

ROBERT GRANT,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE TOWNSHIP	:	DECISION
OF GREEN BROOK, SOMERSET COUNTY,	:	
	:	
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioning Board member, against whom a private citizen filed a slander complaint, alleged the Board wrongfully refused to indemnify him pursuant to *N.J.S.A.* 18A:12-20.

The ALJ noted that board members are indemnified when civil actions are brought against them for any act or omission arising out of and in the course of the performance of duties as a member of a board of education. The ALJ emphasized that petitioner was a member of the Board when he defamed the private citizen; however, he was not acting in any official capacity when he made the comments, he was engaged in personal, political activity. Moreover, he was not sued for reports to the police or to the school administration, he was sued for “unthinking statements [made] to private citizens.” The ALJ denied petitioner’s request for legal fees and costs and dismissed the petition.

Having reviewed the record, including transcripts of the hearing, the Commissioner adopted the findings and determination in the Initial Decision as his own.

August 13, 2001

OAL DKT. NO. EDU. 2931-00
AGENCY DKT. NO. 101-3/00

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The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner’s exceptions and the Board’s reply thereto and cross-exception were filed in accordance with the provisions of *N.J.A.C.* 1:1-18.4 and were fully considered by the Commissioner in reaching his determination here.

Inasmuch as the Commissioner finds that the Administrative Law Judge (ALJ) considered and addressed all *relevant* arguments advanced in petitioner’s exceptions in his Initial Decision, these and the remainder of petitioner’s exception submission, rejected as meritless, will not be detailed here. Specifically rejected are petitioner’s tendered arguments in support of his contentions that: 1) Although the caption of *N.J.S.A.* 18A:12-20 uses the word “indemnity,” the content of this statute is devoted entirely to imposing a “duty to defend” on the board, which petitioner claims is broader than the duty to indemnify; 2) Whether or not an insurance carrier is required to pay an eventual award to the board is irrelevant to petitioner’s right to a defense by the board; 3) Duties of a board member should be broadly interpreted; 4) The test which should be applied in order to determine whether a Board is required to defend pursuant to the statute

should be “[i]f the Board member has acted in good faith, however negligently, in discharging what he perceives as being the duties of his office,” the board’s obligation to defend attaches. (Petitioner’s Exceptions at 31); and 5) petitioner’s conduct does not satisfy the legal definition of slander per se in New Jersey.^{1 2}

By way of cross-exception, the Board urges that the ALJ should have granted its request for legal fees and costs. While recognizing that these are generally not recoverable in an action before the Commissioner of Education, the Board believes an exception should be made in this case where petitioner’s “unauthorized acts have resulted not only in him being sued, but in the expenditure of substantial public funds in defense of the present matter.” (Board’s Reply Exceptions at 17) Moreover, such an exception would additionally serve to discourage frivolous litigation where, like here, the conduct at issue is so clearly outside the purview of the indemnification statute.

Upon careful and independent review of the record, which included transcripts of the three days of hearing conducted at the OAL,³ the Commissioner concurs with the ALJ’s determination that petitioner is not entitled to indemnification pursuant to *N.J.S.A.* 18A:12-20. He, likewise, agrees that the Board’s request for legal fees and costs must be denied. In concluding that petitioner’s claim must fail, the Commissioner is cognizant that petitioner

¹ This particular exception was raised in rebuttal to the ALJ’s statement on page 6, first paragraph, that refers to petitioner defaming Nelson. It is noted that whether or not petitioner’s conduct satisfies the legal standard of defamation or slander per se is unrelated to the question at issue herein. As such, the ALJ’s statement in this regard can be viewed as no more than dicta and, consequently, is immaterial to resolution of this matter.

² Petitioner’s exceptions also raise a procedural issue. He claims that the ALJ denied him the customary right in litigation of presenting his summation last, thereby depriving him of the ability to correct many factual inaccuracies advanced by the Board upon which the ALJ relied in his decision. Even accepting, *arguendo*, each of the factual inaccuracies detailed by petitioner, the result of the Commissioner’s determination here would remain unaltered.

³ Hearing dates were January 12, 17, and 30, 2001.

professes entitlement to reimbursement pursuant to *N.J.S.A.* 18A:12-20 which, in its entirety, reads:

18A:12-20. Indemnity of members of boards of education against cost of defense of civil and criminal action; insurance coverage. Whenever a civil or a criminal action has been or shall be brought against any person for any act or omission arising out of and in the course of the performance of his duties as a member of a board of education, and in the case of a criminal action such action results in final disposition in favor of such person, the board of education shall defray all costs of defending such action, including reasonable counsel fees and expenses, together with costs of appeal, if any, and shall save harmless and protect such person from any financial loss resulting therefrom. Any board of education may arrange for and maintain appropriate insurance to cover all such damages, losses and expenses.⁴

By its very terms, central to qualifying for protection under this statute, which is intended to provide for the legal defense of a member of the board who is sued for official acts taken or omitted by him while actively engaged in carrying out his prescribed responsibilities as a board member, is that *the alleged wrongdoing must arise out of and be in the course of the individual's duties as a board member*. Here, the Commissioner finds that no reasoned review of the record or petitioner's advanced proffers can serve to bring his admitted conduct under the ambit of this provision so as to impose a duty of indemnification upon the Board. Rather, the Commissioner fully concurs with the analysis of the ALJ on pages 6-7 of the Initial Decision, culminating in the conclusion that petitioner's uttering of knowingly false statements about a private citizen to three other private citizens was personal, political activity and the resultant civil suit was, similarly, personal unto him.

⁴ It is noted that this provision was modified, effective July 27, 2001, to extend board member indemnification to administrative, quasi-criminal actions or other legal proceedings. It is further noted that such amendment has no bearing on the instant matter.

Turning to the Board's request for legal fees and costs, although recognizing the Board's legitimate concern with respect to the expenditure of a substantial amount of public funds to defend against an unwarranted claim, it is by now well-established that the Commissioner does not have plenary authority to award counsel fees in determining controversies and disputes presented under Education Law. *See Balsley v. North Hunterdon Bd. of Educ.*, 117 N.J. 434, 442, 443 (1990) where, in an education-discrimination matter, the Supreme Court found that, notwithstanding the Commissioner's "sweeping remedial powers for enforcing equal protection in the administration of the public education laws, ***the absence of express statutory authority is fatal to the claim for counsel fees," and *State, Dept. of Environ. Protect. v. Ventron Corp.*, 94 N.J. 473, 504 (1983), where the Court affirmed that legal expenses are not recoverable absent express authorization by statute, court rule or contract. Consequently, until such time as the Commissioner is granted statutory authority or the imprimatur of the Courts of New Jersey to do so, he must decline to award counsel fees.

Accordingly, the Initial Decision of the OAL is affirmed for the reasons clearly articulated therein. The within Petition of Appeal is hereby dismissed. The Board's request for attorney's fees and costs is denied.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: August 13, 2001

Date of Mailing: August 13, 2001

* This decision, as the Commissioner's final determination may be appealed to the State Board of Education pursuant to *N.J.S.A. 18A:6-27 et seq.* and *N.J.A.C. 6A:2-1.1 et seq.* Commissioner decisions are deemed filed three days after the date of mailing to the parties.