

New Jersey Commissioner of Education**Final Decision**

Francis Gavin,

Petitioner,

v.

Board of Education of the Township of
Allamuchy, Warren County, and Lisa Strutin,

Respondents.

Synopsis

In January 2021, *pro se* petitioner filed an appeal challenging the respondent Board's decision to appoint Lisa Strutin (Strutin) to a vacant seat on the Allamuchy Board of Education. The vacancy was created by the resignation of William Cramer on September 9, 2020, prior to the end of his term. The Board thereafter advertised the vacancy and petitioner submitted a statement of interest and resume on September 28, 2020. The Board interviewed petitioner at a meeting on October 26, 2020 but did not fill the vacancy and instead requested an extension of time from the Executive County Superintendent (ECS) to appoint a replacement member. Subsequently, at a Board meeting on November 23, 2020, Lisa Strutin (Strutin), who had recently lost her bid for reelection to the Board, was appointed to fill Cramer's unexpired term and was elected back to her former position as Board President. Petitioner contended that the Board violated *N.J.S.A. 18A:12-15* when it appointed Strutin to fill the vacancy more than 65 days after the seat was vacated by the resignation of Cramer. The Board contended that this matter is moot as Strutin was subsequently reelected to a full term on the Board in 2021 and the vacancy created by the resignation of Cramer no longer exists.

The ALJ found, *inter alia*, that: there are no material facts at issue here and the matter is ripe for summary decision; the Board failed to appoint a replacement member within the statutory timeframe required by *N.J.S.A. 18A:12-15* and therefore lost its authority to fill the vacancy; *N.J.S.A. 18A:12-15* does not permit an ECS to grant a Board an extension of the 65-day window to fill a vacancy, so the extension in this case (which was later rescinded) was invalid; accordingly, Strutin's appointment was null and void as it was not authorized under *N.J.S.A. 18A:12-15*. The ALJ granted petitioner's motion for summary decision, denied the Board's cross motion, and ordered the ECS to appoint a Board member to the Allamuchy Board of Education.

Upon review, the Commissioner concurred with the ALJ that the Board did not have statutory authority to appoint Strutin to fill the Board vacancy created by Cramer's resignation. However, the Commissioner further agreed with the parties that petitioner's requested relief is now moot as the term created by that vacancy expired on December 31, 2021. Accordingly, the Initial Decision of the OAL was modified with respect to the remedy; petitioner's motion for summary decision was granted, but the requested remedy was dismissed as moot.

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.

143-23
OAL Dkt. No. EDU 00307-21
Agency Dkt. No. 4-1/21

New Jersey Commissioner of Education

Final Decision

Francis Gavin,

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Board of Education of the Township of
Allamuchy, Warren County, and Lisa Strutin,

Respondents.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed and considered, as have the exceptions filed by the respondents, Allamuchy Township Board of Education (Board) and Board member Lisa Strutin, pursuant to *N.J.A.C. 1:1-18.4*, and the reply thereto submitted by the petitioner, Francis Gavin.

Petitioner filed this matter seeking to vacate the Board's appointment of Lisa Strutin to a vacant seat on the Board. On September 9, 2020, William Cramer resigned as a member of the Board, thereby creating a vacancy. The Board advertised the vacancy and petitioner submitted his written expression of interest and a resume on September 28, 2020. The Board interviewed petitioner at its regular Board meeting on October 26, 2020, but after a closed session, announced that it would not be filling the vacancy at that time.

Pursuant to *N.J.S.A. 18A:12-15(f)*, a Board is authorized to fill a vacancy on a board of education. However, in accordance with *N.J.S.A. 18A:12-15(a)*, if the Board has not filled a vacancy within 65 days of its occurrence, the Executive County Superintendent (ECS) shall fill the vacancy.

On September 25, 2020, Strutin, who was president of the Board, contacted the ECS, Rosalie Lamonte, by email to discuss the possibility of taking longer than 65 days to appoint a Board member due to the upcoming school board election. On November 10, 2020 – three days before the 65-day deadline – the vice president of the Board wrote an email to the ECS, inquiring about an extension of the 65 days, and the ECS advised that the deadline would be extended to the November 23 Board meeting. Thereafter, on November 17, 2020, the Board attorney requested an extension to the December 21 Board meeting because the election results would not be certified until the November 23 meeting; the ECS granted this request. After the ECS informed petitioner that the deadline had been extended, petitioner inquired about the process. In response, on November 20, 2020, the ECS rescinded the extension in an email copied to the Board secretary, which stated:

I am definitely aware of the statute to which you refer. The county office obviously prefers that the board makes the decision to fill a vacancy rather than the county superintendent. Nevertheless, since this appears to be generating some controversy, I have decided to ask the Allamuchy board to forward resumes of interested parties to me so that I can, consistent with my statutory authority as the county superintendent, fill the vacancy. The board may certainly advertise or otherwise post information about the vacant seat to generate interest in the position.

After receipt and review of resumes, I will inform the board of my decision.

Notwithstanding the ECS's email, at a Board meeting held on November 23, 2020, Strutin – who had recently lost her bid for reelection – resigned from the Board and expressed interest in the vacant position created by Cramer's resignation. At the same meeting, the Board voted to appoint Strutin to the open seat and then elected her back to her former position as Board president. The ECS sent a letter to the Board on December 3, 2020, directing the Board to rescind Strutin's

appointment to the vacant seat. The Board did not comply. As such, petitioner filed the instant petition challenging Strutin's appointment.

Following cross-motions for summary decision, the Administrative Law Judge (ALJ) found that the Board failed to appoint a member within the statutory timeframe and therefore lost its authority to fill the vacancy. The ALJ found that *N.J.S.A. 18A:12-15* does not permit an ECS to grant a Board an extension of the 65-day window to fill a vacancy, so the extension in this case (which was later rescinded) was invalid. As such, the ALJ declared Strutin's appointment null and void as it was not authorized by *N.J.S.A. 18A:12-15*, and further ordered the ECS to appoint a Board member to the Allamuchy Board of Education.

In their exceptions, the Board and Strutin argue that this petition is now moot as there have been multiple elections for the Board since the petition was filed. The Board explains that Strutin was reelected to the Board in 2021 and the vacancy created by Cramer's resignation in 2020 no longer exists. The Board contends that while a decision on the novel issues in this matter would be beneficial to help guide other Boards and ECSs through similar circumstances, the relief proposed by the ALJ should be rejected as any harm it would remedy concluded more than two years ago.

In reply, petitioner makes clear that the term for the vacancy created when Cramer resigned from the Board on September 9, 2020, ended on December 31, 2021. As such, petitioner agrees with the Board that the specific relief sought is now moot. However, petitioner clarifies that he alerted the ALJ prior to the expiration of the term but requested that a decision on the underlying issue be adjudicated, and the Board agreed. Petitioner argues that as this matter is of public importance and capable of repetition while evading judicial review, a decision should be rendered. Petitioner further contends that since appointed members typically only fill the position until the

next election, judicial intervention will often become moot due to the short timeframe. As such, petitioner requests that the Initial Decision be adopted in all aspects except the requested relief.

Upon review, the Commissioner agrees with the ALJ that the Board did not have statutory authority to appoint Strutin to fill the Board member vacancy created by Cramer's resignation.

N.J.S.A. 18A:12-15 provides:

Vacancies in the membership of the board shall be filled as follows:

- a. By the county superintendent, if the vacancy is caused by the absence of candidates for election to the school board or by the removal of a member because of lack of qualifications or is not filled within 65 days following its occurrence.

...

- f. By a majority vote of the remaining members of the board after the vacancy occurs in all other cases.

When interpreting a statute, the goal is to discern the legislative intent, which can be gleaned from the plain language contained therein. *Board of Education of the City of Sea Isle City v. Kennedy*, 196 *N.J. 1, 12* (2008). The word "shall" in the first line of the statute indicates that the statutory scheme is mandatory. The statute makes clear that a Board has the legal authority to fill a vacancy by majority vote, but if the vacancy is not filled within 65 days, then that authority shifts to the ECS. The legislature clearly delineated who has the authority to appoint a Board member to a vacant seat and the statute leaves no room for interpretation. There is no ambiguity that prior to the expiration of 65 days, a Board may fill a vacancy by majority vote; but after 65 days, the Board no longer has that authority. Notably, the legislature did not provide any mechanism by which an ECS can extend the statutory timeframe beyond 65 days to fill a Board vacancy. Accordingly, here, the Board was not authorized to appoint Strutin to fill the vacancy as more than 65 days had passed

since the resignation of former Board member Cramer. Any extension by the ECS was not permitted under *N.J.S.A. 18A:12-15*.

The Commissioner agrees with the parties, however, that petitioner's requested relief to nullify Strutin's appointment to the Board and to mandate that the ECS fill the vacancy is no longer viable as the term created by that vacancy expired on December 31, 2021. Nevertheless, considering that the issues in this case are capable of repetition, that such cases may often be rendered moot due to a short timeframe before an unexpired term ends, and considering the extensive delays in this matter, through no fault of the parties,¹ the Commissioner has addressed the underlying merits of this matter despite the lack of a remedy available at this late juncture.

Accordingly, the Initial Decision of the OAL is modified with respect to the remedy. Petitioner's motion for summary decision is granted, but the requested remedy is dismissed as moot.

IT IS SO ORDERED.²


ANGELINA ALLEN McMILLAN, J.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: May 16, 2023

Date of Mailing: May 17, 2023

¹ The Commissioner notes that the parties' cross-motions for summary decision were filed and argued by March 30, 2021, while the Board member position at issue was still active. The Initial Decision was issued nearly two years after the cross-motions for summary decision were filed.

² This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A. 18A:6-9.1*. Under *N.J.Ct.R. 2:4-1(b)*, a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDU 00307-21

AGENCY DKT. NO. 4-1/21

FRANCIS GAVIN,

Petitioner,

v.

**BOARD OF EDUCATION OF THE TOWNSHIP
OF ALLAMUCHY, WARREN COUNTY AND**

LISA STRUTIN,

Respondents.

Francis Gavin, petitioner, pro se

Eric L. Harrison, Esq., for respondents (Methfessel & Werbel, attorneys)

Record Closed: February 1, 2023

Decided: February 21, 2023

BEFORE **JULIO C. MOREJON**, ALJ:

STATEMENT OF THE CASE

Petitioner, Francis Gavin (Gavin) seeks to vacate Respondent, Board of Education of the Township of Allamuchy's (the Board), decision to appoint Respondent, Lisa Strutin (Strutin), to a vacant seat on the Board.

PROCEDURAL HISTORY

On January 13, 2021, Gavin filed a petition with the Commissioner of Education of the State of New Jersey (Commissioner), challenging the decision of the Board appointing Strutin to a vacant board position as ultra-vires. Along with the petition, Gavin simultaneously filed with the Commissioner an application for emergent relief pursuant to N.J.A.C. 6A-3-1.6. The matter was transferred to the Office of Administrative Law (OAL) and received at the OAL on January 13, 2021, as an emergent and contested matter.

On January 19, 2021, the parties appeared remotely before the undersigned for oral argument concerning Gavin's application for emergent relief and on January 22, 2021, an Order was entered denying Gavin's application for emergent relief.

Thereafter, on February 24, 2021, the Board filed a motion for summary decision. On March 5, 2021, Gavin filed a cross motion for summary decision. On March 10, 2021, the Board filed its opposition to Gavin's cross motion. On March 30, 2021, the parties appeared remotely for oral argument. In accordance with Executive Order No. 127, as extended by N.J.S.A.26:13-32, all Agency Initial Decisions and Final Decisions were extended until January 1, 2022. I closed the record on February 1, 2023.

FINDINGS

The following facts are not in dispute and **FIND** the same as **FACT** herein.

The Board is a type II board of education pursuant to N.J.S.A. 18A:10-1 with nine members and governs the Allamuchy Township School District in Allamuchy Township, County of Warren and State of New Jersey. (Gavin's Brief in opposition to the Board's motion for summary decision, Statement of Facts; and the Board's Brief in support of its motion, Statement of Undisputed Facts and in opposition to Gavin's motion, Response to Petitioner's Statement of Facts). On September 9, 2020, William Cramer (Cramer) resigned as a member of the Board and a vacancy on the Board was created. Id.

The Board then advertised on their district website the existence of the vacancy. The Board required anyone interested in being appointed to the vacant seat to file a written expression of interest and a resume by October 16, 2020. Id. Gavin submitted to the Board Secretary a written expression of interest and resume on September 28, 2020. Id.

On October 26, 2020, in a public session of a regular board meeting, the Board interviewed Gavin. After conducting the interview, the Board moved into a closed session. Id. When the Board returned to public session, Strutin, the Board president, announced that the Board would not be filling the vacancy at that time. Id. The Board did not identify any other individuals who had expressed an interest in filling the vacant seat nor did the Board interview any other candidates for the seat. Id.

Pursuant to N.J.S.A. 18A:12-15f, the Board by a majority vote of the remaining members of the board after a vacancy, is authorized to fill said vacancy. Pursuant to N.J.S.A. 18A:12- 15a, the authority to fill a board vacancy shifts to the Dr. Rosalie Dr. Lamonte, Interim Executive County Superintendent of Schools for Warren County, (Dr. Lamonte) if the vacancy has not been filled by the local board within sixty-five (65) days following the occurrence of the vacancy. Id. The Board failed to fill the vacancy by November 13, 2020, a period of 65 days since the occurrence of the vacancy, and therefore, the county superintendent is authorized by N.J.S.A. 18A:12- 15a to appoint a board member. Id.

On September 25, 2020, Strutin contacted Dr. Lamonte to discuss the possibility of the Board needing more than 65 days to appoint someone to fill Cramer's vacant seat pending the results of the upcoming election in November. (Certification of James Schlessinger at ¶ 2, Exhibit A, attached to respondents' motion; Certification of Lisa Strutin at ¶¶ 4-5, attached to respondents' motion).

On November 10, 2020, Board Vice President Giovanni Cusmano (Cusmano) sent an email to Dr. Lamonte inquiring as to the deadline for the Board to fill the vacant seat. (Certification of Lisa Strutin at ¶ 6, attached to respondents' motion; Certification of James

Schlessinger at ¶ 4, Exhibit B, attached to respondents' motion). In response, Dr. Lamonte informed Cusmano that the Board could have additional time beyond the 65 day period to fill the vacant seat. (Certification of Lisa Strutin at ¶ 6, attached to respondents' motion; Certification of James Schlessinger at ¶ 4, Exhibit B, attached to respondents' motion).

On November 17, 2020, Board Attorney Ari Schneider, Esq. sent an email to Dr. Lamonte seeking a further extension of time for the Board to fill the seat. (Certification of Lisa Strutin at ¶ 8, attached to respondents' motion; Certification of James Schlessinger at ¶ 5, Exhibit C attached to respondents' motion). Dr. Lamonte reiterated her approval of additional time for the Board to appoint a new member itself. Dr. Lamonte informed Gavin of her extension. (Certification of Lisa Strutin at ¶ 8, attached to respondents' motion; Certification of James Schlessinger at ¶ 5, Exhibit C, attached to respondents' motion)

In response to an email from Gavin on November 14, 2020, advising her that the 65-day time period within which the Board was authorized to fill the vacancy had elapsed and that he continued to be interested in the vacant seat, on November 17, 2020, Dr. Lamonte responded to Gavin in an email informing him that she had "... extended the timeline for the board to interview interested candidates and appoint someone until their December 21, 2020 meeting." (Gavin's Brief in opposition to the Board's motion for summary decision, Statement of Facts; and the Board's Brief in support of its motion, Statement of Undisputed Facts and in opposition to Gavin's motion, Response to Petitioner's Statement of Facts).

On November 18, 2020, Gavin sent an email to Dr. Lamonte inquiring about the circumstances that gave rise to an extension of time to fill the board vacancy and further outlining the statutory framework of relative authority between Dr. Lamonte and the Board. (Certified Petition, Exhibit D).

On November 20, 2020, in response to another inquiry from Gavin, Dr. Lamonte reversed her prior decision granting the Board until at least the December 21, 2020, Board

meeting to fill the vacant Board position and informed Gavin that she would ask the Board to forward to her the resumes of individuals who had expressed an interest in the vacant board position. Dr. Lamont's email to Gavin stated:

I am definitely aware of the statute to which you refer. The county office obviously prefers that the board makes the decision to fill a vacancy rather than the county superintendent. Nevertheless, since this appears to be generating some controversy, I have decided to ask the Allamuchy board to forward resumes of interested parties to me so that I can, consistent with my statutory authority as the county superintendent, fill the vacancy. The board may certainly advertise or otherwise post information about the vacant seat to generate interest in the position.

After receipt and review of resumes, I will inform the board of my decision.¹

[Certified Petition at ¶ 23]

It was not until Dr. Lamonte learned of Strutin's intention to seek appointment to the vacant seat that she attempted to rescind the extension she had previously granted. Dr. Lamonte claimed that the Board's anticipated appointment of Ms. Strutin "was a means to circumvent the results of the election, resulting in a lack of transparency and violation of the public's trust." (Certification of James Schlessinger, Exhibit F)

On November 23, 2020, the Board convened remotely for a regularly scheduled board meeting. At this meeting Strutin resigned from her position as a member of the Board and President and expressed interest in the vacant position created by Cramer's resignation. Strutin was a candidate for reelection at the November 2020 election but did not win reelection, and her term would conclude at the end of 2020. (Gavin's Brief in opposition to the Board's motion for summary decision, Statement of Facts; and the Board's Brief in support of its motion, Statement of Undisputed Facts and in opposition to Gavin's motion, Response to Petitioner's Statement of Facts).

¹ Dr. Lamont's email was copied to James Schlesinger (Schlesinger), the Secretary of the Board regarding her decision of November 20, 2020.

The remaining Board members then went into executive session. When the Board returned to the public session the Board voted to appoint Strutin to fill Cramer's vacant board seat. Strutin was then sworn in as the replacement for Cramer and then the Board elected her as President of the Board. The Board's action in appointing Cramer was taken without public notice, as the agenda did not provide that the Board would consider Strutin to fill Cramer's vacant seat position, and before public comment was allowed regarding the same. Id.

Following the Board's decision, on December 3, 2020, Dr. Lamonte, directed the Board to rescind the appointment of Strutin to the Board not later than the Board's next regularly scheduled board meeting. On December 10, 2020, the Board convened for a special meeting with an agenda of executive session to discuss potential litigation with the Department of Education and a personnel matter. The only action taken by the Board on December 10, 2020 was to appoint an acting superintendent. The regularly scheduled meeting noticed for December 21, 2020 was cancelled due to the Board inability to have a quorum of members. Id.

The Board gave no reason for declining to fill the vacancy at the December 3, 2020, meeting. The Board did not identify any other individuals who had expressed an interest in filling the vacant seat nor did the Board interview any other candidates for the seat. At no time after Cramer's resignation, did the Board publicly discuss seeking an extension of time of the December 21, 2020 extension granted by Dr. Lamonte to fill the vacant seat on the Board after, or adopt a resolution to seek an extension of time of the December 21, 2020, extension provided by Dr. Lamonte. Id.

ARGUMENTS

The Board argues that its appointment of Strutin to fill the vacancy on November 23, 2020 was within its authority under N.J.S.A. 18A:12-15(a) upon Dr. Lamonte granting the Board an extension of the 65-day timeframe under the statute Id. The Board argues further that its decision is presumed valid as Dr. Lamonte's rescission of the granted extension could only be effective if said decision could be shown to be arbitrary,

capricious, or unreasonable. The Board cites to following authority for this argument: Cell v. Zoning Board of Adjustment, 172 N.J. 75, 81 (2002). Furthermore, a “trial court . . . may not substitute its judgment for that of the governmental body being challenged.” Miller v. Passaic Valley Water Commission, 259 N.J. Super. 1, 15 (App. Div.), certif. denied, 130 N.J. 601 (1992). The Board posits that since Gavin has failed to show the Board acted in an arbitrary, capricious, or unreasonable manner, the Board’s decision is valid.

The Board’s main argument is contained in its brief in opposition to Gavin’s cross-motion for summary decision as follows:

This tribunal’s decision on the parties’ cross-motions ultimately comes down to one question: were the actions of the Board in appointing Lisa Strutin arbitrary, capricious, or unreasonable? Cell v. Zoning Board of Adjustment, 172 N.J. 75, 81 (2002)?.

[Board, opposition brief, at page 8]

Gavin’s main argument is that Dr. Lamonte did not have the statutory authority to grant an extension of the 65-day to the Board. Gavin argues that N.J.S.A. 18A:12-15(a) confers a mandatory duty on Dr. Lamonte through the word “shall” in N.J.S.A.18A:12-15(a), and that Dr. Lamonte had no authority to delegate this duty pursuant to N.J.S.A.18A:7-8.

Gavin argues further that while Dr. Lamont had the authority and discretion to grant an extension of 65-days to the Board it would be correct that Dr. Lamont also had the discretion to rescind such an extension in the present circumstances. Gavin cites to In re Election Inquiry, 92 N.J.A.R. at 222, for this authority, where the Superintendent only became aware of the potential conflict of interest after the deadline had passed and after she had granted the extension. After having the concern brought to her attention, the Superintendent rescinded the extension, thereby fully transferring the authority back to herself. Gavin thus argues that Dr. Lamont, like the Superintendent in In Re Election

Inquiry, had the authority to invoke the mandatory duty, as prescribed by the word “shall” in N.J.S.A.18A:12-15(a), to rescind the extension.

Gavin argues that the Board’s appointment of Strutin was ultra vires. In making this argument, Gavin points out that Schlessinger, the Board’s Business Administrator, received Dr. Lamont’s rescission at 5:33 pm on Friday, November 20, and there was ample opportunity to communicate this rescission to the Board before its meeting began at 7:30 pm on Monday, November 23. The Board’s appointment of Strutin after Dr. Strutin rescinded the extension, Gavin argues, was therefore, ultra vires.

Gavin also argues that the arbitrary, capricious, or unreasonable standard is not reached because Dr. Lamonte did not have authority to grant the extension, and therefore the Board’s decision is not presumed to be valid, because the Board had no legal authority to make a decision after the expiration of the 65-day period. Gavin argues for the following relief herein:

1. Declaring the action taken by the Allamuchy Township Board of Education on November 23, 2020 to fill the vacant board seat to be ultra vires and null and void;
2. Vacating the purported appointment of Lisa Strutin on November 23, 2020 as a member of the Allamuchy Township Board of Education; and
3. Mandating the Executive County Superintendent to make an appointment from the citizens of Allamuchy Township to fill the vacancy on the Allamuchy Township Board of Education within a time certain.

DISCUSSION AND CONCLUSIONS

Pursuant to N.J.A.C. 1:1-12.5(b), summary decision “may be rendered if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law.” This rule is substantially similar to the summary-

judgment rule embodied in the New Jersey Court Rules. See Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67, 74 (1954). In Brill v. Guardian Life Insurance Co., 142 N.J. 520, 540 (1995), the New Jersey Supreme Court addressed the appropriate test to be employed in deciding the motion:

[A] determination whether there exists a “genuine issue” of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party. The “judge’s function is not . . . to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.” If there exists a single, unavoidable resolution of the alleged disputed issue of fact, that issue should be considered insufficient to constitute a “genuine” issue of material fact for purposes of Rule 4:46-2.

[Citations omitted.]

In evaluating the merits of the motion, all inferences of doubt are drawn against the movant and in favor of the party against whom the motion is directed. Judson, 17 N.J. at 75. However, “[w]hen a motion for summary decision is made and supported, an adverse party in order to prevail must by responding affidavit set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding.” N.J.A.C. 1:1-12.5(b). The New Jersey Supreme Court has cautioned that, “if the opposing party offers no affidavits or matter in opposition, or only facts which are immaterial or of an insubstantial nature, a mere scintilla, . . . ‘[f]anciful, frivolous, gauzy or merely suspicious’ . . . , he will not be heard to complain if the court grants summary judgment, taking as true the statement of uncontradicted facts in the papers relied upon by the moving party, such papers themselves not otherwise showing the existence of an issue of material fact.” Judson, 17 N.J. at 75 (citation omitted). Stated differently, “[b]are conclusions . . . without factual support in tendered affidavits, will not defeat a meritorious application for summary judgment.” U.S. Pipe & Foundry Co. v. Am. Arbitration Ass’n, 67 N.J. Super. 384, 399-400 (App.Div.1961). Likewise, unsupported and self-serving statements, standing alone, are insufficient to create a genuine issue of material fact.

Heyert v. Taddese, 431 N.J. Super. 388, 413-414 (App. Div. 2013). And the “non-moving party cannot defeat a motion for summary judgment merely by pointing to any fact in dispute.” Brill, 142 N.J. at 529. Disputed issues of fact that are immaterial or of an insubstantial nature will not suffice. Ibid.; Worthy v. Kennedy Health System, 446 N.J. Super. 71, 85-86 (App. Div. 2016), certif. denied, 228 N.J. 24 (2016). Rather, “[c]ompetent opposition requires ‘competent evidential material’ beyond mere ‘speculation’ and ‘fanciful arguments,’” Cortez v. Gindhart, 435 N.J. Super. 589, 605 (App. Div. 2014), certif. denied, 220 N.J. 269 (2015) (citation omitted), and the party opposing the motion “‘must do more than simply show that there is some metaphysical doubt as to the material facts.’” Alfano v. Schaud, 429 N.J. Super. 469, 474 (App. Div. 2013), certif. denied, 214 N.J. 119 (2013) (citation omitted).

Judged against these standards, I **CONCLUDE** that there is no genuine issue as to any material fact and that the matter is ripe for summary decision in favor of Gavin.

Pursuant to N.J.S.A. 18A:12-15, on the occasion of a vacancy occurring on a local board of education, the statute vests the local board of education with authority to appoint a citizen of that municipality to fill such a vacancy. However, that authority exists for a period of 65 days from the creation of the vacancy. After the expiration of 65 days, on the failure of the local board of education to appoint, the authority shifts to the Executive County Superintendent. The statute states in relevant part:

Vacancies in the membership of the board shall be filled as follows:

- a. By the county superintendent, if the vacancy is caused by the absence of candidates for election to the school board or by the removal of a member because of lack of qualifications, or is not filled within 65 days following its occurrence;

* * *

- f. By a majority vote of the remaining members of the board after the vacancy occurs in all other cases.

[N.J.S.A.18A:12-15]

The Board raise the following arguments in an effort to justify the action that they took in contravention of N.J.S.A. 18A:12-15. 1) Dr. Lamonte, the Executive County Superintendent granted an extension of the legislatively established time frame to appoint; and 2) the action of a local agency is not subject to review unless arbitrary, capricious or unreasonable on its merits. Each of these arguments is without merit, as Dr. Lamont did not have the authority to make said extension.

The Board argues that they sought from Dr. Lamonte an extension of the statutory time frame and that the request was granted. However, as discussed herein, the Legislature has established a clearly delineated grant of authority to appoint to fill a vacancy on a local board of education. N.J.S.A. 18A:12-15 grants no authority or provisions for extension or modification of that statutory scheme by anyone. The statute provides that the Executive County Superintendent has no authority to modify the unequivocal provisions of the statute. Id. The only authority granted by the statute to the Executive County Superintendent in the circumstance of a vacancy is to fill that vacancy after the passage of 65 days, the time frame in which the local board of education is authorized to fill the vacancy. Id. [emphasis supplied] There is no grant of authority to the Executive County Superintendent to extend or otherwise disregard the statutory directive.

In addition to the authority to appoint to fill a vacancy on a local board of education, the Legislature, in creating the statutory position of Executive County Superintendent, has defined both the jurisdiction and the general scope of the powers and duties of the position of the Executive County Superintendent. The jurisdiction of the Executive County Superintendent is defined in N.J.S.A. 18A:7-5 as follows:

Each executive county superintendent shall devote his entire time to the duties of his office, and he shall have general supervision of all of the public schools of the districts of the county except those city school districts in which there shall have been appointed superintendents of schools.

Among the 24 specifically mandated powers and duties that the Legislature has vested in the Executive County Superintendent pursuant to N.J.S.A. 18A:7-8, none grant the Executive County Superintendent the authority to extend statutory timeframes or to delegate her authority to a local board of education. Without some legislative grant of authority to modify the statutory scheme, Dr. Lamont, as the Executive County Superintendent had no power to grant an extension of time to appoint to the Board.

In this matter, the Board failed to appoint within the statutory time frame, and thus I **CONCLUDE** the Board lost its authority to appoint after the passage of the 65-days, under N.J.S.A.18A:12-15, and only Dr. Lamonte, the Executive County Superintendent can then appoint to fill the vacancy. The statute provides for no other relevant considerations, interpretations or exceptions. No further inquiry need be made. The fact that Dr. Lamonte granted the Board an extension after the 65-days, and then “rescinded” the same was done so in error, as it is not allowed by N.J.S.A.18A:12-15.

Therefore, I **CONCLUDE** that the appointment of Strutin by the Board on November 23, 2020 was not authorized by N.J.S.A. 18A:12-15 and must be declared to be a nullity and I **CONCLUDE** that the Executive County Superintendent must be ordered to fulfill her statutory duty to appoint a board member.

I **CONCLUDE** that summary decision for Gavin under N.J.A.C. 1:1-12.5, is appropriate herein because there are no genuine issues in dispute and the relief requested in his motion for summary decision, is **GRANTED**.

I **CONCLUDE** that the Board’s motion for summary decision is **DENIED**.

ORDER

It is hereby **ORDERED** that summary decision for Gavin under N.J.A.C. 1:1-12.5, is appropriate herein because there are no genuine issues to dispute the relief requested in his motion for summary decision, and therefore his motion for summary decision is

GRANTED; and it is further **ORDERED** that the relief requested therein by Gavin in his motion for summary decision, is **GRANTED**.

It is hereby **ORDERED** that the Board's motion for summary decision is **DENIED**.

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.

February 21, 2023

DATE

Julio Morejon

JULIO C. MOREJON, ALJ

Date Received at Agency

February 21, 2023

Date E-Mailed to Parties:

February 21, 2023

lr

APPENDIX

EXHIBITS

For petitioner:

Cross Motion for Summary Decision with an accompanying Brief.

For respondent:

Motion for summary decision, legal brief, certifications of Lisa Strutin and certification of James Schlessinger, attorney certification, and exhibits.

The Board's opposition brief to Gavin's cross motion for summary decision