



Pennsylvania School Boards Association

slie & psba
School Law Information Exchange & Public Sector Arbitration

Vol. 53, No. 5

Frequent Question: Is the appointment of someone to a vacant school director seat a permissible subject of executive session discussion?

The answer is no, but this often is a subject of misdirection or confusion, and it is not infrequent that PSBA staff attorneys hear of school boards discussing vacancy appointments in executive session, or receive questions about whether that is permitted.

What solicitors and others researching this issue usually look at first is the last sentence of the Sunshine Act's executive session provision for personnel matters at [65 Pa. C.S. § 708\(a\)\(1\)](#), which says: "The provisions of this paragraph shall not apply to any meeting involving the appointment or selection of any person to fill a vacancy in any elected office." But they often are left scratching their heads after reading the Commonwealth Court's decision in *Cumberland Publishers, Inc. v. Carlisle Area Bd. of Sch. Directors*, 166 Pa. Cmwlth. 176, 646 A.2d 69 (1994), which clearly concludes contrary to what that last sentence seems to say, that a school board did not violate the Sunshine Act when it deliberated in executive session about appointing someone to a vacant school director seat.

The explanation is that the last sentence of §708(a)(1) was added to the current Sunshine Act's predecessor law two years after the *Cumberland Publishers* decision, by Act 9 of 1996, introduced six months after the decision as Senate Bill 238. The legislation's explicit intent to overturn *Cumberland Publishers* was made clear on the Senate floor by the bill's sponsor, in whose Senate district both the plaintiff newspaper and defendant school district were located. See, *Pa. Senate Journal*, June 12, 1995, pp., 616-617. Unfortunately, this is not something that is readily apparent or easily confirmed, for several reasons. The legislation and its floor discussion both are available through links on [this](#) web page.

To begin with, you cannot tell from the court decision itself that the added sentence did not appear in the statutory language the court was construing, because the court quotes only the first part of the corresponding paragraph. There is also no indication that

there even was a 1996 amendment in the legislative history annotations to the current version of the statute, at least as it appears on Westlaw and in West print versions, because Act 93 of 1998 wholly reenacted the Sunshine Act into the Consolidated Statutes nearly unchanged, and repealed the prior Sunshine Act. Citations in the court decision on Westlaw to the predecessor statutory provision link only to a note that the prior provision was repealed by Act 93. There is no red flag or other indicator on Westlaw to signal that the *Cumberland Publishers* decision is no longer good law due to subsequent legislation abrogating it.

The PSBA legal team contacted Westlaw editors to alert them to this, but Thomson Reuters responded that *Cumberland Publishers* cannot be marked with a red KeyCite flag on Westlaw because their policy is to do that only if there is a subsequent court decision that recognizes the legislative abrogation. Our research on Westlaw reveals no case citing *Cumberland Publishers* subsequent to Act 9 of 1996. If you use Lexis and observe the same problem, you may want to consider bringing this to the attention of the Lexis editors. In addition, we will be adding a clarifying note in the upcoming new edition of PSBA's *School Law Handbook*.