

EDU #11871-93
C # 140-95
SB # 62-95

DONALD WOLLMAN, :
 :
 PETITIONER-APPELLANT, :
 :
 V. : STATE BOARD OF EDUCATION
 :
 BOARD OF EDUCATION OF THE CITY : DECISION
 OF TRENTON, MERCER COUNTY, :
 :
 RESPONDENT-RESPONDENT. :
 _____ :

Decided by the Commissioner of Education, May 3, 1995

For the Petitioner-Appellant, Robert M. Schwartz, Esq.

For the Respondent-Respondent, Sumners, Council, George & Dortch
(Thomas W. Sumners, Jr., Esq., of Counsel)

The basic facts herein are not in dispute. Donald Wollman (hereinafter "petitioner") began his employment with the Board of Education of the City of Trenton (hereinafter "Board" or "Trenton Board") in January 1987 as the Assistant Manager of Safety and Loss Control and Custodians. In July 1992, petitioner's title was changed to Assistant Director of Buildings and Grounds.

On May 7, 1993, the Board consented to an administrative order issued by the Commissioner of Education appointing a Fiscal Monitor "to oversee and control the fiscal operations" of the Board. That order provided the Fiscal Monitor with the authority, in consultation with the County Superintendent and the Assistant

Commissioners of Finance and Urban and Field Services, to make budgetary changes as deemed necessary in order to assure that the district had adequate fiscal and technical resources to address the deficiencies identified in Level II monitoring; veto any expenditure of funds submitted to the Board for approval; veto personnel actions; contract with outside auditors or accounting firms; order the training, evaluation, appointment or reassignment of Board employees under the supervision of the Board secretary or school business administrator; direct and supervise Board employees under the supervision of the Board secretary or school business administrator; and terminate or promote such employees without approval of the Board but in accordance with applicable contractual or statutory procedures.

On October 5, 1993, the Fiscal Monitor, acting on the basis of a proposal by a public accounting firm she had retained, submitted a resolution to the Board recommending that the Buildings and Grounds Department be reorganized and that petitioner's position as Assistant Director of Buildings and Grounds be abolished effective October 15. The resolution was presented to the Board as a recommendation from the Fiscal Monitor, and included signature lines for the president of the Board and the Board's acting secretary. The Board, however, neither moved to adopt that resolution nor passed a resolution approving such action. Nor did it take independent action to abolish petitioner's position. Nonetheless, his position was, in fact, eliminated on October 15.

On November 1, 1993, the public accounting firm retained by the Fiscal Monitor issued a written report, "Review of the Building & Grounds Department," in which it proposed, inter alia, that petitioner's position be abolished and replaced with two new

coordinator positions in order to improve efficiency and control of daily operations. On November 18, 1993, the Board adopted a resolution accepting the accounting firm's proposal and supporting the implementation of that proposal by the Fiscal Monitor.

On November 3, 1993, petitioner filed the instant petition with the Commissioner alleging that his position had been improperly abolished. Petitioner contended that the Board's failure to adopt a formal resolution abolishing his position pursuant to N.J.S.A. 18A:28-9 had rendered the Fiscal Monitor's action ultra vires. Petitioner further contended that, as a veteran, he was entitled to a hearing pursuant to N.J.S.A. 38:16-1 before his employment could be terminated.

On March 17, 1995, following a hearing, an Administrative Law Judge ("ALJ") concluded that petitioner had failed to demonstrate that the abolishment of his position was arbitrary, capricious or taken in bad faith. The ALJ found that the Commissioner had not acted improperly in appointing a Fiscal Monitor, and that the Fiscal Monitor's authority to abolish positions for reasons of efficiency could reasonably be inferred from the "scope of powers conferred by the order and the existence of the power to terminate." Initial Decision, slip op. at 14. He further found that the Commissioner's authority was sufficiently broad to encompass the appointment of a Fiscal Monitor with the power to abolish positions and terminate employees. He noted that, while not necessary, the Board had authorized the Fiscal Monitor's action by formally adopting the accounting firm's recommendation.

The ALJ also rejected petitioner's contention that, as a veteran, he had been entitled to a hearing. The ALJ observed that N.J.S.A. 38:16-1 contemplated a hearing

only when the employee's conduct was at issue, and not prior to the abolishment of a position. He therefore recommended dismissing the petition.

On May 3, 1995, the Commissioner adopted the ALJ's recommended decision and dismissed the petition. The Commissioner agreed that the Fiscal Monitor had acted in accordance with her authority when she eliminated petitioner's position, and that petitioner had failed to demonstrate that the abolishment of his position was arbitrary, capricious or taken in bad faith.

Petitioner filed the instant appeal to the State Board.

After a thorough review of the record, we reverse the determination of the Commissioner to dismiss the petition. Unlike the Commissioner, we conclude that the authority of the Fiscal Monitor to abolish positions without the approval of the Trenton Board cannot reasonably be inferred from the terms of the administrative order. However, we find that petitioner's entitlement to back pay as the result of the improper abolishment of his position by the Fiscal Monitor is limited to the period between October 15, 1993 and November 18, 1993.

A review of the petition of appeal which resulted in the administrative order at issue herein is instructive. That petition, which was filed against the Trenton Board in April 1993 by the Assistant Commissioners of Finance and Urban and Field Services, indicated that an External Review Team had identified multiple deficiencies in the fiscal management of the district. The petitioners therein alleged that the Board's 1992-93 budget was lacking in detail, frustrating any attempt to determine whether the sums appropriated therein were sufficient to enable the Board to carry out its Level II Corrective Action Plan, and that its 1993-94 budget could not be approved because the

documentation provided in support thereof was insufficient to provide a basis for evaluation. The petitioners further alleged that an External Auditor had found that the purchasing system utilized by the Board was archaic, cumbersome and in violation of statute, code and good school management practice. The External Auditor also found that the Board's payroll system was rife with errors. Nor had the Board made provision to switch its accounting procedures to Generally Accepted Accounting Principles in 1993-94 as required by statute. The External Auditor also indicated that the district lacked adequate supervision of several departments, including Buildings and Grounds. Petitioners alleged that without immediate implementation of processes to establish a sound fiscal management system, the Board would not be able to implement its Corrective Action Plan and provide a thorough and efficient education for its students. They therefore sought an order appointing a Fiscal Monitor to assume control and supervision of all fiscal operations of the district.

Our review of the petition and resultant order leads us to conclude that the authority to abolish positions without Board approval cannot reasonably be inferred from the scope of powers conferred on the Fiscal Monitor. The intent of the administrative order, as set forth in the petition of appeal, was to assume control of the district's fiscal operations, thereby addressing deficiencies in the fiscal management of the district and implementing processes for the establishment of a sound fiscal management system. In furtherance of that objective, and in view of the allegation that the district lacked adequate supervision of its Buildings and Grounds department, the order provided the Fiscal Monitor with the authority to direct and supervise employees in that department and to terminate or promote such employees without approval from

the Board. The petition did not seek and the order did not provide the Fiscal Monitor with unrestricted control over the district's operations and structure.

Nor do we find that such authority can reasonably be inferred from the provision in the order authorizing the Fiscal Monitor to "terminate or promote any board of education employees under the supervision of the board secretary or school business administrator without approval of the board of education...." The authority to "terminate or promote" expressly involves individual employees under the Fiscal Monitor's supervision; the authority to abolish positions involves control of the district's organizational structure. This is not a distinction without a difference. The Fiscal Monitor's authority to terminate or promote individual employees under her supervision without the approval of the Board cannot, in itself, be read to abrogate the Board's jurisdiction over the district's general organization. Moreover, the use of the word "promote" in conjunction with "terminate" reinforces our belief that the intent of such provision was to permit the Fiscal Monitor to take appropriate personnel action with regard to those employees under her supervision without the necessity for seeking approval from the Board, rather than to eliminate entire positions without approval.

Thus, while the Fiscal Monitor had express authority under the terms of the administrative order to terminate petitioner's employment without the approval of the Board, we agree with petitioner that the Fiscal Monitor did not have authority, express or implied, to abolish his position without approval. As a result, such action was ultra vires.¹

¹ Contrast Dearden v. Board of Education of the City of Trenton, decided by the Commissioner of Education, August 2, 1995, aff'd by the State Board of Education, February 7, 1996, aff'd, Docket #A-4151-95-T5 (App. Div. 1997), in which the Trenton Board adopted a formal resolution accepting the

We turn therefore to consideration of the remedy to which petitioner is entitled as a result of such action. Although petitioner's position was improperly abolished without Board approval on October 15, 1993, the Board, as previously noted, formally adopted a resolution on November 18, 1993 accepting the accounting firm's proposal, which included a recommendation that petitioner's position be abolished. Thus, while we find that the October 15 abolishment of petitioner's position was ultra vires, the Board did thereafter take action to ratify a proposal to abolish that position.

Consequently, we reverse the Commissioner's determination to dismiss the petition and direct the Board to compensate petitioner for his back pay and other emoluments, less mitigation, for the period between October 15, 1993, the effective date of the abolishment of his position by the Fiscal Monitor, and November 18, 1993, when the Board formally acted to abolish his position. In so doing, we reject, for the reasons well expressed by the ALJ and adopted by the Commissioner, petitioner's contention that, as a veteran, he was entitled to a hearing pursuant to N.J.S.A. 38:16-1 et seq. before his position could be abolished. Nor has petitioner demonstrated that the Board abolished his position for the purpose of terminating his services. N.J.S.A. 38:16-3.

Donald C. Addison, Jr., abstained.

Attorney exceptions are noted.

January 7, 1998

Fiscal Monitor's recommendation to abolish Mr. Dearden's position as part of a reorganization of the district's business office. We found it unnecessary in that case to pass upon the Fiscal Monitor's

Date of mailing _____

authority since it was the action of the Board, rather than of the Fiscal Monitor, which was being challenged.