



No. 17050

The University of the State of New York

The State Education Department

Before the Commissioner

Appeal of JOHANNES C. WILLE from action of the Board of Education of the Katonah-Lewisboro Union Free School District regarding the creation of a reserve fund.

Ingerman Smith, LLP, attorneys for respondent, Mary Anne Sadowski, Esq., of counsel

Petitioner appeals the action of the Board of Education ("board" or "respondent") of the Katonah-Lewisboro Union Free School District ("district") in creating a reserve fund for litigation liabilities. The appeal must be sustained in part.

The record indicates that the board budgeted funds in the 2012-2013 school year to pay for potential liabilities arising from litigation related to special education matters. Thereafter, the board requested that the district's special education counsel identify potential settlements for the 2012-2013 school year and preceding school years. Counsel identified potential settlements in the aggregate amount of \$1,185,000. Prior to the close of the 2012-2013 school year, on June 30, 2013, the board journaled this amount as an account payable in the event any litigation settled as budgeted for in the 2012-2013 school year budget.

The board thereafter estimated revenues and expenses, and on August 5, 2013, set the tax levy necessary to support the district's budget for the 2013-2014 school year. After the tax levy for the 2013-2014 school year had been established, an external audit of the district's 2012-2013 fiscal records was completed. The external

auditors advised the board that the potential settlement funds should have been recorded in a liability reserve, rather than being journaled as an account payable.

Accordingly, on September 12, 2013 - 74 days after the 2012-2013 school year ended - the board retroactively created a "Reserve for Liability Claims fund" in the 2012-2013 budget in the amount of \$808,500 (the "Liability Fund").

Petitioner commenced this appeal contending that the board violated Real Property Tax Law ("RPTL") §1318(1) because the \$808,500 actually comprised unexpended funds from the 2012-2013 school year and, therefore, a budget surplus that should have been applied to reduce the 2013-2014 tax levy. He seeks to dissolve the Liability Fund and have the moneys applied to reduce the 2013-2014 tax levy. Petitioner also requests that the board be ordered to follow the law with respect to its accounting practices and calculation of tax levies.

The board contends that the appeal should be dismissed as untimely. The board denies that it acted improperly, asserting that the Liability Fund was not created with "surplus" money but, rather, from funds that were earmarked as expenditures in the 2012-2013 budget.

I must first address certain procedural issues before discussing the merits of petitioner's appeal. An appeal to the Commissioner must be commenced within 30 days from the making of the decision or the performance of the act complained of, unless any delay is excused by the Commissioner for good cause shown (8 NYCRR §275.16; Appeal of Lippolt, 48 Ed Dept Rep 457, Decision No. 15,914; Appeal of Williams, 48 id. 343, Decision No. 15,879). The board argues that the appeal is untimely because it was commenced on June 5, 2014, well more than 30 days after both the end of the 2012-2013 school year on June 30, 2013, and the September 12, 2013 date on which the board created the Liability Fund.

To the extent petitioner challenges the legality of the board resolution establishing the Liability Fund, pursuant to Education Law §1709(8-c), the appeal must be dismissed as untimely. The board resolution was adopted

on September 12, 2013 and this appeal was not commenced until June 5, 2014, several months later. Respondent's action in establishing the Liability Fund was not intrinsically wrong and petitioner has failed to establish facts demonstrating that the board resolution establishing the Liability Fund was in violation of Education Law §1709(8-c). While I agree with petitioner that respondent should have specified in general terms that the reserve is established to pay special education liabilities if that was its intent, there is nothing intrinsically illegal in establishing a general liability reserve fund and petitioner is challenging a discrete action of respondent board that has no continuing effect. Therefore, I find that the continuing wrong doctrine, which provides an exception to the normal 30-day rule, does not apply on these facts (see Appeal of Caldwell and Morgan, 36 Ed Dept Rep 296, Decision No. 13,729). Petitioner did not commence this appeal within 30 days of respondent's action in establishing the Liability Fund and has not provided any excuse for the delay. To the extent petitioner challenges the board resolution establishing this reserve fund, the appeal must be dismissed as untimely (Appeal of Lombardo, 46 Ed Dept Rep 233, Decision No. 15,491).

An appeal under RPTL §1318(1), however, is timely if it is brought within the school district's fiscal year during which unexpended surplus funds are allegedly improperly retained (Appeal of Uy and Norden, 44 Ed Dept Rep 368, Decision No. 15,201; Appeals of Gorman, 43 id. 32, Decision No. 14,906; Appeal of Schadtler, Jr., 40 id. 60, Decision No. 14,421). This appeal was commenced in June 2014, during the 2013-2014 school district fiscal year. Therefore, the appeal is timely with respect to petitioner's allegations that respondent improperly retained surplus funds during the 2013-2014 school year.

Next, the Commissioner will only decide matters in actual controversy and will not render a decision on a state of facts which no longer exist or which subsequent events have laid to rest (Appeal of a Student with a Disability, 48 Ed Dept Rep 532, Decision No. 15,940; Appeal of M.M., 48 id. 527, Decision No. 15,937; Appeal of Embro, 48 id. 204, Decision No. 15,836). Here, the board created the Liability Fund on September 12, 2013. Yet petitioner did not commence this appeal until June 5,

2014,¹ and petitioner's papers were not received by my Office of Counsel until June 12, 2014. Shortly thereafter, the 2013-2014 school year ended and the 2014-2015 tax levy was established.

There is, however, no mechanism for returning a pro rata share of funds to the taxpayers once the tax levy has been made and, therefore, the appeal is moot to the extent such relief is sought herein (Appeal of Muench, 44 Ed Dept Rep 398, Decision No. 15,210; Appeal of Liberatore, 42 id. 321, Decision No. 14,869). Nevertheless, "[i]t is settled doctrine that an appeal will, nevertheless, be entertained where, as here, the controversy is of a character which is likely to recur not only with respect to the [same] parties ... but with respect to others as well" (East Meadow Community Concerts Ass'n v. Bd. of Educ., Union Free School Dist. No. 3, County of Nassau, 18 NY2d 129, 135; Appeal of Muench, 45 Ed Dept Rep 508, Decision No. 15,397). Accordingly, I decline to dismiss this appeal as moot because it raises an important legal issue concerning the proper use of unexpended surplus funds in calculating the tax levy which affects all districts and taxpayers statewide.

Turning to the merits, under RPTL §1318(1), at the conclusion of each fiscal year, a board of education must apply any unexpended surplus funds to reduce its tax levy for the upcoming school year. Surplus funds are defined as "any operating funds in excess of four percent of the current school year budget, and shall not include funds properly retained under other sections of law" (RPTL §1318[1]). Accordingly, the Commissioner has repeatedly held that, at the end of each school year, all unexpended operating funds in excess of the statutorily permitted four percent of the amount of the budget for the upcoming school year must be applied to reduce the tax levy (Appeal of Uy and Norden, 44 Ed Dept Rep 368, Decision No. 15,201; Appeals of Gorman, 43 id. 32, Decision No. 14,906).

Moreover, it is well settled that if a board wishes to retain unexpended surplus funds, it should place the money in a reserve fund before the tax levy (Appeals of

¹ Per the affidavit of service, this is the date the original petition was served on the board.

Gorman, 43 Ed Dept Rep 32, Decision No. 14,906; Appeal of Simons, 39 id. 744, Decision No. 14,367; Application of Mills, 34 id. 92, Decision No. 13,243). Here, it is undisputed that the board created the Liability Fund on September 12, 2013 - well after the 2013-2014 tax levy was established.

The board attempts to circumvent this well-established rule by arguing that the moneys used to create the Liability Fund were not surplus moneys because they were budgeted as an account payable to pay projected settlements related to special education litigation. The board, however, was not permitted to simply designate and earmark unexpended money for projected liabilities (Appeals of Gorman, 43 Ed Dept Rep 32, Decision No. 14,906). Rather, it should have placed this money in a reserve fund before the establishment of the tax levy (Appeals of Gorman, 43 Ed Dept Rep 32, Decision No. 14,906; Application of Mills, 34 id. 92, Decision No. 13,243).

Accordingly, I find that the board violated RPTL §1318(1) by failing to include the \$808,500 in its unencumbered, unrestricted fund balance for the purpose of determining its unexpended surplus funds and calculating its tax levy for the 2013-2014 school year, and the appeal must be sustained in this regard. As of the date of the tax levy, the Liability Fund did not exist, and respondent board has no authority to circumvent RPTL §1318(1) by retroactively assigning these funds to such reserve fund. Nevertheless, as noted above, there is no mechanism for returning a pro rata share of funds to the taxpayers once the tax levy has been made (Appeal of Muench, 44 Ed Dept Rep 398, Decision No. 15,210; Appeal of Liberatore, 42 id. 321, Decision No. 14,869). The board, however, should endeavor to be scrupulous in its future budgetary practices and comply fully with the requirements of RPTL §1318 in the future.

In light of the above disposition, I need not address the parties' remaining contentions.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the Board of Education of the Katonah-Lewisboro Union Free School District henceforth fully comply with Real Property Tax Law §1318 and establish tax levies in strict compliance with the statutory requirements.



IN WITNESS WHEREOF, I, MaryEllen Elia, Commissioner of Education of the State of New York, for and on behalf of the State Education Department, do hereunto set my hand and affix the seal of the State Education Department, at the City of Albany, this 27th day of February 2017.

MaryEllen Elia

Commissioner of Education