



No. 15738

The University of the State of New York

The State Education Department

Before the Commissioner

Appeal of KENNETH KLEIN from action of the Board of Education of the Fire Island Union Free School District regarding voter eligibility.

Guercio & Guercio, attorneys for respondent, Gary L. Steffanetta, Esq., of counsel

Petitioner appeals the determination of the Board of Education of the Fire Island Union Free School District ("respondent") to reject his application for an absentee ballot for the June 19, 2007 school budget vote. The appeal must be dismissed.

Petitioner owns two homes - one within respondent's district and the other in Westchester County, outside respondent's district. On June 7, 2007, petitioner requested an absentee ballot for the district's June 19, 2007 budget vote, claiming that he would be vacationing out of state on that date. By letter dated June 7, 2007, respondent's superintendent informed petitioner that there was a question as to his eligibility to vote and that a hearing would be held on the matter on June 8, 2007. Petitioner emailed respondent's district clerk on June 7, 2007, stating that he would not be able to attend the hearing.

By letter dated June 13, 2007, the district clerk informed petitioner that, at its June 12, 2007 meeting, respondent had rejected his application for an absentee ballot. This appeal ensued.

Petitioner claims that he is qualified to vote in district elections because he has chosen his in-district home as his residence for voting purposes and is registered to vote in Suffolk County. Petitioner explains that "for almost ten years, [he has] exercised [his] voting rights in Suffolk County only." Petitioner also contends that he is "aware of continuing acts of voter harassment and intimidation" by respondent and alleges that respondent has treated "potential voters" in an arbitrary and capricious manner. Petitioner requests that I direct respondent to accept the Suffolk County roll of Fire Island voters for the purposes of school district elections and referenda and to notify voters and various community associations of this policy.

Respondent argues that the appeal must be dismissed as untimely, moot, for lack of standing and for failure to state a claim upon which relief may be granted. Respondent further maintains that its decision to deny petitioner an absentee ballot was neither arbitrary nor capricious.

I must first address several procedural matters. Petitioner has submitted a letter to the editor published in the New York Times. Newspaper articles do not constitute evidence of the truth of the statements contained therein (Appeal of Meyerson, 46 Ed Dept Rep 421, Decision No. 15,552; Application of Coleman, 45 id. 282, Decision No. 15,324; Application of Gabryel, 44 id. 235, Decision No. 15,158). Therefore, I have not considered the newspaper article.

In its memorandum of law, respondent contends that the "affirmation" submitted by petitioner should not be considered because it contains new assertions that were not previously raised in the petition. It is apparent that petitioner intended the "affirmation" as a reply to respondent's answer. The purpose of a reply is to respond to new material or affirmative defenses set forth in an answer (8 NYCRR §§275.3 and 275.14). A reply is not meant to buttress allegations in the petition or to belatedly add assertions that should have been in the petition (Appeal of E.R., 45 Ed Dept Rep 487, Decision No. 15,389; Appeal of Ramroop, 45 id. 473, Decision No. 15,385; Appeal of C.R., 45 id. 303, Decision No 15,330). Therefore, while I have

reviewed the reply "affirmation", I have not considered those portions containing new allegations or exhibits that are not responsive to new material or affirmative defenses set forth in the answer.

Respondent further argues that petitioner's "supporting memorandum" should not be considered because it contains new assertions that were not raised in the petition and "fails to assert any legal argument in furtherance of [petitioner's] claims." A memorandum of law should consist of arguments of law (8 NYCRR §276.4). It may not be used to add belated assertions or exhibits that are not part of the pleadings (Appeal of a Student Suspected of Having a Disability, 45 Ed Dept Rep 483, Decision No. 15,388; Application of Jo, 45 id. 374, Decision No. 15,354; Appeal of a Student with a Disability, 45 id. 327, Decision No. 15,337). Therefore, while I have reviewed petitioner's "supporting memorandum," I have not considered those portions containing new allegations, claims or exhibits that are not arguments of law. Similarly, while I have reviewed respondent's memorandum of law, I have not considered those portions containing new exhibits that are not arguments of law.

In its answer, respondent argues that the appeal must be dismissed as untimely. An appeal to the Commissioner must be commenced within 30 days from the making of the decision or the performance of the act complained of, unless any delay is excused by the Commissioner for good cause shown (8 NYCRR §275.16; Appeal of O'Brien, 44 Ed Dept Rep 43, Decision No. 15,092; Appeal of Spina, 43 id. 354, Decision No. 15,016). The Commissioner has previously held that an appeal is timely when commenced within 30 days of receiving the determination (Appeals of Sitaras, et al., 43 Ed Dept Rep 434, Decision No. 15,044; Appeal of Malek, 41 id. 312, Decision No. 14,697). When the record does not indicate when petitioner actually received the determination, the date of receipt is calculated by affording the usual five days for mailing, excluding Sundays and holidays (Appeal of C.F., 44 Ed Dept Rep 109, Decision No. 15,113; Appeal of O.W., 43 id. 150, Decision No. 14,949). The record indicates that respondent's June 12, 2007 determination was "sent" to petitioner on June 13, 2007. However, there is no evidence in the record to

indicate when petitioner actually received the determination. As such, affording the usual five days for mailing, excluding Sundays and holidays, the date of receipt would be June 19, 2007. Petitioner thus had to commence his appeal on or before July 20, 2007, which he did. Consequently, I will not dismiss the appeal as untimely.

Respondent also contends that the appeal is moot. The Commissioner will only decide matters in actual controversy and will not render a decision on a state of facts which no longer exist or which subsequent events have laid to rest (Appeal of C.A., Sr., 45 Ed Dept Rep 388, Decision No. 15,360; Appeal of the New York Charter Schools Assn., Inc., et al., 45 id. 376, Decision No. 15,355; Appeal of the Bd. of Trustees of the N. Merrick Public Library, et al., 45 id. 363, Decision No. 15,350). Respondent argues that since petitioner failed to challenge the denial of his request for an absentee ballot before the June 19, 2007 budget vote, the appeal is moot. However, petitioner seeks an order directing respondent to undertake certain activities. Accordingly, I decline to dismiss the appeal as moot.

Turning to the merits, Education Law §2012 governs the qualifications of voters at school meetings and elections. To qualify to vote in a school district election, a person must be a citizen of the United States, at least 18 years old, a resident of the district for a period of at least 30 days preceding the election, and not otherwise disqualified as incompetent or ineligible pursuant to Election Law §5-106 (Education Law §2012).

For the purposes of Education Law §2012, a person may have only one legal residence or domicile, and that is the place where such a person intends to have his or her permanent residence (Appeal of Taylor, 39 Ed Dept Rep 712, Decision No. 14,357; Appeal of Kuleszo, 30 id. 465, Decision No. 12,537; Informal Op Atty Gen, 1934, 51 St Dept Rep 123; Matter of the Appeal of Nelson Beck, 74 St Dept Rep 78). Dual home ownership does not confer upon the property owner the right to designate residency for the purpose of participating in school district elections (Appeal of Taylor, 39 Ed Dept Rep 712, Decision No. 14,357;

Informal Op Atty Gen, 1934, 51 St Dept 123). Rather, residency is dependent on the intent and conduct of the owner (Appeal of Taylor, 39 Ed Dept Rep 712, Decision No. 14,357; Informal Op Atty Gen, 1932, 45 St Dept Rep 128).

In an appeal to the Commissioner, a petitioner has the burden of demonstrating a clear legal right to the relief requested and the burden of establishing the facts upon which petitioner seeks relief (8 NYCRR §275.10; Appeal of Hoey and Kosowski, 45 Ed Dept Rep 501, Decision No. 15,394; Application of Bliss, 45 *id.* 308, Decision No. 15,331; Appeal of Rubinstein, 45 *id.* 299, Decision No. 15,329). Petitioner submits evidence that he owns a home in respondent's district, is registered to vote in Suffolk County and was elected to the Board of Trustees of the Incorporated Village of Ocean Beach on June 1, 2007. However, he does not establish that he intends his in-district home to be his primary residence. To the contrary, respondent submits evidence that petitioner has claimed a school tax relief ("STAR") exemption on his Westchester County home since 1999. Petitioner has produced no evidence to the contrary. Pursuant to Real Property Tax Law ("RPTL") §425(3)(a), to qualify for a STAR exemption, the property must "serve as the primary residence of one or more of the owners thereof." Petitioner's conduct thus supports the conclusion that he intends his Westchester County home to be his primary residence. As a result, based on the record before me, I find that respondent's decision to deny petitioner's request for an absentee ballot was reasonable.

Petitioner also argues that he is entitled to vote in respondent's elections because he is registered to vote in Suffolk County. To support this argument, petitioner cites three Commissioner's decisions: Appeal of Breud, Jr. et al., 38 Ed Dept Rep 748, Decision No. 14,133; Appeal of Muench, 38 *id.* 649, Decision No. 14,110; and Appeal of Hennessey, 37 *id.* 480, Decision No. 13,909. However, petitioner's reliance on these decisions is misplaced, as each involved the issue of whether individuals were properly registered to vote, not whether they were qualified voters. Petitioner's registration with Suffolk County is irrelevant for purposes of the instant appeal.

In light of this disposition, I need not address the parties' remaining contentions.

THE APPEAL IS DISMISSED.



IN WITNESS WHEREOF, I, Richard P. Mills, Commissioner of Education of the State of New York for and on behalf of the State Education Department, do hereunto set my hand and affix the seal of the State Education Department, at the City of Albany, this 8th day of April, 2008.

Richard P. Mills
Commissioner of Education