

BOARD OF EDUCATION OF THE :
CITY OF SEA ISLE, :
 : COMMISSIONER OF EDUCATION
PETITIONER, :
 : DECISION
V. :
 :
WILLIAM J. KENNEDY, :
 :
RESPONDENT. :
_____ :

SYNOPSIS

The Board of Education filed a petition claiming that respondent Board member, who is pursuing claims against the district alleging violation of his son’s educational rights, has an incompatible interest mandating his disqualification from Board service pursuant to *N.J.S.A. 18A:12-2*.

The ALJ found that respondent did not have a disqualifying conflict of interest, relying on an October 2004 Advisory Opinion of the School Ethics Commission that interpreted *N.J.S.A. 18A:12-24(j)* as carving out an exception whereby board members may, under circumstances such as respondent’s, pursue their own interests in matters involving the board without violating the School Ethics Act.

The Commissioner rejected the Initial Decision, holding that the School Ethics Commission’s interpretation of its own Act, and its determination that certain conduct would not violate the Act, could not be determinative of a board member’s fundamental qualification to hold office under the school laws. Applying the standards of *N.J.S.A. 18A:12-2* and prior case law, the Commissioner found respondent to have a direct and substantial interest in a claim against the petitioning Board, thus disqualifying him from Board membership. The Commissioner ordered respondent removed as a member of the Sea Isle City Board of Education as of the filing date of this decision, and directed the County Superintendent to fill the resulting vacancy for a term to expire at the reorganization meeting following the April 2006 annual school election, with the remaining one-year portion of respondent’s term (expiring in April 2007) to be placed on the ballot at that same election.

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 2028-05
AGENCY DKT. NO. 62-3/05

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The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Exceptions filed by the Board of Education (Board) were not considered by the Commissioner, having been submitted outside the applicable regulatory time frame absent a request for extension in accordance with *N.J.A.C.* 1:1-18.8.¹

Upon careful review and consideration, the Commissioner determines to reject the Initial Decision, since he cannot concur with the Administrative Law Judge (ALJ) that the School Ethics Commission’s October 2004 interpretation of *N.J.S.A.* 18A:12-24(j) supersedes prior case law arising under *N.J.S.A.* 18A:12-2 or supports a conclusion that respondent does not have a conflict of interest precluding his membership on the Board pursuant to that statute.

As ALJ Law himself well stated in a prior matter where *N.J.S.A.* 18A:12-24(j) was invoked as an exception to *N.J.S.A.* 18A:12-2:

Although subsection (j) of *N.J.S.A.* 18A:12-24 provides that any school official, or members of his/her immediately family, may represent themselves in negotiations

¹ Unless an extension is requested and granted, exceptions are due within 13 days of the mailing date of the Initial Decision. *N.J.A.C.* 1:1-18.4. In this instance, the Initial Decision was mailed on May 20, 2005, but exceptions bearing a face date of June 3, 2005—already one day beyond the regulatory due date of June 2, 2005—were not filed until June 6, 2005.

or proceedings concerning his/her own interests, this subsection of the statute does not amend nor supersede *N.J.S.A.* 18A:12-2. Rather, the School Ethics Act supplements Chapter 12 of Title 18A by "providing standards of ethical conduct for local school officials." (Historical and Statutory Notes, *N.J.S.A.* 18A:12-21). The conflict of interest statute, *N.J.S.A.* 18A:12-2, is clear and unambiguous where it states, "No member of any board of education shall be interested directly or indirectly in any ... claim against the board, ..." As the Commissioner observed in *Alfonsetti, et al. v. Lakewood Twp. Board of Ed.*, 1975 *S.L.D.* 297 at 299:

In every case involving the interpretation of a statute, it is the function of the court to ascertain the intention of the Legislature from the plain meaning of the statute and to apply it to the facts as it finds them, *Carley v. Liberty Hat Mfg. Co.*, 81 *N.J.L.* 505, 507 (E. & A. 1910). A clear and unambiguous statute is not open to construction or interpretation, and to do so in a case where not required is to do violence to the doctrine of the separation of powers. Such a statute [*sic*] is clear in its meaning and no one need look beyond the literal dictates of the words and phrases used for the true intent and purpose in its creation. *Watt v. Mayor and Council of Borough of Franklin*, 21 *N.J.* 274 (1956) (at p. 277).

Where the wording of a statute [*sic*] is clear and explicit we are not permitted to indulge in any interpretation other than that called for by the express words set forth... *Duke Power Co. v. Patten*, 20 *N.J.* 42 (1955) (at p. 49).

The wording of *N.J.S.A.* 18A:12-2 is clear, explicit and unambiguous with respect to the prohibition of a board of education member having a claim against the board of education with which he/she serves. The Commissioner has, in fact, upheld the statute to remove board members who have been found to be in violation of *N.J.S.A.* 18A:12-2. *Taliaferro, supra; Holmdel, supra.*

Accordingly, I CONCLUDE that respondent's reliance upon *N.J.S.A.* 18A:12-24(j) as an exception to *N.J.S.A.* 18A:12-2 is misplaced and is hereby DISMISSED as a defense in this matter. (*Board of Education of the Township of Brick, Ocean County v. Edward Mercer*, 96 *N.J.A.R.2d* (EDU) 5, 9)

This analysis and conclusion are no less cogent, and no less valid, as a result of the School Ethics Commission's subsequent opinion that *N.J.S.A.* 18A:12-24(j) allows for an exception to the ethical standards set forth in *N.J.S.A.* 18A:12-24(a) and *N.J.S.A.* 18A:12-24(g).

In enacting the School Ethics Act, the Legislature declared that, in the interest of confidence in school government, it was necessary to ensure that board of education members avoid conduct that violates—or creates a justifiable impression of violating—the public trust; it further

stated its intent to provide, through the Act, standards to guide such conduct. *N.J.S.A.* 18A:12-22. It established the School Ethics Commission for the express purpose of carrying out the Act, and set forth a process whereby a board member found to have violated the Act's standards of conduct would be sanctioned through a penalty ranging from reprimand to removal. *N.J.S.A.* 18A:12-24, *N.J.S.A.* 18A:12-28, *N.J.S.A.* 18A:12-29. Significantly, it did *not* act to repeal any part of *N.J.S.A.* 18A:12-2, as it clearly could have if it had intended to have all questions of conflict addressed through the School Ethics Act, or to remove the possibility of a board member's disqualification based on inherently incompatible interests as opposed to removal based on the commission of unethical acts while in office.

On its face and in light of its legislative history, the School Ethics Act is clearly intended to guide, and where necessary sanction, the conduct of duly qualified board members; it was not intended, and cannot now be construed, as the means or standard for determining the qualification of a board member pursuant to Article 1 of *N.J.S.A.* 18A:12 (18A:12-1 through 18A:12-3). Moreover, although the School Ethics Commission clearly has the authority to interpret the Act through its decisions and issuance of advisory opinions, *N.J.S.A.* 18A:12-31, the Commissioner, to whom adjudication of board member qualification is reserved in the event of a dispute, *N.J.S.A.* 18A:6-9, is not bound by the Commission's interpretation in applying a school law within his own jurisdiction, particularly where, as here, such interpretation would effectively act to vitiate such law. In other words, the School Ethics Commission's opinion that a board member's pursuit of a claim of the type at issue herein would not constitute a violation of the School Ethics Act does not mean that the existence of such a claim could not disqualify the board member under *N.J.S.A.* 18A:12-2; the Commission cannot determine the legal qualification of a board member, only whether a particular course of conduct violates the Act, and the Commission's opinion in that regard is not dispositive of an inquiry before the Commissioner pursuant to *N.J.S.A.* 18A:12-2.

Thus, notwithstanding the Commission's conclusion that *N.J.S.A.* 18A:12-24(j) carves out an exception to the Ethics Act whereby, under circumstances such as here present, board members may pursue their own interests in matters involving the board, that opinion does not—indeed, cannot—create a concomitant exception to the prohibitions of *N.J.S.A.* 18A:12-2, so that the Commissioner must still ascertain whether respondent has a direct or indirect interest in a claim against the board of education so as to disqualify him as a board member while the claim is pending.

Upon review of the record, the Commissioner finds that respondent does, indeed, have such a claim. In two separate proceedings as referenced in the Initial Decision's factual recitation, respondent has claimed that the Board is denying his son's educational entitlements, alleging that:

[M.] has been abused and continues to be abused in his current placement and***this abuse is the direct result of a lack of support that [M.] and his teacher's aide should be receiving from district personnel and behavioral consultants. The district has violated both the letter and spirit of the Agreement [that settled respondent's prior due process complaint] through the complete disintegration of the provision of services, communication with the parents, and the proper support of the district's own personnel. In short, the district has created an environment that is hostile to [M.], and this environment is causing behavioral reversals. (Initial Decision at 3, Exhibits A and B)

It is well established that the “interest which disqualifies is not necessarily a direct pecuniary interest***; it is based on the moral rule that no man can serve two masters whose interests conflict.” *Lee, supra*, at 9, citing *Aldom v. Borough of Roseland*, 42 *N.J. Super* 495, 502 (App. Div. 1956). It is likewise well established that the determination of whether such a conflict exists is necessarily a factual one and depends on the circumstances of the particular case. *Aldom, supra*, at 503. Having undisputedly elected to pursue two legal claims against the district alleging violation of the educational rights of his child, there can be no question that respondent has an interest of the most direct and personal nature in a claim against the Board, and that his dual

interests as a Board member and a father preclude his continued Board membership under *N.J.S.A. 18A:12-2* unless he abandons his claims.²

Nor is respondent's abstention from voting in matters involving his son's case sufficient to remedy the situation, as respondent and the ALJ suggest based upon the School Ethics Commission opinion. Rather, as noted above, *N.J.S.A. 18A:12-2* is a disqualifying statute, identifying situations that are inherently incompatible with membership on a board of education; it does not provide for board members in such situations to serve while abstaining from vote and discussion on selected issues. Indeed, as the statute recognizes, simply by virtue of his membership on the Board and regardless of any efforts on his part to avoid impropriety, respondent could not function as a Board member without regularly being placed in "a situation of temptation to serve his own purpose to the prejudice of those for whom the law authorized him to act as a public official." *Holmdel, supra*, at 676, quoting *S&L Associates, Inc. v. Washington Township*, 61 *N.J. Super.* 312, 329 (App. Div. 1960) At a minimum, respondent would routinely be—or equally important, have the opportunity to be—privy to matters involving staffing, programming, and personnel issues that directly or indirectly relate to issues implicated in his claim against the Board, raising both the temptation to act in his own interest and the appearance that he may have done so. This is not a question of respondent's conduct, but of the existence of an inherently untenable situation, precisely the evil *N.J.S.A. 18A:12-2* seeks to avoid. *Board of Education of the Borough of Palmyra v. Robert Marinnie*, decided by the Commissioner June 8, 2005 (#208-05), slip opinion at 11.

² This holding is in no way intended to suggest that respondent's son waives or abandons his educational rights because his parent is a Board member, nor does it mean that parents who are also board members lose the ability to pursue claims that their children are being denied lawful educational entitlements. What it does mean, however, is that such parents must decide which of their two conflicting interests they will honor at any given time, since a parent—like anyone else whose board service requires them to relinquish a claim or contract they would otherwise have the right to pursue—may not simultaneously sit as a member of a board while maintaining an action against it.

Accordingly, for the reasons expressed herein, the Commissioner rejects the Initial Decision of the OAL, finding instead that respondent William J. Kennedy has a disqualifying conflict of interest in violation of *N.J.S.A.* 18A:12-2 and is, therefore, removed as a member of the Sea Isle City Board of Education as of the filing date of this decision. Pursuant to *N.J.S.A.* 18A:12-15a, the Cape May County Superintendent of Schools is directed to fill the resulting vacancy for a term to expire upon the Board's reorganization following the next (April 2006) annual school election, and the Board is directed to place the remaining one-year portion of respondent's term, which was due to expire in April 2007, on the ballot for the April 2006 annual school election.

IT IS SO ORDERED.³

COMMISSIONER OF EDUCATION

Date of Decision: June 30, 2005
Date of Mailing: June 30, 2005

³ This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*