[J-124-2007]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF EDUCATION	:	No. 42 MAP 2007
	:	Appeal from the Orders of the Commonwealth Court, dated April 16, 2007 and April 17, 2007 at No. 496 MD 2005
v.	:	
THE EMPOWERMENT BOARD OF CONTROL OF THE CHESTER-UPLAND SCHOOL DISTRICT, MEMBERS MARK WOOLEY, ESQUIRE, KATHY SCHULTZ AND JUAN BAUGHN, SUBSTITUTED RESPONDENTS	:	Application for Supersedeas
CHESTER-UPLAND SCHOOL DISTRICT, SPECIAL BOARD OF CONTROL, MICHAEL F. X. GILLIN, B. GRANVILLE LASH AND ADRIENE M. IRVING	:	
APPEAL OF: CHESTER-UPLAND SCHOOL DISTRICT SPECIAL BOARD OF CONTROL, MICHAEL F.X. GILLIN, AND WALLACE H. NUNN	:	

CONCURRING OPINION

MR. JUSTICE BAER **DECIDED: December 27, 2007**

The Majority couches its ruling vindicating the Secretary of Education's dissolution of the School District Special Board of Control ("SBOC") in this case in "[1] the deference to be given to an agency's interpretation of statutes . . . [2] the fact that

the Department of Education is to administer the [Public School Code[1]], and [3] the broad discretion granted to the secretary under the financial distress statutes." Maj. Slip Op. at 14-15. While I agree that the Secretary enjoys a great deal of latitude in administering the Code, I do not believe that his interpretations of his mandate in this case, or any administrative interpretations forwarded for the first time in connection with adversarial litigation, are entitled to any more weight than any other litigant's argument in support of its position.

The United States Supreme Court, in its extensive precedent concerning judicial deference to administrative interpretations of ambiguous enabling statutes, see, e.g., Chevron USA, Inc., v. Natural Res. Def. Council, 467 U.S. 837 (1984), has recognized the dangers of deferring to interpretations developed in anticipation of litigation. In Bowen v. Georgetown Univ. Hosp., 488 U.S. 204 (1988), the Court declined to defer to an agency interpretation "wholly unsupported by regulations, rulings, or administrative practice," and forwarded for the first time in connection with litigation, on the basis that "Congress has delegated to the administrative official and not to appellate counsel the responsibility for elaborating and enforcing statutory commands." Id. at 212 (quoting Investment Co. Inst. v. Camp, 410 U.S. 617, 628 (1971)).

These same concerns find their expression in this case. The record reveals nothing so much as the bitter acrimony that has characterized the proceedings below, and discloses no prior interpretation supporting the position now forwarded by the Secretary. The parties' agendas do not concern me, nor should they, but privileging the Department's interpretation of the Code under such circumstances is to put a thumb on the scales of justice based not on the soundness of the parties' argument but rather

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[1] Public School Code of 1949, Act of Mar. 10, 1949, Pub. L. 30, art. I, § 101, as amended, 24 P.S. §§ 1-101, *et seq.*

their identities. See id. at 212 ("Deference to what appears to be nothing more than an agency's convenient litigating position would be entirely inappropriate.").

These considerations, however, are not dispositive in this case because one need look no further than the Code's plain language to reach the same outcome as the Majority. Sections 6-691 and 6-692 of the Code plainly vest the Secretary with discretion to create an SBOC when he deems it necessary following a "proper investigation of the district's financial condition." Notably, even where the Secretary of Education finds one or more of the seven criteria listed in § 6-691 to be satisfied, the Code merely authorizes -- but does not require -- the Secretary, in his judgment, to form an SBOC. Nothing could more clearly demonstrate the General Assembly's intent to grant the Secretary of Education broad discretion to identify and address non-functioning school districts than a statute that depends so heavily for its effectuation on the Secretary's judgment.

An implicit corollary to the Secretary's broad authority to convene an SBOC is the equal and opposite power to dissolve it. See PA. CONST. art. VI, § 7 ("Appointed civil officers . . . may be removed at the pleasure of the power by which they shall have been appointed."). While it is true that § 6-692 prohibits mid-term removal of SBOC members except upon "clear and convincing evidence of malfeasance or misfeasance in office," it also provides that an SBOC will assume control of a school district "during the period necessary to reestablish a sound financial structure in the district." It cannot be the case that an SBOC must remain convened for as many as five years beyond its necessity. Moreover, there is no reason why dissolution of an SBOC *in toto* should require more or less than its creation when the Code does not so provide. The determination of when a "sound financial structure" has been restored to an afflicted

school district must lie, as does the prior authority to convene an SBOC, with the Secretary.

These caveats aside, I agree with the Majority that Judge Colins' factual determinations should not be disturbed where the record bears them out, and under the foregoing analysis those findings are sufficient to support the same disposition. In all other respects not mentioned above, I join the Majority Opinion.

Mr. Justice Saylor joins this concurring opinion.