

WILLIAM MARSH, :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE : DECISION

CITY OF ATLANTIC CITY, :

ATLANTIC COUNTY, :

RESPONDENT. :

SYNOPSIS

Petitioner, Coordinator of Adult Education and Community Use of Schools, alleged the Board took no action to abolish his position and, accordingly, sought an order to continue his employment. Board contended petitioner was not entitled to continued employment because the action of the City Council effectively eliminated petitioner's position by not restoring funding for it after the voters rejected the supplemental spending question.

ALJ concluded that there was no statutory provision for the abolishment of positions duly established by a board of education to take effect merely because the board's annual school budget was defeated at the polls by the electorate. ALJ concluded that the Board had to take affirmative action to abolish the position it created; therefore, by failing to abolish petitioner's position when it terminated him in July 1998, the Board's action to terminate petitioner's salary, benefits and other emoluments was *ultra vires*. ALJ concluded that petitioner's position remained in force until such time as the Board takes affirmative action to abolish it. ALJ ordered the Board to reinstate petitioner to his position as Coordinator of Adult Education and Community Use of Schools with mitigated compensation, retroactive to June 18, 1998.

Commissioner set aside the Initial Decision. Although concurring with ALJ's analysis, Commissioner will not grant a relief that compels a board to fill a position which, by law, it does not have the authority to fund. Such a result elevates form over substance, and is contrary to both logic and sound educational and fiscal policy. Moreover, petitioner was unequivocally on notice that his position would be eliminated if the underlying program were not restored following voter defeat, and the administration took subsequent actions that left no doubt as to the RIF to take effect as of June 30, 1998. Commissioner reminded respondent Board and all boards of their obligations with regard to abolishment of positions in the event of program elimination as a result of rejected excess expenditure questions. Additionally, in that the record indicates that the Board may have been aware of its responsibilities and failed to act nonetheless, the commissioner directed the Atlantic County Superintendent to inquire into the circumstances surrounding this matter and to report to him with findings and recommendations for action as appropriate.

December 21, 1999

OAL DKT. NO. EDU 8582-98
AGENCY DKT. NO. 385-8/98

WILLIAM MARSH, :
 :
 PETITIONER, :
 :
 V. : COMMISSIONER OF EDUCATION
 :
 BOARD OF EDUCATION OF THE : DECISION
 CITY OF ATLANTIC CITY, :
 ATLANTIC COUNTY, :
 :
 RESPONDENT. :
 :
 _____ :

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The Board's exceptions were untimely filed pursuant to *N.J.A.C. 1:1-18.4(a)*, in that the Initial Decision was mailed to the parties on October 25, 1999, and the exceptions were filed on November 18, 1999. Accordingly, the exceptions were not considered in the Commissioner's determination of this matter.

Upon careful and independent review of the record, the Commissioner is compelled to set aside the Initial Decision. Initially, the Commissioner finds that the Board is correct in noting that, where a district proposes additional general fund tax levies in excess of its maximum budget required to provide a thorough and efficient system of education, and where such proposed expenditures are rejected by the local voters and, subsequently, are *not* restored by the local governing body or bodies, or are rejected by the board of school estimate, such rejection *is final*. In such cases, no application for restoration by the Commissioner may ensue, and the

Board is thereafter prohibited from modifying its base budget in order to effectuate the purpose(s) of the proposed expenditure. *N.J.S.A.* 18A:7F-5d, *N.J.A.C.* 6:19-2.4(e), 6:19-2.4(f).

However, the Board's argument that, under such circumstances, "[a]ny further action by [it] would be moot or at best superfluous" (Initial Decision at p. 8), ignores a board's responsibilities as provided elsewhere in the State school laws and as summarized by the ALJ (*id.* at pp. 9-11), both to appoint teaching staff members *and* to abolish the positions of teaching staff members where necessary for reasons of economy. As the ALJ observes, "[The Board] may not rely upon an outside party, who may or may not have eliminated a budgetary consideration, to effectuate the abolishing of the position duly established by the board of education." (*Id.* at p. 11) In the instant matter, then, the Board did not fulfill its statutory obligation when it failed to pass a resolution abolishing petitioner's position. Additionally, it failed in this regard notwithstanding the scheduling of a resolution to abolish petitioner's position on two separate agendas, suggesting that arguments to the effect that the Board believed it did not need to act may not reflect the full circumstances surrounding the Board's determination in this matter.

In view of the Board's failure to take action under circumstances which suggest that the Board may, in fact, have been aware of its responsibilities notwithstanding its ultimate failure to fulfill them, the Commissioner directs the Atlantic County Superintendent of Schools to investigate such circumstances and report to the Commissioner with his findings and recommendations, so that action may be taken if warranted.

However, whatever the Board's understanding may actually have been at the time it failed to pass the scheduled resolutions, and notwithstanding that the Board did not act in accordance with its responsibilities, the Commissioner cannot in good conscience find that

petitioner is entitled to the relief he seeks as a result of the Board's failure to act. Here, the record is clear that, by letter dated April 30, 1998, petitioner was advised

of a possible **Reduction in Force** effecting [sic] your position as Neighborhood Facilities Coordinator. If the budget for the 1998-98 [sic] school year is not certified at the level of funding being requested by the Board of Education[,] the Reduction in Force will be implemented.

This letter will serve as the required thirty day notice and will also advise you that your property rights to other district positions will be protected and respected if you are entitled to such "bumping rights."

Dr. H. Benjamin Williams, Superintendent of Schools, is expected to convene a meeting with you shortly to discuss this possible reduction and its impact on you. *** (Exhibit P-2, Letter from Assistant Superintendent Melvin A. Clarke to William Marsh) (emphasis in text)

Thereafter, by letter dated June 22, 1998, petitioner was informed that Acting Superintendent Delois Campbell would be available for an exit conference with him on his last day of work in the District, June 30, 1998. (Exhibit P-6) Petitioner himself alleges that "[o]n or about June 30, 1998, [he] met with the assistant superintendent who advised [him] that his position was abolished and that he should not report to work." (Petition of Appeal at p. 2) Under these circumstances, where petitioner was unequivocally on notice that his position in the District would be abolished if the underlying program were eliminated, and where the administration took subsequent actions that left no doubt as to the reduction in force to take effect as of June 30, 1998, petitioner cannot claim to have been prejudiced by the Board's failure to take the technical action necessary to formally effectuate the abolition of his position.

Moreover, the Commissioner cannot permit a relief that compels, as does the relief sought by petitioner and recommended by the ALJ herein, a board to fill a position which, *by law*, it does not have the authority to fund. Such a result is counter to sound educational and

fiscal policy, elevates form over substance and unjustly enriches petitioner at the expense of the district's students.

Accordingly, the Initial Decision of the ALJ is set aside for the reasons expressed herein, and the within petition is dismissed. *However, the Board herein and all other boards of education in this State are cautioned that, notwithstanding that the funding for a program is eliminated pursuant to voter rejection and subsequent governing body or board of school estimate review, a board must nonetheless take affirmative action to formally abolish any positions which may be impacted by such elimination.* Additionally, as set forth above, the Atlantic County Superintendent is directed to inquire into the circumstances surrounding this matter and to report to the Commissioner with his findings and recommendations.*

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

December 21, 1999

* This decision, as the Commissioner's final determination in the instant matter, 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. 6:2-1.1 et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.