

MICAH RASMUSSEN, DANIEL :
ZOROVICH, GERALD NATHANSON :
AND DIANE STERNER, :
PETITIONERS, : COMMISSIONER OF EDUCATION
V. : DECISION
BOARD OF EDUCATION OF THE :
UPPER FREEHOLD REGIONAL SCHOOL :
DISTRICT, MONMOUTH COUNTY, :
RESPONDENT. :

SYNOPSIS

Petitioners sought to set aside the results of a bond referendum held during a special election of the respondent school district, held on December 14, 2004. The referendum sought voter approval for a school facilities renovation and expansion project, and was passed by a majority vote. Petitioners contended that the Board's failure to disclose to voters the presence of environmental contamination on the proposed school site denied voters the right to make an informed decision on the referendum.

The ALJ found, *inter alia*, that: the petition was filed well outside of the 20-day statutory deadline for challenging the results of a bond election (*N.J.S.A.* 18A:24-65), and, therefore, even if petitioners' allegations were deemed true, the result of the referendum cannot now be challenged; additional arguments put forth by the petitioners were insufficient to disregard the clear mandate of *N.J.S.A.* 18A:24-65; and the petition must be dismissed as a matter of law. Subsequent to the issuance of the OAL's Initial Decision, the Board authorized a new referendum and petitioners sought to withdraw their appeal as moot. The Board opposed petitioners' request, contending it was entitled by law to a final agency decision on a matter it had litigated to conclusion at the OAL.

The Commissioner declined to permit withdrawal of the petition, but rejected the Initial Decision. Although the Commissioner concurred with the ALJ's dismissal of the petition, she did so for reasons of jurisdiction and mootness rather than for the reasons expressed by the ALJ. Noting that Commissioner of Education jurisdiction over the dispute had not been determined, the Commissioner declined to reach the merits of the dispute and explained that remanding the matter to the OAL for the a jurisdictional determination at this juncture would serve no purpose since the matter has been mooted by the Board's decision to hold a new election, effectively granting the sole relief sought by petitioners.

<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>

February 28, 2007

OAL DKT. NO. EDU 8171-06
AGENCY DKT. NO. 336-9/06

MICAH RASMUSSEN, DANIEL :
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The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. No exceptions were filed by the parties.

A few days after expiration of the time frame for submission of exceptions,² however, petitioners' administrative designee advised that he and his fellow petitioners wished to withdraw their appeal based upon action taken by the Board of Education the preceding evening:

Last night, the Upper Freehold Regional Board of Education authorized a new middle school referendum, which for the first time gives the voters the opportunity to make a fully informed decision on this project. In light of this development, the [present] petition is no longer necessary. Please consider it withdrawn, effective immediately. (Letter dated February 8, 2007,³ from Micah Rasmussen to Commissioner Davy c/o Director, Bureau of Controversies and Disputes)

¹ In a communication dated January 11, 2007 and forwarded to the Commissioner on January 23, 2007 by petitioner Rasmussen – whom petitioners had designated as their administrative agent for this matter pursuant to *N.J.A.C. 6A:3-1.3(a)1* – Marc Covitz withdrew as a petitioner.

² Exceptions were due on February 2, 2007 pursuant to *N.J.A.C. 1:1-18.4*, the Initial Decision having been mailed to the parties on January 22, 2007.

³ On February 15, 2007, Mr. Rasmussen submitted, at the Department's request, a confirming letter individually signed by all remaining petitioners (see Note 1 above).

The Board objected to petitioners' request to withdraw their petition, arguing that the matter had been litigated at the OAL to the point of an Initial Decision, which the Commissioner was now obliged by law to accept, modify or reject.⁴ The Board urged that the Initial Decision be adopted, contending that its findings, conclusions and recommendation granting the entirety of the Board's Motion to Dismiss were fully correct.⁵ (Letter dated February 20, 2007, from Board Counsel to Director, Bureau of Controversies and Disputes)

Upon consideration, for the reason set forth below, the Commissioner declines to permit withdrawal of the petition without issuance of a final agency decision, but rejects the Initial Decision of the OAL.

In scrutinizing the petition on its initial filing – notwithstanding that the Board raised no objection to the forum in which petitioners chose to file – the Department was concerned that the Commissioner might not have jurisdiction over the parties' dispute given that the sole relief sought by petitioners was the voiding of an election.⁶ Consequently, in transmitting the matter to the OAL, the Department requested that the

⁴ The Board mistakes the date of the ALJ's decision (January 16, 2007) with the date of its receipt by the Department of Education (January 17, 2007), resulting in the erroneous conclusion that the Commissioner's final decision is due on March 2, 2007, rather than March 5, 2007.

⁵ The Board's position on exception is consistent with its stance in response to petitioners' December 14, 2006 attempt to resolve this matter prior to issuance of an Initial Decision. In declining petitioners' proposal at that time, the Board maintained that its arguments were meritorious and that it was "entitled to a decision dismissing the petition as a matter of law." (Letter dated January 16, 2007, from Board Counsel to Micah Rasmussen)

⁶ The Department's reservations were rooted in 1) the absence of any State statute expressly conferring such authority upon the Commissioner of Education, and 2) the fact that *P.L. 1995, c. 278* had repealed in their entirety the school election statutes long codified in State education law (Title 18A), concomitantly enacting new statutes – codified in State election law (Title 19) – largely conforming school election procedures to those of general elections and transferring disputes arising from the administration and application of the school election process from the Commissioner of Education to the Superior Court. See *N.J.S.A. 19:60-1 et seq.*, *N.J.S.A. 19:29-1 et seq.*, and *George Saunders v. Toms River Regional Schools Board of Education*, 289 *N.J. Super.* 225 (March 27, 1996).

question of Commissioner jurisdiction be decided by the Administrative Law Judge (ALJ) as a threshold matter in light of the relief sought by petitioners.

Although the ALJ was clearly aware of the agency's direction – as evidenced by the Initial Decision's procedural recitation (at 2) – neither he nor the parties addressed the requested determination, instead (apparently) equating it with resolution of the arguments embodied in the Board's Motion to Dismiss. As a result, the Commissioner is now confronted with the existence of a well-reasoned OAL recommendation in a matter she may not, in fact, have the jurisdiction to hear.

Given the circumstances and status of this matter, the Commissioner believes that closure through a final agency ruling adopting, modifying or rejecting the Initial Decision of the OAL is appropriate, and, for this reason, declines petitioners' request to withdraw their petition. However, neither can the Commissioner, in good conscience, rule on the merits of a matter when she is uncertain of her authority to do so.

Ordinarily, the Commissioner would resolve a dilemma of this type by remanding the matter to the OAL for the necessary threshold determination, deferring any ruling on the substantive findings and conclusions of the Initial Decision – if appropriate – until resolution of the underlying jurisdictional question.⁷ In the present instance, however, no useful purpose would be served by compelling further proceedings, since the election petitioners seek to void has been rendered a nullity by the Board's decision to hold a new election – granting, in effect, the very relief sought by petitioners.

⁷ See, for example, *Board of Education of the Lenape Regional High School District v. New Jersey State Department of Education*, decided by the Commissioner on March 21, 2006; *Board of Education of the Lenape Regional High School District v. New Jersey State Department of Education*, decided by the Commissioner on April 25, 2006; and *Board of Education of the West Windsor-Plainsboro Regional School District v. New Jersey State Department of Education*, decided by the Commissioner on May 2, 2006.

Accordingly, the Commissioner being loath to decide the merits of a matter over which her jurisdiction is in question and petitioners' dispute having been mooted by the Board's own actions, the Initial Decision of the OAL is rejected and the Petition of Appeal dismissed for reasons set forth herein.

IT IS SO ORDERED.⁸

COMMISSIONER OF EDUCATION

Date of Decision: February 28, 2007

Date of Mailing: March 1, 2007

⁸This 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.*