

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Muhlenberg School District,	:	
Petitioner	:	
	:	
v.	:	No. 500 M.D. 2008
	:	Argued: November 17, 2008
Pennsylvania Department of Education,	:	
Respondent	:	

BEFORE: HONORABLE ROCHELLE S. FRIEDMAN, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE FRIEDMAN

FILED: November 20, 2008

Muhlenberg School District (District) has filed an “Application for Expedited Special Relief Pursuant to Pa. R.A.P. Nos. 1532(a) and 1532(b)” in connection with a petition for review filed by the District in this court’s original jurisdiction.¹ We grant the application.

¹ Pa. R.A.P. 1532 provides, in pertinent part, as follows:

(a) Special relief. At any time after the filing of a petition for review, the court may, on application ... issue a preliminary or special injunction ... or grant other interim or special relief required in the interest of justice and consistent with the usages and principles of law.

(b) Summary relief. At any time after the filing of a petition for review in an appellate or original jurisdiction matter the court may on application enter judgment if the right of the applicant thereto is clear.

The parties have filed a Joint Stipulation of Material Facts, which includes the following. The Muhlenberg Middle School currently serves 200 students more than its original designed capacity. To ameliorate the overflowing student body, the District has planned to expand and renovate the Middle School at an estimated cost of \$13 million over a sixteen-month period. In order to complete construction of essential common areas prior to the 2009-2010 school year, construction must begin in June 2009, immediately after the conclusion of the 2008-2009 school year. The District believes that it must solicit bids no later than December 2008 and award a contract no later than January 2009.

Section 751 of the Public School Code of 1949 (Code)² requires that work on school buildings exceeding \$10,000 must be done under separate multi-prime contracts, each awarded to the lowest bidder. For example, this provision would require that the District enter into separate contracts for plumbing, heating, ventilation and electrical work.

However, section 1714-B of the Education Empowerment Act (Act), 24 P.S. §17-1714-B, allows a school district to obtain a waiver of the multiple prime contractor requirement where a waiver would enable the school district to improve its instructional program or operate in a more effective, efficient or economical manner. Our supreme court has held that the requirement may be waived where a waiver would have a positive effect on safety, work scheduling and coordination, and the cost to taxpayers. *See Mechanical Contractors*

² Act of March 10, 1949, P.L. 30, *as amended*, 24 P.S. §7-751.

Association of Eastern Pennsylvania v. Department of Education, 594 Pa. 224, 934 A.2d 1262 (2007). This is known as the Mandate Waiver Program.

The District submitted to the Pennsylvania Department of Education (DOE) an application for a section 751 waiver in connection with the work on the Middle School. The District sought the waiver because: (1) the District could not complete the Middle School work within sixteen months for \$13 million if the District were required to enter into multiple prime contracts; (2) the District could save between \$100,000 and \$300,000 if the District utilized a single contractor; and (3) because much of the Middle School work would occur during the school year, it is necessary to have a high level of coordination that would be possible only with a single contractor.

In seeking the waiver, the District relied on the advice of its Project Architect, John R. Hill, AIA, who presented his recommendations to the District in a letter dated May 1, 2008. The District sent a copy of Hill's letter to the DOE with the waiver application. The DOE received the application on May 19, 2008. The DOE requested further information, which the District provided through Hill on June 9, 2008.

Section 1714-B of the Act states that the DOE shall have sixty days from receipt of a waiver application to approve, disapprove or request modification to the application, and, if the DOE fails to act within that time period, the waiver shall be deemed approved. 24 P.S. §17-1714-B(d). If the DOE disapproves, the DOE

shall transmit the basis for the disapproval to the board of school directors, which may submit a revised application for a waiver. 24 P.S. §17-1714-B(e).

By letter dated July 16, 2008, the DOE denied the application. The DOE stated:

The [DOE] has received a large volume of correspondence that has raised concerns regarding the agency's approval of mandate waivers.... In response to those concerns, the Pennsylvania General Assembly amended the statute governing the mandate waiver program to establish within the [DOE] a mandate waiver "task force" to "collect, examine and analyze data from completed school construction projects financed with State funds" and "to investigate the impact on taxpayers of mandate waivers granted for section 751 and 751.1." See 24 P.S. §17-1714B(g.1).^[3] The task force report, which is due December 9, 2008, will determine the validity of the

³ Section 1714-B(g.1) of the Act provides:

- (1) The [DOE] shall establish a task force to investigate the impact on taxpayers of mandate waivers granted for sections 751 and 751.1.
- (2) The task force shall collect, examine and analyze data from completed school construction projects financed with State funds.
- (3) The task force shall be made up of the following members....
- (4) The task force shall present its report, including any legislative recommendations, to the General Assembly and the Governor within six (6) months of the effective date of this section.

24 P.S. §17-1714-B(g.1).

reported concerns and make recommendations to the [DOE].

....

Until the [DOE] receives the results and recommendations of the task force, the [DOE] will not approve applications for waivers of sections 751 and 751.1 of the Public School Code. Accordingly, your application must be denied at this time. After the task force completes its work and makes its report to the [DOE], you may resubmit your mandate waiver application ... and the [DOE] will act on that application promptly.

The District filed a petition for review with this court, arguing that section 1714-B(g.1) of the Act does not authorize DOE to impose a moratorium on section 751 waiver applications. The parties, by stipulation, have asked this court to address: (1) whether section 1714-B(g.1) of the Act authorizes DOE to adopt and implement a moratorium on all requests for mandate waivers to sections 751 and 751.1 of the Code; and, (2) if the provision does **not** authorize a moratorium, whether the District's waiver application is deemed approved because the DOE failed to rule on its merits within sixty days.

With respect to the first issue, section 1714-B(g.1) of the Act simply establishes a task force to study the Mandate Waiver Program. The provision does not grant the DOE authority to suspend the Mandate Waiver Program laws by imposing a moratorium on waiver applications. While the task force is performing its statutory duty, the remaining provisions of the Mandate Waiver Program continue in effect. Thus, school districts may file waiver applications, and, if the DOE fails to act within sixty days, they are deemed approved.

With respect to the second issue, the DOE argues that it acted on the District's application within sixty days by denying it based on the moratorium. However, there can be no question that the DOE does not act on an application, except by reviewing and ruling on its merits. The law provides that, if the DOE disapproves an application, a school district may submit a revised application. 24 P.S. §17-1714-B(e). If the DOE denies an application based on a moratorium, without addressing the merits, school districts lose their statutory right to submit revised applications.

Accordingly, we grant the District's request for summary declaratory relief under Pa. R.A.P. 1532, concluding that the DOE improperly imposed a moratorium on waiver applications and that the waiver application submitted by the District to the DOE is deemed approved.


ROCHELLE S. FRIEDMAN, Judge

File Copy Recipient List

Addressed To: Paul N. Lalley, Esq.
Levin Legal Group
1301 Masons Mill Business Park
1800 Byberry Road
Huntington Valley, PA 19006

James M. Lillis, Esq.
Kozloff Stoudt, P.C.
2640 Westview Dr PO Box 6286
Wyomissing, PA 19610-0286

Michael Murray Monsour, Esq.
Kozloff Stoudt, P.C.
2640 Westview
Wyomissing, PA 19610

Barry Wayne Sawtelle, Esq.
Kozloff Stoudt, P.C.
2640 Westview Dr PO Box 6286
Wyomissing, PA 19610-0286

Judy Shopp, Esq.
PA Department of Education
333 Market St 9th Floor
Harrisburg, PA 17126-0333

1231 - 06/07

J. FERREE

NOV 20 2008

NEWS RM.