

[J-59-2007]
IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

ANTHONY BURGER,	:	No. 6 WAP 2005
	:	
Appellant	:	Appeal from the Order of the Court of
	:	Common Pleas of Washington County
	:	entered December 17, 2004, at No. 2001-
v.	:	562.
	:	
	:	
SCHOOL BOARD OF THE MCGUFFEY	:	
SCHOOL DISTRICT,	:	
	:	ARGUED: March 2, 2006
Appellee	:	RE-SUBMITTED: April 13, 2007

DISSENTING OPINION

MR. JUSTICE EAKIN

DECIDED: MAY 31, 2007

I dissent from the majority's conclusion that 24 P.S. § 10-1080 is not an unconstitutional restriction on the school board's removal authority under Article VI, § 7 of the Pennsylvania Constitution.

Although the Public School Code is comprehensive, and the legislature may have intended to prevent removal of a school superintendent absent due process and specific misconduct by the superintendent, the effect of § 10-1080 is to impose a limitation on a constitutionally created power. The majority relies on the fact the position of superintendent is created by statute, and Article VI, § 1 authorizes the legislature to enact provisions governing appointment and removal. See Majority Slip Op., at 14; but see Suerman v. Hadley, 193 A. 645, 651 (Pa. 1937) (removal power granted by Article

VI, § 4, precursor to Article VI, § 7, is exclusive and applies to any public office, whether state or municipal, appointed under Constitution or under legislative authority). However, although the board is also created by statute, its removal power is conferred by the Constitution; therefore, any conflicting statutory provisions may not stand. See In re Petition to Recall Reese, 665 A.2d 1162, 1164 (Pa. 1995) (legislation's presumption of constitutionality can be rebutted where statute clearly, palpably, and plainly violates Constitution).

Turning to the language of Article VI, § 7, the majority reads the phrases "behave themselves well while in office" and "on conviction of misbehavior in office or of any infamous crime" as imposing an affirmative limitation on the board's removal power, *i.e.*, the board may only exercise its removal power if the superintendent "misbehaves." See Majority Slip Op., at 9. However, I interpret this language not as a restriction upon the board's removal power, but rather as merely a condition imposed upon the appointee, who will certainly be removed for misconduct while in office. In addition to being removed for misbehavior while in office, the appointee may also be removed at the sole discretion of the board. Article VI, § 7 provides the appointing authority (the board) may remove the appointed authority (the superintendent) at its pleasure; to read circumstantial limitations into this broad grant of removal power is to eviscerate the constitutional grant of authority. The majority's interpretation nullifies the meaning of "at the pleasure of the [appointing] power," Pa. Const. art. VI, § 7, and permits the legislature to qualify the Constitution's absolute grant of removal power.¹

¹ The majority opines "an officer cannot be removed for an unconstitutional reason, such as a decision premised upon the race or gender of the officer." Majority Slip Op., at 10. Such reasoning not only dilutes the meaning of the phrase "at the pleasure of," but also suggests an issue which is not before us.

This Court's decision in Buell v. Union Township School District, 150 A.2d 852 (Pa. 1959), is analogous. There, we held a school district's secretary and treasurer were "appointed officers" within the meaning of Article VI, § 4 of the Constitution,² which provided: "Appointed officers, other than judges of the courts of record and the Superintendent of Public Instruction, may be removed at the pleasure of the power by which they shall have been appointed." Buell, at 854 (quoting Pa. Const. art. VI, § 4). Therefore, these officers were removable at the pleasure of the board, and we held the following provision of the School Code of 1949 was unconstitutional:

The board of school directors in any school district, ... shall after due notice, giving the reasons therefor, and after hearing if demanded, have the right at any time to remove any of its officers ... for incompetency, intemperance, neglect of duty, violation of any of the school laws of this Commonwealth, or other improper conduct.

Id. (quoting Act of March 10, 1949, P.L. 30, art. V, § 514, 24 P.S. § 5-514).

Here, the constitutional provision and legislative enactment are nearly identical to those in Buell. Tellingly, the language exempting the "Superintendent of Public Instruction" from the appointing power's absolute removal authority has been excised from the current constitutional provision. I would hold, as in Buell, that the School Code provision at issue conflicts with the constitutional grant of unfettered discretion to the board and is thus invalid. Any other reading gives no meaning to the constitutional provision and eliminates a statutory scheme.

Accordingly, I would affirm, holding § 10-1080 unconstitutionally restricts the board's removal power under Article VI, § 7, and the trial court lacked jurisdiction to

² The text of Article VI, § 7 is similar to that of original Article VI, § 4, as it read in 1874; Article VI, § 4 was renumbered in 1966 as present Article VI, § 7.

review the board's exercise of this power. Therefore, I respectfully dissent. I join the majority's disposition regarding consideration of appellant's ancillary issue.

Mr. Chief Justice Cappy joins this opinion.