

ELLEN MUENCH, :
PETITIONER, :
V. : COMMISSIONER OF EDUCATION
NEW JERSEY DEPARTMENT OF : DECISION
EDUCATION, STATE BOARD OF :
EXAMINERS, :
RESPONDENT. :

SYNOPSIS

Petitioner, a candidate for teacher certification, challenged the State Board of Examiners’ (Board of Examiners) decision to deny her petition for the issuance of a standard certificate, or in the alternative, a third provisional certificate allowing her to participate in a provisional program in the Rahway school District. The Board of Examiners determined that her appeal, filed five months after she received the second of two “insufficient” certification ratings – assigned by two different school districts at the end of each of two consecutive years of teaching under provisional certification – was untimely under *N.J.A.C. 6A:9-17.18 (a)(1)*. Petitioner asserted that her second insufficiency rating and her failure to timely file her appeal were attributable to the effects of domestic abuse and, in any event, she was never given personal notice of the requirements for appealing a certification rating under *N.J.A.C. 6A:9-17.18*. She maintained that her circumstances constituted “good cause” under *N.J.A.C. 6A:9-17.18(c)* for the waiver of any time requirements.

The ALJ found that: the Department has published regulations that clearly define the consequences of a second “insufficient” rating for individuals teaching under a provisional license; the time limit for filing an appeal is clearly identified in the regulations; petitioner had constructive notice of the regulations and adequate opportunity to establish the existence of a “good cause” reason for her failure to file in a timely fashion; and petitioner’s due process rights to proper notice were not violated. Further, the ALJ found that petitioner failed to present evidence in regard to her claim that domestic abuse was the causative factor in both her failure to achieve a “satisfactory” teaching recommendation and her failure to file within the time required by *N.J.A.C. 6A:9-17.18(a)(1)*. Accordingly, the ALJ dismissed the petition for failure to file within the 60-day time limit.

The Commissioner agreed with the ALJ that: petitioner did not show good cause to waive the 60-day limitations period under *N.J.A.C. 6A:9-17.18(a)(1)*; and petitioner’s due process rights were not violated. The Commissioner determined, however, to remand the case to the Board of Examiners to address the issue of petitioner’s invocation of *N.J.A.C. 6A:9-17.18(d)*, which grants candidates who receive a “disapproved” or two recommendations of “insufficient,” and who have not challenged the performance assessment/certification recommendation pursuant to *N.J.A.C. 6A:9-17.18(a)*, the right to petition the Board of Examiners for approval of an additional opportunity to seek provisional employment.

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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Petitioner challenges the January 25, 2005, decision of the State Board of Examiners (Board of Examiners) to deny her petition for the issuance of a standard certificate or, in the alternative, a third provisional certificate allowing her to participate in a provisional program in the Rahway school district. The Commissioner has reviewed the record, the Initial Decision, and petitioner’s post-hearing reply brief dated March 6, 2006, which was not considered in the Office of Administrative Law (OAL). The Commissioner did not review petitioner’s *pro se* letter dated March 17, 2006, because throughout the proceedings she has been represented by counsel, and there has been no notice that she has discharged her attorney and is now representing herself.¹ Respondent did not file exceptions.

The facts that follow are not disputed by the parties. In October 2002, petitioner received a provisional teaching certificate with an endorsement in elementary education. She was hired by the New Brunswick School District for the 2002-2003 school year,² at the end of which she received a rating of “insufficient.”

¹ Under *N.J.A.C.* 1:1-5.1, petitioner may be represented by counsel, or represent herself, but not both.

² The copy of petitioner’s contract with the New Brunswick Board of Education does not specify what petitioner’s teaching assignment would be.

Petitioner completed the course requirements for Teacher of English as a Second Language in August 2003, and was hired by the Perth Amboy District for the 2003-2004 school year as an early childhood ESL teacher. Copies of three of her ratings for the school year at Perth Amboy are in the record. An October 2003 evaluation contained a 'needs improvement' grade for one assessment category. A November 2003 evaluation contained 'needs improvement' grades for two assessment categories, and a February 2004 evaluation contained 'needs improvement' grades for four assessment categories and grades of 'unsatisfactory' for four other assessment categories. The Perth Amboy district ultimately gave petitioner a rating of "insufficient" at the end of the school year.

In September 2004, petitioner began a third year of work as an ESL teacher in grades 6-8 in the Rahway school district. On her first evaluation, dated September 29, 2004, there were eight assessment categories; petitioner received a 'needs improvement' grade for one of them. Subsequent to that evaluation, the Rahway district learned that petitioner had received "insufficient" ratings for the prior two school years which, pursuant to *N.J.A.C. 6A:9-8.7(b)(2)* and (c), meant that petitioner could not enroll in the provisional teacher program for a third year without petitioning the Board of Examiners. Consequently, the Rahway district removed petitioner from the position.

Petitioner appealed to the Board of Examiners on November 24, 2004. She contended that her second insufficiency rating was attributable to the effects of domestic abuse that she was experiencing up until February 20, 2004, and was not representative of her skills. Relying on *N.J.A.C. 6A:9-17.18*, she asked that the Board of Examiners issue her a standard certificate or allow her a third provisional teaching year – and an opportunity to prove her skills – in the Rahway district.

In her appeal to the Board of Examiners, petitioner invoked both *N.J.A.C. 6A:9-17.18(a)* and *N.J.A.C. 6A:9-17.18(d)*. *N.J.A.C. 6A:9-17.18(a)* allows a teaching candidate to challenge a "disapproved" recommendation or the second of two "insufficient" recommendations. Such a challenge must be filed within 60 days of receipt of the adverse

recommendation, *N.J.A.C. 6A:9-17.18(a)(1)*, but the period may be relaxed for good cause. *N.J.A.C. 6A:9-17.18(c)*. On the other hand, *N.J.A.C. 6A:9-17.18(d)* allows a candidate who has received an adverse certification recommendation, and who has not challenged it pursuant to *N.J.A.C. 6A:9-17.18(a)*, to “petition the Board of Examiners for approval of an additional opportunity to seek provisional employment. The candidate shall be responsible for demonstrating by clear and convincing evidence to the Board of Examiners why he or she would be likely to succeed if granted the requested opportunity.”

The decision of the Board of Examiners was issued on January 25, 2005. It did not reach the merits of petitioner’s appeal for standard or provisional certification because the Board of Examiners determined that the appeal was untimely under *N.J.A.C. 6A:9-17.18(a)(1)*, and that petitioner had not shown good cause for relaxing the 60-day limitations period, as permitted by *N.J.A.C. 6A:9-17.18(c)*. The Board of Examiners reasoned that the “insufficient recommendation” had been issued no later than the last day of the 2003-2004 school year, and that petitioner had consequently not filed her appeal until five months after her second rating of ‘insufficient,’ i.e., three months after the regulatory deadline. During the five months, petitioner had evidently conducted a job search which produced the Rahway position. The Board of Examiners concluded that since the after-effects of the domestic violence, which apparently ended with the issuance of a final restraining order in March 2004, did not stop petitioner from conducting a job search, there was inadequate reason to believe that the after-effects constituted an impediment to petitioner filing a timely appeal of her second ‘insufficient’ recommendation.

The Board of Examiners did not address petitioner’s invocation of *N.J.A.C. 6A:9-17.18(d)*. It directed that “the second ‘insufficient’ rating stands, and Ms. Muench may not participate in the Provisional Teacher Program in the future.”

The OAL hearing took place on January 20, 2006. After considering the evidence and a post hearing brief submitted by respondent, the administrative law judge (ALJ) took the same

position that had been taken by the Board of Examiners. He characterized petitioner's appeal as a challenge to the second "insufficient" recommendation, and agreed with the Board of Examiners that before the merits of petitioner's adverse recommendations could be addressed, petitioner was required to prevail on the specific issue of justification of her untimely appeal. No hearing transcripts were provided to the Commissioner, but the ALJ stated in the Initial Decision that petitioner failed to present evidence "regarding the alleged mental, emotional or physical results of the alleged domestic violence and the supposed relationship to Ms. Muench's failure to file within the necessary time frame." (Initial Decision at 3)

Instead, petitioner focused on alleged constitutional issues. Petitioner asserted that since a second recommendation of 'insufficient' has the effect of closing out petitioner's teaching career, the State has a constitutional obligation to provide meaningful notice and opportunity to be heard. There is language in the Initial Decision that suggests that petitioner may have presented witnesses who testified that education students are not, in the course of their training about the provisional certificate program, given personal notice of the appeal requirements for 'insufficient recommendations.' (*Ibid.*)

The ALJ found, however, that the published regulation setting forth the 60-day requirement for appeals satisfied any requirement for meaningful public notice. (*Ibid.*) Any teacher could readily determine when a negative appraisal would need to be appealed and how. In the ALJ's view, petitioner was charged with knowledge of the law, "including duly published regulations contained in the New Jersey Administrative Code." (Initial Decision at 5) "[N]o other form of notice was constitutionally required." (*Ibid.*)

Because he found that adequate notice about the 60-day rule existed, and because he found that petitioner had presented no evidence at the hearing concerning her claims that the after-effects of the domestic violence impeded her ability to pursue a timely appeal, the ALJ concluded that petitioner had failed to make a timely appeal and had failed to show good cause why

the 60-day rule should be waived in her case. (*Ibid.*) He ordered dismissal of her appeal without addressing the issue of her invocation of *N.J.A.C. 6A:9-17.18(d)*.

In petitioner's January 20, 2006 trial brief she articulated her position that the circumstances of her case warranted a relaxation of the 60-day limitations period in *N.J.A.C. 6A:9-17.18(a)(1)*. In her view, the "good cause" showing that is required – under *N.J.A.C. 6A:9-17.18(c)*, as a prerequisite to relaxing the 60-day appeals period – need not be limited to a showing of good cause for tardiness in filing an appeal. Citing no authority, she contended that the Commissioner may look at her situation as a whole to determine good cause for waiving the 60-day rule.³ (Petitioner's trial brief at 7)

Petitioner also argued – as she had in her appeal to the Board of Examiners and her petition to the Commissioner – that she qualified under *N.J.A.C. 6A:9-17.18(d)* for an additional opportunity to seek provisional employment, and that *N.J.A.C. 6A:9-17.18(d)* is not encumbered by the time limitation in *N.J.A.C. 6A:9-17.18(c)*. (Petitioner's trial brief at 7)

The balance of petitioner's brief was devoted to a discussion of due process rights. Petitioner claimed that, under the circumstances of this case, denying her a teaching career would be a constitutional violation. (Petitioner's trial brief at 8) Petitioner characterized the third opportunity for a provisional teaching job that she seeks as a right, and contended that it may not be – but was – withheld from her without proper notice and an opportunity to be heard. (*Ibid.*)

Petitioner's March 6, 2006, "reply brief," appears to constitute a response to the arguments set forth in a post hearing brief submitted by the State on February 17, 2006. It echoes the

³ One of petitioner's allegations in her January 20, 2006, brief was that although she was hired as an elementary teacher, she was illegally forced to teach ESL before she was so qualified. Since, pursuant to *N.J.A.C. 6A:9-17.18(a)*, only the second "insufficient" rating shall be the subject of an appeal concerning standard certification recommendations, this allegation is not germane to the disposition of this controversy. Moreover, the Commissioner has been provided with no evidence to support the contention, and petitioner apparently never challenged the alleged illegal assignment during or directly after her tenure in the New Brunswick School District.

constitutional arguments in her January 20, 2006 brief, and her contention that her circumstances constituted good cause to waive the 60-day limitations period in *N.J.A.C. 6A:9-17.18(a)(1)*.⁴

The Commissioner agrees with the ALJ that petitioner did not show good cause to waive the 60-day limitations period under *N.J.A.C. 6A:9-17.18(a)*. Further, for the reasons set forth in the Initial Decision, the Commissioner agrees that petitioner's due process rights were not violated.⁵ However, the Commissioner has determined to remand the case to the Board of Examiners to address the issue of petitioner's invocation of *N.J.A.C. 6A:9-17.18(d)*.

That regulation states, in pertinent part:

Candidates who receive a recommendation of "disapproved" or two recommendations of "insufficient," and who have not challenged the certification recommendation pursuant to (a) above may petition the Board of Examiners for approval of an additional opportunity to seek provisional employment. The candidate shall be responsible for demonstrating by clear and convincing evidence to the Board of Examiners why he or she would be likely to succeed if granted the requested opportunity. . . .

Petitioner asked, in the alternative, for another chance for a provisional teaching assignment, pursuant to *N.J.A.C. 6A:9-17.18(d)*. She alleged facts that were meant to show that her poor performance was not based upon incompetence, but rather was caused by an anomalous situation. She further offered facts for the purpose of meeting the requirement of *N.J.A.C. 6A:9-17.18(d)* that she demonstrate that she would likely succeed if given another chance as a provisional teacher.

Unlike *N.J.A.C. 6A:9-17.18(a)*, *N.J.A.C. 6A:9-17.18(d)* does not contain a limitations period. Petitioner invoked it in her appeal to the Board of Examiners and before the OAL, but

⁴ The Commissioner notes that petitioner's reference (on page 2 of her brief) to the legislature's provision of *N.J.A.C. 6A:9-17.18(c)* is an error, since regulations are promulgated by State agencies. The Commissioner also finds that petitioner's references to the rules of New Jersey Superior Court are inapposite to the present controversy.

⁵ Further, in the Commissioner's view, petitioner's claim that she has a "right," "property interest," "liberty interest" or "entitlement" to a teaching certificate is bootstrapping. A teaching certificate was never granted to petitioner, due to her failure to satisfy the prerequisites. It is axiomatic that one must first possess a property or liberty interest before one may seek protection against its confiscation.

neither the Board nor the ALJ addressed the issue of its applicability to petitioner's situation. Accordingly, the Commissioner remands this matter to the Board of Examiners for the application of *N.J.A.C. 6A:9-17.18(d)* or, if the Board determines that *N.J.A.C. 6A:9-17.18(d)* may not be applied, for the articulation of the reasons therefor.

IT IS SO ORDERED.⁶

ACTING COMMISSIONER OF EDUCATION

Date of Decision: April 12, 2006

Date of Mailing: April 12, 2006

⁶ This decision may be appealed to the State Board of Education pursuant to *N.J.S.A. 18A:6-27 et seq.* and *N.J.A.C. 6A:4-1.1 et seq.*