



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

AMENDED INITIAL DECISION
ON CROSS MOTIONS FOR
SUMMARY DECISION

OAL DKT. NO. EDU 10129-16
AGENCY DKT. NO. 167-6/16

**BOARD OF EDUCATION OF THE
TOWNSHIP OF WAYNE, PASSAIC
COUNTY,**

Petitioner,

v.

CATHERINE KAZAN,
Respondent.

Isabel Machado, Esq., on behalf of petitioner the Board of Education of the
Township of Wayne (Machado Law Group, attorneys)

Robert J. DeGroot, Esq., on behalf of respondent Catherine Kazan (Law Offices
of Roger J. DeGroot, attorneys)

Record Closed: February 10, 2017

Decided: March 16, 2017

BEFORE GAIL M. COOKSON, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On or about June 17, 2016, petitioner Board of Education of the Township of Wayne (Board) filed an action with the Commissioner of the Department of Education

against respondent Catherine Kazan (respondent) seeking her removal and disqualification as a member of the Board for violating N.J.S.A. 18A:12-2.

The matter was transmitted by the Department of Education to the Office of Administrative Law (OAL), where it was filed on July 11, 2016, for plenary hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. On or about September 23, 2016, the Board filed an Amended Ethics Complaint with the School Ethics Commission (SEC) within the Department of Education, which alleged ten violations under N.J.S.A. 18A:12-21 et seq. The petitioners in the latter matter are six of the other members of the Board. The SEC did not transmit that matter over but is retaining the matter until this action is decided by the Department.¹

I convened a telephonic case management conference with the parties on September 29, 2016, to discuss the potential issues in the case, scheduling, and other case management concerns. It became apparent that the matter was amenable to dispositive motion practice and a briefing schedule was agreed upon. Respondent filed a Motion for Summary Decision on or about October 18, 2016. On or about January 13, 2017, petitioner filed a Cross-Motion for Summary Decision. Responses and replies were thereafter submitted. Those motion submissions having been received, the matter is now ripe for decision.

¹ I initially was under the impression that the matters were to be consolidated and entered my Initial Decision accordingly. While I am no longer in possession of the physical record filed, I do not recall ever being provided with the SEC Letter of October 25, 2016, until the "clarification" letter filed by Isabel Machado, Esq., on March 16, 2017. I note that in one of her briefs, she wrote:

While we recognize that this instant petition concerns Respondent's qualifications to continue to serve on the Board of Education and not her ethics, the same principals apply. Respondent's First Amendment freedoms do not allow her to act on behalf of her personal interests, when such interests conflict with the will of the majority of the voters of Wayne Township and are inconsistent with the Board's interests.

[Cross-Motion Brief at 15]

This Amended Initial Decision is intended to correct the jurisdictional error.

ISSUE PRESENTED ON THE MOTION

Whether respondent should be found disqualified and removed from her elected position on the Board of Education due to alleged breaches of N.J.S.A. 18A:12-2, because of an alleged inconsistent interest. That statute provides in pertinent part: "No member of any board of education shall be interested directly or indirectly in any contract with or claim against the board, . . ."

UNDISPUTED MATERIAL FACTS

1. In 2013, Respondent ran on a political platform pledging to institute a Full Day Kindergarten Program within the District. See Certification of Isabel Machado, Esq. ("Machado Cert."), Exhibit A.

2. Respondent has been a sitting member of the Wayne Township Public Schools Board of Education since January 2, 2014.

3. On or about November 3, 2015, a public question was posed to the residents of Wayne Township asking whether, if a Full Day Kindergarten were to be established in the District, they would support raising the 2% cap. The public question was defeated 5,071 to 4,500. See Machado Cert., Exhibit D and F.

4. In or about November 2015, respondent donated \$100 to a GoFundMe page in support of Full Day Kindergarten. See Machado Cert., Exhibit B.

5. On or about December 3, 2015, fifteen citizens, including respondent filed suit naming the Township Clerk, Paul V. Margiotta, as the official responsible for certifying the election results of the township as the respondent and sought to have the results of the public question set aside due to alleged illegal electioneering on the part of poll workers. See Machado Cert., Exhibit C ("Complaint").

6. On January 7, 2016, at the Board Organizational Meeting, six of the eight Board members voted to approve a motion to implement full-day kindergarten in all nine elementary schools for the 2016/2017 school year within the 2016/2017 budget. The motion was offered by Christian Smith and seconded by respondent. In stating her reasons for supporting the motion, respondent advised that it "is our job, that is what you voted for us to do, and that is the administration's job to find a way" to implement Full Day Kindergarten and cut "whatever we need to cut" to keep the program within the 2% tax levy cap. Id. Furthermore, she stated "it is our job to inform the administration the needs and wants of the community, as boards and trustees." See Machado Cert., Exhibit D.

7. At the January 21, 2016, Board meeting, both the Wayne Superintendent and the Interim Executive County Superintendent spoke to the members concerning budgetary constraints. Both expressed opinions that full-day kindergarten could not be implemented within the cap without impacting mandatory and other programs.

8. At the March 3rd and 14th meetings of the Board, the budget was presented and debated. There was concern expressed about some loss of State funding. Respondent questioned the priorities within the budget and some specific line items. See Machado Cert., Exhibits F and G.

9. After hearing administration's concerns, at the March 14th meeting, the Board voted seven to two to rescind the earlier vote to implement full-day kindergarten within the then-current proposed school budget. See Machado Cert., Exhibit G.

10. On March 17, 2016, the Board ultimately agreed to again place a question on the ballot regarding adding the cost of full-day kindergarten above the then-current school budget funding limit, by a unanimous vote. See Machado Cert., Exhibit H.

11. On or about April 16, 2016, Robert DeGroot, Esq., filed an Order to Show Cause, Certification, and accompanying Petition, identical to the December 2015

Petition, seeking redress to invalidate the November 2015 election results. Prior thereto, DeGroot had concluded that the Complaint was moot as a result of the January vote. The Order to Show Cause was filed because of the vote of the Board rescinding that action. Respondent did not have direct knowledge that an Order to Show Cause would be filed.

12. On or about June 8, 2016, the Board was served with a copy of the Complaint and a Summons. See Machado Cert., Exhibit I. Several days later, the Board was served with a copy of the Order to Show Cause and Petition, filed by the Superior Court under a separate docket number. See Machado Cert., Exhibit K. The service of these court papers was undertaken at the request of the Court Clerk. See Certification of Roger DeGroot, Esq., ¶ 7.

13. At no time relevant to these events did respondent advise the Board that she had been a signatory on the original Complaint to rescind the prior full-day kindergarten ballot question due to improper electioneering.

14. At a June 16, 2016, the Board passed a resolution directing counsel to file a complaint with the School Ethics Commission and a Petition with the Commissioner of Education to disqualify respondent from membership on the Board. Respondent notes that the resolution was passed without giving an opportunity for the respondent to answer any concerns or accusations of the Board members. Additionally, it appears the vote was taken under the mistaken premise that respondent filed an action against the Board.

15. On or about June 17, 2016, a Petition for Disqualification was filed with the Commissioner of Education, which was then transmitted to the OAL as the within matter.

16. Plaintiffs voluntarily withdrew the Complaint on June 26, 2016, after the decision was made to place the question again on the ballot. See Machado Cert., Exhibit O.

17. Respondent filed an answer to said Petition to Disqualify on July 6, 2016. See Machado Cert., Exhibit N.

18. On or about June 24, 2016, respondent was photographed with members of a Facebook group named "Wayne Say OK to Full Day K" at a fundraising event open to the public at an art studio named "Pinot's Palette." See Machado Cert., Exhibit M.

To the extent that the parties have not expressly admitted to all the material facts, I add the following which are material but are established as a matter of documentation and public record and should not be deemed in dispute:

1. The Board of Education of the Township of Wayne was not a party to nor named in the complaint filed to set aside the results of the public ballot question.

2. Neither respondent nor her counsel have any control over the Superior Court's Clerk Office or automated case management system.

LEGAL DISCUSSION

It is well-established that if there is no genuine issue as to any material fact, a moving party is entitled to prevail as a matter of law. Brill v. The Guardian Life Insurance Co. of America, 142 N.J. 520, 540 (1995). The purpose of summary decision is to avoid unnecessary hearings and their concomitant burden on public resources. Under the Brill standard, a fact-finding hearing should be avoided "when the evidence is so one-sided that one party must prevail as a matter of law." Brill guides us thusly:

[A] determination whether there exists a "genuine issue" of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential

materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party.

[Id. at 540]

In explaining the standard to be applied in summary motion practice, the Brill Court explained:

The same standard applies to determine whether a prima facie case has been established by the party bearing the burden of proof in a trial. . . . If a case involves no material factual disputes, the court disposes of it as a matter of law by rendering judgment in favor of the moving or non-moving party.

[Id. at 536-37]

As a result of the agreement on the material facts, I **CONCLUDE** that the issue of any disqualifying offense by respondent can be decided as a matter of law.

The Board asserts ethics violations in the companion dispute, of which it has also provided supporting documentation notwithstanding that it was not consolidated herein, under two statutory provisions applicable to Board members, which provide as follows:

N.J.S.A. 18A:12-24. Conflicts of interest

a. No school official or member of his immediate family shall have an interest in a business organization or engage in any business, transaction, or professional activity, which is in substantial conflict with the proper discharge of his duties in the public interest;

b. No school official shall use or attempt to use his official position to secure unwarranted privileges, advantages or employment for himself, members of his immediate family or others;

c. No school official shall act in his official capacity in any matter where he, a member of his immediate family, or a business organization in which he has an interest, has a

direct or indirect financial involvement that might reasonably be expected to impair his objectivity or independence of judgment. No school official shall act in his official capacity in any matter where he or a member of his immediate family has a personal involvement that is or creates some benefit to the school official or member of his immediate family;

d. No school official shall undertake any employment or service, whether compensated or not, which might reasonably be expected to prejudice his independence of judgment in the exercise of his official duties;

e. No school official, or member of his immediate family, or business organization in which he has an interest, shall solicit or accept any gift, favor, loan, political contribution, service, promise of future employment, or other thing of value based upon an understanding that the gift, favor, loan, contribution, service, promise, or other thing of value was given or offered for the purpose of influencing him, directly or indirectly, in the discharge of his official duties. This provision shall not apply to the solicitation or acceptance of contributions to the campaign of an announced candidate for elective public office, if the school official has no knowledge or reason to believe that the campaign contribution, if accepted, was given with the intent to influence the school official in the discharge of his official duties;

f. No school official shall use, or allow to be used, his public office or employment, or any information, not generally available to the members of the public, which he receives or acquires in the course of and by reason of his office or employment, for the purpose of securing financial gain for himself, any member of his immediate family, or any business organization with which he is associated;

g. No school official or business organization in which he has an interest shall represent any person or party other than the school board or school district in connection with any cause, proceeding, application or other matter pending before the school district in which he serves or in any proceeding involving the school district in which he serves or, for officers or employees of the New Jersey School Boards Association, any school district. This provision shall not be deemed to prohibit representation within the context of official labor union or similar representational responsibilities;

h. No school official shall be deemed in conflict with these provisions if, by reason of his participation in any matter required to be voted upon, no material or monetary gain accrues to him as a member of any business, profession, occupation or group, to any greater extent than any gain could reasonably be expected to accrue to any other member of that business, profession, occupation or group;

And:

N.J.S.A. 18A:12-24.1. Code of Ethics for School Board Members

A school board member shall abide by the following Code of Ethics for School Board Members:

a. I will uphold and enforce all laws, rules and regulations of the State Board of Education, and court orders pertaining to schools. Desired changes shall be brought about only through legal and ethical procedures.

b. I will make decisions in terms of the educational welfare of children and will seek to develop and maintain public schools that meet the individual needs of all children regardless of their ability, race, creed, sex, or social standing.

c. I will confine my board action to policy making, planning, and appraisal, and I will help to frame policies and plans only after the board has consulted those who will be affected by them.

d. I will carry out my responsibility, not to administer the schools, but, together with my fellow board members, to see that they are well run.

e. I will recognize that authority rests with the board of education and will make no personal promises nor take any private action that may compromise the board.

f. I will refuse to surrender my independent judgment to special interest or partisan political groups or to use the schools for personal gain or for the gain of friends.

g. I will hold confidential all matters pertaining to the schools which, if disclosed, would needlessly injure individuals or the schools. In all other matters, I will provide accurate information and, in concert with my fellow board

members, interpret to the staff the aspirations of the community for its school.

h. I will vote to appoint the best qualified personnel available after consideration of the recommendation of the chief administrative officer.

i. I will support and protect school personnel in proper performance of their duties.

j. I will refer all complaints to the chief administrative officer and will act on the complaints at public meetings only after failure of an administrative solution.

Frankly, I am shocked at the level of vitriol that has been on display just in the papers filed in this matter. I am also shocked at the suggestion that a citizen who has been elected to a Board is expected to leave his or her opinions at the door notwithstanding he or she campaigned on specific concerns and issues, and notwithstanding the retention of free speech rights under the First Amendment. Respondent is passionate about full-day kindergarten for Wayne's children. Petitioner is correct that this case is not about the correctness of that position; nor will this matter reach any conclusion on that local subject. Yet, no member who is part of a minority of persons holding a certain viewpoint on an issue of local concern is stifled from expressing those views by any ethical code so long as those views are expressed in an appropriate manner, i.e., without profanity or libelous speech, or for an inappropriate reason, i.e., personal gain.

Petitioner seeks to disqualify and remove respondent from the Board for holding an opinion on a public issue over which clearly reasonable people could disagree, and for speaking her mind on that issue while sitting in Board meetings. Query what was the point of being elected to the Board if holding the minority or even an unpopular point of view is prohibited? No other Board member who voted similarly to respondent has been subjected to charges of unethical behavior before the Commission so far as I can discern. For example, the allegations of the Amended School Ethics Complaint would have findings of violations entered for the acts of debate and vote as a Board member during a Board meeting – Violations Four, Five, Six, Seven, and Eight. Other allegations split hairs or puff up repetitive charges, including Violations Two, Three and

Six. Violation One alleges unethical conduct on the part of respondent because she privately contributed money for a campaign to support full-day kindergarten; she visited a booth in support of full-day kindergarten at Wayne Day; and she was at a public art studio for a fundraising event for full-day kindergarten and was photographed with a pro-full-day kindergarten group of citizens. None of those actions is alleged to have occurred as a result of respondent representing herself as a Board member as opposed to acting as a private citizen. Violation Ten cites hearsay contained in newspaper reports of the dispute between the parties hereto and statements of her attorney as evidence of negative comments attempting to smear other members of the Board. Violation Nine is an allegation that she failed to properly serve her pro se request for an advisory opinion from the Commission (after this dispute had already ripened).²

While the Board argues that the enumerated words spoken and actions taken by respondent violates N.J.S.A. 18A:12-2, because of an alleged inconsistent interest. That statute provides in pertinent part: "No member of any board of education shall be interested directly or indirectly in any contract with or claim against the board, . . .," it has failed to support its argument with evidence of any contract with or claim against. In fact, the ethics proscriptions in Section 24.1 includes the statement "I will refuse to surrender my independent judgment to special interest or partisan political groups or to use the schools for personal gain or for the gain of friends." Respondent retained her independent judgment and nothing to the contrary presented by the Board indicates that she abdicated it for her gain or the gain of others. The only change respondent was seeking to make was to establish full-day kindergarten in Wayne and she tried to do so by exercising her right to lobby her fellow members through debate and discussion.

With respect to the issue of respondent signing on to the Complaint, petitioner has also exaggerated both the facts and their significance. Respondent correctly asserts that she was just one of the fifteen citizens who signed the Complaint, the number needed to mount an election challenge under Title 19. She is also correct in

² While Wayne separates the Board disqualification petition from the SEC ethics complaint, these facts are all set forth in the certifications and documents supporting the present cross-motions.

stating that the Board was not a party to that litigation, no matter what a clerk might say or a computerized summary might display. This was not a lawsuit filed to force the Board to install full-day kindergarten. This was a lawsuit to invalidate the results of a public question on the ballot. That the subject matter of the public question involved the school budget and its 2% cap is not relevant to that lawsuit or this one.

I could reach the conclusion that respondent should have erred on the side of caution and not become a signatory plaintiff to the Complaint, but in no other manner or fashion did she violate the ethical restraints upon Board members. The Commission has recognized that "board members do not surrender the rights that they have as citizens such as freedom of speech" due to their board membership but, in exercising those rights, a board member must comply with the standards set forth in the School Ethics Act. SEC Advisory Opinion, A02-06 (March 10, 2006). I **CONCLUDE** as a matter of law and undisputed facts that petitioner has failed to support these allegations. Moreover, even if it had, the relief sought by petitioner should be seen as extreme and extremely inappropriate.

Again, the Board seeks to disqualify and remove respondent on the basis of N.J.S.A. 18A:12-2, because of alleged inconsistent interests. That statute provides in pertinent part: "No member of any board of education shall be interested directly or indirectly in any contract with or claim against the board, . . ." The Supreme Court of New Jersey has interpreted Section 2 to require a "substantial conflict" in order to support a removal of a duly-elected member of a Board of Education:

Accordingly, the Commissioner's decisions examining claims by board members have discussed the relevance of determining whether the member was pursuing a claim in the public interest rather than "personal aggrandizement and enrichment," Bd. of Educ. of Newark v. Brown, 1984 S.L.D. 671, 680 (Comm'r of Educ.), *aff'd*, 1984 S.L.D. 683 (St. Bd. of Educ.), and such other considerations as whether the claim giving rise to the conflict of interest promised "substantial and material benefit" to the claimant. *Id.* at 681 (internal quotation marks omitted). We note further that, in one decision, the Commissioner specifically rejected the argument that N.J.S.A. 18A:12-2 requires automatic

disqualification for "any" claim against a board. See id. at 679, 681 (citing Hogan v. Bd. of Educ. of Kearny, 1982 S.L.D. 329(ALJ), aff'd, 1982 S.L.D. 354 (Comm'r of Educ.) (permitting abstention to remedy circumstances where "claim" against board involved reimbursement of legal fees incurred in Open Public Meetings Act lawsuit filed by member), aff'd, 1982 S.L.D. 356 (St. Bd. of Educ.)).

In sum, we find that the Commissioner's applications of N.J.S.A. 18A:12-2 demonstrate a willingness to engage in a careful examination of a board member's asserted conflicting interest in a claim against a board and, further, to find that not all claims in which a board member has an interest constitute a "substantial conflict" requiring removal from office as the sole remedy.

[Bd. of Educ. of City of Sea Isle City v. Kennedy, 196 N.J. 1, 15-16 (2008)]

Here, respondent did not sue or file a complaint against the Board of which she was a member. She and fourteen other citizens sought Superior Court review of the election process on the public question. She gained nothing and had no pecuniary interest, such as a family business, adverse to the Board. Nothing I have read requires respondent to sit home from Wayne Day or other cultural events in the community. Moreover, a more careful inquiry by the Board would have revealed that the Complaint was an election law challenge to obtain an order to the municipal clerk to void the election results. Only the subject matter of the public question implicated Board interests. Nevertheless, respondent might have appeared to be challenging her Board in this litigation by the general public of Wayne. It is a very weak claim by petitioner that I **CONCLUDE** should be thrown out entirely. Respondent has every right to remain on the Board on behalf of the citizens who voted for her, no doubt because they agree with her passionate stance about kindergarten.

I would remind all parties that "[d]iscussion in America means dissent." James Thurber. We should welcome different views on important school policies such as full-day kindergarten because "[f]reedom is hammered out on the anvil of discussion, dissent, and debate." Hubert H. Humphrey

ORDER

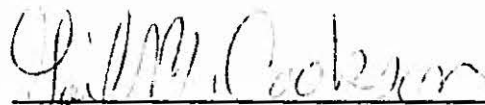
It is **ORDERED** that the motion of respondent Catherine Kazan for an Order Granting Summary decision is hereby **GRANTED**. It is further **ORDERED** that the cross-motion of petitioner Board of Education of the Township of Wayne for an Order Granting Summary Decision is hereby **DENIED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

March 16, 2017
DATE



GAIL M. COOKSON, ALJ

Date Received at Agency:

3-16-2017

Date Mailed to Parties:

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