

STATE OF NORTH CAROLINA
COUNTY OF MECKLENBURG

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
15 EDC 05755

<p>Charlotte Classical School Inc Petitioner,</p> <p>v.</p> <p>NC State Board of Education Respondent.</p>	<p>FINAL DECISION</p>
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THIS MATTER came on to be heard before the undersigned Administrative Law Judge Selina M. Brooks on March 18, 2016 in the Mecklenburg County Courthouse, in Charlotte, North Carolina.

APPEARANCES

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APPLICABLE STATUTES

N.C. Gen. Stat. § 115C-218 et seq.

BASED UPON careful consideration of the sworn testimony of the witnesses presented at the hearing, the documents and exhibits received and admitted into evidence, and the entire record in this proceeding, the undersigned Administrative Law Judge (ALJ) makes the following Findings of Fact. In making these findings of fact, the ALJ has weighed all the evidence and has assessed the credibility, including, but not limited to the demeanor of the witnesses, any interests, bias, or prejudice the witness may have, the opportunity of the witness to see, hear, know or remember the facts or occurrences about which the witness testified, whether the testimony of the witness is reasonable and whether the testimony is consistent with all other believable evidence in the case.

Pursuant to an Order entered on March 21, 2016, Respondent submitted a Proposed Final Decision. Petitioner did not submit comments for consideration. A transcript was not requested by the Parties and, therefore, the Undersigned has relied upon her notes and has referenced “Testimony” herein where applicable.

FINDINGS OF FACT

1. Beginning in 1996, the General Assembly created a system of charter schools, which schools would be operated by nonprofit corporations; would be funded by federal, state, and local tax monies; and would operate independently of the traditional local school boards, but would nevertheless be deemed “public” schools. The General Assembly vested in the State Board of Education (“SBE”) the sole authority to approve such schools, to regulate such schools and, if necessary, to terminate the charters issued to such schools. N.C. Gen. Stat. §§ 115C-218, -218.1, -218.5, -218.95 & -218.105.

2. The processes and procedures governing the consideration and approval or denial of a charter school application are set forth in the General Statutes as well as in policies adopted by the State Board of Education. For example, N. C. Gen. Stat. § 115C-218 (b) establishes the North Carolina Charter School Advisory Board (hereinafter sometimes referred to as the “CSAB”), and sets forth that the CSAB is responsible for, among other things, making “recommendations to the State Board of Education on the adoption of rules regarding all aspects of charter school operation, including time lines, standards, and criteria for acceptance and approval of applications[.]” N.C. Gen. Stat. § 115C-218 (b)(10) The CSAB is required to “review applications and make recommendations to the State Board for final approval of charter applications.” *Id.* The CSAB reviews applications both for initial charters and for renewals, and reviews any requests for changes to the charter, such as enrollment increases, changes to the by-laws, or changes to the location of the school. In addition, as part of the charter application process, the CSAB requires that the governing board for the applicant group or representatives from the proposed school appear at a CSAB meeting to present and respond to questions by the CSAB. *Id.*

3. The CSAB, created by statute, reports to the SBE. Its members are appointed pursuant to statute and it functions as an advisory board to the SBE; no staff of DPI serves on the CSAB. N.C. Gen. Stat. § 115C-218 (b).

4. The CSAB is staffed by the Office of Charter Schools (“OCS”) and works closely with other divisions in the Department of Public Instruction (“DPI”) in order to stay apprised of all issues involving charter schools, both individually and collectively. The OCS reports regularly to the Leadership for Innovation Committee (“LFI”), a standing committee of the SBE for which charter schools are a primary and ongoing focus.

5. In addition to the General Statutes, other requirements concerning charter schools and the charter school application process are set forth in policies adopted by the SBE. For example, SBE Policy TCS-U-012 entitled, Charter School Application and Review Process, provides specific directions that must be followed in the consideration and review of charter school applications. (Respondent’s Ex. 4) For instance, paragraph (a) of this Policy establishes that for each application round, there will be a deadline for applicants to file their applications and, if an

applicant's application and fee are not received by the deadline specified by the OCS, then the application will not be considered. Likewise, paragraph (c)(2) of this Policy states that "[t]he Charter School Advisory Board, with the assistance of the Office of Charter Schools, shall review each complete application and determine whether the application" meets certain requirements and, if so, the application shall be forwarded to the SBE for additional consideration. (Respondent's Ex. 4)

6. For the 2014-2015 charter school application cycle (for schools proposed to open in August 2016), the deadline for submitting applications was September 26, 2014. Applicants whose applications were initially approved by the SBE by September 2015, would then be permitted to participate in a year of planning (the "planning year") and training by the OCS in order to be prepared to open their schools in August 2016. (Respondent's Ex. 6, LFI 1 Attachment 1, p. 3). Forty applications were submitted in advance of the September 26, 2014 deadline, including an application from the Petitioner, Charlotte Classical School, Inc. ("Charlotte Classical"). (Respondent's Ex. 16)

7. Those applications, including the application submitted by Charlotte Classical, were then reviewed in accordance with the procedures and policies previously approved by the SBE. With respect to the application submitted by Charlotte Classical, staff from OCS conducted the initial screening process to ensure that all required portions were included within the application submission, and deemed the application complete on or about October 23, 2014. (Respondent's Ex. 9, p. 81) The application was then forwarded to the CSAB for its consideration.

8. At the November 13, 2014 CSAB meeting, both the Policy committee and the Performance committee of the CSAB met to determine whether applications submitted by the September 26, 2014 deadline were complete or incomplete. With respect to the application submitted by Charlotte Classical, a motion was made to deem the application complete, which motion was seconded and carried unanimously. (Respondent's Ex. 10)

9. Following the application completeness screening, the substantive review of applications began. In December 2014 and January 2015, three external evaluators and DPI/OCS staff members (collectively, the "evaluators") reviewed and evaluated Charlotte Classical's application using an evaluation rubric developed by OCS staff and previously approved by the SBE. The evaluators reviewed and rated the application in multiple categories, including: (1) Mission and Purposes; (2) Education Plan; and (3) Operations. Each evaluator was required to give a "pass" or "fail" rating for each category/section of the application, along with written explanation for his or her ratings. (Respondent's Ex.(s) 8 & 9)

10. In the area of Mission and Purposes, all three of the evaluators gave the Charlotte Classical application a "fail" rating. In the area of Education Plan, all three of the evaluators gave the Charlotte Classical application a "fail" rating. In the area of Operations, all three of the evaluators gave the Charlotte Classical application a "fail" rating. For the overall assessment of the Charlotte Classical application, all three of the evaluators voted against inviting the Charlotte Classical board of directors in for an interview with the CSAB. (Respondent's Ex. 9, pp. 16, 30-31, 52, 67)

11. Notwithstanding the negative evaluations by the external evaluators and as permitted by the practices and procedures of the CSAB, on February 9, 2015, the Policy committee of the CSAB voted unanimously to move Charlotte Classical along in the application process by inviting the Charlotte Classical board for an interview. (Respondent's Ex.(s) 9, p. 81, & 11, p. 000006)

12. On or about March 10, 2015, Charlotte Classical board members presented to and were interviewed by the CSAB. Some CSAB members raised concerns about the education plan and the budget proposed by Charlotte Classical. After much discussion and deliberation, the CSAB voted 6-5 in favor of recommending to the SBE that Charlotte Classical be allowed to start the planning year. Rebecca ("Becky") Taylor was one of the members of CSAB who voted against the recommendation. (Petitioner's Ex. 2; Respondent's Ex. 12, pp. 000026-28)

13. At its regularly scheduled meeting on May 6, 2015, the SBE discussed the slate of charter schools being recommended by the CSAB to start the planning year in preparation for opening in August 2016. For each charter school that did not receive a unanimous CSAB vote in favor of starting the planning year, Dr. Joel Medley, OCS Director, presented information to the SBE concerning the issues raised by CSAB members. (Petitioner's Ex. 3; Respondent's Ex. 16, Item IV.D.1.a.LFI, and 17, pp. 12-14) With respect to the Charlotte Classical application, Dr. Medley reported that at least one CSAB member was concerned that insufficient information about the classical education model had been presented by the Charlotte Classical board during the course of the interview with the CSAB. (Respondent's Ex. 17, p. 14) Becky Taylor was a member of the SBE and present at this meeting. *Id.*

14. In addition to the presentation made by Dr. Medley to the SBE, members of the SBE were encouraged by the Chair and Vice Chair of the LFI Committee to read the minutes from the CSAB meetings, the completed evaluation rubrics and the relevant applications in order to gain a better understanding of the basis for the split votes where any application had not been unanimously recommended by the CSAB for approval. This agenda item was returned for discussion at the June meeting. (Respondent's Ex. 17, p. 14)

15. Information about each of the applications recommended by the CSAB for further consideration by the SBE is included in the materials presented to the SBE in advance of the meeting at which a prospective school is on the agenda for discussion and/or action. SBE members have access to every charter application that the SBE is considering (as they are posted online and a link to each application is included in the materials provided to each SBE member in advance of the SBE meeting), as well as any and all correspondence sent to them from or about any applicant. All proponents of applications have open and equal access to contact Board members and the SBE is free at any time to reconsider, review, or to amend any recommendation coming to it via the CSAB and DPI staff. (Testimony)

16. At its regularly scheduled meeting on June 3, 2015, the SBE considered the slate of charter schools being recommended by the CSAB to start the planning year in preparation for opening in August 2016. (Respondent's Ex. 13) Further discussion was facilitated by LFI Committee Chair and SBE member Becky Taylor. (Petitioner's Ex. 4; Respondent's Ex. 14, pp. 35-38)

17. After much discussion and upon the motion of Becky Taylor, the SBE voted unanimously in open session not to approve the charter application of Charlotte Classical. (Respondent's Ex. 14, p. 38)

18. The Board Chair for Charlotte Classical was notified in writing that the SBE voted not to grant approval of the Charlotte Classical application. (Petitioner's Ex. 5; Respondent's Ex. 15)

19. On or about October 12, 2015, a Petition for Contested Case Hearing was filed by Charlotte Classical School challenging the Respondent's denial of Petitioner's application for a public school charter.

20. At the contested case hearing, evidence was received concerning the membership and procedures of the CSAB and SBE. Petitioner's witness, Eddie Goodall, a former North Carolina State Senator and the current Executive Director of the North Carolina Charter Public Schools Association, testified concerning the membership of the CSAB and the SBE, and his opinion that Becky Taylor's membership on both the CSAB and the SBE is a conflict of interest in violation of the State Ethics Act. Mr. Goodall specifically stated that he does not question the integrity of Ms. Taylor but that he is critical of the statutory provision that allowed her to be a member of both Boards. In 2015, Mr. Goodall lobbied for the passage of House Bill 334 which addressed the statutory provisions concerning the membership composition of the CSAB and SBE, and which was later ratified. (Testimony; Petitioner's Ex. 8)

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has personal and subject matter jurisdiction over this contested case. The parties received proper notice of the hearing in this matter. To the extent the Findings of Fact contain conclusions of law, or that the Conclusions of Law are findings of fact, they should be so considered without regard to their given labels.

2. The Petitioner bears the burden of proof by a greater weight or preponderance of the evidence of showing that by denying the Petitioner's charter application, the Agency has deprived it of property or substantially prejudiced its rights and that the agency's decision was erroneous in one or more of the ways enumerated in N.C. Gen. Stat. § 150B-23. *Surgical Care Affiliates, LLC v. N.C. Dep't of Health and Human Servs., Div. of Health Serv. Regulation, Certificate of Need Section*, 762 S.E.2d 468, 474-475 (N.C. Ct. App. 2014), *review denied*, 768 S.E.2d 564 (N.C. 2015)

3. "[A]gency action is considered 'arbitrary and capricious' only if it indicates a lack of fair and careful consideration and fails 'to indicate any course of reasoning and the exercise of judgment.'" *Watson v. N.C. Real Estate Com'n*, 87 N.C. App. 637, 649, 362 S.E.2d 294, 301 (1987) quoting *State ex rel. Comm'r of Ins. v. North Carolina Rate Bureau*, 300 N.C. 381, 420, 269 S.E.2d 547, 573 (1980).

4. An Administrative Law Judge "shall decide the case based upon the preponderance of the evidence, giving due regard to the demonstrated knowledge and expertise of the agency with

respect to facts and inferences within the specialized knowledge of the agency.” N.C. Gen. Stat. § 150B-34(a).

5. Respondent is entitled to a presumption that it acted in good faith in denying the Petitioner’s application for a charter to operate a school beginning in the 2016-2017 school year. In accordance with *Painter v. Wake County Bd of Ed.*, 217 S.E.2d 650, 288 N.C. 165 (1975), absent evidence to the contrary, it will be presumed that “public officials will discharge their duties in good faith and exercise their powers in accord with the spirit and purpose of the law. Every reasonable intendment will be made in support of the presumption.” *See also Huntley v. Potter*, 122 S.E.2d 681, 255 N.C. 619 (1961).

6. The burden is upon the party asserting the contrary to overcome the presumption by competent and substantial evidence. “Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Rusher v. Tomlinson*, 119 N.C. App. 458, 465, 459 S. E. 2d 285, 289 (1995), *aff’d*, 343 N.C. 119, 468 S.E. 2d 57 (1996); *Comm’r of Insurance v. Fire Insurance Rating Bureau*, 292 N.C. 70, 80, 231 S.E.2d 882, 888 (1977). “It is more than a scintilla or a permissible inference.” *Lackey v. Dept. of Human Resources*, 306 N.C. 231, 238, 293 S.E.2d 171, 177 (1982).

7. In weighing evidence which detracts from the agency decision, “[i]f, after all of the record has been reviewed, substantial competent evidence is found which would support the agency ruling, the ruling must stand.” *Little v. Bd. of Dental Examiners*, 64 N.C. App. 67, 69, 306 S.E.2d 534, 536 (1983)(citations omitted).

8. In North Carolina, the State Board of Education is constitutionally mandated to “supervise and administer the free public school system and the educational funds provided for its support.” N.C. Const. art. IX, § 5. In addition, N.C. Gen. Stat. § 115C-218.5 (a)(1) provides that “[t]he State Board may grant final approval of [a charter school] application if it finds...the application meets the requirements set out in this Article and such other requirements as may be adopted by the State Board of Education.”

9. N.C. Gen. Stat. § 115C-218 (b) establishes the North Carolina Charter School Advisory Board and sets forth that the CSAB is responsible for, among other things, making “recommendations to the State Board for final approval of charter applications.” The State Board of Education alone is charged with making the final decision on the approval or denial of all public charter school applications in this State and is not bound by the recommendations of the CSAB. N.C. Gen. Stat. § 115C-218.5

10. For the Charlotte Classical application at issue in this contested case, all of the external evaluators who reviewed the application gave the application a “fail” rating and voted not to move the application forward in the process.

11. Notwithstanding the evaluators’ vote, the CSAB further considered the Charlotte Classical application, including interviewing members of the board of directors for Charlotte Classical regarding the application. At the conclusion of the Charlotte Classical presentation and

interview, and after discussion and deliberation, the CSAB voted 6-5 to recommend to the State Board of Education that Charlotte Classical begin the planning year.

12. At its regularly scheduled meeting in May and then again in June 2015, the SBE was presented with the CSAB's recommendation. As with all other applications that did not receive a unanimous vote from the CSAB, the SBE was presented with information regarding the concerns about the Charlotte Classical application and interview of the applicant.

13. Petitioner argues that the membership composition of the CSAB and SBE was unethical even though the membership composition of both Boards met the statutory requirements at that time and, therefore, the decision of the SBE to accept the CSAB's recommendation and to vote to disapprove Petitioner's application is a failure to use proper procedure, arbitrary and capricious, in error of law, and not supported by the evidence.

14. In light of the substantial evidence presented at the hearing regarding the Respondent's compliance with N.C. Gen. Stat. § 115C-218 *et seq.*, the Undersigned concludes as a matter of law that the Petitioner has failed to carry its burden of proving that the Respondent acted arbitrarily or capriciously, acted erroneously, exceeded its authority or jurisdiction, failed to use proper procedure, or failed to act as required by law or rule.

15. Respondent did not act arbitrarily or capriciously, erroneously, exceed its authority or jurisdiction, fail to use proper procedure, or fail to act as required by law or rule.

BASED UPON the foregoing Findings of Fact and Conclusions of Law the Undersigned makes the following:

FINAL DECISION

The State Board of Education's decision to deny the Petitioner's application for a charter to operate a charter school is **AFFIRMED**.

NOTICE

This is a **Final Decision** issued under the authority of N.C. Gen. Stat. § 150B-34.

Under the provisions of North Carolina General Statute § 150B-45, any party wishing to appeal the final decision of the Administrative Law Judge must file a Petition for Judicial Review in the Superior Court of the county where the person aggrieved by the administrative decision resides, or in the case of a person residing outside the State, the county where the contested case which resulted in the final decision was filed. **The appealing party must file the petition within 30 days after being served with a written copy of the Administrative Law Judge's Final Decision.** In conformity with the Office of Administrative Hearings' rule 26 N.C. Admin. Code 03.0102, and the Rules of Civil Procedure, N.C. General Statute 1A-1, Article 2, **this Final Decision was served on the parties the date it was placed in the mail as indicated by the date on the Certificate of Service attached to this Final Decision.** N.C. Gen. Stat. § 150B-46 describes the contents of the Petition and requires service of the Petition on all parties. Under N.C.

Gen. Stat. § 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 24th day of May, 2016.

Selina M Brooks
Administrative Law Judge