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### School Law Seminars

MB&M attorneys were among the presenters of "Current Issues in School Law." Offered throughout the state under the auspices of the Pennsylvania Bar Institute, the seminars provided solicitors, educators and administrators with practical insight into: • School construction, bidding requirements and construction litigation • Teacher tenure and negotiations • Investigating student and parental complaints about teachers • Discrimination and sexual harassment; and • School finance - Should districts opt in to Act 72? To inquire about these and other school law topics, contact Attorneys Alfred Maiello or Michael Brungo.

### Veteran Attorney Joins Firm

Falco A. Muscante has joined Maiello Brungo & Maiello and will be a member of the Education Law Group. Mr. Muscante has nearly 20 years of experience and is currently a Director of the South Allegheny School Board.

### Maiello Brungo & Maiello On Line

Don't forget to visit our Website, www.mbm-law.net, to learn more about our firm, get the latest legal updates, and find links to additional legal resources.

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Education News  
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- Speculation Has No Place in Assessments
- Actual Use of Property Affects Taking
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### SPECULATION AND ASSUMPTION IMPROPER IN ASSESSING PROPERTY

Growth can hit an area seemingly overnight. But as property values in a developing area rise, taxing bodies must not be too eager to raise any and all assessments. Assessment of property cannot be based on assumption with respect to future or possible use.

In *ENF Family Partnership v. Erie County Bd. of Assessment Appeals*<sup>1</sup>(2004), the property owner held the only parcels zoned for agricultural use in an area that was zoned residential and commercial. The three parcels were reassessed in line with their status as agricultural property pursuant to a countywide reassessment.

The school district filed appeals on the parcels and, at the hearing, presented two appraisals that concluded that the highest and best use of the property was commercial. Each of the appraisals assumed that the zoning on the three parcels could be changed to commercial, thus dramatically increasing the fair market value. Based on these appraisals, the Appeals Board increased the parcels' assessed values. The trial court affirmed.

The property owner challenged the increases to the assessed values based on the hypothetical highest and best use of the parcels as found in the appraisals. The Commonwealth Court found in favor of the property owner.

The Court held that "factors based upon pure speculation, such as what a property would be worth in an altered condition, are irrelevant and may not be considered." There was no evidence presented at the board level or the trial court level that the property owner had applied for a change in zoning. The Court noted that the mere possibility or assumption that the three parcels might be rezoned at some time in the future was nothing more than speculation and should not have been considered by the Appeals Board in rendering its decision.

This decision has profound implications for taxing jurisdictions seeking to increase assessed values of properties, especially those properties situated in areas experiencing a growth in commercial development. Only those factors in existence at the time of the assessment or factors that have a high probability of occurring at the time of the assessment are relevant to a determination of assessed value.

A taxing jurisdiction cannot base an argument for an increase in an assessed value merely on the fact that a property could or should be utilized in a certain capacity and that the property owner may, in fact, utilize the property in that manner at some uncertain point in the future.

<sup>1</sup>204 Pa. Commonw. LEXIS 826 (Pa.Commonw.Ct., 2004)



## U.S. Supreme Court Expands ADEA Claims

On March 30, 2005, the United States Supreme Court issued a significant decision in *Smith v. City of Jackson, Mississippi*, (2005) which affects the rights of employees under the Age Discrimination and Employment Act (ADEA) 29 U.S.C. §623(a)(2). The ADEA prohibits employers from discriminating against employees or applicants because of age (over 40).

The Court concluded that an employee may bring a lawsuit for employment discrimination under the ADEA without demonstrating that the employer intended to discriminate on the basis of age. The Court's holding permits an employee to claim discrimination where employment policies and practices are "facially neutral" but treat workers in a protected class (40 and older) less favorably than those in an unprotected class (substantially younger). This is referred to as a "disparate impact" theory, and is used in other discrimination lawsuits.

Employers can avoid liability if they demonstrate that a "reasonable factor other than age" (RFOA) motivated the practice. RFOA defense has been interpreted very broadly to include any reasonable, legitimate business cause for a policy, not related to age.

How should an employer respond to this decision? First, review your benefits packages and employment policies for any adverse impact on older workers in addition to other protected groups. Second, do not adopt numerical quotas simply to avoid liability.

In another case of interest to the education community, on March 29, 2005, the Supreme Court held that a girls' high school basketball coach who was terminated for complaining about the lack of funding for the girls' program in comparison to the boys' is entitled to bring a private cause of action under Title IX sounding in Retaliation. In *Jackson v. Birmingham Bd. of Educ.*, (2005), the Court concluded that retaliation by the school district under those circumstances is sex discrimination under Title IX, a federal law that prevents educational entities receiving federal financial assistance from discriminating on the basis of sex.

## Use of Property Key Factor in Determining Appropriateness of Taking

In *Marple Twp. v. Marple Newton School Dist.*<sup>2</sup>(2004), Marple Township filed a declaration of taking against property owned by the school district and used to house the district's maintenance trucks, lawn mowing and plowing equipment, and snow removal materials. The Township intended to use the property for erecting public buildings, public works, and recreational facilities. The School District objected to the taking. In ruling in favor of the Township, the court focused on the use of the property at the time of the taking.

The Court disagreed with the School District's argument that the taking was improper, as the First Class Township Code prohibits condemnation of property used for any public school, educational institution or charitable organization. The Court noted that the property had not been used for truly educational purposes for more than 20 years, and that although various charitable organizations have used the property for fundraisers, these activities were not consistent in nature to support the assertions that charitable institutions were using the property.

Next, the School District argued that the Public School Code requires districts to provide grounds and buildings to accommodate all students. The Court agreed; however, it found that the district did not need use of the property to comply with the Code. In support of its determination, the Court cited the fact that the district, immediately prior to the condemnation proceedings, had placed the property on the market with a real estate agent.

Finally, the Court reaffirmed the rule providing that property devoted to one public use may be taken for another public use as long as the taking "will not materially impair or interfere with or is not inconsistent with the use already existing and is not detrimental to the public." Again, the Court found that the School District's use, or non-use by its intent to sell, was evidence that the taking of the property was neither inconsistent with the existing use nor detrimental to the public.

<sup>2</sup>856 A.2d 225 (Pa.Comm. Ct., 2004)

The *Marple Township* decision requires a school district or any other public or charitable institution to be fully aware of the nature and use of its property at the time a condemnation proceeding is instituted. Although a public or charitable institution may own property, this may not protect the property from a taking.

## Student Discipline for After-School Misconduct

School officials can have a difficult time determining the boundaries of their authority to discipline students for misconduct, especially when the misconduct occurs off school property or after hours.

In general, Pennsylvania courts have upheld the discipline of students for essentially out-of-school behavior when there is a nexus between the misconduct and a "disruption of the educational process at some level." For example, in *J.S. v. Bethlehem Area School District*, the Pennsylvania Supreme Court upheld the expulsion of a student for creating a threatening Web site aimed at his teacher because the student used school computers to show the Web site to other students, and the threat contained in the site clearly disrupted the teacher's ability to conduct an orderly class.

The Commonwealth Court has since provided clearer, more defined guidelines in the discipline of students for off-campus, after-school misconduct. In *D.O.F. v. Lewisburg Area School District*, one evening the student went to a playground on school property where the police caught him smoking marijuana. As a result, the student was expelled from school. On appeal, the common pleas court reversed the student's expulsion and found that while the misconduct did occur on school property, the student was not under school supervision at that time.

The District argued that it had the authority to discipline the student because he was on school property at the time of the misconduct and that the student made the plan to smoke marijuana during a concert held at the school earlier in the evening while he was under the school's supervision. The court specifically rejected the District's argument, ruling that because the smoking occurred at a time outside of the school's supervision, the District could not discipline the student. Moreover, the court found that the student's in-school conduct did not establish a sufficient nexus between the incident and the Board's supervisory authority.

When faced with an incident involving off-campus or after-school misconduct, school officials should determine whether the conduct somehow disrupted the school's educational process. If so, then it is possible that the school may have the authority to discipline the student.

## Have You Given Required Notice of Military Leave Rights?

The federal Uniformed Services Employment and Reemployment Rights Act (USERRA) was amended to require employers to notify employees who voluntarily or involuntarily leave employment to undertake military service of their rights regarding reemployment, health insurance protection and freedom from discrimination or retaliation.

Under USERRA, service members who leave civilian jobs to perform military duties have the right to return to their pre-service jobs with the same pay, benefits and status they would have attained absent the military service. There are additional requirements under Pennsylvania Law, and you should consult your solicitor to be certain you are in compliance with both federal and state mandates.

Employers can comply with the federal notice requirement by posting a Department of Labor poster or by distributing the information to affected employees through other direct means. It is recommended that the notice not only be posted but also be distributed to all employees, in order to ensure compliance.

Free printed copies of the approved poster are available at (866) 4-USA-DOL (866-487-2365), or it can be downloaded from the Department's Web site at [www.dol.gov/vets/programs/userra/poster.htm](http://www.dol.gov/vets/programs/userra/poster.htm).

