

BOARD OF EDUCATION OF THE :  
BOROUGH OF PALMYRA, :  
BURLINGTON COUNTY, : COMMISSIONER OF EDUCATION

PETITIONER, : DECISION

V. :

ROBERT MARINNIE, :

RESPONDENT. :  
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SYNOPSIS

The Board of Education of the Borough of Palmyra filed a Petition of Appeal with request for emergent relief, seeking removal of Board member Robert Marinnie for alleged conflict of interest, pursuant to *N.J.S.A.* 18A:12-2, as the result of a Tort Claim Notice against the Board filed by respondent's adult son, who resides with his parents. Oral argument and limited testimony were presented at an emergent relief hearing.

The ALJ ordered the respondent disqualified from holding office as a member of the Palmyra Board of Education, finding, *inter alia*, that respondent had a direct interest in the Tort Claim Notice brought by his son against the Board and had consequently engaged in a number of actions inappropriate to his position on the Board.

The Commissioner adopted the recommended order of the ALJ as the final decision in this matter, rendering his own decision on a summary basis. The Commissioner did not adopt the ALJ's conclusions regarding respondent's alleged misconduct, finding them to be immaterial to a determination under *N.J.S.A.* 18A:12-2, but found instead that the specific factual circumstances of respondent's relationship to his immediate family placed him in a situation where his interest in the lawsuit being pursued by his son was inherently incompatible with board membership. Accordingly, the Commissioner ordered respondent removed as a member of the Palmyra Board of Education as of the date of this decision, and directed the County Superintendent to fill the resulting vacancy pursuant to *N.J.S.A.* 18A:12-15a.

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.
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June 8, 2005

OAL DKT. NO. EDU 2611-05  
AGENCY DKT. NO. 96-4/05

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The record of this matter, including the audiotape of hearing, and the Order Granting Emergent Relief issued by the Office of Administrative Law (OAL) have been reviewed. In accordance with the Department’s notice of April 29, 2005, proposing to consider the OAL Order as an Initial Decision resolving this matter in its entirety, respondent submitted objections to which the Board of Education (Board) duly replied.<sup>1</sup>

In his objections, respondent contends that concluding the matter at this point would deny him his due process rights and violate the standards for issuance of summary decision, which is what the Order would effectively become if it is considered an Initial Decision as proposed. Respondent claims that material facts are in dispute, including but not limited to: 1) whether there was a “conspiracy” between respondent and other board members to discover information to help in respondent’s son’s litigation; 2) whether respondent was seeking information to the detriment of the Board; 3) the type of seminar attended by respondent and the purpose of his attendance; 4) why other Board

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<sup>1</sup> Respondent objected to the Board’s reply on grounds of lateness, but, as correctly pointed out by the Board in a subsequent communication, the requisite filing period was five *working* days, not five calendar days. Accordingly, the Board’s submission was timely filed. See also *N.J.A.C. 6A:3-1.2*.

members discussed the issue underlying respondent's son's Tort Claim Notice while respondent remained silent; and 5) whether respondent was provided with confidential information or provided such to his son. (Respondent's Objections at 1-3) Respondent contends that the Administrative Law Judge (ALJ) made erroneous conclusions regarding the first four of these issues, which can only be proven by the testimony of witnesses not present at the emergent hearing, and that respondent was not asked, nor did anyone testify, as to whether confidential information was ever discussed with or provided to him. Respondent further claims that his due process rights were violated because, although it was not the intent of the ALJ to make a final determination in this matter, the ALJ nonetheless reached definite conclusions regarding respondent's conduct and that of other Board members based on unsworn statements by the Board attorney—whom respondent had no opportunity to cross-examine—and on testimony by respondent that was clearly understood to be limited in nature. (*Id.* at 4-5)

In reply, the Board proffers that respondent suffered no denial of due process, vigorously opposing respondent's claim that the ALJ reached conclusions based on the Board attorney's unsworn and unchallenged statements. To the contrary, the Board contends, the ALJ's decision is based entirely on the Board's complaint as verified by the Board Secretary; the statements of respondent's attorney regarding her own involvement in the tort claim and ethics matters under discussion; and, above all, respondent's sworn testimony, which was freely offered in opposition to the verified complaint, with no objection to the Board's cross-examination and no attempt on re-direct to clarify or rehabilitate respondent's previous statements. The Board further argues, in reply to respondent's claim regarding the interim nature of the ALJ's order,

that the ALJ was “very clear in her decision that respondent shall be removed as a board member based on the record presented, especially the testimony of respondent himself.” (Board’s Reply at 1-2, quotation at 2)<sup>2</sup>

Upon careful review and consideration, the Commissioner determines to adopt as the final decision in this matter the recommended order of the ALJ that respondent be removed as a member of the Palmyra Board of Education. However, he does so for the reasons set forth below rather than those stated by the ALJ.

In the Initial Decision, the ALJ concludes, for purposes of emergent analysis, that respondent engaged in a number of inappropriate actions, conclusions to which respondent takes exception because the ALJ reached them in the absence of a plenary hearing. The Commissioner, however, finds that none of these conclusions are necessary for an analysis of inconsistent interests under *N.J.S.A.* 18A:12-2, which hinges not on a board member’s *conduct*, as it would if similar allegations were made pursuant to the School Ethics Act, but on personal circumstances which may place him or her in a situation that is inherently incompatible with board membership regardless of any actions taken—or not—in response to them. The Commissioner, therefore, does not adopt the ALJ’s factual findings as set forth in the Initial Decision at 8-10, and, indeed, makes no findings of any kind with respect to respondent’s conduct as a Board member, as opposed to his status.<sup>3</sup>

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<sup>2</sup> The Board objects to any consideration of the affidavit included with respondent’s exceptions, arguing that such submission is precluded by *N.J.A.C.* 1-1:18.4(c) and that it represents, at most, “a futile attempt to recant damaging testimony that was offered at the hearing on April 25.” (Board’s Reply Exceptions at 1)

<sup>3</sup> Even if the School Ethics Act had been invoked in this matter, the Commissioner’s jurisdiction would not extend to determining whether violations of the Act had occurred. *N.J.S.A.* 18A:12-21 *et seq.*

*N.J.S.A.* 18A:12-2 requires the Commissioner to 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.<sup>4</sup> Upon review of the record in the present instance, the Commissioner finds that respondent's own testimony provides ample evidence to conclude that, under the particular circumstances operative herein, respondent has at the very least an indirect interest in his adult son's tort claim against the district.

The record reflects that respondent's son (Robert) graduated from the district's high school in June 2004 and entered Cheyney State College in Pennsylvania that fall. He did not return to college following Thanksgiving break, having filed a Tort Claim Notice dated November 19, 2004, that states in substantive part:

On or about August 23, 2004 I was advised that I may be ineligible to participate in the NCAA Division II athletics because of the method in which the Clearinghouse received my transcript and SAT scores [reference to attachment]. Shortly thereafter and upon proper receipt of the documents, I was advised that I was ineligible to play because I was not given the proper courses in high school such as a foreign language and because my SAT score was low.\*\*\*

Because I was a special education student with an IEP. (*sic*) During my attendance at Palmyra High School I was eligible for time consideration on the SAT, however the school failed to assist me or at a minimum provide me with this information. I have subsequently learned that the Palmyra Board of Education did not have a curriculum as required by New Jersey law and this along with the failure to provide an appropriate IEP with the necessary courses caused my lack of proper prerequisites in order to qualify for the NCAA Clearinghouse.

As a direct result of Palmyra Board of Education's failure to provide an appropriate education, I am currently ineligible to play any collegiate sports. I am required to take college remedial courses in order

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<sup>4</sup> It is well established, and the parties do not attempt to argue otherwise, that a notice of tort claim constitutes a "claim against the board" pursuant to *N.J.S.A.* 18A:12-2. *Board of Education of the Borough of Berlin, Camden County v. Charlotte Lee*, decided by the Commissioner June 14, 2002 (#238-02), slip opinion at 7-8.

to bring me to a freshman level, and I am precluded from any possibility for professional scouting.

Witnesses include all school administration, all school board members during the years Robert (*sic*) attended school, parents, guidance and teaching faculty, prior students during the year Robert (*sic*) attended school. Addresses of all these witnesses is (*sic*) in the possession of the school.

\*\*\*Individuals responsible include all school administration, board members, and staff that are responsible for curriculum, guidance and special education during the time I attended Palmyra High School.

\*\*\*Insurance is not applicable to this matter.

To the best of my knowledge there have been no statements or admissions made with regards to this matter except that it has come to my attention that the Palmyra Board of Education does not have an adopted curriculum.

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The damages for the above matter include tuition, books and fees for courses required to complete the high school education not provided by the Board as well as the value of a loss year in participating in sports and be scouted by professionals (*sic*). The necessary attendance of extra school time in order to complete the college education due to having to complete the high school courses first. The delay in the ability to work full time or play sports professionally. The value requires professional computation, but I estimate the amount to exceed \$1,000,000.00 based upon salaries of professional athletes.

The record further reflects that: Robert is 19 years old, single, and living at home with respondent and his wife, Robert's mother. After leaving school, Robert worked part-time at a seasonal job, which ended after the holidays, and started working full-time in early April 2005. He is presently employed at S&T Lubrication, Inc., working approximately 35 hours per week at the rate of \$7.50 per hour, based on the pay stubs submitted by respondent.

Neither respondent nor his son owns a car. The household has two cars, one driven by Robert and his mother, the other by respondent; both are titled to respondent's wife, and she is the insurance policyholder for both, with Robert and respondent as covered drivers. Robert gives his mother money toward the loan on their

jointly driven car, as well as for room and board; respondent has no knowledge of how much. Robert buys his own clothes; respondent's wife gives him money. Family medical insurance is provided through respondent's wife's employer; Robert has ceased to be eligible for his prior coverage because he is no longer a full-time student, and respondent does not know what new arrangements, if any, have now been made.

Respondent earns "some money" as a self-employed handyman. His wife is employed in the billing department of a medical center and earned approximately \$34,000 in 2003 and \$35,000 in 2004 based on her income tax returns. Respondent and his wife are "totally separate" financially; they have held nothing jointly since "before 2000." They do not file joint income tax returns. Respondent did not file income tax returns for 2002, 2003 or 2004; he has no knowledge of his tax returns, which are done by his sister on a "five-year plan." Robert was claimed as a dependent on his mother's tax returns for 2003 and 2004; respondent does not provide support for his son.

Respondent does not know what his son earns or how many hours he works, or how much money he gives his mother toward loans and expenses. He does not know what colleges his son applied to, what courses he took, how much college cost, how it was paid for (except that he didn't sign for any loans), what remedial education courses Robert took and at what cost, etc.; all of this was or is handled by his wife. Respondent has no checking account; all checks are signed by his wife from her account. Respondent and his wife rent their home.

These constitute the facts material to the pertinent inquiry in this matter. Although respondent may dispute the conclusions to be drawn from them, the facts themselves are based entirely on respondent's own documents and testimony; even

granting respondent every inference, therefore, the matter is amenable to summary disposition on the present record.<sup>5</sup> *Contini v. Board of Education of Newark*, 96 N.J.A.R. 2d (EDU) 196, 215, citing *Lima & Sons, Inc. v. Borough of Ramsey*, 269 N.J. Super. 469, 478 (App. Div. 1994); *In the Matter of the Tenure Hearing of Andrew Phillips, School District of the Borough of Roselle, Union County*, Commissioner's Decision No. 129-97, decided March 20, 1997; and *In the Matter of the Tenure Hearing of Neal A. Ercolano, Board of Education of Branchburg Township, Somerset County*, Commissioner's Decision No. 140-00, decided May 1, 2000.

What these uncontroverted facts demonstrate is that respondent and his son are two fully integrated members of a family of three adults that functions as a single household unit. In such a situation, the fact that it is respondent's wife rather than respondent who is the principal breadwinner and who handles the family's financial and administrative affairs, owns the family assets and has all the direct dealings with Robert in these regards cannot serve to insulate respondent from the obvious interest and benefit that would accrue to any member of this household by virtue of a lawsuit brought by one or both of the others; indeed, respondent himself conceded on the record that the entire family would likely benefit if Robert wins his case against the Board.

Contrary to respondent's contention that this matter is about "the Board member, not his family," because of the manner in which respondent's household is constituted, this case cannot be reasonably viewed as being solely about respondent. The Commissioner finds it disingenuous to argue, as respondent does, that Robert's situation

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<sup>5</sup> The Commissioner reiterates that the facts in dispute between the parties substantially relate to respondent's conduct as a Board member and to the conduct of other Board members, and, as such, are not material to the determination herein.



is irrelevant because he is “emancipated”—that is, because he is 19, now working full-time, and in control of his own lawsuit<sup>6</sup>—and there is no proof of direct financial benefit to respondent individually. Although a Board member’s interest need not be financial to be disqualifying under *N.J.S.A. 18A:12-2*,<sup>7</sup> the circumstances in this matter are such that respondent would clearly benefit “in a substantial and material way” (*Holmdel, supra*, at 680) if his son—who presently lives with respondent and his wife, has had and continues to have his educational and/or living expenses subsidized by them,<sup>8</sup> and claims to have been prevented by the Board’s tortious conduct from attaining his anticipated educational and career advancement<sup>9</sup>—were to prevail in a lawsuit seeking in excess of one million dollars in compensation for educational costs and lost wages.<sup>10</sup> Under facts of this matter, Robert need not be considered “dependent” in the legal sense argued by respondent in order for respondent to have an interest in his son’s claim against the Board; indeed, the situation presented here is more analogous to that of a Board member disqualified because a spouse who is employed and stands as a legal equal has a claim of

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<sup>6</sup> Respondent argues: “An emancipated child [is one who] is self-supporting and who has moved beyond the sphere of influence and responsibility exercised by a parent and obtains an independent status of his or her own. (citation omitted) Robert is emancipated. He works full time and supports himself. Respondent is unable to change his son’s position with regards to the Tort Claim Notice that was filed by his son. Robert is no different than the adult in *Board of Education of the Township of Brick, Ocean County v. Edward Mercer*, 96 *N.J.A.R.2d* (EDU) 5 (citation corrected) who lived at home but supported himself. The Commissioner in *Brick* determined the son was emancipated.” (Response to Petitioner’s Brief for Summary Disposition at 2)

<sup>7</sup> “The interest which disqualifies is not necessarily a direct pecuniary interest, nor is the amount of such an interest of paramount importance; it is based on the moral rule that no man can serve two masters whose interests conflict.” *Lee, supra*, at 9, citing *Aldom v. Borough of Roseland*, 42 *N.J. Super* 495, 502 (App. Div. 1956).

<sup>8</sup> Again, under the particular facts of this matter, it is immaterial that respondent’s wife rather than respondent actually earns and handles the money and writes the checks.

<sup>9</sup> Robert’s present hourly wages translate into an estimated annual gross salary of approximately \$13,000 per 50-week work year, based on a 35-hour work week.

<sup>10</sup> Although the waivers and/or releases respondent’s papers indicate he and his wife have signed or would sign are not on record, under the particular facts of this matter, the Commissioner would not conclude differently even if they were.

his or her own against the district, from which the Board member has been shown to be likely to benefit materially and substantially. See, for example, *Taliaferro vs. Hawthorne Board of Education*, 94 N.J.A.R.2d (EDU) 197.<sup>11</sup>

With respect to the situation in which respondent would be placed if he were to remain on the Board, regardless of any efforts on his part to avoid misconduct, the Commissioner finds that—particularly given the broad scope of Robert’s claim and list of responsible parties—it would be virtually impossible for respondent to function as a Board member in the Palmyra School District and not see and hear things which would inevitably bear upon his son’s lawsuit. To the contrary, respondent would routinely be privy to matters relating to curriculum, guidance and special education,<sup>12</sup> as well as to personnel decisions pertaining to the broad array of district staff named as responsible parties in the Tort Claim Notice.

For example, although respondent clearly did not seek Board membership to further his son’s lawsuit—the timing of events would have made this impossible—during the course of respondent’s term, one of the suit’s central issues became a matter of discussion in the district, “something that was unfolding before the Board,” in the words of respondent’s attorney. Even if respondent did not collude, once he was on the Board, to bring issues of interest to his son to the Board’s attention, he undisputedly heard the

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<sup>11</sup> There are a number of factual differences between the situation in *Brick, supra*, and the situation here, including that in the *Brick* matter, the son was fully self-supporting (earning \$20,000 per year in 1994) and, despite living at home, had since the age of 18 received no support whatsoever from his parents for education, automobile, insurance, medical or living expenses. Notwithstanding, to the extent that the *Brick* decision’s focus on “emancipation” may be read as inconsistent with the decision herein, the Commissioner is not bound by—and here repudiates—such interpretation. (See *In re Masiello*, 25 N.J. 590, 598-99 (1958) and *N.L.R.B. v. J. Weingarten, Inc.*, 420 U.S. 251 (1975), concerning the role of precedents in administrative proceedings.)

<sup>12</sup> Respondent himself stated that he could not remember the timing of certain discussions because special education issues come up “all the time.” He also stated that the district’s curriculum, and its lack of approval, was a matter of ongoing discussion.

discussions on these points once they were raised. Even if respondent did not travel to the Board's insurance office for the purpose of dropping off his son's Tort Claim Notice, but to drop off papers related to a Board matter of his own at the administration's request, respondent himself indicates that he had the notice with him in his personal "Board file" and gave it to the Board's insurance office when staff noticed it in the file respondent was showing them; indeed, the potential for legal pursuit of Robert's situation was first raised in a conversation between respondent and the attorney with whom he was conferring on a school ethics matter, even if that attorney did not ultimately represent Robert beyond meeting with him to discuss the possibility of a tort claim and then filing the notice of claim on his behalf so as not to risk violating the statute of limitations.<sup>13</sup> Even if the information respondent obtained at the district's special education in-service program could have been obtained elsewhere by any parent or member of the public, and even if respondent was not the only Board member in attendance and had legitimate reasons to attend the program, it was respondent's status as a Board member that placed him in a situation where he could hear information pertinent to his son's lawsuit in a context directly related to the Palmyra School District and its staff.<sup>14</sup>

For the Commissioner to find that respondent's dual interests as a Board member and Robert's father conflict in a manner that violates *N.J.S.A. 18A:12-2*, as well as its concomitant moral rule that "no man can serve two masters whose interests conflict" (*Lee, supra*, at 9, citing *Aldom v. Borough of Roseland*, 42 *N.J. Super* 495, 502

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<sup>13</sup> This statement is based on respondent's attorney's explanation at hearing with regard to her involvement in Robert's tort claim, in addition to respondent's testimony and documents.

<sup>14</sup> Notwithstanding that he disputes the statement on exception, Respondent admitted on cross-examination that he likely decided to attend the specific session on special education because of his son's situation; however, as indicated above, it is the *opportunity* for such access, not the motivation for taking advantage of it, that is determinative herein.

(App. Div. 1956)), the Commissioner need not conclude that respondent actively shared privileged information with his son, or as the Board puts it, that he “aided and abetted” his son’s legal action to such an extent that his “fingerprints” are “all over” the Tort Claim Notice. Rather, it is enough that the respondent, simply by virtue of his membership on the Board, is regularly in position to be 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”—precisely the evil sought to be avoided by the statute.<sup>15</sup> *Holmdel, supra*, at 676, quoting *S&L Associates, Inc. v. Washington Township*, 61 *N.J. Super.* 312, 329 (App. Div. 1960) Although respondent suggests that the allegations against him may be in retaliation for views he has expressed as a Board member, or because of the importance of his vote on a divided Board, the Commissioner stresses that the outcome of this matter is controlled by the determination of whether respondent has a conflict of interest in violation of law, and not on the motivation for submitting the matter for adjudication.

Accordingly, for the reasons expressed herein, respondent Robert Marinnie is found to have a conflict of interest in violation of *N.J.S.A.* 18A:12-2 and is, therefore, removed as a member of the Palmyra Board of Education as of the filing date of this decision. Pursuant to *N.J.S.A.* 18A:12-15a, the Burlington County Superintendent of Schools is directed to fill the resulting vacancy for the remaining length of respondent’s term, which is due to expire upon the Board’s reorganization following the April 2006 annual school election. Because the Commissioner’s decision resolves this

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<sup>15</sup> Although respondent testified that he “never” talks to his son about “what goes on at the school board,” respondent’s attorney herself recognized that it was virtually impossible for some communication not to occur, even inadvertently. As she stated: “Do I say that they don’t talk to each other? That would be ridiculous – they live together.”

matter without need for further proceedings, the Clerk of the OAL is requested to return the file to the agency pursuant to *N.J.A.C.* 1:1-3.3(a).

IT IS SO ORDERED.<sup>16</sup>

COMMISSIONER OF EDUCATION

Date of Decision: June 8, 2005

Date of Mailing: June 8, 2005

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<sup>16</sup> This 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.*