



STATE OF NEW JERSEY

In the Matter of Wayne Kubs
Borough of Rutherford

**FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION**

CSC DKT. NO. 2015-1640
OAL DKT. NO. CSV 05914-17

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ISSUED: MAY 25, 2018 BW

The appeal of Wayne Kubs, of the removal of his name from the eligibility list for Police Officer (S9999R), Borough of Rutherford, was heard by Administrative Law Judge John P. Scollo (ALJ), who rendered his initial decision on March 23, 2018 reversing the removal of Kubs' name from the list. Exceptions were filed on behalf of the appointing authority and a reply to exceptions was filed on behalf of the appellant.

Having considered the record and the ALJ's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting on May 23, 2018, accepted and adopted the Findings of Fact and Conclusion as contained in the attached ALJ's initial decision.

It is noted that the S9999R eligible list has expired. As such, that list should be revived at the time of the next certification for Police Officer, Borough of Rutherford to allow Kubs' name to appear on that certification. Further, as Kubs is a veteran, his appointment from that certification is mandated absent any disqualifying issues identified upon an updated background check which may include medical and psychological examinations.

ORDER

The Civil Service Commission finds that the action of the appointing authority in removing Wayne Kubs' name from the eligibility list for Police Officer (S9999R), Borough of Rutherford was not justified. The Commission therefore reverses that action and grants the appeal of Wayne Kubs.

Further, the Commission revives the Police Officer (S9999R), Borough of Rutherford, eligible list at the time of the next certification for Police Officer, Borough of Rutherford to allow Kubs' name to appear on that certification. Further, as Kubs is a veteran, his appointment from that certification is mandated absent any disqualifying issues identified upon an updated background check which may include medical and psychological examinations.

Should Kubs ultimately be appointed, upon the successful completion of his working test period, the Commission orders that he be granted a retroactive date of appointment to the date he would have been appointed if his name had not been removed from the subject eligible list. This date is for salary step placement and seniority-based purposes only. However, the Commission does not grant any other relief, such as back pay or counsel fees, except the relief enumerated above.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 23RD DAY OF MAY, 2018



Deirdre L. Webster Cobb
Chairperson
Civil Service Commission

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and
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attachment



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. CSV 05914-17

CSC DKT. NO. 2015-1640

WAYNE R. KUBS,

Petitioner,

v.

BOROUGH OF RUTHERFORD,

Respondent.

Catherine M. Elston, Esq., for Petitioner (C. Elston & Associates, LLC,
attorneys)

Dominic P. DiYanni, Esq. for Respondent (Eric M. Bernstein & Associates, LLC
attorneys)

Record Closed: January 26, 2018

Decided: March 23, 2018

BEFORE: JOHN P. SCOLLO, ALJ:

STATEMENT OF THE CASE

Petitioner, a veteran, is appealing the April 19, 2017 decision (issued on April 26, 2017) of the Civil Service Commission, which upheld the appointing authority's

(Borough of Rutherford's) removal of his name from the eligible list for Police Officer candidates. The name of another candidate, who was not a veteran and who was the nephew of Rutherford's Mayor, Joseph DeSalvo, remained on the list and was appointed as a police officer. The sole issue before the Office of Administrative Law is whether the extent to which Rutherford's Mayor was present during several of the candidate interviews created a conflict of interest, which tainted the appointment process.

PROCEDURAL HISTORY

The Civil Service Commission transmitted this matter to the Office of Administrative Law (OAL), where it was filed on April 28, 2017 as a contested case. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13.

On May 4, 2017 this matter was assigned to John P. Scollo, A.L.J. On May 16, 2017, Judge Scollo, along with Appellant's counsel, Catherine M. Elston, Esq. and Respondent's counsel, Dominic DiYanni, Esq. held an initial telephone conference. On May 18, 2017 Judge Scollo issued his Pre-Hearing Order setting dates for the completion of discovery, a motion schedule and setting a hearing date. This Order was amended on May 23, 2017 and thereafter various extensions were granted to allow additional discovery, including depositions. Subsequent telephone status conferences were held.

On December 19, 2017 both sides moved for Summary Decision. On or about January 3, 2018 the Tribunal received Opposition papers from both sides and on or about January 8, 2018 the Tribunal received Appellant's reply to Respondent's Opposition. After clarifications were made, the Tribunal deemed the motion record completed by January 26, 2018.

FINDINGS OF FACT

Based on the evidence presented in the parties' Motion, Opposition and Reply papers, as well as in the Joint Certification of Counsel (Joint Appendix) containing various documents, I **FIND** that the parties are not in dispute about the following **FACTS** and that there are no issues of material fact outstanding, which would preclude a disposition of the issue by Summary Decision:

1. The municipal government of the Borough of Rutherford consists of an elected Borough Council and an elected Mayor. The Mayor votes only to break a tie. (DeSalvo Dep. 15:18)
2. The process for the appointment of police officers in the Borough of Rutherford is as follows: After receiving recommendations from the Chief of Police, the Mayor decides which candidates to appoint; then the Council decides and votes on whether to appoint or not appoint each individual candidate. (DeSalvo Dep. 50:4 through 51:13; 116:23 through 117:7; and 119:6 through 122:16)
3. In June, 2014 the Borough of Rutherford (hereinafter "Boro", or "Rutherford") Police Department (hereinafter "RPD") conducted interviews of candidates for the position of police officer.
4. Russo chose between five and eight RPD detectives to serve as investigators. It was the job of each investigator to do background research on the candidates assigned to him by Chief Russo and to assist the Chief in interviewing the candidates. Mayor Joseph DeSalvo and Councilman Frank Nunziato, who was the Council's Police Liason, were invited to attend the interviews by the Chief. (Russo Dep. 25:19 through 27:3 and 39:2 through 40:17)

5. The hiring procedure for new police officers was explained by Chief Russo. Generally, the Tribunal's summary of the process, based on the evidence submitted, is as follows: The RPD would contact the Mayor and Boro Council through the Police Liason regarding the need for new officers to replace those expected to retire. After the RPD received authorization from the Boro government, the RPD contacted the Civil Service Commission to obtain a list of candidates. Potential candidates were contacted to ensure that they were still interested in a position and efforts were made to screen potential candidates to ensure that they would be eligible (e.g. residency requirements, etc.). Then RPD would send applications to potential candidates. Those responding within the time limit would have their applications assigned to RPD's investigators, who would do background research. After the background research was done on each of the applicants assigned to them, the investigators prepared a summary report for the Chief to review regarding each potential candidate. The Chief would discuss the background information with the investigators and if there were no outright objections or other issues, then the Chief would arrange dates and times for the applicants to be interviewed. (Russo Dep. 25:19 through 27:3; 29:18 through 30:12; 32:11 through 33:18; and 43:3 through 44:11)

6. The purpose of the interview was to learn about the candidate, to clarify issues about his background, and to ask him scenario-based questions in order to further evaluate him. (Russo Dep. 43:3 – 6; 45:25 through 47:8; and 53:23 through 60:25; see also, the Deposition of Mayor Joseph DeSalvo 94: 2-9 and 118: 17 through 119:5)

7. The interviews of the candidates were conducted by Chief Russo and available members of his team of investigators, who would ask questions of the candidates. Mayor DeSalvo and the Police Liason, Councilman Frank Nunziato, were invited to attend the interviews, but they did not speak with or ask questions of the candidates and neither of them attended all of the interviews. (Russo Dep 34:16 -25; DeSalvo Dep. 94:6 through 97: 13)

8. Chief Russo wrote a list of fourteen questions for each of the candidates to answer during his interview. Each candidate answered each of these questions during his interview. Questions posed to the candidates were not limited to those on the Chief's list of questions. The questioners were able to ask other questions. (Russo Dep. 43: 25 through 44:19; 54: 17-19; 55:7-10; 58:5-11; 62:19-20)

9. Paper copies of the Chief's list of fourteen questions were given to the investigators. (Russo Dep 45:6-24)

10. One of the candidates interviewed was James Fecanin, who is the nephew of Mayor DeSalvo. (Russo Dep. 67:18 through 70:23 and DeSalvo Dep. 102: 11 through 103:12)

11. Chief Russo and the investigators knew that James Fecanin was Mayor DeSalvo's nephew. (Russo Dep. 68:7-25; 70:7-23; and DeSalvo Dep 102:11 through 103:12)

12. Mayor DeSalvo attended the interviews of several, but not all, of the candidates before his nephew was interviewed. (Russo Dep. 76:12-15; 108:10-13; and DeSalvo Dep. 118:1-3 and 14-16)

13. Mayor DeSalvo did not attend the interview of his nephew, James Fecanin. (DeSalvo Dep. 100: 1-8)

14. For the interviews that Mayor DeSalvo attended, he heard the candidates being asked all fourteen questions on Chief Russo's list. (DeSalvo Dep. 95: 22 through 96: 5 and 106: 2-20). Mayor DeSalvo heard the questions before his nephew, James Fecanin, was interviewed. (Russo Dep. 107: 2 through 111:10)

15. Mayor DeSalvo was not asked to sign a document promising that he would not disclose to his nephew any information about the interview process, including the contents of the Chief's 14-question list. (Russo Dep. 110:17-20)

16. Having been present during the several candidates' interviews, which took place before James Fecanin was interviewed, and having heard all of the questions on Chief Russo's 14-question list as well as other questions posed to the candidates, Mayor DeSalvo received information, which could have been advantageous to James Fecanin, if Mayor DeSalvo had disclosed it to him before Fecanin's interview. (Russo Dep. 107:2 through 114:14 and DeSalvo Dep.)

17. Regarding the possibility of James Fecanin becoming employed as a police officer for the Boro, Mayor DeSalvo admitted that this would be deemed to be a personal interest of his arising out of their uncle-nephew relationship. (DeSalvo Dep. 115: 3-6)

18. Mayor DeSalvo admitted that a member of the public could perceive it to be a conflict of interest if, before James Fecanin was interviewed, the Mayor had already heard the actual questions that the other police officer candidates had been asked. (DeSalvo 111: 21 through 113:23 and 126:8 through 128:8)

APPLICABLE LAW

In 1991, New Jersey enacted the Local Government Ethics Law (LGEL), which is found at N.J.S.A. 40A:9-22.1, et seq. At N.J.S.A. 40A:9-2.2 the Legislature declared that: (a) public offices and public employments are public trusts; (b) that democracy depends upon the public's confidence in the integrity of its representatives; (c) that whenever the public perceives a conflict between the private interests and the public duties of a government officer, that confidence is imperiled; (d) that governments have the duty to provide standards of conduct for government service and to appraise the

conduct of government officials while conducting their public duties; and (e) that this law was enacted to set and enforce ethical standards and require appropriate financial disclosures by those who are in government service.

N.J.S.A. 40A:9-22.3 sets forth the definitions of various terms used in the LGEL. One such term is "member of immediate family". Member of immediate family is defined as: "the spouse or dependent child of a local government officer or employee residing in the same household." An Appellate panel in Haggerty v. Red Bank Borough Zoning Board of Adjustment, 385 N.J. Super. 501, 514 (App. Div, 2006) summarized the Local Government Ethics Law's definitions of "local government officer" and "local government agency" as follows:

The Ethics Law defines "local government officer" as any person "serving on a local government agency which has The authority to enact ordinances, approve development applications or grant zoning variances," N.J.S.A. 40A:9-22.3 (g) (2), and a "local government agency" as a municipal board which performs functions in other than a purely advisory nature. N.J.S.A. 40A:9-22.3 (e).

N.J.S.A. 40A:9-22.5 sets forth provisions with which local government officers and employees must comply. Among the pertinent provisions are the following:

- a. No local government officer or employee 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;
- c. No local government official or employee shall use or attempt to use his official position to secure unwarranted privileges or advantages for himself or others;
- d. No local government officer or employee 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 or personal involvement that might reasonably be expected to impair his objectivity or independence of judgment;

g. No local government officer or employee shall use, or allow to be used, his public office or employment, or any information not readily available to the members of the public, which he receives or acquires in the course of or 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....

N.J.S.A. 40A:9-22.10 and 22.11 set forth penalties for ethical violations and provide for various disciplinary actions, including demotion, suspension, or removal. N.J.S.A. 40A:9-22.13 mandates the establishment of a County Ethics Board to serve the members of the county government; N.J.S.A. 40A:9-22.20 has similar provisions on the municipal level. N.J.S.A. 40A:9-22.15 mandates the adoption and publication of a county Code of Ethics. N.J.S.A. 40A:9-22.21 has similar provisions on the municipal level. N.J.S.A. 40A:9-22.16 empowers the County Ethics Board to investigate and hold hearings on possible ethical violations involving county or municipal officials or employees. N.J.S.A. 40A:9-22.22 has similar provisions on the municipal level. N.J.S.A. 40A:9-22.17 provides that any county or municipal officer or employee to request from the County Ethics Board an advisory opinion as to whether any proposed activity or conduct would, in its opinion, constitute a violation of the County Code of Ethics or any financial disclosure requirements. N.J.S.A. 40A:9-22.24 has similar provisions on the municipal level.

New Jersey has a Conflicts of Interest Law codified at N.J.S.A. 52:13B-12 to -28. New Jersey's conflicts of interest jurisprudence has its origins in the Common Law. The New Jersey Supreme Court has, in no uncertain terms, set clear guidelines for attorneys and judges to follow in conflict of interest issues.

In New Jersey, prerogative writ jurisdiction has served as the mechanism for the supervision of government officials. In Wyzykowski v. Rizas, 132 N.J. 509 (1993), a case brought under the Municipal Land Use Law, the Supreme Court set forth a comprehensive history of the origins of our conflicts of interest law as well as

expounding its general principles for application in a variety of legal and factual contexts. Starting on p. 522 the Court said:

“Our judicial system is historically vested with a comprehensive prerogative-writ jurisdiction, which it inherited from the King's Bench. We have frequently exercised that jurisdiction in the supervision of government tribunals, including administrative agencies. Avant v. Clifford, 67 N.J. 496, 520 (1975). That common law jurisdiction is guaranteed under N.J. Constitution, article VI, section 5, paragraph 4. The oft-cited function of the common law writ of certiorari is “to bring before the superior court for inspection the records of the proceedings of the inferior tribunal, to determine whether the latter had jurisdiction and had proceeded according to law.” State v. Court of Common Pleas, 1 N.J. 14, 19 (1948). Among the guarantees of the common law is the entitlement to a fair and impartial tribunal.

These obligations are not mere theoretical concepts or idealistic abstractions of no practical force and effect; they are obligations imposed by the common law on officers and assumed by them as a matter of law upon their entering public office. The enforcement of these obligations is essential to the soundness and efficiency of our government, which exists for the benefit of the people who are its sovereign. [Driscoll v. Burlington-Bristol Bridge Co., 8 N.J. 433, cert. denied, 344 U.S. 838 (1952).]

Thus, common law principles concerning the participation of public officials in matters in which they have a personal interest primarily govern this dispute. At common law “[a] public official is disqualified from participating in judicial or quasi-judicial proceedings in which the official has a conflicting interest that may interfere with the impartial performance of his duties as a member of the public body.” Scotch Plains-Fanwood Bd. of Educ. v. Syvertsen, 251 N.J. Super. 566, 568 (App. Div. 1991).

The Municipal Land Use Law codified the common law principles, expressly prohibiting a planning board member from acting “on any matter in which [the member] has, either directly or indirectly, any personal or financial interest.” N.J.S.A. 40:55D-23.b.

We repeat the general guidelines for determining whether a particular interest is sufficient to disqualify. “The decision as

to whether a particular interest is sufficient to disqualify is necessarily a factual one and depends upon the circumstances of the particular case." Van Itallie v. Franklin Lakes, 28 N.J. 258, 268 (1958) (citing Aldom v. Borough of Roseland, 42 N.J. Super. 495, 503 (App. Div. 1956)). "The question will always be whether the circumstances could reasonably be interpreted to show that they had the likely capacity to tempt the official to depart from his sworn public duty." Van Itallie, *supra*, 28 N.J. at 268.

Local governments would be seriously handicapped if every possible interest, no matter how remote or speculative, would serve as a disqualification of an official. If this were so, it would discourage capable men and women from holding public office. Of course, courts should scrutinize the circumstances with great care and should condemn anything which indicates the likelihood of corruption or favoritism. But in doing so they must also be mindful that to abrogate a municipal action at the suggestion that some remote and nebulous interest is present, would be to unjustifiably deprive a municipality in many important instances of the services of its duly elected or appointed officials. The determinations of municipal officials should not be approached with a general feeling of suspicion, for as Justice Holmes has said, "Universal distrust creates universal incompetency." Graham v. United States, 231 U.S. 474, 480 (1913); see also Ward v. Scott (II), 16 N.J. 16 (1954). [Id. 28 N.J. at 269.]

Actual proof of dishonesty need not be shown. Aldom, *supra*, 42 N.J. Super. at 503. An actual conflict of interest is not the decisive factor, nor is "whether the public servant succumbs to the temptation," but rather whether there is a potential for conflict. Griggs v. Borough of Princeton, 33 N.J. 207, 219 (1960) (citing Aldom, *supra*, 42 N.J. Super. Atv 502). A conflicting interest arises when the public official has an interest not shared in common with the other members of the public. Id. 33 N.J. at 220-21. Another way of analyzing the issue is to understand that "[t]here cannot be a conflict of interest where there do not exist, realistically, contradictory desires tugging the official in opposite directions." LaRue v. Township of East Brunswick, 68 N.J. Super. 435 (App. Div. 1961)."

As the decision in Wyzykowski demonstrates, the Supreme Court intended that its statement of general principles should be applied universally. As will be seen, it also

adopted a four-part categorization of conflicts of interest that should result in disqualification. Continuing at p. 524 the decision reads as follows:

"Our courts have invoked the application of the test under varied circumstances. See Griggs, supra, 33 N.J. 207 (invalidating determination of "blighted" area by borough council where two participating councilmen were professors of university benefitted by designation); Pyatt v. Mayor of Dunellen, 9 N.J. 548 (1952) (voiding vote for ordinance where councilmen were employees of corporation that substantially benefitted); Barrett v. Union Township Committee, 230 N.J. Super. 195 (App. Div. 1989) (voiding vote where councilman's mother resided in nursing home favored by zoning amendment); Sokolinski v. Woodbridge Township Municipal Council, 192 N.J. Super. 101 (App. Div. 1983) (enjoining vote of board of adjustment members employed by or related to employees of board of education who benefitted by variance); Marlboro Manor, Inc. v. Board of Commissioners, 187 N.J. Duper. 359 (App. Div. 1982) (voiding vote where councilmen were members of church opposed to transfer of liquor license); S&L Associates v. Township of Washington, 61 N.J. Super. 312 (App. Div. 1960) (invalidating zoning amendment enhancing value of property owned by certain voting members of governing body), aff'd in part, rev'd in part, 35 N.J. 224 (1961); Aldom, supra, 42 N.J. Super. 495 (voiding zoning ordinance where employer of councilman who voted for enactment would be benefitted); Hochberg v. Borough of Freehold, 40 N.J. Super. 276 (App. Div. 1956) (voiding zoning amendment permitting enlargement of horse track at which a participating councilman operated horsemen's kitchen), certif. denied, 22 N.J. 223 (1956); Bracey v. City of Long Branch, 73 N.J. Super. 91 (Law Div. 1962) (voiding ordinance where architect-member of planning board stood to gain by urban renewal ordinance benefitting his client-agency). But see Van Itallie, supra, 28 N.J. 258 (upholding zoning amendment although participating councilman's brother held a "lower echelon" position in benefitted corporation).

A commentator has distilled those varying circumstances into four types of situations that require disqualification: (1) "Direct pecuniary interests," when an official votes on a matter benefitting the official's own property or affording a direct financial gain; (2) "Indirect pecuniary interests," when an official votes on a matter that

financially benefits one closely tied to the official, such as an employer or family member; (3) "Direct personal interest," when an official votes on a matter that benefits a blood relative or close friend in a non-financial way, but a matter of great importance, as in the case of a councilman's mother being in the nursing home subject to the zoning issue; and (4) "Indirect personal interest," when an official votes on a matter in which an individual's judgment may be affected because of membership in some organization and a desire to help that organization further its policies. See, Michael A. Pane, Conflict of Interest: Sometimes a Confusing Maze, Part II, New Jersey Municipalities, March 1980, at 8,9."

The Supreme Court's ruling in Wyzykowski provides government officials and employees with guidance which enables them to decide whether they have an interest (be it financial or personal), which is something "not shared in common with the other members of the public" concerning a matter on which they will be called upon to deliberate and vote. It is the dual functions of deliberation and voting that makes the process quasi-judicial. If the government official or employee has a financial or personal interest and encounters "contradictory desires tugging [him] in in opposite directions" then a potential for a conflict of interest exists and recusal is required.

The courts of New Jersey have recognized that the quasi-judicial functions of government officials are governed by the same ethical standards that apply to judges. In Kremer v. City of Plainfield, 101 N.J. Super. 346 (Law Div. 1968) an applicant's attorney appeared before the Board of Adjustment. One of the Board's members was the uncle of the applicant's attorney. After the Board of Adjustment granted the application for a variance, the plaintiff brought a prerogative writ action seeking to set aside the grant of the variance. Judge Wood, citing various authorities noted that judges are required to recuse themselves when a party to a case is related by blood or marriage or where his conduct of the case could result in the impression that he could be affected by the "kinship, rank, position or influence of any party or other person."

The judge noted that the standards he relied on applied to judges, but went on to rule that

"[T]here is no sound reason why a lesser standard should govern the conduct of those acting in a quasi-judicial capacity. The need for unquestionable integrity, objectivity and impartiality is just as great for quasi-judicial personnel as for judges." Kremer at 352-53.

The Appellate Division in Randolph v. City of Brigantine Planning Board, 405 N.J. Super. 215, 226 (App. Div. 2009), quoted the reasoning of Judge Woods and adopted Kremer. The panel ruled that:

"planning board members, in their quasi-judicial capacity, may not participate in evaluating an application in any matter in which their direct or indirect private interests may be at variance with the impartial performance of their public duty." Randolph at 225.

In Wyzykowski at p. 523 the Court underscored the principle, handed-down from the common law, that:

"[a] public official is disqualified from participating in judicial or quasi-judicial proceedings in which the official has a conflicting interest that may interfere with the impartial performance of his duties as a member of the public body."

The Court emphasized that judicial and quasi-judicial functions are to be regarded as equally important from the standpoint of the ethical responsibilities. Thus the standards imposed on government officials in the discharge of their quasi-judicial functions rise to the same high level which judges must meet in the discharge of their judicial duties.

It follows that government officials must conform to the appearance of impropriety standard when issues of conflicts of interest arise in the performance of their quasi-judicial duties. The Supreme Court said exactly that in Kane Properties, LLC v. City of Hoboken, 214 N.J. 199, 220 (2013). Re-affirming that the appearance of impropriety standard applies to all judicial and quasi-judicial proceedings, the Court categorically stated:

“[T]he appearance of impropriety standard has never been altered as it relates to judges, see, Code of Judicial Conduct, Canon 2 (“A judge should avoid impropriety and the appearance of impropriety in all activities.”), and, as our Appellate Division has observed, it remains applicable to municipal officials acting in a quasi-judicial capacity, see, Randolph v. City of Brigantine Planning Board, 405 N.J. Super. 215, 226 (App. Div. 2009) (citing Kremer v. City of Plainfield, 101 N.J. Super. 346, 352-53 (Law Div. 1968).” Kane at 220.

The Court went on to further explain its continuing adherence to the appearance of impropriety standard for both attorneys and for judges at p. 221 of Kane, saying:

“Our traditional explanation of the appearance of impropriety standard recognized that ‘[t]o maintain public confidence in the bar it is necessary that the appearance of, as well as actual, wrongdoing be avoided.’ In re Cipriano, 68 N.J. 398 (1975); accord, In re Opinion Number 415, 81 N.J. 318, 323 (1979). In particular, we have commented that “[w]hen representation of public bodies is involved, the appearance of impropriety assumes an added dimension [because positions] of public trust call for even more circumspect conduct.’ In re Opinion Number 415, 81 N.J. 318 at 324 (footnote omitted). As our Appellate Division has observed, when an ‘office calls for the service of an attorney in areas where the public interest is involved, the possible areas of conflict of interest are subject to even closer scrutiny and more stringent limitation.’ Lafayette, supra, 208 N.J. Super. at 473 (citing In re Opinion 452, 87 N.J. 45, 50 (1981)).

We recently articulated the manner in which a claim that a judge’s act violated the appearance of impropriety standard is to be evaluated. DeNike v. Cupo, 196 N.J. 502, 514-19 (2008). We defined the appropriate standard to use in determining whether there was an appearance of impropriety in that context as: ‘Would a reasonable, fully informed person have doubts about the judge’s impartiality?’ Id. at 517; see, In re Tenure Hearing of Onorevole, 103 N.J. 548, 561 (1986). As we explained, if a judge’s conduct gave the public ‘reason to lack confidence in the integrity of the process and its outcome [,]’ the decision rendered would have to be reversed and the matter retried. DeNike, supra, 196 N.J. at 517.

In establishing that approach, we did not require evidence that the judge in fact conducted the proceedings in a biased or unfair way. *Id.* at 517-19. Instead, we made it clear that “it is not necessary to prove actual prejudice...” to establish an appearance of impropriety; an “objectively reasonable” belief that the proceedings were unfair is sufficient.’ *Id.* at 517 (quoting *State v. Marshall*, 148 N.J. 189, cert. denied, 522 U.S. 850 (1997)); see *Griggs v. Borough of Princeton*, 33 N.J. 207, 220 (1960) (holding that when an appearance of impropriety standard applies, it is ‘the mere existence of a conflict, not its actual effect, which requires the official [municipal] action to be invalidated’).”

The applicable law in the matter before the Tribunal is rooted in the Common Law. The Common Law established the enduring principle that a public officer is disqualified from participation in a judicial or quasi-judicial matter wherein he has an interest which may interfere with the impartial performance of his governmental duties. While each case is fact sensitive, the question is always the same: whether the circumstances could reasonably be interpreted to show that they have the capacity to tempt the officer to depart from his sworn public duties. *Van Itallie v. Franklin Lakes*, 28 N.J. 258, 268 (1958). The standard to be applied to those in judicial and quasi-judicial positions is an appearance of impropriety standard, meaning that if a reasonable, fully-informed person had reason to doubt the decision-maker’s impartiality, then a conflict exists and the action would have to be set aside. *DeNike v. Cupo*, 196 N.J. 502, 514-19 (2008).

LEGAL ANALYSIS AND CONCLUSION

The issue before this Tribunal is whether the extent to which Mayor DeSalvo was present during several of the candidate interviews created a conflict of interest, which tainted the appointment process. The fact question is whether DeSalvo had a sufficient-enough personal, monetary or other interest in the proceedings to invalidate the decision-making process. The resolution of this or any other fact question in a conflict of interest case depends on the circumstances of the particular case. *Van Itallie v. Borough of Franklin Lakes*, 128 N.J. 258, 268 (1958). Here, the relevant facts are not

in dispute: (1) Mayor DeSalvo is the uncle of James Fecanin; (2) Several candidates for the position of police officer were interviewed before James Fecanin; (3) Mayor DeSalvo sat in on several interviews and learned all of the questions on Chief Russo's 14-question list plus several other questions posed to the candidates; (4) A candidate's knowledge of the aforementioned questions before his interview would be valuable to a candidate and would give him an advantage over other candidates.

In DeNike v. Cupo, 196 N.J. 502, 518 (2008) our Supreme Court observed that a trial judge's discussion of employment opportunities with a law firm which was representing a party in a case that was still pending before that judge constituted a pattern of factual circumstances that "invites doubt about the trial judge's partiality". Certainly this applies also to people holding a quasi-judicial office. See, Scotch Plains-Fanwood Board of Education v. Syvertsen, 251 N.J. Super. 566, 568 (App. Div. 1991); Kremer v. City of Plainfield, 101 N.J. Super. 346, 352-53 (Law Div. 1968); Randolph v. City of Brigantine Planning Board, 405 N.J. Super. 215, 226 (App. Div. 2009); Wyzykowski v. Rizas, 132 N.J. 509, 523 (1993). In DeNike, the Supreme Court formulated a standard by which judges and those in quasi-judicial positions could decide whether to participate in a matter or not. That standard is set forth in the form of the following question: "Would a reasonable, fully informed person have doubts about the judge's (or quasi-judicial person's) impartiality?" DeNike at 517. If a reasonable, fully informed person would have doubt, then a recusal is indicated. DeNike at 518.

I **CONCLUDE** that Mayor DeSalvo had a sufficient personal interest (the hiring of his nephew, James Fecanin) in the outcome of the appointment / hiring process to warrant his recusal from the process.

I **CONCLUDE** that Mayor DeSalvo had the present, apparent ability to give the interview questions to his nephew and thus afford him an advantage over the other candidates.

When the above-reference standard, enunciated in DeNike, is carried-over into the matter at hand, the question becomes: Would Mayor DeSalvo's learning of the

interview questions (the 14-question list and the others) before his nephew was interviewed cause a reasonable, fully informed member of the public to have doubts about the integrity of the appointment / hiring process? The answer to this question was actually stated by Mayor DeSalvo himself. Mayor DeSalvo admitted that a member of the public could perceive it to be a conflict of interest if, before James Fecanin was interviewed, the Mayor had already heard the actual questions that the other candidates had been asked. (DeSalvo Dep. 111: 21 through 113: 23 and 126:8 through 128:8). I **CONCLUDE** that, even though it has not been proven that the Mayor actually violated his oath by actually providing his nephew with the interview questions, the reasonable perception of a conflict of interest in the mind of a reasonable, fully informed member of the public was enough to taint the appointment / hiring process.

I **CONCLUDE** that Mayor DeSalvo's presence at and during the police officer interviews / selection process and his exposure to the questioning of police officer candidates created a conflict of interest, which indeed tainted the police officer selection process.

In fashioning an appropriate remedy, I **CONCLUDE** that it would be impractical, as well as unfair to the police officers who were hired, to invalidate the entire appointment / hiring process that took place in 2015. However, I **CONCLUDE** that it would be appropriate to reverse the removal of Wayne Kubs' name from the eligible list and thereby restore it to the list for consideration when the Borough of Rutherford next seeks to hire police officers.

ORDER

Based upon the foregoing and because the actions of Mayor Joseph DeSalvo, tainted the appointment / hiring process for the hiring of police officers in 2015, it is hereby **ORDERED** that the following remedies shall be put into place:

- (1) the police officers hired in 2015 by the Borough of Rutherford shall remain in their positions;

(2) the removal of Wayne Kubs from the eligible list is hereby **REVERSED**;

(3) the name of Wayne Kubs shall be **RESTORED** to the list of eligibles and shall therefore be considered with the names of future candidates the next time the Borough of Rutherford seeks to hire police officers.

It is further **ORDERED** that the decision of the Civil Service Commission upholding the Respondent's decision to remove Petitioner's name from the list of candidates is hereby **REVERSED**.

I hereby **FILE** my initial decision with the **CIVIL SERVICE COMMISSION** for consideration.

This recommended decision may be adopted, modified or rejected by the **CIVIL SERVICE COMMISSION**, which by law is authorized to make a final decision in this matter. If the Civil Service Commission 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 **DIRECTOR, DIVISION OF APPEALS AND REGULATORY AFFAIRS, UNIT H, CIVIL SERVICE COMMISSION, 44 South Clinton Avenue, PO Box 312, Trenton, New Jersey 08625-0312**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

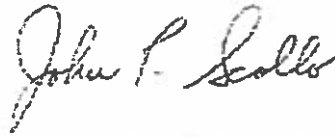
March 23, 2018

DATE

Date Received at Agency:

Date Mailed to Parties:

db



JOHN P. SCOLLO, ALJ

APPENDIX

Moving Papers and Pleadings

Joint Certification of Counsel (Joint Appendix)