

SHANE BERGER, :
PETITIONER, : COMMISSIONER OF EDUCATION
V. : DECISION
GLADYS RIVERA AND BOARD OF :
EDUCATION OF THE TOWNSHIP OF :
BLOOMFIELD, ESSEX COUNTY, :
RESPONDENTS. :

SYNOPSIS

Petitioner – a former member of the Bloomfield Board of Education (Board) – challenged the eligibility of respondent, Gladys Rivera – currently a member of the Board – to serve in that capacity, based on a residency requirement. Petitioner asserted that Rivera had not been a resident of Bloomfield for one year immediately preceding the board election as is required by *N.J.S.A.* 18A:12-1. Petitioner filed an application for emergency relief in this matter, which was denied. A plenary hearing was held in the matter on February 7, 2017, after which the record was closed.

The ALJ found, *inter alia*, that: the question posed in this matter is when did respondent Rivera become a bona fide resident of Bloomfield; Rivera was elected to the Board in November 2016; petitioner ran for re-election to a third term in the same race, but failed to earn enough votes to continue his service on the Board; soon after the election, questions were raised about the residency of respondent, and whether she had lived in town for the requisite one year prior to running for the Board; petitioner retained the services of a detective agency to conduct a residency investigation on respondent; the resulting detective’s report concluded that respondent lived in Elizabeth rather than Bloomfield; on the other hand, respondent provided testimony from herself and others that contradicted the facts and assumptions of the detective’s report, and indicated that respondent had relocated to Bloomfield after beginning a romantic relationship with her now-fiancé in April 2015; and the pivotal issue here is whether petitioner has satisfied his burden of proving by a preponderance of the credible evidence that respondent did not reside in Bloomfield for the requisite period of time. The ALJ concluded that the competent, credible evidence in this matter does not establish that respondent was not a resident of Bloomfield for the requisite one year prior to her election to the Bloomfield Board of Education. Accordingly, the petition was dismissed.

Upon review, the Commissioner concurred with the findings and conclusions of the ALJ. Accordingly, the Initial Decision was adopted as the final decision in this matter and the petition was dismissed.

This synopsis is not part of the Commissioner’s decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

OAL DKT. NO. EDU 19266-16
AGENCY DKT. NO. 319-12/16

SHANE BERGER, :
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The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions filed pursuant to *N.J.A.C.* 1:1-18.4 by the petitioner, Shane Berger. This matter involves a claim by the petitioner that respondent, Gladys Rivera – a current member of the Bloomfield Board of Education (Board) – was not a resident of Bloomfield for one year immediately preceding the school board election as required by *N.J.S.A.* 18A:12-1.¹ In this case, the relevant school board election was held on November 8, 2016. Following a hearing at the OAL, the Administrative Law Judge (ALJ) found that the petitioner did not present sufficient evidence to establish that the respondent was not a resident of Bloomfield for the requisite one year prior to her election to a seat on the Board. Therefore, the ALJ dismissed the petition.

In his exceptions, the petitioner maintains that the ALJ erred when she concluded that the competent, credible evidence in this matter does not establish that the respondent was not a resident in Bloomfield for the requisite one year period prior to the school board election. In

¹ Pursuant to *N.J.S.A.* 18A:12-1, “[e]ach member of any board of education shall be a citizen and a resident of the district ... and shall have been such for one year immediately preceding his appointment or election.”

support of his argument, the petitioner offers witness testimony that he contends demonstrates by a preponderance of the evidence that it is more likely than not that the respondent did not live in Bloomfield one year prior to the election. The petitioner stresses that the respondent is “a literal ghost” when it comes to evidence that she resided in Bloomfield on or before November 8, 2015. (Petitioner’s Exceptions at 4) The petitioner also emphasizes that the ALJ herself stated: “[c]learly, significant question remains as to whether respondent was domiciled in Bloomfield for the requisite one year prior to her election.” (*Id.* at 2) Based on the totality of the circumstances, the competent, credible evidence contradicts the respondent’s assertion that she lived in Bloomfield for the requisite one year prior to her election. Therefore, the petitioner argues that he has met his burden of proof, and the respondent should be removed from her position on the Board.

Upon a comprehensive review of the record in this matter, the Commissioner concurs with the ALJ – for the reasons thoroughly set forth in the Initial Decision – that the petitioner did not present sufficient evidence to establish that the respondent was not a resident of Bloomfield for the requisite one year prior to her election to a seat on the Board. In this case, the petitioner alleges that the respondent was not a bona fide resident of Bloomfield for one year prior to the election, while the respondent maintains that she was in fact a resident of Bloomfield. Importantly, it is the petitioner who carries the burden of proving by a preponderance of the evidence that the respondent was not a resident of Bloomfield as of November 8, 2015.

Although there may be questions regarding the respondent’s residency², based on her overall assessment of the evidence and witness testimony, the ALJ found that the respondent’s testimony that she was a resident of Bloomfield for the requisite period was not

² The Initial Decision outlines the details and the circumstances surrounding the respondent’s residential history and the residency investigation.

successfully challenged. The ALJ had the opportunity to assess the credibility of the various witnesses who appeared before her and made findings of fact based upon their testimony. In this regard, the clear and unequivocal standard governing the Commissioner's review is:

The agency head may not reject or modify any findings of fact as to issues of credibility of lay witness testimony unless it is first determined from a review of the record that the findings are arbitrary, capricious or unreasonable or are not supported by sufficient, competent, and credible evidence in the record. [N.J.S.A. 52:14B-10(c)].

The respondent maintains that she moved into her fiancé's residence in Bloomfield before November 8, 2015. The ALJ found that the respondent testified plausibly and her fiancé testified credibly in connection with concerns raised by the petitioner regarding where the respondent resided during the relevant period. It is clear that the ALJ's ultimate determination in this matter was dictated by which party had the burden of proof. Notwithstanding the petitioner's contentions to the contrary, the Commissioner finds no basis in the record to reject either the ALJ's determinations of witness credibility or her application of the petitioner's burden of proof to find that the petitioner did not present enough evidence to prove that the respondent was not a resident of Bloomfield as of November 8, 2015.

Accordingly, the recommended decision of the ALJ is adopted as the final decision in this matter, and the petition of appeal is hereby dismissed.

IT IS SO ORDERED.³

ACTING COMMISSIONER OF EDUCATION

Date of Decision: June 20, 2017

Date of Mailing: June 20, 2017

³ Pursuant to *P.L. 2008, c. 36* (N.J.S.A. 18A:6-9.1), Commissioner decisions are appealable to the Superior Court, Appellate Division.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 19266-16

AGENCY DKT. NO. 319-12/16

SHANE BERGER,

Petitioner,

v.

**GLADYS RIVERA, AND BOARD OF
EDUCATION OF BLOOMFIELD, ESSEX
COUNTY,**

Respondents.

Ciro Spina, Esq., for petitioner (Law Offices of Jef Henninger, attorneys)

James A. Key, Jr., Esq., for respondent Gladys Rivera (Key Law Firm,
attorneys)

Jonathan M. Busch, Esq., for respondent Bloomfield Board of Education (Busch
Law Group, LLC, attorneys)

Record Closed: February 7, 2017

Decided: May 8, 2017

BEFORE **LESLIE Z. CELENTANO**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The petitioner, Shane Berger, asserts that Gladys Rivera, currently a member of the Board of Education of Bloomfield, Essex County, New Jersey, had not been a resident of Bloomfield for one year immediately preceding the election as is required by N.J.S.A. 18A:12-1.

Petitioner filed an application for emergency relief seeking an Order voiding the candidacy of Rivera for a seat on the Board and enjoining Rivera from continuing to occupy a seat and/or removing her from her elected position.

Oral argument was heard on January 5, 2017, and on January 6, 2017, an Order was issued denying the emergent relief sought.

The matter was scheduled for plenary hearing on February 7, 2017, and was heard on that date, at the conclusion of which the record closed.

TESTIMONY

Edward Koster

Edward Koster has been the director of the Spartan Detective Agency for three and a half years. He previously served as a police officer for twenty-five years in the Township of Union. He was asked by petitioner to conduct an investigation of Gladys E. Rivera. He generated two reports, one that was later determined to be related to a different Gladys Rivera, and a second that investigated the correct person. (P-2.) The report, dated January 13, 2017, revealed that as of that date Ms. Rivera's address was 542 South Broad Street, in Elizabeth, N.J. Koster used several databases in his research, and checked telephone numbers and cell-phone numbers, and cross-referenced everything, and nothing came up to suggest that Ms. Rivera resided in Bloomfield, N.J., as of January 13, 2017. Her cell-phone bill does not go to the Bloomfield address, nor do any utility bills.

Jill Fischman

Jill Fischman is in her second term on the Bloomfield Board of Education and served as president from June 2016 until December 2016. She was notified in December 2016 that questions had arisen regarding respondent's residency, and whether she had lived in town for the requisite one year prior to running for the Board of Education. Ms. Fischman testified that she sent respondent a text message indicating that there were concerns about her residency, and asked for proof of residency. In turn, respondent sent Ms. Fischman her New Jersey Motor Vehicle Commission (MVC) change-of-address form dated March 24, 2016.⁴ Respondent indicated that she would provide additional proofs, or a letter from her landlord; however, none of those things were forthcoming, and Ms. Fischman heard nothing further from respondent regarding the request for additional proofs of residency.

As a result, Ms. Fischman asked Nicholas Dotoli, Esq., Board attorney, to seek the assistance of the police department in determining respondent's residency. She does not know what they did and did not receive any reports. She asked for the inquiry because respondent had said that her campaign manager would provide additional proofs of residency, and did not, and so she asked that a police check be undertaken.

Leonardo Marin III

Leonardo Marin has resided at 329 Ampere Park in Bloomfield for four years with his mother and younger brother. He indicated that he has been the building supervisor for those four years, for which he receives no salary, but does receive additional property privileges, including use of the patio and additional parking. The residence is a three-family house and he lives on the second floor. The third-floor tenant is Richard Mendez, who has lived there approximately nine years, and now Gladys Rivera, respondent, who moved in with Mr. Mendez in April 2016. Marin testified that he had just finished a course of physical therapy for a sports injury at the time, and noted her moving boxes in gradually.

⁴ This is only eight months before the election.

Vincent Kearney

Lieutenant Kearney has been employed by the Bloomfield Police Department for sixteen years and is the lieutenant in charge of the Internal Affairs Division. He has been a lieutenant since 2014, and prior to that was a sergeant for five years. He was asked by the police director to do an investigation of respondent, and was provided with the Spartan report and the letter from Mr. Marin. He determined that respondent moved to Bloomfield in the spring of 2016, sometime between the dates of March 9 and April 19, 2016, and that prior to that she resided at 542 South Broad Street in Elizabeth, N.J. An MVC search revealed that on March 9, 2016, the address on her driver's license had been changed to 329 Ampere Parkway in Bloomfield. He checked the voter-registration system, which revealed that respondent changed her voter registration to the Bloomfield address on April 19, 2016. He also found prior voter registrations at 542 South Broad Street in Elizabeth (until September 2016) and a prior voting address of 527 Morris Avenue, also in Elizabeth, N.J.

Lieutenant Kearney then conducted witness interviews, including of Mr. Marin, who indicated that respondent moved into his building in April, and that at some point, "several months ago," Richard Mendez had asked permission for respondent to move in with him. Marin did not recall exactly when Mendez had sought permission, but indicated that it was several months before Lieutenant Kearney spoke to him in January 2017.

Lieutenant Kearney testified that he did not speak to respondent's prior landlord. He also testified that NJ MVC laws require individuals who move to change their address within fourteen days or they can receive a summons.

Shane Berger

Mr. Berger is self-employed and owns a chain of laundromats. He was elected to the Bloomfield Board of Education in 2010 and reelected in 2013, and has served as chairman of every committee. He has also served as the liaison for every school;

however, he was not reelected in the last cycle in 2016, and came in fourth place. He has also previously served on the county school board association, and was the State chairman of the Standards and Assessments Standing Committee.

Mr. Berger testified that many people reached out to him indicating that “someone needs to do something” about the fact that a nonresident had been elected to the Board. He recognized that he would not get the seat if respondent were unseated; however, he felt that residency issues are important matters that the Board has to address, and that if a Board member does not even comply, how can they determine residency compliance by others?

Berger testified that he went to the county superintendent of elections and was advised that the onus is on the district to determine respondent’s residency. He then met with the Board attorney, Mr. Dotoli, and the superintendent, Mr. Gonzalez. Soon thereafter, he received a call from the county superintendent’s office instructing him how to challenge the election results.

Berger testified that he wants credibility for the Board of Education, and that the residency of Board members cannot be in question. He says he is doing his civic duty. He believes respondent did not live in town for the requisite one year prior to the election, and that she has provided no proof otherwise, despite requests from the then-president of the Board, Ms. Fischman.

Nicholas J. Dotoli

Mr. Dotoli is employed by the Bloomfield Township Board of Education as director of human resources and general counsel. He oversees all employment acts and certification issues and also oversees special education. He advises the Board members and reports to the superintendent.

Residency issues related to respondent came to his attention from members of the community who were concerned whether there had been compliance with N.J.S.A. 18A:12-1, et seq., and whether respondent actually lived in town. He sent an email to

the police director (R-1) at the request of the Board president, Ms. Fischman, to investigate the residency issue. He also spoke to Lieutenant Kearney regarding his report, and was concerned that respondent had moved to Bloomfield in April 2016.

He testified that he has never had to do an investigation of a Board member. He agreed that investigations are conducted of student residency issues, but he does not feel the same standards apply under N.J.S.A. 18A:12-1. A student may not attend school if not a resident of the district, but he does not believe it is within his jurisdiction to make sure the Board members are qualified to sit, and feels that is the responsibility of the County Board of Elections, which has jurisdiction to determine if Board members have met the requirements.⁵

Amarilis Martinez

Ms. Martinez testified that she lives at 511 Fulton Street in Elizabeth, which is a two-family home that she has owned for thirty-six years. She stated that respondent rented a room from her from early 2015 until June 30, 2015, pursuant to her rent

⁵ Under the school laws governing the qualifications of school-board members, N.J.S.A. 18A:12-1 to -2.2, “[e]ach member of any board of education shall be a citizen and resident of the district . . . and shall have been such for at least one year immediately preceding his appointment or election.” N.J.S.A. 18A:12-1. Moreover, “[w]henver a member of a local or regional board of education shall cease to be a bona fide resident of the district . . . his membership in the board shall immediately cease.” N.J.S.A. 18A:12-3. And, in the event a school-board member is removed because he is not a resident of the district, the county superintendent of schools shall fill the vacancy. N.J.S.A. 18A:12-15(a).

The Commissioner of Education has “jurisdiction to hear and determine . . . all controversies and disputes arising under the school laws.” N.J.S.A. 18A:6-9. However, in 1995 the Legislature “transfer[red] responsibility for the conduct of school elections from boards of education to the officials responsible for conducting other elections under New Jersey’s election code (Title 19 of the Revised Statutes),” and “jurisdiction over school election-related disputes [was] removed from the Commissioner of Education and State Board of Education, so that such disputes will be handled in the same manner as those arising with respect to other elections.” P.L. 1995, c. 278; Statement to Senate Amendments to A1705 (adopted June 12, 1995). As a result of that change, “controversies and disputes concerning the conduct of school elections shall not be deemed to arise under the school laws.” N.J.S.A. 18A:6-9.

Thus, while the Commissioner does not have jurisdiction over the conduct of school elections, the Commissioner still has jurisdiction over post-election challenges to a board member’s qualifications, including the residency requirement under N.J.S.A. 18A:12-1. See, e.g., Bd. of Educ. of Sea Isle v. Kennedy, EDU 2028-05, Comm’r (June 30, 2005) (confirming that the Commissioner is the one “to whom adjudication of board member qualification is reserved in the event of a dispute, N.J.S.A. 18A:6-9”), aff’d, State Bd. of Educ. (January 4, 2006), <<http://njlaw.rutgers.edu/collections/oal/>>, aff’d, 393 N.J. Super. 93 (App. Div. 2007) (stating that “[c]laims regarding an individual’s qualifications to serve on a local board fall under the Commissioner’s jurisdiction”), aff’d, modified for other reasons, 196 N.J. 1 (2008).

receipts. At the end of June 2015, respondent moved out and moved in with her boyfriend, Richard Mendez, in Bloomfield. She believes that they became engaged on July 5, 2015, and moved in together around that time. Her daughter is married to respondent's son, and both her sons now live in the building as of June 2015, when respondent moved out. She testified that respondent paid \$300 a month for the room. She stated that respondent still receives mail at her address, and that she comes there every weekend, because "she is family," as they are both grandmothers to the same children.

Aida Ortiz

Ms. Ortiz testified that she lives at 12 Turnbridge Place in Bloomfield, N.J., where she has lived for seventeen years. She has known respondent since Mother's Day 2015, when her son introduced Rivera as his fiancée. Her son resides at 329 Ampere Parkway, Bloomfield, and Ms. Ortiz testified that she was there when respondent moved in with her son at that address. She testified that she helped bring some things upstairs. Respondent was unsure of the security of the mail at the Bloomfield address because she did not trust the residents there, and so she still sends mail to Ms. Ortiz's home in Bloomfield. Respondent asked her almost a year ago if she could use her address to send mail to. She also stated that respondent took a "small bedroom set" into the apartment, and that she unpacked clothes and dishes for about two hours, helping to empty out a small truck they rented.

Richard Mendez

Mr. Mendez testified that he has lived at 329 Ampere Parkway in Bloomfield for three and a half or four years, and that respondent is his fiancée. He testified that they met online on April 10, 2015; started dating about a week later; and became engaged on July 5, 2015. He testified that he introduced her to his mother, Ms. Ortiz, on Mother's Day of 2015, and that she moved into his apartment at the end of June or in early July 2015. Mr. Mendez provided a receipt for the engagement ring dated June 8, 2015. (R-2.) He agrees that respondent asked his mother if her mail could go to his mom's house because they felt there was mail tampering since she moved in with him.

Mendez stated that when his mother met respondent in May 2015 she was not yet his fiancée, and so his mother was incorrect when she said that respondent was introduced to her as his fiancée.

He also stated that his mail was tampered with in July 2015, so they began to send their mail to his mother's address, and that his mother's address is on all his bills and checks.⁶ The mailboxes at 329 Ampere Parkway in Bloomfield do not have locks on them; however, the mailbox at his mother's house does, so all the mail goes here. Mendez confirmed that he asked permission of the landlord for respondent to move in around June of 2015. He also stated that respondent does not pay any of the bills.

Finally, Mendez testified that a joint account with respondent was opened on August 3, 2015. (R-3.)

Gladys Rivera

Ms. Rivera testified that from January 2015 until the end of June 2015 she lived at 511 Fulton Street in Elizabeth. She then said she had moved there at the end of August 2014. At the end of June 2015 she moved into 329 Ampere Parkway in Bloomfield, with Richard Mendez. She arranged at the time for her mail to remain coming to the Fulton Street address until she was comfortable with mail going to Bloomfield. She believed that Leo Marin's younger brother would go through the mailbox, and so arranged for bank statements and certain other mail to go to her mother's address, and other mail to continue to go to Martinez's address.

Rivera testified that she "started off fine" with other tenants at the Bloomfield address; however, relationships changed when the Marins had her daughter's car towed from the driveway one day. It was parked in Mr. Mendez's spot at the time, yet it was towed. The Marin boys continued to visit, as they were friendly with Mendez's son; however, their mother, Teresa, no longer spoke to her.

⁶ None were produced and there was no indication they had been requested to be produced.

Ms. Rivera testified that her fiancé's mother, Aida Ortiz, helped a bit with the move. They had an SUV that they used, but did not bring any furniture; they had a futon delivered a few weeks later. She stated that she moved in with Mendez in July 2015 after Ms. Martinez needed the room she had been renting for another son, who moved in when she moved out, and remains living there today. She had nowhere to go back to, and so moved in with Mr. Mendez.

Rivera agreed that she had been asked for proof of residency, and only provided an MVC address-change form from March 2016, and that other address changes slipped her mind because a lot was going on. She stated that her cell-phone bill goes to her son because it is in his name, and that the bank statement for her personal account goes to Ms. Martinez's home at 511 Fulton Street in Elizabeth. The statements for the joint account with Mr. Mendez go to 12 Turnbridge Place in Bloomfield, Ms. Ortiz's home. She testified that she changed her voter registration in March or April 2016, and agreed that there are no bills or other utilities in her name, and that she is not on the lease. Rivera again stated that she lived at 542 South Broad Street in Elizabeth from December 2010 until August 2014,⁷ and then moved to 511 Fulton Street in Elizabeth, but she did not change her address because she "didn't see a need."

FACTUAL DISCUSSION

Based upon consideration of the testimonial and documentary evidence presented at the hearing and having had the opportunity to observe the demeanor of the witnesses and to assess their credibility, I **FIND** the following **FACTS** by a preponderance of the credible evidence:

Gladys Rivera is a member of the Board of Education of the Township of Bloomfield in Essex County. An election was held in November 2016 for four seats on the Board. Three seats were for three-year terms and one seat was for a one-year term. Respondent earned 4,258 votes for one of the three-year seats, and thus was

⁷ This varies from Ms. Martinez's testimony and the rent receipts she referenced, which she indicated reflected that Rivera rented the room from January 2015 through June 2015.

seated. Petitioner ran in the same election, also seeking a three-year term, and placed fourth, with 2,670 votes.

Soon after the election, questions were raised about the residency of Ms. Rivera and whether she had lived in town for the requisite one year prior to running for the Board. The president of the Board at the time, Jill Fischman, advised respondent of the concerns that had been raised as to her residency and asked for proof that Ms. Rivera did indeed reside in Bloomfield. In response to this inquiry, respondent sent Ms. Fischman the New Jersey Motor Vehicle Commission address form dated March 24, 2016. Rivera indicated she would provide additional proofs and a letter from her landlord; however, no additional proofs were received by Ms. Fischman.

Ms. Fischman then requested that the Board attorney, Nicholas Dotoli, Esq., ask the police department for help in determining respondent's residency. That was her last involvement with the issue.

Believing that Rivera had not resided in Bloomfield for the one year immediately prior to the election as is required by statute, petitioner retained the services of the Spartan Detective Agency to conduct a search on Rivera. The investigator reported that as of the date of his report, January 13, 2017, all information came back indicating Ms. Rivera's address to be 542 South Broad Street in Elizabeth, New Jersey. He concluded that she resided at the address following voter-registration searches, motor-vehicle searches, and cell-phone searches, as more fully detailed in a twenty-five-page report he provided to petitioner. He also determined that Rivera was registered to vote in Elizabeth, New Jersey, and therefore also did not meet the requirement of the statute that she be registered to vote in the district. After receiving the report, petitioner filed his application to have her removed from her position on the Board.

Respondent previously resided at 542 South Broad Street, Elizabeth, New Jersey. She then moved to 511 Fulton Street in Elizabeth, New Jersey, and lived there from either August 2014 or January 2015 until the end of June 2015, when she moved out.

Respondent and Richard Mendez met online on April 10, 2015, and started dating about a week later, becoming engaged on July 5, 2015. Respondent moved in with Mendez at 329 Ampere Parkway in Bloomfield, New Jersey, sometime between July 1, 2015, and March 9, 2016. Respondent and Mendez opened a joint bank account on August 3, 2015.

On March 9, 2016, Rivera changed the address on her driver's license to 329 Ampere Parkway in Bloomfield, New Jersey. Respondent changed her voter registration to Bloomfield, New Jersey, on April 19, 2016.

Respondent has her mail delivered to her mother's address, to Ms. Ortiz's⁸ address, and to Ms. Martinez's⁹ address.

DISCUSSION AND CONCLUSIONS

The statute, at N.J.S.A. 18A:12-1, Qualifications, provides in salient part as follows:

Each member of any board of education shall be a citizen and resident of the district, or of such constituent district of a consolidated or regional district as may be required by law, and shall have been such for at least one year immediately preceding his appointment or election, he shall be able to read and write, shall be registered to vote in the district, and, notwithstanding the provisions of N.J.S. 2C:51-1 or any other law to the contrary, he is not disqualified as a voter pursuant to R.S. 19:4-1

N.J.S.A. 18A:12-2.1, Oaths, provides as follows:

Each member of the board of education shall, before entering upon the duties of his office, take and subscribe:

- (1) An oath that he possesses the qualifications of membership prescribed by law, including a specific

⁸ Aida Ortiz is Mr. Mendez's mother.

⁹ Martinez's daughter is married to respondent's son.

declaration that he is not disqualified as a voter pursuant to R.S. 19:4-1 and a specific declaration that he is not disqualified due to conviction of a crime or offense listed in N.J.S. 18A:12-1, and that he will faithfully discharge the duties of his office, and also

(2) The oath prescribed by R.S. 41:1-3.

In the case of a Type I school district the oath shall be filed with the clerk of the municipality and in all other cases it shall be filed with the secretary of the board of education of the district.

The question then is, when did Rivera become a bona fide resident of Bloomfield, New Jersey? The petitioner in this matter asserts that respondent is not eligible for membership on the Board for having failed to meet the one-year residency requirement of the statute. Petitioner seeks to have respondent removed from the Board. Respondent contends that she was a resident of Bloomfield for more than one year preceding her election and that the burden is on the petitioner to prove she was not.

As a threshold matter, it must be presumed that respondent met the requirements of the County Board of Elections, because respondent's name was printed on the ballot. The Board of Elections must therefore, have been satisfied that the candidate was qualified by residence, among other things, to be elected to the Board.

It is well settled that a person can have more than one residence, but only one domicile. Somerville Bd. of Educ. v. Manville Bd. of Educ., 332 N.J. Super. 6, 12 (App. Div. 2000), aff'd, 167 N.J. 55 (2001). The domicile of a person is the place where he has his true, fixed permanent home and principal establishment, and to which whenever he is absent, he has the intention of returning, and from which he has no present intention of moving. In re Unanue, 255 N.J. Super. 362, 374 (Law Div. 1991), aff'd, 311 N.J. Super. 589 (App. Div.), certif. denied, 157 N.J. 541 (1998), cert. denied, 526 U.S. 1051, 119 S. Ct. 1357, 143 L. Ed. 2d 517 (1999). The acts, statements and conduct of the individual, as viewed in the light of all the circumstances, determine a person's true intent. Collins v. Yancey, 55 N.J. Super. 514, 521 (Law Div. 1959).

Respondent testified that she registered to vote in Bloomfield in March or April of 2016; however, no testimony was offered as to whether respondent did in fact vote in Bloomfield in the following election cycle. However, failure to vote is not proof of lack of residence; indeed, the notion that she was still a resident of Elizabeth would be disproven with the same argument.

The basis of the petition in this matter is primarily threefold: (1) respondent receives no bills or any other mail at the Bloomfield address; (2) respondent was registered to vote in Elizabeth, New Jersey, until March or April 2016; and (3) respondent changed the address on her driver's license in March 2016. When asked by the president of the Board of Education for proof as to her residency, respondent failed to provide any, other than the MVC address change processed less than eight months before the election. While at first blush it appears that respondent had not established domicile in Bloomfield within the requisite one year, she offered the plausible explanation that the mail was not secure at the Bloomfield address, and so all of her bills and bank statements continued to be sent to prior addresses or to her mother's home. The pivotal issue, therefore, in this matter is whether petitioner has satisfied his burden of proving, by a preponderance of the credible, competent evidence, that respondent did not reside in Bloomfield for the requisite period of time.

In connection with that determination, it is necessary for me to assess and weigh the credibility of the witnesses for purposes of making factual findings as to the disputed facts. Credibility is the value that a finder of facts gives to a witness' testimony. It requires an overall assessment of the witness' story in light of its rationality, internal consistency and the manner in which it "hangs together" with the other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). "Testimony to be believed must not only proceed from the mouth of a credible witness but must be credible in itself," in that "[i]t must be such as the common experience and observation of mankind can approve as probable in the circumstances." In re Perrone, 5 N.J. 514, 522 (1950). A fact finder "is free to weigh the evidence and to reject the testimony of a witness . . . when it is contrary to circumstances given in evidence or contains inherent improbabilities or contradictions which alone or in connection with other circumstances in evidence excite suspicion as to its truth." Id. at 521-22; see McPherson v. D'Amato, 305 N.J. Super.

109, 115 (App. Div. 1997). A trier of fact may reject testimony as “inherently incredible,” and may also reject testimony when “it is inconsistent with other testimony or with common experience” or “overborne” by the testimony or other witnesses. Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958). Similarly, “[t]he interest, motive, bias, or prejudice of a witness may affect his credibility and justify the [trier of fact], whose province it is to pass upon the credibility of an interested witness, in disbelieving his testimony.” State v. Salimone, 19 N.J. Super. 600, 608 (App. Div.), certif. denied, 10 N.J. 316 (1952) (citation omitted). The choice of rejecting the testimony of a witness, in whole or in part, rests with the trier and finder of the facts and must simply be a reasonable one. Renan Realty Corp. v. Dep’t of Cmty. Affairs, 182 N.J. Super. 415, 421 (App. Div. 1981).

It is also necessary to consider the nature of the evidence presented. Hearsay evidence is admissible in administrative proceedings and “shall be accorded whatever weight the judge deems appropriate taking into account the nature, character and scope of the evidence, the circumstances of its creation and production, and, generally, its reliability.” N.J.A.C. 1:1-15.5(a). Notwithstanding the admissibility of hearsay evidence, the “residuum rule” requires that “some legally competent evidence must exist to support each ultimate finding of fact to an extent sufficient to provide assurances of reliability and to avoid the fact or appearance of arbitrariness.” N.J.A.C. 1:1-15.5(b). In the words of the New Jersey Supreme Court:

[A] fact finding or a legal determination cannot be based upon hearsay alone. Hearsay may be employed to corroborate competent proof, or competent proof may be supported or given added probative force by hearsay testimony. But in the final analysis for a court to sustain an administrative decision, which affects the substantial rights of a party, there must be a residuum of legal and competent evidence in the record to support it.

[Weston v. State, 60 N.J. 36, 51 (1972).]

In this matter, the record includes contradictory testimony related almost solely to the failure to submit changes of address. The Spartan Detective Agency report reflects Elizabeth addresses for everything in respondent’s name, through the date of the report

in January 2017. The preliminary investigation by the police department reflects largely the same information, along with reports of interviews, including that of Mr. Marin, who indicated that respondent had only moved in “several months ago.”¹⁰ The testimony of Ms. Martinez was of limited usefulness, and the date she alleges respondent began renting a room from her differs from the testimony of respondent. Additionally, the testimony of Ms. Ortiz conflicted with that of respondent in terms of the furniture purportedly moved into the Bloomfield address. Mr. Mendez testified credibly regarding the issues with the mail that respondent experienced at his address. Respondent’s testimony regarding those issues with the mail was plausible.

Notwithstanding the efforts of petitioner to attempt to shift the burden of proof to respondent, ultimately the allegations and testimony of respondent have not been successfully challenged, and the burden of proof rests squarely with petitioner. It is the sworn testimony of respondent that she resided in Bloomfield for more than one year preceding the school-board election in November 2016. Her prior residence in Elizabeth has been occupied by the owner’s son since respondent moved out, and she cannot return there. The MVC address change in March 2016 and the voter-registration address change in April 2016 are not, by themselves, sufficient to discredit respondent’s testimony that Bloomfield was her residence and domicile from and after July 2015. Petitioner’s contention that the failure to file change-of-address forms, or to receive mail at the Bloomfield address, is proof of no change in domicile from Elizabeth, is insufficient to refute the limited testimony to the contrary.

Clearly, significant question remains as to whether respondent was domiciled in Bloomfield for the requisite one year prior to her election. However, absent competent, credible evidence of the contrary, no consideration can be given to granting the extraordinary relief sought of removal from the Board.

“The plaintiff’s residence will be presumed to be where he alleges it to be, unless the contrary appear.” 71 N.J.L. 115 (Sup. Ct. 1904).

¹⁰ Mr. Marin testified on direct examination that he observed Rivera visit the home “on and off” on weekends, commencing in January 2015. This was three months before Rivera and Mendez met. On redirect, he indicated that he began to see her “dating back to July 2015,” and that Rivera started moving boxes in around April 2015.

Based upon all of the foregoing, I am constrained to **CONCLUDE** that the competent, credible evidence in this matter does not establish that respondent was not a resident in Bloomfield for the requisite one year prior to her election to a seat on the Bloomfield Board of Education.

ORDER

The petition to declare that Gladys Rivera was not a bona fide resident of the Township of Bloomfield, Essex County, New Jersey, for one year prior to her election to the Board of Education is **DISMISSED**.

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.

May 8, 2017

DATE



LESLIE Z. CELENTANO, ALJ

Date Received at Agency:

May 8, 2017

Date Mailed to Parties:

May 8, 2017

dr

APPENDIX

Witnesses

For Petitioner:

Shane Berger
Edward Koster
Jill Fischman
Leonardo Marin III
Vincent Kearney
Nicholas J. Dotoli

For Respondents:

Gladys Rivera
Amarilis Martinez
Aida Ortiz
Richard Mendez

Exhibits

For Petitioner:

P-1 Not in evidence
P-2 Comprehensive Report dated January 13, 2017
P-3 Official Statement from Leonardo Marin III
P-4 Investigation Report dated January 13, 2017

For Respondents:

R-1 Subpoena Ad Testificandum and Subpoena Duces Tecum
R-2 Engagement ring receipt dated June 14, 2015
R-3 TD Bank verification letter dated January 6, 2017