

SUPERIOR COURT
OF THE
STATE OF DELAWARE

E. SCOTT BRADLEY
JUDGE

SUSSEX COUNTY COURTHOUSE
1 The Circle, Suite 2
GEORGETOWN, DE 19947

January 28, 2009

Craig A. Karsnitz, Esquire
Young Conaway Stargatt & Taylor, LLP
110 W. Pine Street
P.O. Box 594
Georgetown, DE 19947

Paula A. Fontello, Esquire
Deputy Attorney General
102 W. Water Street, 3rd Floor
Dover, DE 19904

Thomas A. Pedersen, Esquire
5 West Market Street
Georgetown, DE 19947

Jennifer L. Kline, Esquire
Deputy Attorney General
102 W. Water Street, 3rd Floor
Dover, DE 19904

**RE: Cape Henlopen School District v. Delaware Interscholastic Athletic
Association and State Board of Education
C.A. No. 08A-01-003 ESB
C.A. No. 08A-04-001-ESB
Letter Opinion**

Date Submitted: August 28, 2008

Dear Counsel:

This is my decision on the Cape Henlopen School District's ("Cape Henlopen") appeal of the State Board of Education's ("SBE") decision upholding the Delaware Interscholastic Athletic Association's ("DIAA") decision denying Cape Henlopen's request for a waiver of the penalties associated with Cape Henlopen's use of an ineligible basketball player for almost two seasons. I have dismissed Cape Henlopen's appeal because the SBE's decision is non-appealable. Cape Henlopen also filed a writ of certiorari so that I could review the record of the proceedings before the DIAA and SBE to see if they committed any errors of law. I have declined to do so because Cape Henlopen filed its petition for a writ of certiorari too late.

STATEMENT OF THE CASE

Shemik Thompson was a student and member of the boys' varsity basketball team at the Cape Henlopen High School. He lived with his mother in the school district. In December 2005, while Thompson was in the 11th grade, his mother moved to Georgia. Thompson remained in the school district and continued to go to school and play on the basketball team. Before moving to Georgia, Thompson's mother executed a power of attorney authorizing Thomas Pedersen and/or Dwight Tingle to make decisions regarding her son. Tingle is the boys' varsity basketball coach. Pedersen is a lawyer who lives in the school district. Thompson lived with Pedersen while his mother lived in Georgia. This arrangement continued through the 2006-2007 school year.

The DIAA governs interscholastic athletics in the State of Delaware.¹ It does this, in part, by administering rules and regulations adopted in consultation and cooperation with the SBE.² Some of these rules and regulations govern the eligibility of students who participate in interscholastic athletics and the consequences that result when an ineligible student participates in interscholastic athletics.³ In order to be eligible to participate in interscholastic athletics, a student has to meet certain residency requirements.⁴ If an ineligible student participates in interscholastic athletics, the school that the student plays for has to forfeit all of the games in which the student played.⁵ A school

¹ 14 Del.C. § 301.

² 14 Del.C. § 303.

³ 14 Del.C. § 303(b).

⁴ 14 *DE Admin. Code* § 1051.1.3.1.

⁵ 14 *DE Admin. Code* § 1009.2.10.

may ask the DIAA to waive the forfeiture penalty.⁶ If the DIAA grants the waiver, then the school is only reprimanded and fined \$200.⁷

A question about Thompson's eligibility to play basketball at Cape Henlopen came up after Pedersen asked the Cape Henlopen High School for a copy of Thompson's high school transcript. The school secretary responsible for student transcripts wondered why Pedersen wanted Thompson's transcript. This led to an investigation into the relationship between Pedersen and Thompson by John Yore, the Cape Henlopen High School principal. Yore concluded that Thompson did not meet the residency requirements because the power of attorney signed by his mother did not meet the applicable requirements. Therefore, Thompson was and had been ineligible to play basketball. Yore informed the DIAA that Cape Henlopen had used an ineligible player on the boys' varsity basketball team for almost two seasons, and that Cape Henlopen planned on forfeiting all of the games in which the ineligible player had played. Yore also requested the DIAA to waive the forfeiture penalty associated with using an ineligible player.

The DIAA held a hearing on Cape Henlopen's waiver request. Cape Henlopen conceded that it had used an ineligible basketball player. The only issue was the waiver of the forfeiture penalty. The DIAA has the authority to set aside the effect of any rule or regulation when the affected party establishes by a preponderance of the evidence that certain criteria have been met.⁸ The DIAA denied Cape Henlopen's request, reasoning that granting the waiver request would violate the intent of the eligibility rule, which exists to make sure only eligible athletes participate in interscholastic

⁶ 14 *DE Admin. Code* § 1009.2.10.2.2.

⁷ *Id.*

⁸ 14 *DE Admin. Code* § 1006.9.1.1.

athletics. Cape Henlopen appealed the DIAA's decision to the SBE. The SBE appointed a hearing officer to review the matter. He prepared a proposed order affirming the DIAA's decision. The SBE voted to adopt the hearing officer's proposed order on December 20, 2007. Cape Henlopen filed an appeal of SBE's decision on January 23, 2008. Cape Henlopen filed a petition for writ of certiorari on April 2, 2008. The DIAA and SBE filed motions to dismiss both.

DISCUSSION

I. The Appeal

The DIAA and SBE argue that the SBE's decision is final. Their argument is based on 14 Del.C. § 312. Section 312 sets up a process for dealing with disputes over the rules and regulations promulgated by the SBE. It states that the DIAA shall decide "all controversies involving the rules and regulations, including the waiver thereof, adopted pursuant to this chapter." It further states that any party to such a controversy may appeal the DIAA's decision to the SBE. It further states that the SBE may hear the appeal and decide the controversy and that the "decision of the SBE shall be final and not subject to further appeal."⁹

Cape Henlopen filed its appeal pursuant to 29 Del.C. §§ 10142 and 10161(a). The SBE is a state agency subject to the Administrative Procedures Act ("APA"). The APA permits any party against whom a "case decision" has been decided to appeal that decision to the Superior Court. The parties agree that the SBE's decision in this matter is a "case decision."

14 Del.C. § 312 and 29 Del.C. § 10142 conflict with each other. One allows an appeal from the SBE's decision and the other does not. "Where possible, a court will attempt to harmonize two

⁹ 14 Del.C. § 312.

potentially conflicting statutes dealing with the same subject.”¹⁰ If they cannot be reconciled, however, the law is that specific statutes trump general statutes.¹¹ “Likewise, if the two acts are irreconcilable, the later enacted statute must prevail over the earlier.”¹² These two statutes cannot be reconciled with each other. 14 Del.C. § 312 was enacted after 29 Del.C. § 10142 and, given that it deals directly with the issue at hand, it is more specific. Therefore, Cape Henlopen’s appeal is governed by 14 Del.C. § 312. Section 312 does not allow an appeal of the SBE’s decision.

II. The Writ of Certiorari

The DIAA and SBE argue that Cape Henlopen filed its petition for a writ of certiorari too late. “There is no time fixed by statute or by court rule for filing an action in certiorari,”¹³ but the court should apply the thirty-day time limit for appeals, “by analogy,” to filing for a writ.¹⁴ “There appears to be no good reason, absent exceptional circumstances, why a party should have more time to ask for the writ of certiorari than he would have to take an appeal or sue out a writ of error in an ordinary case.”¹⁵ The 30-day filing period is not jurisdictional, but is subject to the discretionary power of the Court to excuse defaults in appropriate cases.¹⁶ The SBE issued its decision on

¹⁰ *Turnball v. Fink*, 668 A.2d 1370, 1377 (Del. 1995).

¹¹ *Hamilton v. State*, 285 A.2d 807, 809 (Del. 1971).

¹² *Turnball*, 668 A.2d at 1377 (Citing *State ex. rel. State Highway Dept. v. George F. Lang Co.*, 191 A.2d 322 (1963)).

¹³ *Elcorta, Inc. v. Summit Aviation, Inc.*, 528 A.2d 1199, 1201 (Del. Super. 1987).

¹⁴ *Id.* At 1201.

¹⁵ *Id.* At 1201, citing *Eigner v. Geake*, N.M.Sup., 192 P.2d 310, 310-11 (N.M. 948).

¹⁶ *Dover Historical Society v. City of Dover Planning Commission*, 2003 WL 22290413, at *3 (Del. Super. Aug. 25, 2003) (reversed and remanded on other grounds).

December 20, 2007. Cape Henlopen did not file its petition for a writ of certiorari until April 2, 2008, more than 90 days after it received notice of the SBE's decision. This is outside the 30-day time limit, making the request untimely. Cape Henlopen argues that the Court should excuse its untimely request because the SBE told Cape Henlopen that it had 30 days to file an appeal of its decision. I was not persuaded by this argument. Cape Henlopen was represented by legal counsel at the proceedings before the SBE and should have relied on its legal counsel and not the SBE to determine how and when to proceed.

CONCLUSION

The Motions to Dismiss filed by the Delaware Interscholastic Athletic Association and State Board of Education are GRANTED.

IT IS SO ORDERED.

Very truly yours,

E. Scott Bradley

cc: Prothonotary's Office