

DAVID MATTHEWS, :
 :
 PETITIONER, : COMMISSIONER OF EDUCATION
 :
 V. : DECISION
 :
 BOARD OF EDUCATION OF THE CITY :
 OF ENGLEWOOD, BERGEN COUNTY, :
 :
 RESPONDENT. :
 _____ :

SYNOPSIS

Petitioner, a former member of the respondent Board of Education, sought indemnification by the Board pursuant to *N.J.S.A. 18A:12-20* for the costs of his defense against a complaint filed against him with the School Ethics Commission. In the proceeding for which he sought indemnification, the Commission held, and the Commissioner of Education affirmed on appeal, that petitioner had violated three provisions of the Code of Ethics for School Board Members.

The ALJ found that, in order to be eligible for indemnification under the statute, the acts or omissions forming the basis of the charges against petitioner must have arisen out of and in the course of the performance of his duties as a board member, requiring their analysis as to time, place and subject matter in accordance with applicable case law. The ALJ noted that the Commission had dismissed most allegations against petitioner; on the actions that resulted in findings of violation, the ALJ found that two of these arose out of and in the course of the performance of board member duties, while one did not.

The Commissioner adopted the ALJ's analysis and conclusions with respect to general principles of applicable law and petitioner's eligibility for indemnification as to his defense against those allegations resulting in findings of violation by the School Ethics Commission. However, the Commissioner found the record and Initial Decision insufficient to render a complete determination, in that these did not address the full panoply of actions underlying the allegations brought before the Commission and for which petitioner sought indemnification – only those resulting in findings of violation – nor did they address the manner in which the extent of indemnification would be determined where some of the acts or omissions underlying the complaint were found eligible for indemnification while others were not. The Commissioner remanded the matter for further proceedings as necessary to fully resolve the parties' dispute.

<p>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.</p>

April 15, 2010

OAL DKT. NO. EDU 1228-08
AGENCY DKT. NO. 333-11/07

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The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed by the Deputy Commissioner to whom this matter has been delegated pursuant to *N.J.S.A.* 18A:4-33, as have the respective exceptions and replies filed by each party in accordance with *N.J.A.C.* 1:1-18.4 and 1:1-18.8.

In his exceptions, petitioner urges the Commissioner to endorse the conclusion of the Administrative Law Judge (ALJ) that he is entitled to indemnification by the Board of Education (Board) for “nearly all” of the costs of his legal defense against the school ethics allegations brought against him by two other Board members and the Superintendent of Schools;¹ he objects, however, to the conclusion that he is not entitled to indemnification with respect to his violation of *N.J.S.A.* 18A:12-24.1(d). In the latter regard, petitioner contends that the ALJ erred by applying the wrong legal standard – stating that petitioner was found to have violated *N.J.S.A.* 18A:12-24(d) (undertaking of employment or service which might reasonably be expected to prejudice independent judgment in the exercise of official duties), when, in fact,

¹ *Stephen Brown, Carol Lisa and Glenn Garrison v. David Matthews, Board of Education of the City of Englewood, Bergen County*, School Ethics Commission Dkt. No. C13-07, decided October 27, 2008; affirmed on appeal to the Commissioner of Education pursuant to *N.J.A.C.* 6A:4, Decision No. 123-09A, decided April 14, 2009.

he was found to have violated the provision of the Code of Ethics for School Board Members requiring board members not to administer the schools, but to see that they are well run – and by failing to recognize that petitioner’s conversation with Deputy Superintendent Susan Mullins was fully within the scope of his duties as a Board member, arising directly from his involvement in that capacity in the ongoing issue of Ms. Mullins’ employment status within the district. (Petitioner’s Exceptions at 1-10, quotation at 5) In both his exceptions and his reply to the exceptions of the Board, petitioner once again urges – as he did before the ALJ – that any action by a board member relating to the conduct of school affairs *must* be deemed to have arisen out of and in the course of the performance of the board member’s duties, since *N.J.S.A.* 18A:11-1(d) expressly provides for boards of education to “perform all acts and do all things, consistent with law and the rules of the state board, necessary for the lawful and proper conduct, equipment and maintenance of the public schools of the district.” (Petitioner’s Reply Exceptions at 2)

The Board, in turn, urges rejection of the ALJ’s conclusions in all respects save petitioner’s violation of *N.J.S.A.* 18A:12-24.1(d), renewing its argument that merely because a board member takes an action having some relationship to school affairs does not mean that such action was taken in the course of the board member’s duties as required by *N.J.S.A.* 18A:12-20 in order to qualify for indemnification. According to the Board, actions taken by a board member without board knowledge or approval, in opposition to or defiance of the board, or beyond the reasonable bounds of acceptable behavior cannot possibly be found, as they largely were by the ALJ, to have arisen in the course of performance of legitimate duties; indeed, the Board posits, the ALJ’s analysis “turns the statutory intent on its head” by effectively providing that “even if a member does something he is not supposed to as a member of a school board, his action being

linked to school law prohibiting such conduct is enough to support reimbursement.” (Board’s Exceptions at 5-10, quotation at 10; Board’s Reply Exceptions at 1-3)²

Upon review, the Deputy Commissioner finds the record and Initial Decision insufficient to render a complete determination, and hence remands the matter to the OAL for further proceedings.

Initially, the Deputy Commissioner notes that the question of indemnification for costs associated with defending against a complaint alleging violation of the Code of Ethics for School Board Members (*N.J.S.A.* 18A:12-24.1) is both one of first impression and one posing unique difficulties, since proceedings arising under this statute frequently – as here – involve a plethora of diverse allegations rather than claims arising from a single act which may be discretely analyzed in terms of the statutory standard for indemnification. Moreover, in that proceedings under the School Ethics Act are administrative proceedings which do not require favorable disposition in order for the charged party to be eligible for indemnification, analysis under the requisite standard cannot be limited solely to those actions found to constitute violations of the Act.

Petitioner has, in effect, addressed this difficulty by arguing from the outset that allegations of violation of the Code of Ethics for School Board Members inherently arise from the performance of board member duties, so that any proceeding to defend against them must necessarily be indemnified in full; the Board, in turn, has countered that behavior evincing defiance, extremism and disregard of board authority is inherently contrary to legitimate performance of board member duties, so that any complaint arising from such behavior cannot be found eligible for indemnification at all. However, as the ALJ has correctly recognized, in

² The Board also asserts that the ALJ’s inadvertent citation to *N.J.S.A.* 18A:12-24(d), rather than *N.J.S.A.* 18A:12-24.1(d), had no effect on the Initial Decision’s analysis and conclusions. (Board’s Reply Exceptions at 1-2)

Code of Ethics matters, as in any other, it is the particular actions on which the allegations against a charged party are predicated that must be scrutinized – consistent with prior case law as to time, place and subject matter – in terms of the statutory standard of “arising out of and in the course of the performance of his duties as a member of the board” in order to determine a petitioner’s entitlement to indemnification.³

As to those actions specifically reviewed by the ALJ pursuant to this standard – that is, those on which the School Ethics Commission based its findings of violation – the Deputy Commissioner is unpersuaded by the parties’ respective exceptions and concurs with the ALJ’s analysis and conclusions in this regard.⁴ However, the Initial Decision does not address – nor does the record contain documentation and argument enabling the Deputy Commissioner to make informed determinations regarding – the full panoply of actions underlying the complaint before the Commission for which petitioner here seeks indemnification, including a substantial number of the allegations dismissed at various points in the Commission’s proceedings.⁵ Similarly lacking is any consideration of how the extent of

³ In this regard, see also *Bower v. Bd. of Ed. of East Orange*, 149 N.J. 416 (1997), interpreting analogous language in the statute providing for indemnification of school employees.

⁴ In so holding, the Deputy Commissioner additionally notes that, by his own account, petitioner’s conversation with Susan Mullins took place during a “chat” when he stopped by her office while in the building on other business, and that petitioner was interviewed during the affirmative action investigation specifically in his capacity as a board member against whom the superintendent had made allegations of creating a hostile work environment. (School Ethics Decision, *supra*, at 6, 12) With respect to petitioner’s attendance at the Bergen Tech School meeting – which the Commission found to have constituted “private action” in violation of the School Ethics Act, rejecting the testimony and evidence proffered by petitioner in support of his contention that he was both authorized and entitled to attend (*Id.* at 5, 11-12, 14, 15) – the Deputy Commissioner stresses that it is the action(s) underlying the charge, not the charge itself or its ultimate disposition, that determine whether a party’s costs of defense are eligible for indemnification in an administrative matter.

⁵ Petitioner’s exceptions appear to construe the opening paragraph of the ALJ’s conclusion (at 10) as finding him indemnified against all dismissed allegations, which constituted the bulk of the complaint against him. To the extent that such construction may be correct, the Deputy Commissioner observes that no basis is stated for the bald assertion that “the bulk of the overall dispute arose as a result of [petitioner’s] participation as a Board member,” apart from a reference to the mere fact of the allegations’ dismissal – which is, in itself alone, immaterial to eligibility for civil or administrative indemnification under the standard of statute.

indemnification is appropriately determined in the event that some of the acts or omissions underlying the complaint at issue qualify for indemnification while others do not.

Accordingly, the Deputy Commissioner adopts the analysis and conclusions of the Initial Decision with respect to its statements of applicable law⁶ and its findings on petitioner's eligibility for indemnification as to those allegations resulting in findings of violation by the School Ethics Commission. She remands the matter to the OAL, however, for such further proceedings as are necessary to fully resolve the parties' dispute consistent with the parameters set forth above.

IT IS SO ORDERED.⁷

DEPUTY COMMISSIONER OF EDUCATION

Date of Decision: April 15, 2010

Date of Mailing: April 15, 2010

⁶ The Initial Decision does, in fact, misstate various provisions of *N.J.S.A.* 18A:12-24.1 by quoting the analogous paragraphs of *N.J.S.A.* 18A:12-24; however, this error is not reflected in its subsequent analysis and conclusions, and had no effect on the outcome of the matter. Additionally, *Scirrotto v. Warren Hills Bd. of Educ.* is inadvertently cited as 72 *N.J. Super.* 391 (App. Div. 1994); the correct citation is 272 *N.J. Super.* 391 (App. Div. 1994).

⁷ Pursuant to *P.L.* 2008, c. 36 (*N.J.S.A.* 18A:6-9.1), Commissioner decisions are appealable to the Appellate Division of the Superior Court.