

MICHAEL GUNTHER, :
 :
 PETITIONER, :
 :
 V. : COMMISSIONER OF EDUCATION
 :
 BOARD OF EDUCATION OF THE TOWNSHIP : DECISION
 OF HOWELL, MONMOUTH COUNTY, :
 :
 RESPONDENT. :
 _____ :

SYNOPSIS

Petitioner, a former member of the Board of Education of Howell Township and a former officer with the municipality’s police department, appealed the Board’s refusal to pay attorney fees for defending a matter brought against him while a member of the Board. Respondent Board countered that the underlying conduct at issue did not arise out of the performance of Board member duties; underlying conduct relates to allegations that the petitioner obtained certain police reports and confidential information and disseminated same to members of the Board of Education without Board knowledge or authorization.

The ALJ denied a motion to bar testimony concerning, *inter alia*: petitioner’s alleged violation of Howell Township Board of Education policy and the Board Member Code of Ethics; Monmouth County Prosecutor’s Office return of indictment against the petitioner; and petitioner’s entry into the Monmouth County Pretrial Intervention Program (PTI). The ALJ granted respondent Board’s motion for summary judgment as there are no genuine issues of material fact in this case, and dismissed the petition. In doing so, the ALJ concludes that petitioner is not entitled to indemnification under *N.J.S.A. 18A:12-20* because his entry into PTI was not a favorable disposition of criminal charges previously brought against him.

The Commissioner concurs with the ALJ’s determination that petitioner has no right to indemnification pursuant to *N.J.S.A. 18A:12-20*, but finds that it is not necessary to reach to discussion of petitioner’s participation in PTI. The Commissioner finds and concludes that petitioner’s alleged conduct in the civil suit brought against him neither arose out of the performance of his board duties nor occurred in the course of performing those duties, but would have been undertaken on his own initiative and at his own peril, so that he is not entitled to be defended at public expense. Accordingly, the Initial Decision is adopted with this modification, and the petition is 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.

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The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner’s exceptions, filed in accordance with *N.J.A.C.* 1:1-18.4, were fully considered by the Commissioner in reaching his determination herein.¹

Petitioner’s exceptions, *inter alia*, contend that the Administrative Law Judge’s (ALJ) reliance on *Cressinger*,² *supra*, in support of her determination that he was not entitled to indemnification in this matter, was misplaced. That case, he asserts, dealt with a teaching staff member seeking reimbursement, pursuant to *N.J.S.A.* 18A:16-6.1, not *N.J.S.A.* 18A:12-20, for legal expenses in connection with the defense of a criminal matter. Here, he professes, *N.J.S.A.* 18A:12-20 is clear in mandating indemnification for a board member’s counsel fees incurred in connection with the defense of a civil suit, notwithstanding the outcome of that action. Furthermore, the “favorable disposition” requirement of this statute is solely applicable

¹ It is noted that the Board did not file reply exceptions.

²The volume citation for this case is erroneously presented as 225 *N.J. Super.* on Page 12 of the Initial Decision. This should be 256 *N.J. Super.*

in instances where a board member is seeking reimbursement for defense of criminal charges. (Petitioner's Exceptions at 6) Petitioner further charges that "the ALJ's reference to Petitioner's criminal past manifests the prejudice suffered as a result of the improper introduction of this evidence which was entirely irrelevant on the issue of his reimbursement for counsel fees paid to his civil attorney," and urges that the Commissioner reject the Initial Decision and enter an Order directing petitioner's reimbursement of the costs of his defense of the Therien lawsuit. (*Id.* 6, 7)

Upon careful and independent review of the record, the Commissioner concurs with the ALJ's determination that petitioner has no right to indemnification pursuant to *N.J.S.A.* 18A:12-20 in this matter. However, contrary to the finding of the ALJ, the Commissioner concludes that such a determination is not a consequence of the ultimate result of the criminal charges previously brought against him. Consequently, the Initial Decision is adopted as modified below.

Initially, the Commissioner is compelled to clarify what appears to be confusion with respect to the applicability of the provisions of the governing statute vis-à-vis the situation existing herein. The statutory provision underlying petitioner's application for reimbursement is *N.J.S.A.* 18:12-20, which obligates a board of education to indemnify its members for the cost of defense of certain civil and criminal actions, and in its entirety specifies:

Whenever a civil, administrative, criminal or quasi-criminal action or other legal proceeding has been or shall be brought against any person for any act or omission arising out of and in the course of the performance of his duties as a member of a board of education, and in the case of a criminal or quasi-criminal action such action results in final disposition in favor of such person, the board of education shall defray all costs of defending such action, including reasonable counsel fees and expenses, together with costs of appeal, if any, and shall save harmless and protect such person from any financial loss resulting therefrom. Indemnification for exemplary or punitive damages shall not be mandated and shall be governed by the standards and procedures set forth in

N.J.S. 59:10-4. Any board of education may arrange for and maintain appropriate insurance to cover all such damages, losses and expenses.

By its very terms, central to qualifying for protection afforded under this statute -- which is intended to provide for the legal defense of a member of the board who is sued for official acts taken or omitted by him while actively engaged in carrying out his prescribed responsibilities as a board member – is that *the conduct triggering the legal action against him must have: 1) arisen out of the performance of his duties, and 2) occurred in the course of performing those duties.* In the context of the defense of a civil action, the outcome of the litigation is irrelevant; the statute protects both successful and unsuccessful litigants as long as the above two criteria are satisfied. However, in the context of a *criminal or quasi-criminal* charge made against a board member, the statute imposes a third criteria as a prerequisite to indemnification, *i.e., the legal action must result in a final disposition in favor of the board member.* Here, it is uncontroverted that petitioner is seeking reimbursement for defending a *civil* lawsuit brought against him by Robert Therien and his wife. As such, notwithstanding that the gravamen of this civil litigation is related to the underlying factual conduct contained in the prior indictment returned against petitioner, the focus here is upon the lawsuit for which petitioner is seeking to be indemnified. As such, the Commissioner finds it unnecessary to reach to the ALJ's Initial Decision discussion of petitioner's acceptance into and completion of a Pre-Trial Intervention program or the effect of the subsequent expungement of his criminal record with respect to these charges.

Turning next to the issue of whether petitioner has satisfied the two statutory requisites entitling him to the relief he seeks, guidance in this respect is gleaned from

consideration of the underlying scope of the statute. As found by the Court in *Errington v. Mansfield Tp. Bd. of Ed.*, 100 N.J. Super. 130 (App. Div. 1968):

The purpose of the ***statute is to make manifest the implied power of boards of education to provide for the legal defense of a member of the board who is sued individually for some action taken by him in furtherance of his *prescribed duties*. *Those duties are prescribed by statute, by the rules and regulations of the board itself and of those who supervise its activities, and by resolutions of the board authorizing specific action to be taken.* (emphasis supplied)
(at 138)

A review of the statement of material facts prepared by counsel for Mr. Gunther in support of his motion to dismiss the Therien suit (See Initial Decision, pp. 8-10), indicates that he was accused of obtaining certain police reports and information with respect to Mr. Therien and disseminating these to board of education members. The Commissioner's review discloses, and nowhere does petitioner dispute, that he was not in any manner authorized or directed on behalf of the Board to acquire or disclose any such information in his capacity as a board member. (See Board's Answer to Petition of Appeal at 4-5). Furthermore, the record establishes that such conduct would be in direct violation of a specific board policy which states that board members "have no authority as individuals except when authorized by the Board." (*Ibid.* – Certification of Ronald Sanasac, Board President, at 2) The Commissioner, therefore, finds and concludes that it is clearly evident that petitioner's alleged conduct in the civil suit lodged against him -- no matter what the personal motivation for such conduct may have been -- neither *arose out of the performance of his board duties* nor *occurred in the course of performing those duties*, but rather would have been undertaken on his own initiative and at his own peril, so that he is not entitled to be defended against such allegations at public expense.

Accordingly, the Initial Decision of the OAL is adopted as modified above and the instant Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.*

ACTING COMMISSIONER OF EDUCATION

Date of Decision: September 16, 2005

Date of Mailing: September 16, 2005

* 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.*