

EDU # 2028-05
C # 235-05
SB # 31-05

BOARD OF EDUCATION OF THE CITY	:	
OF SEA ISLE, CAPE MAY COUNTY,	:	
	:	STATE BOARD OF EDUCATION
PETITIONER-RESPONDENT,	:	
	:	DECISION
V.	:	
	:	
WILLIAM J. KENNEDY,	:	
	:	
RESPONDENT-APPELLANT.	:	

Decided by the Commissioner of Education, June 30, 2005

For the Petitioner-Respondent, Cooper Levenson (James B. Arsenault, Jr., Esq., of Counsel)

For the Respondent-Appellant, Mayerson & Associates (Gary S. Mayerson, Esq., of Counsel)

The Board of Education of the City of Sea Isle filed a petition of appeal with the Commissioner of Education seeking a declaratory ruling that the appellant, William J. Kennedy, a member of the Sea Isle Board, had an incompatible conflict of interest which mandated his disqualification from membership on the Board pursuant to N.J.S.A. 18A:12-2.¹ The alleged conflict involved the fact that the appellant had pending claims against the Board which he had filed on behalf of his son under the Individuals with Disabilities Education Act.

¹ N.J.S.A. 18A:12-2, "Inconsistent interests prohibited," provides: "No member of any board of education shall be interested directly or indirectly in any contract with or claim against the board...."

In an Initial Decision issued on May 16, 2005, an administrative law judge (“ALJ”) concluded that the appellant did not have a disqualifying conflict. Observing that the School Ethics Commission had concluded in an advisory opinion that N.J.S.A. 18A:12-24(j) of the School Ethics Act provided an exception to the appellant’s situation,² the ALJ recommended that the Commissioner dismiss the petition.

On June 30, 2005, the Commissioner rejected the ALJ’s recommendation. In determining that the appellant did, in fact, have a conflict which disqualified him from membership on the Board pursuant to N.J.S.A. 18A:12-2, the Commissioner explained:

Significantly, [the Legislature] 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

² N.J.S.A. 18A:12-24(j) provides: “Nothing shall prohibit any school official, or members of his immediate family, from representing himself, or themselves, in negotiations or proceedings concerning his, or their, own interests....”

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....

...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 Tp. Bd. Of Educ. V. O’Connel, 1990 S.L.D. 674], 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—privity 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....

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.

Commissioner’s Decision, slip op. at 3-5 (emphasis in original).

Accordingly, the Commissioner directed that the appellant be removed as a member of the Sea Isle Board.

On July 21, 2005, the appellant filed the instant appeal to the State Board.

After a thorough review of the record, and given the clear and unambiguous language of N.J.S.A. 18A:12-2, we are constrained to affirm the decision of the Commissioner for the reasons articulated therein.

January 4, 2006

Date of mailing _____