

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Carbondale Area School District, :
Petitioner :
 :
v. : No. 1919 CD 2007
 : Argued: April 7, 2008
Fell Charter School, :
Respondent :

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE DAN PELLEGRINI, Judge
HONORABLE MARY HANNAH LEAVITT, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE PELLEGRINI

FILED: May 13, 2008

The Carbondale Area School District (School District) appeals an order of the State Charter School Appeal Board (CAB) reversing the Board of School Directors' (Directors) denial of its application to renew the charter of the Fell Charter School (Fell School). In its appeal, it argues that the CAB lacked substantial evidence, failed to specifically articulate its reasons for disagreeing with the findings of the School District, improperly considered testimony, and violated the Sunshine Act.¹ For the following reasons, we affirm.

In 2002, the Fell School was granted a charter for five years. Because the five-year term was set to expire in October 2006, the Fell School filed an application with the School District to renew its charter. In December 2006, the Superintendent of the School District sent a Notice of Revocation/Non-Renewal

¹ 65 Pa. C.S. §§701-716.

(Notice) to the Fell School Board of Trustees denying the renewal of the charter pursuant to Section 1729-A of the Charter School Law (CSL), 24 P.S. §17-1729-A.² The Notice enumerated 86 allegations and stated that the Fell School had materially violated the terms of its charter because it failed to meet the education and performance standards set forth in its charter,³ it failed to meet generally

² Act of March 10, 1949, P.L. 30, §17-1729-A, *as added by* the Act of June 19, 1007, P.L. 225, 24 P.S. §17-1729-A. That section provides as follows:

(a) During the term of the charter or at the end of the term of the charter, the local board of school directors may choose to revoke or not to renew the charter based on any one of the following:

(1) One or more material violations of any of the conditions, standards or procedures contained in the written charter signed pursuant to section 1720-A.

(2) Failure to meet the requirements for student performance set forth in 22 Pa. Code Ch. 5 (relating to curriculum) or subsequent regulations promulgated to replace 22 Pa. Code Ch. 5 or failure to meet any performance standard set forth in the written charter signed pursuant to section 1716-A.

(3) Failure to meet generally accepted standards of fiscal management or audit requirements.

(4) Violation of the provisions of this article.

³ The performance deficiencies noted were that the Fell School operated without a business manager; failed to have enough members on the Board of Trustees; failed to have sufficient enrollment numbers; failed to spend more money on education than on support services; failed to have a spanish teacher; failed to have a program facilitator for math and technology; failed to have individualized personalized learning plans; failed to use constructivist teaching practices; tracked students by ability; failed to have extensive access to computer technology; failed to “loop” teachers (looping involves students having the same teachers for grades K-2, 3-5 and so on); failed to offer foreign language instruction; failed to teach dance and theater or expose the students to a professional artist/educator; failed to have a media arts program; failed to have mentoring and tutoring programs; and failed to ensure that all students who have attended the Fell School for five years performed at grade level or beyond.

acceptable standards of fiscal management,⁴ it violated provisions of the CSL and other applicable laws,⁵ and these failings justified non-renewal of the charter. After hearings were held, the Directors voted not to renew the Fell School's charter and adopted all of the proposed findings of fact and conclusions of law submitted by the School District. The Fell School appealed the decision not to renew its charter to the CAB in April 2007.

Before the CAB, the Fell School also made a motion to supplement the record to highlight changes which had occurred within the Fell School after the renewal hearings, including the affidavit of Mary Jo Walsh (Walsh), the principal. The affidavit from the Fell School was accepted into evidence and indicated that it had paid its applicable taxes, that the tax lien entered against it was a mistake and that the lien had been resolved, that the criminal background checks of employees

⁴ The financial deficiencies noted were that the Fell School failed to keep basic financial records of the Fell School on site; failed to provide the School District with its audit for 2006 in a timely fashion; failed to make principal payments on Notes Payable that the Fell School entered with Mosaica Education, Inc., which totaled more than \$1,000,000; allowed the deficit to grow by over \$175,000 between 2004 and 2005; overspent its budget between 2004 and 2005 by \$178,593; and failed to provide evidence to the School District that a tax lien filed by the Department of Revenue had been withdrawn.

⁵ The Notice alleged that the Fell School violated the CSL and other applicable laws because employee complement of the Fell School did not meet the certification requirements of the CSL; the Fell School's personnel files contained various irregularities; some teachers did not hold a bachelor's degree in the subjects they taught as required by federal law; there were some employees who did not have proof of criminal and/or child abuse background checks as required by law; and at least 75 percent of the Fell School's professional employees lacked the proper state certifications required by the CSL.

had been made and that the Board of Trustees now had five trustees. Although the School District objected to the Fell School's motion, it was granted by the CAB.⁶

In August 2007, at a public meeting with a quorum present, the CAB voted unanimously to grant the renewal of the charter and reverse the decision of the Directors. At the close of the hearing, the Chairman of the CAB announced that the CAB's counsel would prepare a written decision based on the vote taken at the public meeting, and that such a decision would be mailed to the parties. On September 19, 2007, the CAB issued a written decision setting forth 21 findings of fact and 15 conclusions of law. In its discussion, the CAB found that the School District did not present compelling evidence of material violations of the conditions, standards or procedures in the charter and rejected the Directors' findings regarding the organizational⁷ and financial deficiencies⁸ of the Fell School as well as problems with its educational program.⁹

⁶ The School District also submitted a motion to supplement the record to the CAB, which was not opposed by the Fell School. The motion sought to supplement the record with minutes from the Fell School's March 12, 2007 Board of Trustees meeting which were not available at the time the record closed. The minutes indicated that the Fell School had terminated its only spanish language teacher for all grades, K-10, as of March 1, 2007, and was relevant because the Fell School's charter required that it provide foreign language instruction to all students. The CAB granted the motion.

⁷ The CAB rejected the findings of organizational deficiencies as rising to the level of a material violation because the Fell School had no control over public disinterest in serving on the Board of Trustees and periodic vacancies and/or members serving longer terms did not rise to the level of a material violation; it rejected the Directors' finding that at least 75 percent of the professional staff members of the Fell School did not hold appropriate state certification because Level I certificates were valid for actual years of professional service as an educator, not for calendar years, and that only the Bureau of Teacher Certification and Preparation could determine the validity of a certificate and no evidence was presented that it had determined that the certificates were invalid; it rejected the Directors' finding that the Fell School had violated **(Footnote continued on next page...)**

The CAB then held that the Directors did not have a sufficient legal basis to deny the Fell School's request for renewal of its charter because the evidence did not support the findings that the Fell School had materially violated the terms of the charter, failed to meet generally accepted standards of fiscal

(continued...)

the Certification Staffing Policy Guideline because the appropriate job descriptions existed and all employee files contained their job descriptions; and, while the Fell School was not in compliance with the requirements regarding background clearance at the time of the hearings, it was in compliance when it appeared before the CAB; therefore, the earlier non-compliance was not fatal to the Fell School's renewal application.

⁸ In discussing the alleged failures to meet generally accepted standards of fiscal management, the CAB disagreed with the Directors' finding that the Fell School did not meet such standards. While the Fell School operated at a deficit during its first three years, it was now operating in the black, and evidence indicated that the Fell School had paid all of its applicable taxes, liens and notes. Therefore, the CAB found that the Fell School had not violated standards of fiscal management.

⁹ Regarding problems with its education programs, the CAB found that Fell School was acting in accord with its charter even though mentoring and tutoring programs were not currently offered due to a lack of interest in such programs because such programs would be offered if requested; the students were grouped under a flexible group model, with ability being only one of the factors considered and, therefore, students were not tracked solely by ability; personalized learning plans were in place and the record established that integrated learning systems were used in the Fell School; the lack of a spanish teacher was not a material violation because the Fell School hired a spanish teacher but later had to terminate the individual for incompetence and insubordination and was currently searching for a qualified instructor. As to the lack of looping and the division of the school into smaller houses, the CAB found that they were not material violations because the Fell School stated that such changes would occur as its financial position improved. The CAB rejected the Directors' final reason for failing to renew the Fell School's charter, that it was not in compliance with federal and state law concerning the provision of special education services to disabled children, because on February 16, 2006, the Director of the Bureau of Special Education wrote a letter commending the Fell School for resolving areas of non-compliance and for being in complete compliance with the applicable special education laws. Additional concerns that the Fell School was not meeting its goals were discussed and dismissed by the CAB.

management, violated provisions of the CSL, or violated federal and state laws regarding special education services. The School District then appealed to this Court.¹⁰

I.

A.

On appeal, the School District contends that the CAB's process in reviewing its application was flawed. First, it argues that the CAB erred by failing to address each and every finding that the Directors made in support of revocation/non-renewal. In reviewing the decision of a school district's denial of an application for the renewal of a school charter, the CAB is not bound by the school district's findings since it may substitute its own findings and judgment for that of the local school board. *West Chester Area School District v. Collegium Charter School*, 760 A.2d 452 (Pa. Cmwlth. 2000). Moreover, even if it adopts a school district's findings, the CAB has independent judgment to determine whether those findings put forward facts that are sufficiently serious or material to cause the non-renewal of a school's charter. *School District of the City of York v. Lincoln Charter School*, 889 A.2d 1286 (Pa. Cmwlth. 2006). The CAB's only requirement is to articulate rational reasons as to why it did not follow a school district's

¹⁰ The CAB is the administrative agency charged with exclusive review of an appeal of a local school board's decision to revoke or not renew a charter, and their review is *de novo*. *Montour School District v. Propel Charter School – Montour*, 889 A.2d 681 (Pa. Cmwlth. 2006). Accordingly, our scope of review is limited to determining whether the adjudication is in violation of constitutional rights, is not in accordance with law, or is not supported by substantial evidence. *Ronald H. Brown Charter School v. Harrisburg City School District*, 928 A.2d 1145 (Pa. Cmwlth. 2007).

decision. 24 P.S. §17-1729-A(d).¹¹ See also *Keystone Central School District v. Sugar Valley Concerned Citizens*, 799 A.2d 209 (Pa. Cmwlt. 2002).

In satisfying the requirement that it articulate reasons why it reversed a school district's determination, the CAB does not have to engage in a line-by-line analysis of each of the district's findings and decisions; all that it needs to do is explain why it refused to follow the school district's determination. In this case, the CAB fulfilled its duty to provide a written opinion rationally explaining why it disagreed with the findings of the Directors and why it believed that no material violations of the Fell School's charter or the CSL had occurred.

B.

The School District next contends that the CAB capriciously disregarded its evidence because if it had not, it would have no choice but to affirm the Directors' decision not to renew the Fell School's charter. In *Hinkle v. City of Philadelphia*, 881 A.2d 22, 27 (Pa. Cmwlt. 2005), we explained:

¹¹ 24 P.S. Sec. 17-1729-A(d) provides, in relevant part:

The appeal board shall have the exclusive review of a decision not to renew or revoke a charter. The appeal board shall review the record and shall have the discretion to supplement the record if the supplemental information was previously unavailable. The appeal board may consider the charter school plan, annual reports, student performance and employee and community support for the charter school in addition to the record. *The appeal board shall give due consideration to the findings of the local board of directors and specifically articulate its reasons for agreeing or disagreeing with those findings in its written decision.* (Emphasis added.)

“Capricious disregard” [standard] . . . is just another name for the agency abusing its discretion and is an error of law when the agency fails to give an indication that it has examined countervailing substantive testimony that had to be considered at arriving at its decision.

The capricious disregard standard then is nothing more than a shorthand way of referring to an amalgam of existing overlapping legal and constitutional standards mentioned above that safeguard against arbitrariness by state and local administrative agencies by requiring a meaningful explanation of why the losing party’s overwhelming evidence was not accepted.

Simply put, all capricious disregard guarantees is that an agency will not be arbitrary and that it will provide a meaningful explanation of why one party prevailed. In this case, the CAB did not capriciously disregard anything, and its decision discussed all the relevant evidence from both sides and rationally explained why it disagreed with the Director’s decision not to renew the charter.

C.

The School District then contends that the CAB improperly considered the affidavit of Walsh, the Fell School principal, because the Fell School had the opportunity to introduce her testimony during the hearings before the Directors in February 2007.

Under the CSL, the CAB has the discretion to supplement the record with information previously unavailable. 24 P.S. §27-1729(A)(d).¹² Walsh had testified at the February 2007 hearing before the Directors that the Fell School had paid its taxes, and that the filing of the lien had been in error. The contested affidavit merely corroborated her testimony that the Department of Revenue had issued a statement of account on February 21, 2007, that showed that the Fell School had a zero balance for taxes owed. This letter would have been unavailable at the time of the hearing and merely supplemented information that was already in the record. Further, the part of the affidavit concerning the membership of the Board of Trustees was unavailable at the time of the hearing because it dealt with the number of Trustees “presently” or at the time the affidavit was made serving on the Board. In any event, the Board did not rely on that portion of the affidavit in arriving at its decision. Under the CSL, the CAB’s power to supplement the record is discretionary, and the scope of judicial review for such discretionary power is to determine whether there has been a flagrant abuse of discretion. *City of Scranton v. Bureau of Workers’ Compensation*, 787 A.2d 1094 (Pa. Cmwlth. 2001). We find no abuse of discretion in the CAB’s decision to supplement the record with previously unavailable information that merely corroborated or explained evidence already in the record.

¹² That section provides in relevant part: “[t]he appeal board shall review the record and shall have the discretion to supplement the record if the supplemental information was previously unavailable.”

D.

Even though the CAB voted at a public meeting to sustain the Fell School's appeal, the School District contends that the decision was invalid because the written opinion supporting that decision was not adopted at a public meeting. It maintains that the CAB's decision must be adopted and issued at a public meeting under Section 704 of the Sunshine Act, 65 Pa. C.S. §703, which provides that "official action and deliberations by a quorum of the members of an agency shall take place at a meeting open to the public."

While it is true that all formal or official actions of a board or other administrative agency are required to be in public under the Sunshine Act, the writing itself need not be issued at a public meeting as that term is defined in the Sunshine Act, because the writing itself is not an "official action." 65 Pa. C.S. §703.¹³ *Piecknick v. South Strabane Township*, 607 A.2d 829 (Pa. Cmwlth. 1992). Under the Sunshine Act, the important occurrence is the voice vote of a board's members at a public meeting. *See Bruno v. Zoning Board of Adjustment of City of Philadelphia*, 664 A.2d 1077 (Pa. Cmwlth. 1995). In the present case, it is not contested that the CAB's discussion and vote took place at a public meeting. The condition that the writing itself be adopted at a public meeting is not a requirement

¹³ 65 Pa. C.S. §703 defines "official action" as:

- (1) Recommendations made by an agency pursuant to statute, ordinance or executive order.
- (2) The establishment of policy by an agency.
- (3) The decisions on agency business made by an agency.
- (4) The vote taken by any agency on any motion, proposal, resolution, rule, regulation, ordinance, report or order.

under the Sunshine Act and, therefore, no violation of the Sunshine Act's provisions occurred.

E.

The School District also contends that the CAB erred when it concluded that the School District was required to produce “compelling” evidence to substantiate its reasons for non-renewal of the Fell School’s charter.¹⁴ The Fell School contends that the CAB has used a “compelling” standard in other cases, *see e.g. Renewal Application of the Lincoln Charter School*, CAB 2005-3, and has likened “compelling” evidence to the “clear and convincing proof” standard used in some civil proceedings. We have stated that the standard or burden of proof in civil proceedings is based upon the level of concern regarding the degree of accuracy in the findings made by the finder of fact. *See Suber v. Pennsylvania Commission of Court and Delinquency*, 885 A.2d 678 (Pa. Cmwlth. 2006). In this case, we need not determine whether an appeal of a renewal of a school charter requires “compelling evidence” because the CAB’s use of “compelling” in this context indicates that the evidence was not sufficient to lead to a legal conclusion that material violations of the Fell School’s charter, the CSL or other laws existed that would justify the non-renewal of the charter.¹⁵

¹⁴ The School District contends, for a multitude of reasons, that there was not substantial evidence to support the CAB’s decision to grant the Fell School’s charter renewal. Other than evidence that was supplemented, the CAB generally accepted the Directors’ fact-finding, but disagreed with the legal conclusions the Directors drew from that evidence by determining that the evidence did not support a finding that a material violation of the charter had occurred.

¹⁵ The School District contends that the CAB erroneously concluded that the Fell School improperly calculated the certification percentages of the Fell School’s staff and improperly determined that some of the teachers’ certificates had lapsed. However, under 22 Pa. Code **(Footnote continued on next page...)**

Accordingly, the order of the CAB is affirmed.

DAN PELLEGRINI, JUDGE

(continued...)

§49.82, an Instructional I Certificate is valid for six years of teaching, and the validity period is determined based on years of active teaching rather than on calendar years from the date of issue. *Pointek v. Elk Lake School District*, 360 A.2d 804 (Pa. Cmwlth. 1976). The CAB, therefore, properly determined that at least 75 percent of the Fell School's staff had the required certifications.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Carbondale Area School District, :
Petitioner :
 :
v. : No. 1919 CD 2007
 :
Fell Charter School, :
Respondent :

ORDER

AND NOW this 13th day of May, 2008, the September 19, 2007
Order of the State Charter School Appeal Board is affirmed.

DAN PELLEGRINI, JUDGE