

Filed

STATE OF NORTH CAROLINA
COUNTY OF CABARRUS

2012 MAY 18 PM 3:43
IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
12 EDC 01801

	Office of	
North Carolina Learns Inc. d/b/a North Carolina Virtual Academy,	Administrative Hearings	
Petitioner,)	
)	
vs.)	DECISION
)	
North Carolina State Board of Education,)	
Respondent.)	

This contested case was commenced by the filing of a petition on March 21, 2012 and an amended petition with motions on March 28, 2012. Administrative Law Judge Fred Morrison, Jr., conducted a settlement conference with the parties under the authority of G.S. 150B-22 and 26 NCAC 03.0107 on April 09, 2012 in the Office of Administrative Hearings.

On April 18, 2012, Respondent filed a motion to dismiss for lack of subject matter jurisdiction in the Office of Administrative Hearings based upon the argument that:

[t]he State Board of Education is not an agency or unit of government “in the executive branches’ (sic) of [S]tate government. The State Board of Education is created wholly separate and apart from the Executive Branch (Article III, N.C. Constitution) and exists as its own constitutional body by virtue of Article IX of the North Carolina Constitution.”

Petitioner filed a response to Respondent’s motion to dismiss and a motion for summary judgment with supporting documents and affidavits on April 24, 2012. Respondent filed its response to Petitioner’s motion for summary judgment on May 04, 2012, together with Respondent’s cross-motion for summary judgment, also with supporting documents and affidavits.

A motions hearing with extensive oral arguments was conducted before Administrative Law Judge Beecher R. Gray on May 8, 2012, on all pending motions, including: (1) Petitioner’s motion for preliminary and permanent injunctive relief; (2) Petitioner’s motion for expedited discovery; (3) Respondent’s motion to dismiss; (4) Petitioner’s motion for summary judgment; and (5) Respondent’s cross-motion for summary judgment. Briefs and supporting materials were submitted by both parties on the various motions and reviewed by the undersigned prior to the hearing. Petitioner filed a draft Order and Decision on May 14, 2012 and Respondent filed its comments to the draft on May 15, 2012.

BASED UPON careful consideration of the entire record in this proceeding, the Undersigned finds and determines as follows:

UNDISPUTED FACTS AND FINDINGS FROM THE RECORD

1. Petitioner, North Carolina Learns, Inc., d/b/a North Carolina Virtual Academy (“Petitioner” or “NCVA”), is a North Carolina non-profit corporation and an applicant for a charter (the “Application”) from the Cabarrus County (Schools) Board of Education (“CCBE”) for a charter school pursuant to the N.C. Charter Schools Act of 1996 (the “Act,” i.e. N.C.G.S. §§ 115C-238.29A, *et seq.*) with its registered office and principal place of business in Cabarrus County, North Carolina.
2. Respondent, North Carolina State Board of Education (“SBE” or “Respondent”), is an entity identified in the Constitution of the State of North Carolina empowered to “supervise and administer the free public school system...and make all needed rules and regulations in relation thereto, subject to laws enacted by the General Assembly.” (N.C. Constitution, Article IX, Secs. 3 & 4)
3. Judicial or official notice is taken of the North Carolina Administrative Code reflecting that--since the adoption of the Act to date--Respondent has adopted no rules for the “final approval” of charter applications initially submitted to a local board of education as a chartering entity and, after preliminary approval by a local board of education, delivery to Respondent for “final approval.”
4. This matter is a petition for administrative review relating to Respondent’s alleged failure to consider and deny or approve the virtual charter school Application submitted by Petitioner to the CCBE under N.C.G.S. §§ 115C-238.29B-238.29D. Petitioner asserts in its written submittals in this matter that it did not apply on the basis of the Fast Track Application program referenced in Respondent’s written materials.
5. The Act provides that “(a)ny person, group of persons, or nonprofit corporation seeking to establish a charter school may apply to” one of three (3) types of chartering entities for preliminary approval: a local board of education; the board of trustees of a constituent institution of The University of North Carolina; or the Respondent State Board of Education to establish a charter school. N.C.G.S. §§ 115C-238.29B(a) and (c). The Act sets forth a list of 13 matters that must be addressed in a charter school application. N.C.G.S. 115C-238.29B(b). The Act provides that “[r]egardless of which chartering entity receives the application for preliminary approval, the State Board of Education shall have final approval of the charter school.” N.C.G.S. § 115C-238.29B(c).
6. On November 1, 2011, Petitioner submitted its virtual charter school application to the CCBE. The virtual charter school application was, in form and content, consistent with the 2012 form Application for submission directly to Respondent, there being no known or available prescribed form for submission of an application for a charter school to a local school board. Thereafter, the staff of CCBE reviewed and evaluated the Application using that same “Rubric” identified by Respondent for direct applications to Respondent for opening charter schools in 2012. On January 23, 2012, CCBE gave preliminary approval to Petitioner’s Application by a vote of 5 in favor and 2 opposed.

7. On February 14, 2012--prior to the February 15, 2012 deadline established by N.C.G.S. 115C-238.29D(a)--Petitioner delivered and filed a "Request for Final Approval of Application for Charter School" (the "Request") with both the Office of Charter Schools of Respondent and Respondent Board, incorporating in the Request both the Application and verification of CCBE's preliminary approval thereof.
8. North Carolina General Statute Section 115C-238.29D(a) provides:

[t]he State Board may grant final approval of an application if it finds that the application meets the requirements set out in this Part or adopted by the State Board of Education and that granting the application would achieve one or more of the purposes set out in G.S. 115C-238.29A. The State Board shall act by March 15 of a calendar year on all applications and appeals it receives prior to February 15 of that calendar year.
9. During the Chairman's "Announcements/Reminders, etc." section of the October 6, 2011, meeting of the State Board of Education, Chairman William Harrison announced that "the State Board will not be considering any virtual applications in the 'fast track' pool." (the "Announcement"). The Announcement was not ratified by a vote of the board. (See Minutes, SBE Meeting, October 6, 2011, p. 31-32)
10. Despite having received Petitioner's preliminary approval, application, and request for final approval on February 14, 2012, Respondent State Board of Education neither considered nor acted upon Petitioner's timely-filed Request by March 15, 2012. To date, Respondent never has considered nor acted upon Petitioner's Request.
11. Petitioner has engaged in all known procedures identified in Chapter 150B and Title 26 of the North Carolina Administrative Code for resolving or settling the dispute regarding this matter as required by N.C.G.S. § 150B-22.

BASED UPON the foregoing undisputed facts and findings in the record and the supporting materials identified herein, the Undersigned makes the following:

CONCLUSIONS OF LAW

1. The parties properly are before the Office of Administrative Hearings. N.C.G.S. §§ 150B-22, *et seq.*, provides for an administrative proceeding to determine a person's rights when those rights are impacted by an agency's actions (which can include an agency's inaction).
2. Petitioner is an aggrieved person under N.C.G.S. § 150B-2(6) and (7).
3. "Person aggrieved" means any person or group of persons of common interest directly or indirectly affected substantially in his or its person, property, or employment by an administrative decision." N.C.G.S. § 150B-2(6). "Person" means any natural person, partnership, corporation, body politic, and any unincorporated association, organization, or society which may sue or be sued under a common name." *Id.* § 150B-2(7)

4. Although Respondent argued in writing in its motion to dismiss and orally during arguments on the pending motions that the State Board of Education is in the legislative branch, Respondent is an agency of the executive branch of the government of the State of North Carolina over which the Office of Administrative Hearings has jurisdiction. (N.C.G.S. §150B-23; Empire Power Co. v. DEHNR, 337 N.C. 569, 595, 447 S.E.2d 768, 783 (1994))
5. Under N.C.G.S. § 150B-23, the Office of Administrative Hearings may review an agency action to determine if the agency:
 - a) Exceeded its authority or jurisdiction;
 - b) Acted erroneously;
 - c) Failed to use proper procedure;
 - d) Acted arbitrarily or capriciously; or
 - e) Failed to act as required by law.
6. In that Respondent is Constitutionally subject to “laws enacted by the General Assembly” (N.C. Constitution, Article IX, Section 4), Respondent may not create rules or policies which prevent Petitioner from applying to the CCBE for a charter under N.C.G.S § 115C-238.29B(c).
7. Respondent’s failure to consider or to grant final approval to Petitioner’s Request for final approval at its March 1, 2012, meeting or at any time prior to the statutorily mandated deadline of March 15, 2012, constitutes a loss of jurisdiction over the subject matter by Respondent. *See, e.g.*, N.C.G.S. § 115C-238.29D(a) (“The [SBE] shall act by March 15 of a calendar year on all applications and appeals it receives prior to February 15 of that calendar year”) and N.C.G.S. 115C-238.29I(e) (“...the SBE may establish an alternative time line for the submission of applications, preliminary approvals...and final approvals so long as the SBE grants final approval by March 15 of each calendar year.”) *See Snow v. Board of Architecture*, 273 N.C. 559, 569, 160 S.E.2d 719, 727 (1968) (administrative agency loses jurisdiction over the subject matter when it fails to make a decision within the time allowed by law); *HCA Crossroads Residential Centers, Inc. v. N.C. Department of Human Resources*, 327 N.C. 573, 577, 398 S.E.2d 466, 469 (1990).
8. By failing to consider--much less grant final approval of--Petitioner’s Request for final approval, Respondent has deprived Petitioner of its right to receive a decision on whether Petitioner legally was entitled to form and operate the charter school for which it applied to the chartering entity CCBE for the establishment of a charter school as preliminarily approved by the CCBE under Chapter 115C of the General Statutes of North Carolina.
9. The actions/inactions of Respondent were arbitrary, capricious, and without valid basis in law, rule, policy, process, or fact. Respondent’s failure to consider Petitioner’s Request for final approval--as required by State law--was not based on action by the State Board of Education on the Request or the Application, on any defect in the preliminary approval process as followed by Petitioner or the CCBE, or on the CCBE’s preliminary approval.
10. The Chairman’s Announcement does not constitute an action of Respondent Board nor an adoption by Respondent of a requirement as defined under N.C.G.S. § 115C-238.29D(a).

11. Respondent's failure to act or failure to grant final approval to Petitioner's Request for final approval of its application by the date required by statute (March 15, 2012) was made as a result of using an improper procedure or no procedure; was affected by errors of law or rule; and was arbitrary, capricious, and an abuse of discretion.
12. By its failure to act upon Petitioner's Request, Respondent has lost jurisdiction to take further action regarding Petitioner's Request for final approval of its application and the terms and conditions of the charter. Petitioner's Request/Application is deemed approved as a matter of law to be and remain consistent with legislative intent as evidenced in the Charter School Act, Part 6A of chapter 115C of the General Statutes of North Carolina. Under N.C.G.S. § 115C-238.29E, other applicable provisions of the Act, and the terms of the Application, the CCBE--as the chartering entity to which application was made and which issued preliminary approval--presents the only remedy consistent with the legislative intent demonstrated in the provisions of the Charter School Act to issue a charter to Petitioner to establish and operate the charter school for which it applied. *Stevenson v. Durham*, 281 N.C. 300, 303 (1972); *H.C.A. Crossroads Residential Centers, Inc. v. N.C. Department of Human Resources*, 327 N.C. 573, 577, 398 S.E.2d 466, 469 (1990).

DECISION

The undersigned finds and holds that there are sufficient undisputed facts, findings, and evidence in the record to support the Conclusions of Law stated above and the entry of Summary Judgment; that Petitioner's Motion for Summary Judgment, viewed in the light most favorable to the nonmovant, has merit and should be granted; and that Respondent's Motion to Dismiss and Cross-Motion for Summary Judgment should be denied. The other pending motions are rendered moot by this Decision.

ACCORDINGLY, based upon the foregoing, it hereby is ORDERED, ADJUDGED, AND DECREED as follows:

1. Respondent's Motion to Dismiss hereby is DENIED.
2. Petitioner's Motion for Summary Judgment hereby is GRANTED. Respondent's Cross-Motion for Summary Judgment is DENIED. Other pending motions are dismissed as moot.
3. By its failure to act upon Petitioner's Request for final approval of its Application, Respondent has lost jurisdiction over final approval of the Application and the terms and conditions of the charter; the Request/Application is deemed approved as a matter of law; and, under N.C.G.S. § 115C-238.29E, other applicable provisions of the Act, and the terms of the Application, the CCBE--as the chartering entity under G.S. §238.29B(c)(1)--shall charter Petitioner to establish and operate the charter school for which it applied.

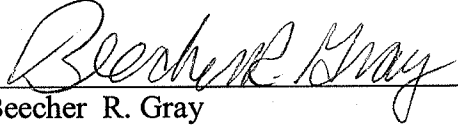
This is a final decision under the authority of N.C.G.S. § 150B-34.

NOTICE

Under N.C.G.S. 150B-45, any party wishing to appeal the final decision of the Administrative Law Judge may commence such appeal by filing a Petition for Judicial Review in the Superior Court of Wake County or in the Superior Court of Cabarrus County. The party seeking review must file the petition within 30 days after being served with a written copy of the Administrative Law Judge's Decision and Order. Under N.C.G.S. 150B-47, the Office of Administrative Hearings is required to file the official record in the contested case with the Clerk of Superior Court within 30 days of receipt of the Petition for Judicial Review. Consequently, a copy of the Petition for Judicial Review must be sent to the Office of Administrative Hearings at the time the appeal is initiated in order to ensure the timely filing of the record.

IT IS SO ORDERED.

This the 18 day of May, 2012.




Beecher R. Gray
Administrative Law Judge

A copy of the foregoing was mailed to:

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ATTORNEYS FOR RESPONDENT

This the 21st day of May, 2012.



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MEMORANDUM FOR THE RECORD

DATE: 10/15/54

TO: SAC, NEW YORK

FROM: SA [Name], NEW YORK

SUBJECT: [Subject]

Reference is made to [Subject]

[Text]

[Text]

[Text]

[Text]

[Text]

[Text]

[Text]

[Faint handwritten notes or stamps]