

DEBORAH E. CIAMBRONE, :
 :
 PETITIONER, :
 :
 V. : COMMISSIONER OF EDUCATION
 :
 GERALD WITTY AND THE BOARD OF : DECISION
 EDUCATION OF THE BOROUGH OF :
 BLOOMINGDALE, PASSAIC COUNTY, :
 :
 RESPONDENTS. :
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SYNOPSIS

Petitioning teaching staff member alleged that respondent Board Member Witty invaded her privacy and abused his authority by accessing her personnel records, and that the respondent Board arbitrarily and capriciously refused to sanction Witty. Respondents denied the allegations and raised as affirmative defenses that the petition was untimely and that the relief requested was outside the scope of the Commissioner's jurisdiction.

The ALJ concluded that the petition was timely filed, but dismissed it because the Commissioner lacks jurisdiction over the subject matter of the petition, holding that the Commissioner has jurisdiction over boards of education and board members only when applying specific school laws.

The Assistant Commissioner, to whom this case was delegated for decision, generally affirmed the ALJ's determination that the Commissioner lacked jurisdiction over the issues raised, and the relief sought, in the petition. However, the Assistant Commissioner clarified that he did have jurisdiction over this matter to the extent that petitioner raised issues of a board member's authority and sought a declaration that the Board must ensure that access to personnel records by board members is restricted to conform with past decisions of the Commissioner. The Assistant Commissioner reminded respondent Board and all boards of education of their obligation to restrict access to personnel files by board members in conformance with applicable decisions of the Commissioner.

May 7, 2001

OAL DKT. NO. EDU. 9202-00
AGENCY DKT. NO. 279-8/00

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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 respondents’ reply thereto were timely filed pursuant to the requirements of *N.J.A.C.* 1:1-18.4.

Petitioner advances three exceptions to the Administrative Law Judge’s (ALJ) dismissal of this matter for lack of Commissioner of Education jurisdiction over the issues raised. Petitioner first charges that, in reaching such a conclusion with respect to board member access to personnel files, the ALJ employed “a flawed, rigid and mechanistic application of N.J.S.A. 18A:6-9,” and compounded this error by failing to consider, apply, or even acknowledge the specific decisions of the Commissioner that form the basis of petitioner’s claims. (Petitioner’s Exceptions at 1, 2) Citing *Horner v. Kingsway Regional High School District Bd. of Ed.*, 1990 *S.L.D.* 752 and *Witchel v. Cannici et al.*, 1966 *S.L.D.* 159, petitioner advances that the Commissioner has made it abundantly clear that board member access to personnel files is strictly circumscribed to those instances where “the employee is being recommended for or subjected to an employment action requiring a Board vote or when access is

necessary for the performance of essential duties.” (*Id.* at 2) These standards, petitioner urges, are viewed “as ‘flowing from basic rights and responsibilities of board members***.’ *Horner, supra* at 767” (*Id.* at 2) Consequently, she observes that acceptance of the ALJ’s determination in this regard leaves us with the anomaly that the Commissioner of Education is without the authority to enforce the very personnel file access standards which he created. That there may be no education statute or regulation which specifically sets forth these standards is of no import, petitioner submits, as they were established through case law, which is equally enforceable and applicable to all school districts. Furthermore, petitioner avers, the jurisdiction of the Commissioner has never been restricted solely to violations of education law and regulation but, rather, “attaches when issues involve the expertise of the agency or other matters involving the operation and supervision of local school district[s].” (*Ibid.*)

Petitioner cites *Hinfey v. Matawan Regional Bd. of Ed.*, 77 N.J. 514, (1978); *Desilets v. Clearview Regional Bd. of Ed.*, 137 N.J. 585 (1994); and *Red Bank Bd. of Ed. v. Warrington et al.*, 138 N.J. Super. 564 (App. Div. 1976) for the proposition that the authority of the Commissioner, pursuant to *N.J.S.A.* 18A:6-9, has been given “great breadth” by the New Jersey courts and has been found to encompass issues of educational policy and pedagogical goals, issues not necessarily linked to a particular statute or regulation but which involved the review of local school district actions. (*Id.* at 2-3) Petitioner, therefore, maintains that, in light of the courts’ broad interpretation of the Commissioner’s jurisdiction pursuant to *N.J.S.A.* 18A:6-9, along with the fact that the Commissioner has delineated those specific instances where board members may access personnel records -- rulings which arose by virtue of his particular expertise in the oversight of local boards of education -- these restrictions have

become part of the “broadly-defined school laws,” and controversies associated with them are properly adjudicated pursuant to *N.J.S.A.* 18A:6-9. (*Ibid.*)

In response to this exception, respondents submit that petitioner’s arguments are no more than a defective attempt to camouflage her common law privacy issue here as a school law controversy. Respondents advance that *N.J.S.A.* 18A:6-9 delineates the jurisdictional authority of the Commissioner: “[t]he Commissioner shall have jurisdiction to hear and determine . . . all controversies and disputes arising under the school laws.” (Respondents’ Reply Exceptions at 2) While conceding that the New Jersey courts have broadly interpreted the authority of the Commissioner, respondents argue that it is also evident that these courts have, at the same time, made it clear that such authority is not unlimited, stating:

The Commissioner of Education only has jurisdiction over disputes “primarily” and “directly” *arising under the school laws*. *Board of Educ. of Hamilton v. Fraleigh*, 93 N.J.A.R. 2d (EDU) 538. In general, “school law” disputes are limited to those arising under Title 18A. *Fair Lawn Bd. of Educ. v. Mayor of Fair Lawn*, 143 N.J. Super. 259, 266 (Law Div. 1976), *aff’d*, 153 N.J. Super. 480 (App. Div. 1977). As explicitly stated by the Supreme Court of New Jersey, “[w]here the controversy does not arise under the school laws, it is outside the Commissioner’s jurisdiction even though it may pertain to school personnel.” *Board of Educ. of E. Brunswick v. Township Council of E. Brunswick*, 48 N.J. 94, 102 (1966). Further, where the subject matter of the dispute does not call for any particular administrative expertise, the Commissioner of Education also cannot invoke jurisdiction. *Board of Educ. of Hamilton v. Fraleigh*, 93 N.J.A.R.2d (EDU) 538. (emphasis in text) (Respondents’ Reply Exceptions at 2-3)

Here, respondents argue, the controversy “does not ‘primarily’ and ‘directly’ *arise* under the school laws,” rather it is a constitutional issue, *i.e.*, petitioner’s reasonable expectation of privacy in her personnel file. (emphasis in text) (*Id.* at 3) At best, respondents advance, petitioner’s claim is only tangentially related to school law in that the underlying conduct at issue is alleged

to have involved a Board member. Although she may have a cause of action under the Fourth Amendment or in common law tort, petitioner cannot credibly claim that her underlying dispute arises under Title 18A or requires the particular expertise of the Commissioner of Education to adjudicate. (*Ibid*). Respondents further profess that petitioner's citation to decisions of the Commissioner and her attempt to position this matter under the Commissioner's general supervisory power over boards of education in New Jersey is misguided. "[T]he operative question is not whether the Commissioner has supervisory powers over the board, but rather, whether Petitioner's allegations of invasion of privacy 'primarily' and 'directly' arise under the school laws." (*Id.* at 4) They charge that petitioner has failed to cite any precedent which would compel that the Commissioner examine such a claim and, therefore, urge that the ALJ's recommended disposition be affirmed.

Petitioner's second exception objects to the dismissal of her claim against Witty as a result of the ALJ's determination that the Commissioner lacked jurisdiction over individual board members absent the involvement of a particular school law. Such a conclusion is defective, petitioner submits, as it again evidences an unduly narrow view of the school laws and is contrary to a number of decisions of the Commissioner rendered over time. Initially in this regard, petitioner posits that, as a Board member, Witty's position and authority derive from *N.J.S.A. 18A:12-1 et seq.* and, therefore, his actions, particularly if contrary to or independent of the Board, could constitute a dispute arising under the school laws. (Petitioner's Exceptions at 4) Petitioner further cites a number of Commissioner decisions dealing with issues such as allegations of a conflict of interest in appointing an individual as an employee, conflict of interest based upon financial interest, appointment of a board member in violation of law, violations of the Open Public Meetings Act, and failure to renew a contract of employment, which she claims

have involved board members in their individual capacity. (*Ibid.*) Finally, petitioner argues that, in his capacity as a Board member, “Witty took an oath ‘to faithfully discharge the duties of [his] office[.]’ N.J.S.A. 18A:12-2.1(1).” Willfully violating the established standards for accessing personnel records, she charges, is a violation of that oath and should, therefore, be heard by the Commissioner pursuant to *N.J.S.A.* 18A:6-9. (*Id.* at 5)

In rejoinder, respondents again argue that petitioner cites no authority in support of her contention that this matter arises under education law, thereby compelling adjudication by the Commissioner of Education. “[T]he Commissioner cannot assert jurisdiction over Witty in his individual capacity to resolve a privacy claim.” (Respondents’ Reply Exceptions at 5) At issue here, respondents maintain, is not a controversy encompassed within *N.J.S.A.* 18A:6-9 but, rather, merely a teacher’s personal disagreement with an individual member of the Board, an issue which is not amenable to resolution before the Commissioner. (*Ibid.*) Respondents assert that the ALJ rightly concluded “that ‘the school laws do not make the Commissioner a general supervisor of the individual members of a School Board unless applying a specific school law.’” (*Id.* at 7)

Petitioner’s third exception disputes the ALJ’s finding that the Commissioner does not have jurisdiction over her claims against the Board. She submits that, for the reasons previously argued herein, her primary claim concerning Board Member Witty’s improper behavior with respect to personnel records is justiciable before the Commissioner. Similarly, her claim against the Board that it failed to adequately investigate Witty’s behavior and take any action in response to his misconduct is equally cognizable before the Commissioner. (Petitioner’s Exceptions at 5) Petitioner advances that, as this matter was decided pursuant to respondents’ Motion to Dismiss, all factual allegations in her Petition of Appeal were deemed

admitted for purposes of this motion. Therefore, it must be assumed that Witty did review petitioner's personnel file, with the only outstanding issue being whether he had a right to do so. (*Ibid.*) Additionally, again for purposes of the Motion to Dismiss, it must be accepted that the Board was apprised of the behavior of its member and failed to take action against him. (*Ibid.*) Petitioner tenders that pursuant to *N.J.S.A.* 18A:4-23 and *N.J.S.A.* 18A:7F-5, the Commissioner has the responsibility to oversee the activities of school boards and their members. She claims that the actions of both Witty and the Board constitute an abuse of their power which requires that the Commissioner of Education exercise his supervisory authority to insure that such abuse does not reoccur. As such, petitioner contends, this is a controversy and dispute arising under the school laws which establishes jurisdiction pursuant to *N.J.S.A.* 18A:6-9. (*Id.* at 6) Petitioner further observes that “[c]ases such as *Gillard v. Schmidt*, 579 F.2d 825, 829 [3rd Cir. 1978], have established that New Jersey school employees have a legitimate expectation of privacy as to searches of the workplace by board members.*** It is the violation of this confidentiality that is to be examined by the Commissioner.” (*Id.* at 7)

In reply, respondents aver that, although petitioner is charging that the Commissioner's general supervisory power pursuant to *N.J.S.A.* 18A:4-23 converts this matter to a school law issue and grants him jurisdiction over both respondents, the legal authority cited by petitioner in support of her contention wholly belies her argument that this case arises under school laws. Rather, respondents argue, the contention confirms respondents' contention that this dispute is, in reality, “a constitutional claim or common law tort for the invasion of a privacy right.” (Respondents' Reply Exceptions at 8) Specifically, respondents emphasize petitioner's citation to *Gillard, supra*, “for the proposition that ‘New Jersey school employees have a legitimate expectation of privacy as to searches of the workplace by board members.’” (*Ibid.*)

Of import here, respondents posit, is that *Gillard* was a civil case brought in Federal court pursuant to 42 *U.S.C.* §1983 and the Fourth Amendment to the United States Constitution “premised upon an unreasonable search that violated Gillard’s reasonable expectations of privacy,” not a controversy or dispute pursuant to *N.J.S.A.* 18A:6-9. (*Id.* at 9) For this and all of the previously discussed reasons, respondents urge that the Commissioner affirm the Initial Decision of the ALJ.

Upon careful and independent review of the record in this matter and thorough consideration of the parties’ exception arguments, the Assistant Commissioner, to whom this matter has been delegated pursuant to *N.J.S.A.* 18A:4-34, determines to affirm the conclusion of the ALJ, as clarified below.

Initially, with respect to what petitioner categorizes as her “primary” claim and prayer for relief, *i.e.*, a finding or declaration that Board Member Witty violated petitioner’s reasonable expectation of privacy with regard to her personnel record, the Assistant Commissioner concurs with the ALJ, and with the arguments advanced by respondents, that such issue is not properly before the Commissioner and must be dismissed. Similarly, to the extent that petitioner is seeking a directive from the Commissioner that the Board must sanction or take action against one of its members, the Assistant Commissioner likewise agrees with the ALJ that, even assuming that the alleged conduct occurred as charged, a directive of the type sought by petitioner is outside the jurisdictional purview of the Commissioner and, therefore, this request must be dismissed.

However, to the extent that petitioner’s claim arises under standards embodied in prior rulings of the Commissioner concerning the scope of an individual board member’s authority, in his or her official capacity, to access personnel files, and to the extent that petitioner

seeks as relief a directive that the Board herein ensure that access by individual Board members is restricted in accordance with those standards, the Assistant Commissioner agrees with petitioner that this matter is appropriately before the Commissioner. The Commissioner has previously determined that board member access to personnel files “should be strictly limited to those instances where the employee is being recommended for or subjected to an employment action requiring a vote of the Board or where access to personnel information is necessary for the performance of essential Board members duties.” *Horner, supra*, at 766-67. Thus, it is clearly a board’s responsibility to ensure that access by board members, in their individual capacity, is confined within established parameters, and the Assistant Commissioner so reminds the Board herein.

Accordingly, the Initial Decision of the OAL is affirmed as clarified above and the within Petition of Appeal is dismissed. This Board, and all boards, are reminded of their responsibility to take such actions as may be necessary to ensure compliance with the Commissioner’s established parameters regarding the extent of board member access to district personnel files.

IT IS SO ORDERED.*

ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: May 7, 2001

Date of Mailing: May 8, 2001

* This decision, as the Assistant 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.