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LYNN P. SHERMAN *ET AL.*,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF BEACH HAVEN, OCEAN COUNTY,	:	DECISION
	:	
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioning parents appealed Board's decision to abolish the half-day, four-year-old kindergarten program (K/4) in favor of a full-day, five-year-old kindergarten program to replace K/4 and the half-day, five-year-old kindergarten program (K/5).

At the OAL the respondent Board moved for summary decision. The ALJ granted respondent's motion, concluding that petitioners failed to demonstrate affirmatively that the District's decision was arbitrary, capricious or unreasonable. The ALJ also determined that the Board's alleged misrepresentation to the K/5 teacher, who resigned upon information that the K/5 program would not be a full-time program for two or three years, was not an affirmative demonstration of the District's arbitrary, capricious or unreasonable conduct. The ALJ further concluded that the Board was permitted the discretion to consider sound economics and business principles as may be necessary for the lawful and proper conduct of the schools in matters such as the abolition of the K/4 program and that the Board was authorized to transfer funds among line items and program categories of its budget to operate the full-day kindergarten program. Finally, the ALJ concluded that it was unnecessary to consider whether the District violated terms of the Open Public Meeting Act (OPMA) when it considered elimination of the K/4 program without including same in its agenda for the June 21, 1999 meeting since adequate notice of the Board's intent to consider elimination of K/4 was provided in the agenda published for a subsequent meeting on October 7, 1999.

The Commissioner agreed with and adopted as his own the ALJ's recommended decision granting the Board's motion for summary decision, concluding that the ALJ properly applied the standard for summary decision set forth in *Brill v. Guardian Life Ins. Co. of America*, 142 *N.J.* 520 (1995) in determining that petitioners failed to demonstrate that the decision to eliminate K/4 was arbitrary, capricious or unreasonable. Notwithstanding this holding, however, the Commissioner determined that the June 21, 1999 meeting agenda did not comply with the intent of the OPMA since it did not provide sufficient notice that possible elimination of the preschool program would be discussed. Although the Commissioner agreed with the ALJ that there is no basis upon which to grant the relief sought by petitioners, given that the Board later provided adequate notice of its intent to consider elimination of K/4 in its October 7, 1999 meeting agenda, the Commissioner cautioned the Board that it must at all times and in all matters recognize and effectuate the intent of the OPMA.

January 18, 2000

OAL DKT. NO. EDU 6647-99
AGENCY DKT. NO. 239-8/99

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The record and Initial Decision issued by the Office of Administrative Law have been reviewed. Petitioners' exceptions were timely filed pursuant to *N.J.A.C*. 1:1-18.4. The Board's reply exceptions, upon granting of an extension, were likewise timely filed.

Petitioners except to the Administrative Law Judge's (ALJ) conclusion that numerous exhibits submitted in opposition to the Board's Motion for Summary Decision did not raise issues of material fact to demonstrate affirmatively that the Board's action to eliminate the preschool program for four-year-old children (K/4) was arbitrary, capricious and unreasonable. They also except to the ALJ's failure to consider the Giordano grievance an affirmative showing of arbitrary, capricious and unreasonable action by the Board. Petitioners further object to the ALJ's "interpretation of the budget and the application of funds," arguing, *inter alia*, that if the Board has a surplus of $75,000, there is no economic reason that the Board should not or could not keep the four-year-old program. (Petitioners' Exceptions at 7-8) Lastly, petitioners take

exception to the ALJ's failure to rule that the Board was in violation of the Open Public Meeting Act (OPMA), at least until October 7, 1999.

The Board's reply exceptions urge affirmance of the ALJ's recommended decision, averring that all of petitioners arguments, except for the one relative to a $75,000 surplus, merely rehash arguments properly rejected by the ALJ. Moreover, the Board argues that the exception alleging that the Board's actions were not based on sound economic and business principles because the District has a $75,000 surplus should not be permitted to be raised at this juncture because "[t]his allegation and its implication transgresses the well established principle that an administrative tribunal's decision must be based upon evidence that is part of the established record." (Reply Exceptions at 1-2) It further argues, *inter alia*, that:

> The amount of undesignated general fund balances, commonly known as surplus funds, is regulated by law.*** For example, *N.J.S.A.* 18A:7F-7 requires local boards, like Beach Haven, to designate at least 6% of its budget or $75,000 (whichever is greater) as surplus funds. *N.J.A.C.* 6:19-2.5 also mandates that local boards estimate the amount of surplus funds a year in advance.
>
> The use of surplus, on the other hand, is regulated by law only if the surplus exceeds the statutory limit. Specifically, N.J.S.A. 18A:7F-7c provides that if Beach Haven's surplus exceeds the 6% or $75,000 limit, the excess must be reserved and designated in the following year's budget. Aside from these requirements, the use of surplus is a matter of board discretion. (*Id*. at 2)

Upon thorough consideration of the record of this matter, the Commissioner agrees with and adopts as his own the ALJ's recommended decision granting the Board's Motion for Summary Decision for the reasons set forth in the Initial Decision, except as noted below. After comprehensive review of the entire record, the Commissioner concludes that the ALJ properly applied the standard for summary decision as set forth by the court in *Brill, supra,* and,

therefore, adopts the ALJ's conclusions that no genuine issues of material fact exist in the matter which would require a plenary hearing.

The Commissioner further concludes that the ALJ correctly determined that petitioners have failed to show that the decision to eliminate the K/4 preschool program was arbitrary, capricious and unreasonable. *N.J.S.A*. 18A:11-1 grants a board of education broad discretionary powers to "[p]erform all acts and do all things, consistent with law and the rules of the state board, necessary for the lawful and proper conduct, equipment and maintenance of the public schools of the district." Thus, the Board herein had the discretionary authority to abolish the half-day program for four-year-old children and create a full-day kindergarten program. Further, it is well-settled law that when a board acts within its discretionary authority, its decision "is entitled to a presumption of correctness and will not be upset unless there is an affirmative showing that such decision was arbitrary, capricious and unreasonable." *Thomas v. Bd. of Ed. of Morris Tp*., 89 *N.J. Super*. 327, 332 (App. Div. 1965), *aff'*d 46 *N.J.* 581 (1966).

The standard of review for determining whether or not a board of education action was arbitrary, capricious or unreasonable is narrow in its scope and consequently imposes a heavy burden on those who challenge actions of boards of education. The standard defined by the New Jersey courts states:

> In the law, "arbitrary" and "capricious" means having no rational basis. ***Arbitrary and capricious action of administrative bodies means willful and unreasoning action, without consideration and in disregard of circumstances. Where there is room for two opinions, action is not arbitrary or capricious when exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached. ***Moreover, the court should not substitute its judgment for that of an administrative or legislative body if there is substantial evidence to support the ruling. (*Bayshore Sew. Co. v. Dep't. of Env., N.J.,* 122 *N.J. Super*. 184, 199-200 (Ch. Div. 1973), *aff'd* 131 *N.J. Super*. 37 (App. Div. 1974) (citations omitted)

In applying this standard to the instant matter, the Commissioner finds and determines that the record does not establish that the Board herein took willful or unreasoning action, without consideration and in disregard of the circumstances. On the contrary, it shows that the Board acted based upon educational and economic reasons, notwithstanding petitioners' arguments to the contrary regarding a $75,000 surplus they allege exists. Further, upon review of the parties' arguments and the documentary evidence in support thereof, the Commissioner agrees with the ALJ's conclusion that the Giordano grievance is not an affirmative demonstration of arbitrary, capricious and unreasonable conduct by the Board.

Consequently, the Commissioner agrees with the ALJ that the Board's abolishment of the preschool (K/4) program was a proper exercise of its discretionary authority. Notwithstanding this holding, however, the Commissioner believes that petitioners raise legitimate concerns about the adequacy of notice provided to the public about the possible elimination of the preschool program, given that the agenda for the June 21, 1999 meeting merely stated that there would be discussion of all-day kindergarten.

On the issue of the OPMA and adequate notice, the Board argues, *inter alia*, that:

> The [OPMA] entitles the public to be present at a meeting, however, it does not mandate or guarantee public participation. A board of education retains the right to permit, prohibit or regulate active public participation at any meeting. *N.J.S.A.* 10:4-12a.
>
> Here, the Board exercised this right and permitted public discussion of [the controverted] issue at two board meetings. (Exhibits B – Board minutes of May 24, 1999, and C - Board minutes of June 21, 1999.) Thus, Petitioners' allegations that the Board violated the Act when it failed to allow public discussion are blatantly false. Accordingly, this claim must fail.
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> ***At the May 24th Board meeting, four members of the public commented about the preschool program during the public discussion portion of the meeting. Exhibit B. Twelve people spoke

> at the June 21st meeting. Exhibit C. *** (Brief in Support of Respondent's Motion for Summary Judgment, at 9-10)

Moreover, while the Board argues that petitioners have failed to establish an OPMA violation, it is clear from the record that the Board recognized the need to take action to address any possible violation of the OPMA. Of this, the Board states:

> At the emergent relief hearing, [the ALJ] commented that he believed the agenda notice for the June 21, 1999 meeting did not comply with the spirit of the Sunshine Law. Item 7.1 of the June 21, 1999 agenda provides: "Discussion: All day Kindergarten." The Judge stated that this did not adequately inform the public that action would be taken to eliminate the preschool program.
>
> The Sunshine Law does not require agenda information to be published for regularly scheduled meetings. (Citations omitted) However, if an agenda is voluntarily published, it must be complete and adequately disclose what matters are to be considered.***Based upon the Judge's comments, the Board sought to take corrective action pursuant to *N.J.S.A.* 10:4-15a. This statutory provision states:
>
>> Any action taken by a public body at a meeting which does not conform with the provisions of this act shall be voidable in a proceeding in lieu of prerogative writ in the Superior Court, which proceeding may be brought by any person ***provided, however, that a public body may take corrective or remedial action by acting de novo at a public meeting held in conformity with this act and other applicable law regarding any action which may otherwise be voidable pursuant to this section…
>
> Accordingly, a special meeting was held on October 7, 1999. The Board published a new agenda which specifically states that the Board would discuss creating a full day kindergarten, and eliminating the preschool program, and action would be taken.***This corrective action effectively positions the Board in full compliance with the Act. (*Id.* at pp. 10-11) *See also* August 26, 1999 Transcript at 95-96.

Upon review the record on the issue of notice, the Commissioner determines that, even though the Board may have been in technical compliance with the requirements of OPMA through its publication of an agenda including full-day kindergarten as an item of discussion (7.1 Discussion: All day kindergarten), it failed to honor the intent of the law by wording the agenda in such a way that the public could not have reasonably been expected to realize that elimination of the preschool program would be discussed as part of that item. Thus, the Board effectively precluded the public from having sufficient notice of the discussion so as to enable all interested persons to attend the meeting in question. Notwithstanding this determination, however, the Commissioner agrees with the ALJ that there is no basis upon which to grant the relief sought by petitioners to reinstate the preschool program, given that the Board took official action on October 7, 1999 to ratify an action, otherwise lawful, to discontinue the preschool (K/4) program and create a full-day kindergarten program. However, the Borough of Beach Haven Board of Education is cautioned that it must at all times and in all matters adhere to the OPMA, not just in terms of technical compliance, but also in terms of the law's intent.

Accordingly, for the reasons set forth in the Initial Decision as elaborated herein, the Board's Motion for Summary Decision is granted and the Petition of Appeal is dismissed.[*]

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

January 18, 2000

[*] 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.