasonable manner. *B.C. v. Cumberland Regional School District*, 220 *N.J. Super.* 214, 231-232 (App. Div. 1987); *Kopera v. West Orange Board of Education*, 60 *N.J. Super.* 288, 297 (App. Div. 1960). Nor may the Commissioner substitute her own judgment for that of the NJSIAA, even if she were to decide differently in a *de novo* hearing, where due process has been provided and where there is adequate basis for the decision reached by the NJSIAA committee. *Dam Jin Koh and Hong Jun Kim v. NJSIAA*, 1987 *S.L.D.* 259; *see, also, N.J.A.C.* 6A:3-7.4(a).

Moreover, this standard has been codified to provide clear notice to the public and regulated parties:<sup>4</sup>

1. If the NJSIAA has granted a petitioner due process and its decision is supported by sufficient credible evidence in the record as a whole, the Commissioner shall not substitute his \*\*\*judgment for that of the NJSIAA, even if the Commissioner might judge otherwise in a *de novo* review.
2. The Commissioner shall not overturn NJSIAA's application of its own rules absent a demonstration by the petitioner that such rules were applied in an arbitrary, capricious, or unreasonable manner. *N.J.A.C. 6A:3-7.5(a)*.

Additionally, the New Jersey courts have spoken as to the narrow scope of “arbitrary, capricious, or unreasonable” in the context of challenges such as that herein:

In the law, “arbitrary” and “capricious” means having no rational basis. \*\*\* Arbitrary and capricious action of administrative bodies means willful and unreasoning action, without consideration and in disregard of circumstances. Where there is room for two opinions, action is not arbitrary or capricious when exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached.\*\*\* (citations omitted) *Bayshore Sew. Co. v. Dep't of Env't. Protection*, 122 *N.J. Super.* 184, 199-200 (Ch. Div. 1973), *aff'd* 131 *N.J. Super.* 37 (App. Div. 1974).

Thus, petitioners bringing claims against the NJSIAA bear a heavy burden, and, considering the record of this matter in light of the prescribed standard of review, the Commissioner cannot find that the CJSOA has met such burden herein.

Initially, the NJSIAA cannot be found to have engaged in improper rulemaking as alleged by the CJSOA, since the NJSIAA is not a State agency and its governing rules and regulations are not subject to the requirements of the Administrative Procedure Act. *N.J.S.A. 18A:11-3*. Similarly unpersuasive is the CJSOA's claim that the NJSIAA unfairly applied a standard that was not reflected in published rules with which

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<sup>4</sup> See 31 *N.J.R.* 4173(a) and 32 *N.J.R.* 1177(a).

the CJSOA fully complied. By their own terms, the rules in question do not establish standards for NJSIAA *approval* of officials' associations, but merely delineate the minimum level of organizational information and evidence of willingness to submit to NJSIAA governance that an applicant association must provide to the committee in order to be eligible for *consideration*. The decision to approve an application, or not, is expressly left to the discretion of the Executive Committee, exercise of which the rules do not circumscribe in any way – thus allowing for evaluation of each individual application on a case-by-case basis in light of its unique character and particular attendant circumstances, subject only to the proviso that approval may not be denied arbitrarily or for unlawful reasons. In the present instance, the CJSOA's application did, in fact, receive the consideration to which it was entitled by virtue of passing the regulatory threshold, and the Commissioner can find nothing unreasonable or unlawful in the NJSIAA's subsequent evaluation of the application or its decision to deny approval, as reflected in both the staff recommendation to the Executive Committee and the deliberations of the committee itself.

Finally, the Commissioner must reject the CJSOA's central contention that it was denied due process in this matter. Nothing in law requires the NJSIAA to limit the discretion of its Executive Committee by codifying specific parameters for approval of officials' associations, and applicants for such approval have no cause for complaint where they have received reasonable notice of the basis for their review and opportunity to be heard before a decision is made on their application. In the present instance, the record belies the CJSOA's claims that it was surprised by and unprepared for the NJSIAA's consideration of need as a factor in evaluating its application: At least as

early as May 4, 2007, through its survey of potentially affected schools, the NJSIAA placed the CJSOA on notice that it was considering whether there was, in fact, a need for creation of a new basketball officials' association; indeed, the CJSOA's own May 8, 2007 counter-memorandum to the surveyed schools recognized this purpose by providing what its president believed to be the clarifying and amplifying information necessary to convince survey respondents that, among other things, its application did, indeed, fill such a need.<sup>5</sup> Finally, even if it were true – which it is not – that the NJSIAA gave no indication that need would be a consideration until Assistant Director White wrote to the CJSOA on May 21, 2007 advising of his recommendation to the Executive Committee, the 16 days between that letter and the committee meeting on June 6, 2007 were entirely sufficient for the CJSOA to prepare a presentation countering the NJSIAA staff recommendation and challenging the anticipated opposition of existing associations, bearing in mind that the process for approval of an officials' association application is an executive review – not an adjudicative proceeding based on an adversarial evidentiary hearing. Indeed, the transcript of the committee meeting (Record on Appeal, Item 1) shows the CJSOA to have made just such a presentation, particularly through the extended and comprehensive arguments of its president and assignor – both of whom not only addressed opposing recommendations, but also proffered additional considerations of their own.

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<sup>5</sup> To the extent that the CJSOA deems the NJSIAA survey instrument deficient as a tool for evaluating need, any such perceived deficiency was effectively remedied by the CJSOA's own communication with the surveyed schools. Similarly, to the extent that the CJSOA believes the survey was not sufficiently widely disseminated, as it argued before the Executive Committee (Record on Appeal, Item 1 at 10), it had ample time to register that complaint with the NJSIAA or make contact of its own, as it did with respect to the surveyed schools.

Accordingly, the Commissioner having found that the CJSOA was afforded the due process to which it was entitled and that the NJSIAA's decision denying approval of the CJSOA's application for certification was neither unreasonable nor contrary to law, the NJSIAA's decision is upheld and the petition of appeal dismissed.<sup>6</sup>

IT IS SO ORDERED.<sup>7</sup>

COMMISSIONER OF EDUCATION

Date of Decision: February 13, 2008

Date of Mailing: February 13, 2008

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<sup>6</sup> The Commissioner also dismisses NJSIAA Assistant Director Larry White as an individual respondent in this matter, since, as noted by the NJSIAA (Reply Brief at 12), Mr. White functioned solely as a staff member of the NJSIAA, whose executive body ultimately made the decision under appeal.

<sup>7</sup> This decision, as the final decision of the State administrative agency, may be appealed to the Superior Court. *N.J.S.A.* 18A:11-3, *N.J.A.C.* 6A:3-7.5.