

155-23
OAL Dkt. No. EDU 02655-23
Agency Dkt. No. 77-3/23

New Jersey Commissioner of Education
Order on Emergent Relief

Robert Zywicki,

Petitioner,

v.

Board of Education of the Township of
Mount Olive, Morris County,

Respondent.

The record of this emergent matter, the sound recording of proceedings at the Office of Administrative Law (OAL), and the recommended Order of the Administrative Law Judge (ALJ) have been reviewed.

This matter arises from tenure charges certified by the Mount Olive Board of Education (Board) against petitioner, who is the district's superintendent. Petitioner alleged that the Board improperly invoked the Doctrine of Necessity to certify the tenure charges, such that the Board's vote should be vacated. Following oral argument on petitioner's motion for emergent relief, the Administrative Law Judge (ALJ) issued an Order dismissing the petition because jurisdiction over petitioner's claims lies with the School Ethics Commission, not the Commissioner.

Upon review, the Commissioner concludes that it was improper for the ALJ to dismiss the petition in an Order. Pursuant to *N.J.A.C. 1:1-12.7*, the disposition of a motion which

completely concludes a case shall be by initial decision. This requirement is critical because, when an initial decision is issued, the parties can file exceptions pursuant to *N.J.A.C. 1:1-18.4*.¹ While the ALJ could have issued an initial decision dismissing the case for lack of jurisdiction, he did not do so. Dismissing the case in its entirety through an Order, without affording the parties the opportunity to file exceptions, deprived them of an important protection built into the applicable regulatory scheme. Accordingly, the Commissioner rejects the ALJ's Order.

However, the Commissioner finds that the record contains sufficient information to rule on petitioner's motion for emergent relief. Pursuant to *Crowe v. DeGioia*, 90 *N.J.* 126, 132-134 (1983), and *N.J.A.C. 6A:3-1.6*, there are four prongs the Commissioner must consider when emergent relief is sought: 1) whether the petitioner will suffer irreparable harm if the requested relief is not granted; 2) whether the legal right underlying petitioner's claim is settled; 3) whether the petitioner has a likelihood of prevailing on the merits of the underlying claim; and 4) whether, when the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted.

The Commissioner concludes that petitioner has failed to demonstrate that he will suffer irreparable harm if the requested relief is not granted. Irreparable harm is defined as harm "that cannot be redressed adequately by monetary damages." *Crowe, supra*, 90 *N.J.* at 132-33. Petitioner claims that he will suffer based on the loss of his salary and health benefits, but those are precisely the types of harm that can be redressed by monetary damages. To the extent that petitioner alleges damage to his reputation, the Commissioner concludes that

¹ There is no regulation permitting the parties to file exceptions to an Order Denying Emergent Relief.

petitioner has presented only conclusory and speculative arguments and has failed to demonstrate that his reputation will be damaged irreparably if he is not immediately reinstated.

As all four *Crowe* factors must be met for emergent relief to be granted, it is not necessary to address the remaining factors. The Commissioner also does not reach the issue of whether jurisdiction over this matter lies with the School Ethics Commission. The Commissioner, however, concurs with the ALJ that her referral of this case to the OAL does not constitute a decision that jurisdiction over the matter lies with the Commissioner, for the reasons detailed in the Order.

Accordingly, the Order dismissing the petition is rejected. Petitioner's motion for emergent relief is denied. This matter shall continue at the OAL with such proceedings as the parties and the ALJ deem necessary to bring it to closure.

IT IS SO ORDERED.


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

Date of Decision: May 25, 2023
Date of Mailing: May 25, 2023



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER DENYING

EMERGENT RELIEF

OAL DKT. NO. EDU 02655-23

AGENCY DKT. NO. 77-3/23

ROBERT ZYWICKI,

Petitioner,

v.

**BOARD OF EDUCATION OF THE TOWNSHIP
OF MOUNT OLIVE, MORRIS COUNTY,**

Respondent.

Stephen J. Edelstein, Esq. for petitioner (Weiner Law Group, LLP, attorneys)

Joseph L. Roselle, Esq. for respondent (Schenck, Price, Smith & King, LPP,
attorneys)

BEFORE: JOHN P. SCOLLO, ALJ:

STATEMENT OF THE CASE

Petitioner, Robert Zywicki filed a Verified Petition of Appeal and a Motion for Emergent Relief with the Commissioner of Education's Office challenging and seeking to overturn two actions (i.e., votes) of the Mt. Olive Board of Education (hereinafter MOBOE), which took place during the MOBOE's March 13, 2023 meeting. In the first action, the MOBOE voted to invoke the Doctrine of Necessity, and subsequently, in the

second action, the MOBOE voted to certify tenure charges against Robert Zywicki, the Superintendent of Schools.

PROCEDURAL HISTORY

On or about March 22, 2023, the Petitioner, Robert Zywicki (hereinafter “Zywicki” or the “Superintendent”), through his attorney, Stephen J. Edelstein, filed a Petition of Appeal with an accompanying Motion for Emergent Relief. On March 23, 2023, Attorney Edelstein filed his supporting Brief. On March 23, 2023, the Office of Controversies and Disputes in the Department of Education (hereinafter the “DOE” or the “Commissioner”) transmitted the case to the Office of Administrative Law (OAL) where it was filed on March 24, 2023 as a contested case. The matter was then assigned to John P. Scollo, ALJ, who ordered the parties to submit Opposition papers, Reply papers, Briefs and supporting materials by March 30, 2023. Oral argument via Zoom was conducted on April 3, 2023 with concerned citizens and a member of the press¹ in attendance.

After the hearing, the judge ordered the attorneys to submit their written summation Briefs by April 5, 2023 with clarifications of their arguments and additional materials.

BACKGROUND INFORMATION ASCERTAINED FROM THE PARTIES’ SUBMISSIONS

In support of Petitioner Zywicki’s position, Attorney Edelstein first explained what the Doctrine of Necessity is. He noted at the outset that of the nine people who constituted the MOBOE on March 13, 2023, four of them were conflicted on the issue of voting on tenure charges against Zywicki due to their involvement in pending litigation with Zywicki (who initiated the litigation is not entirely clear to this Tribunal). The four BOE members claimed to be conflicted by Edelstein are: Mr. Antoine Gayles, Mr.

¹ The Tribunal welcomes the participation of the press in this matter. While this Judge does not know the parties, their histories, their affiliations, their personal biases or prejudices, or their feelings towards each other, it is evident that these parties have engaged in multiple actions and lawsuits against each other over matters which directly or indirectly affect the schools. The taxpayers will likely bear the costs of these legal matters. The newspaper’s thorough and objective investigation, probing into the origins and causes of these multiple actions, would render a great service to the people of Mt. Olive.

Anthony Strillacci, Ms. Elizabeth Ouimet, and Dr. Anthony Giordano. Attorney Edelstein also noted that the Doctrine of Necessity could only be invoked if there were at least five BOE members who were genuinely conflicted. Edelstein claims that enemies of Zywicki (including the above four people and Christopher Zeier and the MOBOE's attorney, Marc Zitomer), improperly and in bad faith manipulated the issue of conflicts in order to bring the number of purportedly "conflicted" BOE members to at least five so that all MOBOE members, including the four previously listed above, would be able to vote on the tenure charges thus making it virtually certain that said charges would be certified. Edelstein argued that if the machinations of Zywicki's "enemies" in manipulating the number of "conflicted" people had not been successful, then there would have still been a quorum (five people) available to vote on the tenure charges and that the effort to certify the tenure charges against Zywicki would have failed. Attorney Roselle argued to the contrary.

ANALYSIS OF THE ARGUMENTS

The following is not a verbatim account of the arguments and documents presented, but rather it encompasses points that the Tribunal found to be most important.

Petitioner's and Respondent's Arguments Regarding Emergent Relief

Attorney Edelstein argued that the MOBOE's improper invocation of the Doctrine of Necessity and its improper certification of tenure charges against Zywicki, and its concomitant suspension of Zywicki's salary and benefits calls for emergent relief. He argued that Zywicki meets the standards (i.e., the four prongs) set forth in Crowe v. DeGioia, 90 N.J. 126 (1982) and thus qualifies for emergent relief. Attorney Roselle argued to the contrary claiming that emergent relief would not be justified and that Zywicki meets none of the criteria for emergent relief as set forth in Crowe v. DeGioia, 90 N.J. 126 (1982). This will be addressed further below.

The Parties' Arguments Regarding Jurisdiction

Both sides agree that the threshold issue before me is the question of whether the OAL has jurisdiction over this matter.

The Parties' jurisdictional arguments with respect to the Commissioner's decision to refer the matter to the OAL

Zywicki's Petition of Appeal and Motion for Emergent Relief were filed with the Commissioner of Education, who immediately referred the matter to the Office of Administrative Law.

Attorney Edelstein notes that the Commissioner of Education could have dismissed the Petition of Appeal and the Motion if she believed that she lacked jurisdiction. Therefore, he argues that the very fact that the Commissioner referred the matter to the OAL demonstrates that the Commissioner believes he has jurisdiction.

Attorney Roselle, the Respondent's counsel, notes that jurisdiction properly lies with the School Ethics Commission and that the Commissioner of Education's acceptance of Zywicki's papers does not automatically mean that she acknowledged that jurisdiction was proper and was no longer an issue. Attorney Roselle argues that issues dealing with Board member conflicts of interest or the proper invocation of the Doctrine of Necessity belong before the School Ethics Commission. The Respondent relies on previous OAL rulings in Gilliam Gardner v. Board of Education of the City of Hackensack, Bergen County and James Montesano, Patricia Aquino-Lozano and Celso King, Intervenors, OAL Docket No.: EDU 09421-12 (2013) and Castriotta v. Board of Education of the Township of Roxbury, Morris County, OAL Docket No. : EDU 09217-10 (2011), *reversed* on other grounds, 427 N.J. Super. 592 (App. Div. 2012)

The Parties' jurisdictional arguments with respect to whether this matter arises under the School Laws or under the School Ethics Act (N.J.S.A.18A:12-21, et seq.)

Attorney Edelstein argues that this case contains a valid and important issue which arises under the school laws and therefore jurisdiction belongs to the Commissioner of Education and thus to the OAL. For support, he points to the wide scope of N.J.S.A. 18A:6-9, where it says:

The commissioner shall have jurisdiction to hear and determine, without cost to the parties, all controversies and disputes arising under the school laws....

That being so, Edelstein argues, the case clearly belongs under the jurisdiction of the Commissioner of Education.

The issue Edelstein refers to is whether or not the MOBOE failed to follow Board Policy 0163, a bylaw, when on March 13, 2023 it allegedly failed to post notice of its intent to invoke the Doctrine of Necessity. Attorney Edelstein maintains that this is a school law issue and therefore it brings this matter into the jurisdiction of the Commissioner of Education. He concludes that the Board's invocation of the Doctrine of Necessity fails because the Board did not announce (by posting, as required by the bylaw) its intention to invoke the Doctrine of Necessity.

Attorney Edelstein's other argument is that when the Board ignored one of its own bylaws, it was acting beyond the scope of its bylaws when it went ahead with the vote to invoke the Doctrine of Necessity and when it went ahead with the vote on the tenure charges. The bylaw (Board Policy number 0163) covers the invocation of the Doctrine of Necessity and says:

"When the Board announces the Doctrine of Necessity is being invoked, the details, parameters and / or other pertinent facts of the matter to be voted should be revealed on an agenda for the public meeting in which the matter is to be voted upon."

Edelstein argues that the ignoring of a bylaw raises a school law issue because boards of education must follow procedures set forth in N.J.S.A. 18A:11-1 (for making, amending, or repealing bylaws) if they intend to act outside the bounds of their present bylaws. Attorney Edelstein argues that the Board was only empowered to make, amend or repeal its bylaws by following N.J.S.A. 18A:11-1 and that any such changes must appear in the Board's minutes. Edelstein says, "That did not occur" on March 1, 2023.

The Respondent does not concede that the Board acted beyond the scope of its bylaws because it simply did not ignore or set aside the bylaw. Instead, the MOBOE acted within the scope of its bylaws. It concedes that advance posting of its intent to invoke the Doctrine of Necessity did not take place before the March 13, 2023 Board meeting. However, the Respondent argues that no advance posting could possibly be made of its decision to invoke the Doctrine of Necessity because the MOBOE only received advice regarding the invocation of the Doctrine of Necessity from its attorney during the actual Board meeting of March 13, 2023. Moreover, the Board did announce that it was invoking the Doctrine of Necessity during the Board Meeting. The Respondent argues that its action was fully in keeping with the wording of Board Policy 0163 for the following reasons

because it did announce its decision to invoke the Doctrine of Necessity at its earliest opportunity to do so at the Board meeting to those in attendance;

because the announcement itself constituted the required posting of an agenda;

because there is no requirement in the bylaw for any minimum amount of posting time that must pass before the Board may vote on a matter under the Doctrine of Necessity; and

because the very wording of the bylaw allows a posting to be simultaneous with the vote, as demonstrated by the words "for the public meeting in which the matter is to be voted upon.

APPLICABLE LAW

Jurisdiction of the Commissioner of Education

N.J.S.A. 18A:6-9 provides

The commissioner shall have jurisdiction to hear and determine, without costs to the parties, all controversies and disputes arising under the school laws

The New Jersey School Ethics Act

The New Jersey School Ethics Act is found at N.J.S.A. 18A:12-21 through N.J.S.A. 18A:12-34. N.J.S.A. 18A:12-24 sets forth prohibited conduct pertaining to all school officials. The Code of Ethics for School Board Members is found therein at N.J.S.A. 18A:12-24.1. In addition to the requirements of the School Ethics Act, it imposes additional rules governing the conduct of School Board Members. The establishment of the School Ethics Commission is set forth in N.J.S.A. 18A:12-27. The School Ethics Commission's (or "S.E.C.'s") powers and duties are set forth in N.J.S.A. 18A:12-28 and -29. The jurisdiction of the School Ethics Commission is set forth in N.J.S.A. 18A:12-29 where the statute says that the S.E.C. accepts complaints alleging a violation of the School Ethics Act or of the Code of Ethics for School Board Members. The S.E.C. then determines whether or not probable cause exists to credit the allegations of the complaint. If the S.E.C. determines that probable cause does not exist, then it shall dismiss the complaint. If the S.E.C. determines that probable cause exists, then it shall refer the matter to the Office of Administrative Law (OAL). Once the OAL hears the matter, the S.E.C. determines by majority vote whether the conduct complained of constitutes a violation of the School Ethics Act (i.e., it decides whether to accept or reject the ALJ's Initial Decision). If the S.E.C. finds that a violation has occurred, it shall, by majority vote, recommend a sanction (reprimand, censure, suspension, or removal) to the Commissioner of Education, who then shall act on the S.E.C.'s recommendation regarding the sanction.

LEGAL ANALYSIS AND CONCLUSIONS

Decision on whether the Commissioner of Education's decision to refer the matter to the OAL manifests a decision on his part that jurisdiction lies with the Commissioner rather than with the School Ethics Commission

While that is true that the Commissioner could have dismissed the Petition of Appeal and the Motion for Emergent Relief if she believed she lacked jurisdiction, the Commissioner was not under any obligation to do so. Her decision to refer the matter to the OAL was proper and, in most cases, the usual course; but her referral does not necessarily decide the question of jurisdiction. To believe otherwise would mean that the issue of determining jurisdiction can never be decided by the OAL. Obviously, that is not true. The parties, in their arguments, have not taken such a position and they have vigorously argued the pros and cons of jurisdiction.

I **CONCLUDE** that the Commissioner of Education's referral of the matter to the OAL does not manifest a decision on her part that jurisdiction lies with the Commissioner of Education's Office.

Decision as to whether the bylaw's (Board Policy 0163's) requirement for a posting is or is not a school law issue

I have evaluated the arguments of both counsel. Attorney Edelstein's argument is that the Board's alleged ignoring of its own bylaw raises a school law issue because boards of education must follow procedures set forth in N.J.S.A. 18A:11-1 (for making, amending, or repealing bylaws) if they wish to act outside the bounds of their present bylaws. This, he argues, is a matter of school law. His purpose is to characterize this matter as a school law case. The Respondent's position is that the thrust of Attorney Edelstein's allegations, indeed his entire case, is that the Board "improperly and in bad faith" invoked the Doctrine of Necessity in order to certify tenure charges against Mr. Zywicki. The Respondent argues that Zywicki's allegations are all School Ethics issues, which belong under the jurisdiction of the School Ethics Commission.

The applicable law was stated by Margaret Monaco, ALJ in Clarissa Gilliam Gardner v. Board of Education of the City of Hackensack, Bergen County and James Montesano, Patricia Aquino-Lozano and Celso King, Agency Docket No. 146-5/12 (2013)

“The Commissioner’s jurisdiction is defined by statute and is limited to controversies and disputes arising under the school laws.” N.J.S.A. 18A:6-9. Our courts have held that, “[w]here the controversy does not arise under the school laws, it is outside the Commissioner’s jurisdiction even though it may pertain to school personnel.” Bd. of Educ. Of E. Brunswick v. Twp. Council of E. Brunswick , 48 N.J. 94, 102 (1966). It is recognized that “the sweep of the Department’s interest and the Commissioner’s jurisdiction does not extend to all matters involving boards of education.” Archway Programs, Inc. v. Pemberton Twsp. Bd. of Educ., 352 N.J. Super. 420, 424-425 (App. Div. 2002).

In my analysis, Attorney Edelstein’s words tell it all. By his use of the words, “improperly and in bad faith”, Attorney Edelstein makes it clear that he is arguing that the members of the MOBOE engaged in unethical conduct. The issue of whether the MOBOE ignored the bylaw is only part and parcel of the larger ethical claims. Therefore, I **CONCLUDE** that the allegation that the MOBOE ignored its bylaw does not transform the matter into a school law case.

Decision Regarding Jurisdiction

The Petitioner, Robert Zywicki, submitted his Petition of Appeal and Motion for Emergent Relief and later submitted his supporting Brief and Exhibits to the Office of Controversies and Disputes in the New Jersey Department of Education. Zywicki did not file his papers with the School Ethics Commission (the “S.E.C.”).

While the Commissioner of Education has jurisdiction over “all controversies and disputes arising under the school laws”, it is also clear that jurisdiction over School Ethics matters belongs with the School Ethics Commission (i.e., that ethics matters are to be initiated by a complaint filed with the S.E.C., not with the Commissioner, and then the S.E.C. decides the threshold issue of probable cause). Zywicki’s allegations are that the

MOBOE “improperly and in bad faith” invoked the Doctrine of Necessity in order to “manipulate” the vote on the certification of the tenure charges against him. The essence of Zywicki’s allegations (bad faith manipulation of who was or was not “conflicted” in order to invoke the Doctrine of Necessity, and bad faith manipulation of the vote certifying tenure charges) is that certain members of the MOBOE acted unethically and conspired to strip him of his position, his compensation and his family’s health benefits. Therefore, by his own words, Zywicki states that the matter presents ethical issues rather than school law issues.

Since it is clear that Zywicki himself has characterized this matter as an ethics matter, it follows that pursuant to N.J.S.A. 18A:12-28 and 29, jurisdiction lies with the S.E.C. rather than the Commissioner of Education. See *Castriotta v. Bd. of Educ. Of Roxbury*, EDU-09217-10, Final Decision (May 18, 2011), <http://www.nj.gov/education/legal/>, rev’d on other grounds, 427 N.J. Super. 592 (App. Div. 2012), where the Commissioner of Education re-affirmed that the “review and adjudication of allegations of Code of Ethics For School Board Members violations is solely within the purview of the School Ethics Commission.”

In his filed papers, Zywicki does not raise a valid school law issue; the issues he raises are ethical issues. If this were a matter arising under the school laws, then the Commissioner (and subsequently, at his discretion, the OAL) would have jurisdiction. However, the nature of the allegations, set forth in Zywicki’s own words, demonstrates that they are ethical matters and not matters arising under the school laws. As stated above, N.J.S.A. 18A:12-28 and -29 provide that complaints regarding ethical matters fall within the jurisdiction of the S.E.C. rather than the jurisdiction of the Commissioner of Education. I **CONCLUDE** that jurisdiction belongs with the S.E.C. and Zywicki should have brought his grievance by way of a Complaint filed with the S.E.C. It follows, and I **CONCLUDE** that this OAL matter, having been transmitted to the OAL by the Commissioner of Education, who lacked jurisdiction, cannot be maintained, and must be **DISMISSED** for lack of jurisdiction.

Legal Analysis Of The Arguments Concerning The Crowe Factors

Since the matter has been decided on jurisdictional grounds, there is no need for this Tribunal to make an analysis of the Crowe factors.

ORDER

It is hereby **ORDERED** that Zywicki's Petition of Appeal is **DISMISSED** and his Motion for Emergent Relief seeking an Order immediately vacating the MOBOE's vote to invoke the Doctrine of Necessity and immediately vacating the MOBOE's certification of the tenure charges brought against Zywicki must be, and hereby is, **DENIED**; and it is further

ORDERED that a copy of this **ORDER** shall be transmitted by email from the OAL to both attorneys, Stephen J. Edelstein and Joseph L. Roselle, and that receipt of same shall be acknowledged immediately by the attorneys.

This order on application for emergency relief may be adopted, modified, or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who is authorized by law to make the final decision in this case. The final decision shall be issued without delay but no later than forty-five days from the entry of this order. If the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** does not adopt, modify, or reject this order within those forty-five days, this recommended order shall become the final decision on the issue of emergency relief under N.J.S.A. 52:14B-10.



April 14, 2023

DATE

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JOHN P. SCOLLO, ALJ

APPENDIX

List of Exhibits

For Petitioner

P-1 Petitioner Zywicki's (per Attorney Edelstein) March 31, 2023 submission containing Brief (supplementing his March 23, 2023 Letter Brief to the Commissioner of Education, attached as "#1"); and also attaching as "#2", Board Policy 0131; and also attaching as "#3", the Minutes of the MOBOE meeting of 3/13/23.

P-2 Petitioner Zywicki's April 5, 2023 supplement / summation of the April 3, 2023 oral argument, with an attached Exhibit "A" (a copy of the OAL Transmittal Sheet)

P-3 Copies of Statutes, Regulations, Rules and Cases relied upon by the Petitioner

For Respondent's

R-1 Respondent MOBOE's March 30, 2023 submission containing Brief; Outline of Factual Background; Certification of Christopher Zeier, attaching Exhibits "A" through "L"; and an Index of Cases with cases.

R-2 Respondent's April 5, 2023 supplement / summation of the April 3, 2023 oral argument with an attached "Exhibit "A" (a copy of the 3/13/23 Resolution to Invoke the Doctrine of Necessity); Exhibit "B" (a copy of Zywicki's Answer to the Tenure Charges, Agency Docket Number 70-3/23, dated March 31, 2023); Exhibit "C" (a copy of a 3/31/23 letter from Jennifer Killough-Herrera of the Department of Education to Attorney LaPira and Attorney Edelstein; and, an Index of Cases with cases).

R-3 Copies of Statutes, Regulations, Rules and Cases relied upon by the Respondent.