

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

PAULA S. TISHOK, GRETCHEN VAN NESS,  
KENDAL L. HOPKINS, and MELISSA BEHM,

Petitioners,

v.

Docket No.  
136 CD 2015

COMMONWEALTH OF PENNSYLVANIA  
PENNSYLVANIA DEPARTMENT OF EDUCATION,

Respondent.

PETITIONERS' MEMORANDUM OF LAW IN OPPOSITION  
TO RESPONDENT'S PETITION FOR RELIEF IN THE FORM  
OF A MOTION TO DISMISS AND/OR QUASH

Now come the Petitioners, Paula S. Tishok, Gretchen Van Ness, Kendal L. Hopkins, and Melissa Behm, and hereby oppose the Respondent's Petition for Relief in the Form of a Motion to Dismiss and/or Quash. As grounds therefore, Petitioners state that they have standing to bring the present Petition for Relief and should have been permitted formally to intervene in the proceedings before the Department of Education. Petitioners also have standing as "aggrieved parties" under section 702 of the Pennsylvania Administrative Agency Law to pursue the present appeal. In addition, Petitioners state that the Respondent has misread Rule 1513 of the Pennsylvania Rules of Appellate Procedure regarding indispensable parties. Finally, Petitioners state that Respondent's final decision in the Wilson College matter is a final, appealable order and is properly before this Court for review.

Seeking to insulate its flawed regulatory process from judicial review in this case of first impression, Respondent presents several arguments in support of its motion to dismiss or quash

the Petition for Review, which we address in turn below. We must note, however, that this is no ordinary agency action. The substantial evidence shows that Wilson College, the regulated entity, intentionally skirted the legal requirements for making fundamental changes to its Articles of Incorporation contained in section 6504 of Title 24 of the Pennsylvania Code, repeatedly misrepresented the need for those changes, refused to answer questions at the Informational Hearing, and vowed to proceed with implementing those fundamental changes regardless of Respondent's final decision in this matter. Although a violation of section 6504 is a summary criminal offense under Title 24, section 6509, in an abuse of its discretion Respondent took no action against the College and instead ratified the College's actions. The Petitioners are not just ordinary citizens with a general interest in others following the law, but are recognized and respected alumnae leaders in the Wilson College community who have devoted decades in service to the College. In addition, this appeal raises important questions involving the public interest in the prudent and lawful management of nonprofit entities in Pennsylvania, and the public interest in the protection of the historic missions of colleges and universities in the Commonwealth. For the reasons stated below, Respondent's Application for Relief should be denied.

1. Respondent Abused Its Discretion when It Denied Petitioners' Motion to Intervene Based on Lack of Standing

(a) Introduction

As this Court made clear in its thorough review of Pennsylvania law governing standing to intervene in an agency proceeding in *Bensalem Racing Ass'n, Inc. v. Pennsylvania State Harness Racing Commission*, 1053 C.D. 2010 (Pa. Cmwlth. 2011), different standards apply to a party seeking to intervene in an agency proceeding and to a party seeking review of a final agency

action. In order to intervene in an agency proceeding, this Court has stated that a person must show that she has “[a]n interest which may be directly affected” by the proceedings. *Id.* at 11 (quoting section 35.28(a)(2) of General Rules of Appellate Practice and Procedure, 1 Pa. Code sections 35.27-.32). As the Pennsylvania Supreme Court has noted, “the requirement of a ‘substantial’ interest simply means that the individual’s interest must have substance[;] there must be some discernible adverse effect to some interest other than the abstract interest of all citizens in having others comply with the law.” *Wm. Penn Parking Garage, Inc. v. City of Pittsburgh*, 464 Pa. 168, 346 A.2d 269 (1975).

In addition to the general standing principles articulated in the *Wm. Penn Parking Garage, Inc.* decision, section 702 the Pennsylvania Administrative Agency Law, 2 Pa. C.S. section 702, provides that “any person aggrieved by an adjudication of a Commonwealth agency who has a direct interest in such adjudication shall have the right to appeal therefrom to the court vested with jurisdiction of such appeals.” As this Court has noted, “Whether a party has standing to appeal is determined on a case-by-case basis, and, if one is determined aggrieved, one has standing.” *Briggs v. Workers’ Compensation Appeal Board*, 1785 C.D. 2012 (Pa. Cmwlth. 2013). Petitioners, individually and on behalf of the protestors they represent, satisfy the Pennsylvania Supreme Court’s and this Court’s tests for standing to intervene in an agency proceeding and standing to appeal an agency decision.

(b) Standing to Intervene in Agency Proceedings

Before addressing the merits of Respondent's argument that it did not abuse its discretion in denying Petitioners's Petition to Intervene, it is necessary to address the misstatements and omissions in Respondent's Application for Relief. First, when Respondent granted Limited Participant status to Petitioner Van Ness, it was not solely in her individual capacity. Not only did Petitioner Van Ness file her protest and motion to intervene both individually and on behalf of the group Wilson College Women, but Respondent appointed her to represent each of the 40 persons who filed protests in this matter. Certified Record at 370 ("Ms. Van Ness will, as a limited participant, represent all those who provided responses to the Notice at a public hearing that will be scheduled."). Second, although Petitioner Hopkins serves as Vice President of the Alumnae Association of Wilson College, her protest was filed and she participated in the agency proceeding in her individual capacity. Certified Record at 212. Finally, Respondent inexplicably failed to include in the Certified Record submitted to this Court all 40 protests that it received in the Wilson College matter. Therefore, it is impossible to know whether other persons sought to intervene in this matter. On information and belief, many of these protests specifically referenced and incorporated the relief requested in the omnibus protest filed by Petitioner Van Ness on behalf of Wilson College Women. Certified Record at 379. Acting as the appointed representative of all 40 protesters, Petitioner Van Ness renewed her request to intervene in the February 7, 2014 pre-hearing conference call. Petitioners Tishok, Hopkins and Behm also participated in the February 7, 2014 conference call and joined in the renewed motion to intervene. Respondent is thus incorrect when it claims that no request to intervene was made by the other protesters.

As stated in the Petition to Intervene, Certified Record at 379, and in the testimony submitted by the Petitioners in the agency proceeding, the interests at stake far exceed those that arise simply because one is an alumna of a college or a member of an alumnae association. The discernible adverse effects on the substantial interests of Petitioners, and those they represented throughout the agency proceeding, of the College's actions and Respondent's ratification of those actions, includes the following.

As Petitioner Tishok testified, at all relevant times she served as Vice Chair of the College's Board of Trustees and chaired the Trusteeship Committee, which is charged with authority over governance matters. In addition, she is a former two-term President of the Alumnae Association of Wilson College, and has received the life-long honor of being named an Everitt-Pomeroy Trustee. Certified Record at 96-97. Petitioner Tishok has donated not only her time and expertise as a successful and respected businesswoman to the College, but she has consistently contributed financially to the general fund, to specific projects, and to the College's capital campaigns. The Board of Trustees' violations of its fiduciary duties and its knowing reliance on flawed and incomplete information when it voted to approve fundamental changes to the charter, as well as the College's misrepresentation of its financial health, see Certified Record at 243-67, cast doubt on Petitioner Tishok's reputation for integrity, honesty, and sound financial stewardship. In addition, Petitioner Tishok's interest in good governance, her interest in exercising her informed, independent judgment as a Trustee of the College, her interest in having her voice heard and her vote duly considered throughout the Board's consideration of fundamental changes to the College's charter and mission, were all adversely affected by the events at issue in this controversy. The ratification by Respondent of all of these actions, including the Board of

Trustees's retaliation against Petitioner Tishok, has a discernible negative impact on Petitioner Tishok's substantial interests.

Petitioner Hopkins has a substantial interest in this matter for two reasons: her participation as a student volunteer in the Save Wilson effort in 1979, and in her continuing service to the College through the Alumnae Association of Wilson College, where she currently serves as Vice President of the Board of Directors. Certified Record at 212. When Judge Keller preliminarily enjoined the closing of Wilson College in 1979, in the lawsuit brought by the alumnae Save Wilson Committee, he made specific mention of the alumnae's role in securing the future of the College. Certified Record at 457 ("The difficult days that lie ahead for Wilson College, its governing board, its alumnae, and its students body are obvious. However, we doubt that those future days are any more fraught with peril, any more risky, any more doomed to failure, than the conditions and circumstances which confronted the incorporators 110 years ago."). Petitioner Hopkins has a substantial interest, arising out of her participation in the events of 1979 and her role in the Alumnae Association, in contributing to the health and well-being of the College. That interest has been adversely affected by the College's actions and the Respondent's ratification of those actions.

Petitioner Behm is a former Alumnae Trustee of the College, a former Board Member of the Alumnae Association of Wilson College, a long-time donor to the College, and the current President of the Wilson College Club of Baltimore. Petitioner Behm has also received the life-long honor of being named an Everitt-Pomeroy Trustee. Petitioner Behm has a substantial interest in good governance and in the proper discharge of Board of Trustee's fiduciary duties arising from her role as a former Trustee and as a current Everitt-Pomeroy Trustee. Certified Record at

230. Petitioner Behm's substantial interest in appropriate alumnae involvement in the shared governance of the College arise from her former role on the Board of the Alumnae Association, her role as a representative of the Association as an Alumnae Trustee, and her current role as President of the Wilson College Club of Baltimore, the College's largest formal alumnae club. These substantial interests have been harmed by the College's actions and the Respondent's ratification of those actions.

Petitioner Van Ness is a former Trustee, former Vice Chair of the Board of Trustees, former co-chair of the Governance Committee of the Board of Trustees, former chair of the Enrollment Management and Student Life Committee of the Board of Trustees, and a member of the Commission on Shaping the Future of Wilson College. Certified Record at 379. Petitioner Van Ness has also received the life-long honor of being named an Everitt-Pomeroy Trustee. Petitioner Van Ness was a student plaintiff in the 1979 Save Wilson litigation and thus shares with Petitioner Hopkins a substantial interest in protecting the health and well-being of the College. In addition, Petitioner Van Ness has a substantial interest in good governance and in the responsible stewardship of the College arising out of her role on the Board of Trustees and her service on the Commission for Shaping the Future of Wilson College. Certified Record at 490. As with Petitioner Tishok, the Board of Trustees' violations of its fiduciary duties and the College's misrepresentations regarding its financial health cast doubt on Petitioner Van Ness's reputation for honesty, integrity, and sound financial stewardship. These interests have been negatively impacted by the College's actions and the Respondent's ratification of those actions.

As recognized and respected leaders in the College community, the Petitioners have substantial interests at stake in this controversy that differ from those of citizens generally. The Col-

lege's actions, ratified by Respondent, cast doubt on Petitioners' reputations and contributions over the decades. Each of the Petitioners has a substantial interest in the lawful and prudent management of the College and in the lawful use of their donations of time and treasure to the College. The College's actions, ratified by Respondent, also harm the interests of the protestors represented by Petitioner Van Ness. The Petitioners and these protestors, most of whom are alumnae of the College, have a substantial interest in protecting their degrees — degrees that have added value because they were granted by a women's college. Certified Record at 284-89. The Petitioners and the protestors they represent also share a substantial interest in preserving one of the last remaining women's colleges in Pennsylvania, and in preserving choice and diversity in institutions of higher education in our country. *Id.*; see also Certified Record at 379.

The Petitioners' and protestors' interests in this matter far exceed those of the citizenry as a whole. Additionally, the denial of the Petition to Intervene short-changed the Petitioners' due process rights and the due process rights of the 40 protestors. Although Petitioners endeavored to develop and submit to Respondent a complete record of what had transpired at the College, they were unable to conduct formal discovery, request the production of documents, or depose witnesses. The written testimony submitted by counsel for the College was not in affidavit form, sworn to under the pains and penalties of perjury. In addition, none of the witnesses who testified at the Informational Hearing were under oath and the parties were not permitted to directly question or cross-examine the witnesses. Furthermore, in an adjudicatory hearing, the Respondent would have been able to compel the College's witnesses to answer questions. As the transcript of the hearing painfully demonstrates, the Respondent's Hearing Officer abandoned various lines of questioning and concluded the Hearing early when the College President refused to



answer her questions. Certified Record at 152-68. Respondent's failure to conduct an adjudicatory hearing in this important matter resulted in a final decision that failed to address several issues raised by Petitioners, including the important public interest served by maintaining a diverse array of institutions of higher education in the Commonwealth; the value of women's colleges in producing the workforce of tomorrow, informed citizens, and leaders in our communities; and the College's many misrepresentations of the need for the fundamental changes in the College's charter and mission. Failure to convene an adjudicatory hearing rather than an informational hearing also means that Petitioners were deprived of the right to seek reconsideration or rehearing of Respondent's final decision before filing their Petition for Review with this Court.

(c) Standing to Appeal

Should this Court determine that the Respondent's denial of the Petition to Intervene was not an abuse of discretion, that does not end the analysis. The Respondent's denial of the Petitioners' formal right to intervene does not foreclose their right to bring the present Petition for Review. Section 702 of the Pennsylvania Administrative Agency Law expressly provides that, "*Any person aggrieved by an adjudication of a Commonwealth agency who has a direct interest in such adjudication shall have the right to appeal therefrom to the court vested with jurisdiction of such appeals ...*" (emphasis supplied). This Court is vested with jurisdiction of such appeals. 42 Pa. Code section 763. The Pennsylvania Supreme Court has explained that "by virtue of Section 702 of the Administrative Agency Law, neither party status nor traditional intervention is necessary to challenge actions of an administrative agency. Rather, standing to appeal administrative agency decisions extends to 'persons,' including non-parties, who have a 'direct interest' in the subject matter ... A direct interest requires a showing that the matter complained of caused

harm to the person's interest." *Citizens Against Gambling Subsidies, Inc. v. Pennsylvania Gaming Control Board*, 591 Pa. 312, 318-19 (2007) (per curiam). Explaining further, the Supreme Court stated "the direct interest requirement retains the function of differentiating material interests that are discrete to some person or limited class of persons from more diffuse ones that are common among the citizenry." *Id.* Moreover, the right to appeal by a person who is not a party to the administrative proceedings is reflected in Rule 1513(a) of the Pennsylvania Rules of Appellate Procedure, which states that "the aggrieved party *or person* shall be named as petitioner ..." (emphasis added).

There is no need to repeat the description of the Petitioners' extensive interests in this matter. These interests not only constitute substantial interests but also direct interests that differentiate the Petitioners and the protestors from the general public for the purposes of determining whether Petitioners and the protestors they represent qualify as "aggrieved parties" under Rule 313(b).

Furthermore, because the Respondent permitted Petitioners to participate in the agency's proceedings, it has waived its objection to standing to bring this appeal. In *Burns v. Rebels, Inc. and Pennsylvania Liquor Control Board*, 1535 C.D. 2000 (Pa. Cmwlth. 2001), this Court noted that even though the Liquor Control Board "incorrectly concluded that Petitioners lack standing, the Board nevertheless permitted Petitioners to participate in the hearing and disposed of the issues raised by Petitioners. Accordingly, the Court may reach the merits of this appeal." See also *Housing Auth. of the City of Pittsburgh v. Van Osdol*, 40 A.3d 209 214 (Pa. Cmwlth. 2012) (because the Association participated in the proceedings before the ZBA, without objection, this

Court concluded that Association had standing and proceeded to address the merits of Association's arguments).

Although Petitioners were denied formal intervention, Respondent treated them as parties. Respondent required the Petitioners to participate in the agency proceedings on the same terms as the College. Like the College, they were required to submit evidence and written testimony, as well as legal argument, in advance of the Informational Hearing. They and the College were required to submit proposed questions to the Hearing Officer prior to the Informational Hearing. They were given the same amount of time at the Hearing to present their arguments. Additionally, after the Informational Hearing concluded, Respondent ordered the Petitioners and the College to submit their post-hearing filing simultaneously.

The record shows the extensive participation of Petitioners in the administrative proceedings under review. On much less than this record, the Commonwealth Court has permitted appeals brought by non-parties to proceed.

(d) The Denial of Petitioners' Motion to Intervene is Still Appealable

As a general rule, this Court has jurisdiction only over appeals taken from final orders. *Commonwealth v. Scarborough*, 64 A.2d 602, 608 (Pa. 2013). As this Court noted in *Eastern Pennsylvania Citizens Against Gambling v. Pennsylvania Gaming Control Board*, 1912 C.D. 2013 (Pa. Cmwlth. 2014), while an order denying a party the right to intervene is generally not a final order, such an order may still be appealed if it qualifies as a collateral order. A collateral order is an order separable from and collateral to the main cause of action, where the right involved is too important to be denied review, and the question presented is such that if review is postponed until final judgment in the case, the claim will be irreparably lost. Pa. R.A.P. 313(b).

Respondent's argument that the denial of Petitioners' Motion to Intervene is a collateral order is incorrect.

The question of Petitioners' standing to intervene in the administrative proceedings below is similar to the question of the absolute immunity of public officials addressed in *Piscatory v. School District of Philadelphia*, 1072 C.D. 2014 (Pa. Cmwlth. 2015). In that case, Petitioner filed an interlocutory appeal from the trial court's order finding that material issues of fact existed regarding whether certain defendants were immune from suit and granting in part and denying in part his motion for summary judgment. In his interlocutory appeal, Petitioner argued that the immunity issue was separate and distinct from the underlying tort claims, making the court order immediately appealable under the collateral order doctrine. This Court disagreed and dismissed the interlocutory appeal, holding that without further factual development, "it would be premature" to invoke the collateral order rule and attempt to resolve the immunity issue. *Id.* at 6.

The question of Petitioners' standing to intervene in the administrative proceedings is an issue of first impression in Pennsylvania. There is no caselaw regarding whether parties such as Petitioners have standing to intervene in proceedings regarding proposed fundamental changes to a college or university's charter at the Department of Education. The issue of Petitioners' standing is interwoven with the merits of the agency's final order that is the subject of the Petition for Review. This is most definitely not a case where postponing review until final judgment means that the claim would be irretrievably lost.

## 2. Respondent Has Misread Rule 1513

Respondent has asserted that the present Petition for Review must be dismissed for failure to join an indispensable party, Wilson College. A careful reading of Rule 1513(a) of the

Pennsylvania Rules of Appellate Procedure, however, shows that Petitioners have complied with the filing requirements and named the appropriate parties in their Petition for Review. Should the Court now determine that Petitioner's reading of the plain language of Rule 1513(a) is incorrect, and should this Court determine that Wilson College is an indispensable party to this matter, in the absence of relevant precedent or official comment clarifying the application of Rule 1513 to petitions of review of actions by the Department of Education, the Petition for Review should not be dismissed and Wilson College should be joined in this appeal.

Subsection (a) of Rule 1513 provides that "In an appellate jurisdiction petition for review, the aggrieved party or person shall be named as the petitioner and, unless the government unit is disinterested, the government unit and *no one else shall be named as the respondent*. If the government unit is disinterested, all real parties in interest, and not the government unit, shall be named as respondents." (emphasis supplied). The Official Note to Rule 1513 explains that "Government units that are usually disinterested in appellate jurisdiction petitioner for review of their determinations include: ...the Department of Education (with regard to teacher tenure appeals from local school districts pursuant to section 1132 of the Public School Code of 1939, 24 P.S. sec. 11-1132)."

Based on the plain language of Rule 1513(a), including the command that "*no one else shall be named as the respondent*," and the explanation contained in the Official Note, the Petitioners named just the Department of Education as the Respondent in the Petition for Review. The Petition for Review does not involve a public school teacher tenure appeal pursuant the Public School Code of 1949, and therefore the Respondent is not a "disinterested government unit." Respondent apparently assumes that it is a disinterested government unit in relation to *all* appeals

of its agency decisions, but the language of the Official Note suggests that the Respondent is a disinterested government unit in only certain specified appeals. There are no cases interpreting Rule 1513(a) and the Official Note does not address non-public school teacher tenure appeals. In the absence of any interpretations by the Pennsylvania courts expanding the meaning of Rule 1513(a), a petitioner in this Court should not be penalized for relying on the the plain language of the Rule. In addition, as section 763(a) of Title 42 of the Pennsylvania Code makes clear, this is not an original jurisdiction action. Therefore, the requirement in subsection (b) of Rule 1513 that any indispensable party be named as a respondent does not apply.

Should this Court clarify the meaning of Rule 1513(a) or determine that Respondent is a disinterested government unit for all appellate jurisdiction petitions for review, not just those involving public school teacher tenure appeals, and should this Court determine that Wilson College is an indispensable party to these proceedings, the College has suffered no prejudice at this early stage in the review process and can be joined by order of the Court.

### 3. Conclusion

As the foregoing discussion shows, the final decision issued by Respondent in the Wilson College matter is an appealable decision. In this case of first impression, no caselaw exists compelling the dismissal of the Petition for Review, and the important questions of public interest counsel for permitting this appeal to proceed. Petitioners are not simply alumnae; we are donors, supporters, advocates, and leaders within the College community. We represent many more like us. We are committed to the honorable and lawful governance of our alma mater and we have served as stewards of an important and increasingly rare public resource: a women's college.

Sentimental attachments are not our motivation. A special duty arose after the Save Wilson case in 1979. That duty took us to the Department of Education, and it brings us to this Court.

Respectfully submitted,

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