#390-11 (OAL Decision: http://lawlibrary.rutgers.edu/oal/html/initial/edu8348-11_2.html)

FELIX ROQUE, INDIVIDUALLY AND AS MAYOR OF THE TOWN OF WEST NEW YORK, HUDSON COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
JANET PASSANTE AND ALEXANDER LOCATELLI,	:	DECISION
RESPONDENTS.	:	

SYNOPSIS

In this controversy, petitioner – the current mayor of West New York – charged that the appointment of respondents to the municipality's school board by the former mayor subsequent to his defeat for re-election is violative of the law, and sought removal of these individuals from the Board. Respondents contended that they were legitimately appointed by the outgoing mayor, and should be allowed to serve out their respective terms. The matter was transmitted to the Office of Administrative Law (OAL) for an emergent relief hearing; however, the Administrative Law Judge (ALJ) determined to resolve the case on its merits rather than address it as an emergent relief issue.

The ALJ found that: the parties agreed that they are governed by *N.J.S.A.* 18A:12-7 and *N.J.S.A.* 18A:12-8, relevant sections of which provide that board members be appointed between April 1 and April 15 to terms that commence on May 16, and board vacancies be filled to the unexpired term of the departing member within thirty days; respondent Passante was appointed to a full term on May 13, 2011, which is plainly outside the statutory time frame; *N.J.S.A.* 40:73-5, which applies to Commission forms of government, makes unlawful any appointment between the first and third Tuesday in May of an election year; and respondent Locatelli's appointment falls within this time period. The ALJ concluded that the appointments of both respondents to the West New York Board of Education were improper and, accordingly, respondents must be removed from the school board.

Upon comprehensive review, the Commissioner concurred with the ALJ's ultimate conclusion that the appointments of both respondents were improper and, consequently, they must be immediately removed from the Board. The Commissioner, however, found that *N.J.S.A.* 40:73-5 – the foundational premise for the ALJ's recommendation – is not relevant to the Town of West New York, and respondent Locatelli's appointment was invalidated by the fact that he was already a sitting Board member when he was appointed to another seat on the Board, which is clearly violative of *N.J.S.A.* 18A:12-7 and respondent Passante's appointment violated the express terms of *N.J.S.A.* 18A:12-8. Accordingly, the Commissioner ordered the removal of respondents as board members of the West New York Board of Education.

September 19, 2011

OAL DKT. NO. EDU 8348-11
AGENCY DKT. NO. 186-7/11

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The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Primary exceptions of both petitioner and respondents, and respondents' reply exceptions – filed in accordance with the provisions of *N.J.A.C.* 1:1-18.4 – were fully considered by the Commissioner in reaching his determination herein.[1]

Petitioner's exceptions are in agreement with the ALJ's recommendation that both respondents should be immediately removed from the West New York Board of Education for the reasons stated in the judge's decision. He does, however, disagree with the ALJ's determination that an additional reason justifying the removal of Alexander Locatelli – *i.e.*, that he was appointed by outgoing Mayor Vega on May 13, 2011 to fill the unexpired term of another Board member while he was already serving as a Board member under a term which was not due

[1] It is noted that this matter was transmitted to the OAL for hearing and subsequent recommended Order on Emergent Relief. Apparently, the Administrative Law Judge (ALJ) on his own accord determined to resolve the case on its merits rather than address it as an emergent issue as requested by the Agency. Notwithstanding that the ALJ captioned his subsequent decision as an "Initial Decision on Emergent Relief," *N.J.A.C.* 1:1-12.6 makes no provision for the issuance of an Initial Decision on Emergent Relief. Accordingly, with the receipt of exception arguments of the parties, the Commissioner has reviewed this matter as a regular Initial Decision and any and all references to the prior emergent nature of this matter have been deemed irrelevant.

to expire until May15, 2011 – was inconsequential. Petitioner contends, as he did below, that Locatelli's May 13, 2011 appointment was invalid because he could not simultaneously hold two Board of Education seats. The ALJ erroneously rejected this argument, petitioner maintains, reasoning that because "Locatelli could have resigned the seat that was about to expire in favor of the seat held by Mr. Lopez…the error is minor and that the situation self-corrected on May 15, 2011, when Mr. Locatelli's earlier term expired." [Initial Decision at 2] (Petitioner's Exceptions at 2) Irrespective of the fact that Locatelli *could have* resigned, petitioner argues, the plain fact of the matter is that he did not do so. Petitioner cites to *Georgia v. Suruda*, 154 *N.J. Super*. 439, 445 (Law Division 1977) for the proposition that the law is clear that "a person could be appointed to a new position inconsistent with a former one, but only after a resignation from the former position had been accepted." (*Id*. at 2-3) Petitioner, furthermore, adamantly disagrees with the ALJ that "the error is minor." Pursuant to *N.J.S.A.* 18A:12-7, he points out, the Mayor is limited to appointing "a qualified person to fill the vacancy…" At the time he was appointed, petitioner posits, Locatelli was not a qualified person. Formal requirements such as this exist in order that vacancies are filled in a measured manner to help insure that government functions effectively. It is without question, petitioner avers, that Locatelli was not eligible to be appointed on May 13, 2011 – the date of his appointment – and must, therefore, be immediately removed. (*Id*. at 3)

In reply, respondents argue that Mayor Vega's May 13, 2011 appointment letter which, in relevant part, stated "…I appoint you to a position of the West New York Board of Education, effective May 13, 2011 to finish the term vacated by Mr. Domingo Lopez. Your term will expire May 15, 2015," cannot reasonably be read to mean that Mr. Locatelli would occupy two positions simultaneously. Clearly, respondents maintain, the appointment was intended "to

take effect on May 16, 2011 when the Board met," and after Mr. Locatelli completed his existing term on May 15, 2011. The overlap of only two days during which Mr. Locatelli was "technically" completing one term while already appointed to another term whose duties had not yet begun was, they argue – and as the ALJ recognized – a minor, self-correcting error, particularly in light of the fact that Mr. Locatelli did not engage in any Board business or meetings during this two-day overlap. (Respondents' Reply Exceptions at 1-6, quotation at 2)

Respondents' primary exceptions make two specific relevant exceptions to the Initial Decision: 1) *N.J.S.A.* 40:73-5 applies to "second class cities" and does not apply to the *Town* of West New York, and 2) The Town of West New York is governed by *N.J.S.A.* 18A:12-7 and *N.J.S.A.* 18A:12-8 under which the appointments of both respondents are legal. With respect to the first of these – the ALJ found that respondents' appointments were illegal because they were made between the first Tuesday in May and the third Tuesday in May – which is prohibited by *N.J.S.A.* 40:73-5. Such a finding is clearly erroneous, respondents argue, as – for the following reasons – this statutory provision is not applicable in this matter.

The heading of *N.J.S.A.* 40:73-5 specifically defines its applicability – this provision is entitled "Appointment in *second class cities* in certain years (emphasis added)." The language of this provision prohibits certain appointments "…in any *city of the second class* governed by the commission form of government (emphasis added)." West New York, respondents offer, *is not a second class city*, it is a *Town*, incorporated as such by an act of the New Jersey Legislature on March 2, 1898; the statute was adopted by the inhabitants on July 5, 1898 and the results were certified on July 6, 1898. Notwithstanding that West New York is a *Town*, respondents aver, the ALJ found that this statutory provision –

which, pursuant to its own terms, is applicable *only* to *second class cities* – governed the Town of West New York. Respondents point out:

> The terms "city" and "town" have special well-recognized meanings. They are two (2) of several ways in which municipalities are classified in the State of New Jersey, including for example borough, town, township, city and village. *N.J.S.A.* 40:70-2. Cities themselves are further divided into four (4) classifications based upon population and location: (1) First Class (cities with a population over 150,000); (2) Second Class (cities with populations between 12,000 and 150,000); Third Class (other cities except Atlantic Ocean resorts cities); and Fourth Class (cities which are Atlantic Ocean resorts). *N.J.S.A.* 40A:6-4. The governance of *towns* such as West New York is set forth in *N.J.S.A.* 40A:6-4 through *N.J.S.A.* 40A:6-8.
>
> Certain laws, rules and regulations apply to all types of municipalities. Other laws, rules and regulations apply to only one type of municipality or a subset of municipalities. The decision with respect to what laws apply to what type of municipality is properly left to the legislature. (Respondents' Exceptions at 3-4)

Moreover, respondents advance, the Walsh Act, *N.J.S.A.* 40:70-3, which is entitled "An act relating to, regulating and providing for the government of cities, towns, townships, boroughs, villages and other types of municipalities governed by boards of commissioners or improvement commissioners of this state," does not specify, nor does it imply, that all legislative provisions under this Act apply uniformly to each type of municipality. To the contrary, that each type of municipality is listed separately acknowledges that all types of municipalities are not to be treated the same way for all purposes. Respondents submit that "[w]hen the legislature intends that a statute applies to all municipalities, it either uses the term 'municipality,' such as in *N.J.S.A.* 40:73-1 through *N.J.S.A.* 40:73-3, or it makes no governmental designation at all, such as in *N.J.S.A.* 40:73-4. However, they maintain, when the legislature intends that a law is to apply to a specific type of municipality, it says so," pointing to *N.J.S.A.* 40:71-9.1 "Boards of fire commissioners in townships"; *N.J.S.A.* 40:72-9 "Assignment of deputy by director in second class cities and certain forth class cities"; and *N.J.S.A.* 40:73-9 "Borough under 5000; tax

collector or treasurer; waiver of residency requirement" as examples. A principal precept of statutory construction, respondents urge, is that the plain language of a statute should be used as the primary indicator of legislative intent. (*Id.*at 4-5)

Respondents point out that in this matter petitioner had the burden of proving that the statute at issue did not mean what it clearly says, a burden, they assert, he did not satisfy and the ALJ's conclusions based on petitioner's arguments are clearly erroneous, as evidenced by: 1) Neither petitioner nor the ALJ cite any legislative history or case law with respect to *N.J.S.A* 40:73-5 which would support their expanded interpretation of this provision; 2) the ALJ stated that "*N.J.S.A.* 40A:6-4 classifies for legislative purposes cities of the second class as having between 12,000 and 150,000 people" (Initial Decision at 3) From that and nothing more, he improperly concluded that a *town* with a population in that range is really a *second class city*; 3) the ALJ relied on *N.J.S.A.* 40A:70-2 which lists the various types of municipalities and bootstraps this listing to conclude that the term municipality "subsumes all of the various names taken by local government," and thus the legislature had no purpose for using the word "city" in *N.J.S.A.* 40:73-5; 4) the ALJ bolstered his expanded application of this provision by questioning at hearing whether respondents believed the legislature was concerned about lame duck appointments in second class cities but not in towns. In response to this – respondents offer – the short answer is that the legislature defines its concerns and has done so in this case in plain and unambiguous language. Utilizing the ALJ's leap of logic, *N.J.S.A.* 40:73-5 would also apply to first, third and fourth class cities along with townships, boroughs, villages, etc. (*Id*. at 6-7) Respondents conclude their arguments on this particular issue by re-emphasizing that the plain meaning of the words in the statute at issue here unequivocally demonstrate that its prohibitions were not intended to be applicable to Towns like West New York. (*Id*. at 9-10)

Respondents' second exception – *i.e.*, that appointments in Type 1 School Districts like the Town of West New York are governed by *N.J.S.A.* 18A:12-7 and *N.J.S.A.* 18A:12-8, under which the appointments of both respondents are valid – may be summarized as follows. Preliminarily in this regard, respondents argue that the applicable statutory provisions do not prohibit appointments being made by a lame duck mayor. To the contrary, citing *Cordasco v. Board of Education of the Town of West New York,* 96 *N.J.A.R.* 2[d] (EDU) 661 which specifically dealt with this very issue, the ALJ in that case stated:

> Despite arguments engaged in by the parties dealing with their respective interpretations of related or collateral case law, the clear fact remains that the petitioner's appointment by [the outgoing mayor] was validly accomplished in strict compliance with the requirements of *N.J.S.A.* 18A:12-7. *The statute contains no condition or prohibition against being exercised by a lame-duck mayor.* (emphasis added)

Respondents point out that such ruling was upheld by the Commissioner. (Respondents' Exceptions at 10-11)

With respect to the appointment of respondent, Alexander Locatelli, he was appointed by Mayor Vega – pursuant to a letter dated May 13, 2011 – to fill a vacancy, namely the unexpired term of Domingo Lopez. Mr. Locatelli's appointment is governed by *N.J.S.A.* 18A:12-7 which lists the requirements for such appointment, namely, 1) the vacancy must be reported to the mayor, and 2) the appointment of a qualified person is to be made by the mayor within 30 days thereafter. Respondents argue that Mayor Vega's appointment of Mr. Locatelli was in full compliance with the stated requirements of the statute and must be upheld. (Respondents' Exceptions at 11-12)

As to respondent Janet Passante, she was appointed by the outgoing Mayor on May 13, 2011 to a full five year term of office. *N.J.S.A.* 18A:12-8 – which *initially* governed her appointment – specifies that appointments to a full term of office are to be made between April 1

and April 15 for terms to begin on May 16. Although respondents concede that her appointment was made outside the statutory timeframe, they claim this was merely an "administrative oversight." They contend that case law dealing with the time periods specified in this statute is sparse. They, however, cite to *Board of Education of the City of Orange*, 233 *N.J. Super*. 242 (App. Div. 1989) for the proposition that this time period is unrelated to the outcome of municipal elections but, instead, was designed to conform to the schedule of school budget dates. Respondents argue that, nonetheless, on May 16, 2011 the Board position to which Mayor Vega intended to assign Ms. Passante became *vacant*, thus allowing this appointment to be made pursuant to *N.J.S.A.* 18A:12-7. The appointment of Ms. Passante, respondents posit – as was the case with Mr. Locatelli's – complied with the terms of this statute and must be permitted. (*Id.* at 12-13)

Upon his comprehensive review, the Commissioner agrees with the ALJ's ultimate conclusion that the appointments of both Alexander Locatelli and Janet Passante to the school board of West New York were improper and, consequently, these individuals must be immediately removed from the Board. In so concluding, however, the Commissioner rejects the ALJ's foundational premise of his recommendation, *i.e.*, that the appointments are prohibited by *N.J.S.A.* 40:73-5. Rather, the Commissioner finds – for the reasons cogently presented by respondents in their exceptions – that this statutory provision, by its stated terms, applies solely to second class cities and, therefore, is not relevant to the Town of West New York.

It is noted that the record of this matter establishes the following uncontested facts:

- The Town of West New York operates under a Commission form of government

- West New York is a Type 1 School District where appointments to the board are made by the Mayor for a term of five years
- Municipal elections were held in West New York on May 10, 2011, and all incumbent commissioners, including Mayor Silverio Vega were defeated
- By letter dated May 13, 2011, Mayor Vega appointed Janet Passante to a full five year term, effective May 15, 2011
- By letter dated May 13, 2011, Mayor Vega also appointed Alexander Locatelli to fill the unexpired term of Domingo Lopez, who had resigned the previous day. This letter of appointment established an effective date of May 13, 2011
- On May 13, 2011 Alexander Locatelli was a sitting member of the West New York Board of Education whose term was due to expire on May 15, 2011
- The new Mayor took office on May 17, 2011

It is uncontroverted that board appointments in a Type 1 School District are covered by *N.J.S.A.* 18A:12-7 **Boards; appointments; vacancies** [addressing the handling of board vacancies] which, in pertinent part, specifies: "The boards of education shall be appointed by the mayor…of the municipality constituting the district. Any vacancy occurring in the membership of the board shall be reported forthwith by the secretary of the board to the mayor…, who shall within 30 days thereafter appoint a qualified person to fill the vacancy for the unexpired term," and *N.J.S.A.* 18A:12-8 **When appointed; commencement of terms** [addressing full term appointments] which, in pertinent part, specifies: "…the members of the board shall be appointed between April 1 and April 15 and their terms of office shall begin on May 16, next succeeding…"

The Commissioner determines that the appointments of respondents made by outgoing Mayor Vega on May 13, 2011 were violative of law and, therefore, void *ab initio*. Specifically, Janet Passante was appointed to a full five year term and, pursuant to the plain, unambiguous language of *N.J.S.A.* 18A:12-8, such appointment was required to be made between April 1 and April 15. As her appointment was clearly outside this requisite statutory period, it is invalid. (*Orange Tp. Bd. of Educ. V. Brown*, 233 *N.J. Super.* 242)[2] Similarly, the appointment of Alexander Locatelli – a sitting Board member on the appointment and effective date of May 13, 2011 – is also violative of the pertinent governing statute, *N.J.S.A.* 18A:12-7. As was pointed out in petitioners' exceptions, absent his resignation from his current board seat, it is an impossibility for an individual to occupy two board positions simultaneously (*Georgia v. Suruda*, supra.). Consequently, on May 13 Mr. Locatelli was not a "qualified person to fill the vacancy" pursuant to this statute. The Commissioner strongly disagrees with the ALJ's determination that the May 13th appointment was no more than a "minor" error which "self-corrected on May 15, 2011." (Initial Decision at 2) Rather, an appointment which is violative of law at its inception cannot "self-correct" by the passage of time no matter how short. At this point, however, the Commissioner is compelled to point out that if either or both of these appointments had been made by outgoing Mayor Vega on May 16, 2011, pursuant to *N.J.S.A.* 18A:12-7, the results in this matter would have been altered.

Finally, the parties are hereby reminded that the fact that the two respondents were not legally able to serve on the Board subsequent to May 16, 2011 does not serve to nullify

[2] Respondents' attempt to re-categorize Ms. Passanti's appointment as a "vacancy," and thus subject to the dictates of *N.J.S.A.* 18A:12-7, is unavailing. This provision applies only where an unexpected vacancy occurs because a board member has left office before the end of his or her term, thereby leaving the board with fewer than its full complement of members. (*See Orange Tp. Bd. of Educ. v. Brown*, supra). An appointment made on May 13, 2011 to be effective on May 15, 2011 cannot logically be termed one to fill a vacancy which doesn't exist until May 16, 2011.

or invalidate any Board actions after that date on which these individuals voted. It is long-established law that – during this period – respondents were *de facto* board members "because they held office under color of a known election or appointment and their ineligibility was unknown to the public at the time they were seated." *Maxine J. Pijeaux v. Board of Education of the City of Orange, Essex Co.*, 94 *N.J.A.R.* 2d 345, 346

Accordingly, the recommended decision of the OAL directing respondents immediate removal from the West New York Board of Education is adopted for its conclusion only. For the reasons detailed above, Janet Passante and Alexander Locatelli are hereby removed as board members of the West New York Board of Education.

IT IS SO ORDERED.[3]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: September 19, 2011

Date of Mailing: September 19, 2011

[3] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1).