

|                                    |   |                           |
|------------------------------------|---|---------------------------|
| ALFONSO MASTROFILIPO, JR.,         | : |                           |
|                                    | : |                           |
| PETITIONER,                        | : | COMMISSIONER OF EDUCATION |
|                                    | : |                           |
| V.                                 | : | DECISION                  |
|                                    | : |                           |
| BERGEN COUNTY OFFICE OF EDUCATION, | : |                           |
| INTERIM EXECUTIVE COUNTY           | : |                           |
| SUPERINTENDENT NORAH PECK, AND     | : |                           |
| BOARD OF EDUCATION OF THE BOROUGH  | : |                           |
| OF LODI, BERGEN COUNTY,            | : |                           |
|                                    | : |                           |
| RESPONDENTS.                       | : |                           |

SYNOPSIS

Petitioner asserted that he had been deprived, illegally or without authority, from his seat on the Board of Education of the Borough of Lodi (Board) following an election held on November 8, 2016. Petitioner currently holds a seat on the same Board, but only for a temporary one-year term to fill an unrelated vacancy; he sought a determination that another vacancy should not be filled by the Bergen County Office of Education, Interim Executive County Superintendent (County Superintendent), and that any seat he holds should be deemed to be a position with a three-year term. The Bergen County Office of Education and the County Superintendent filed a motion for summary decision.

The ALJ found, *inter alia*, that: there are no genuine issues of material fact in this matter, and the matter is ripe for summary decision; an election was held in November 2016 to fill three seats on the Board for terms of three years each; ten candidates ran for the three Board seats; petitioner received the fourth largest number of votes, and therefore was not deemed to be a successful candidate; however, an additional Board position became available in the month prior to the election due to a resignation, and – after the election – the Board announced that it would accept applications for that Board seat; petitioner applied for and was selected to serve in this vacant position, which had one year left of a three year term; one day before petitioner was sworn in to serve in the vacant one-year Board position, one of the three members-elect to the three-year Board seats – Vincent J. Russo – was disqualified based on a criminal history background check; petitioner sought an order establishing himself as the rightful successor to this vacant three-year Board seat, and also requested an order prohibiting the County Superintendent from filling the vacancy; Title 18A establishes a clear mechanism for filling vacancies on school boards; in the instant case, the parties disagree as to whether the County Superintendent is authorized to fill the vacancy because petitioner claims that the member-elect who was disqualified cannot be deemed a “member” of the Board. The ALJ concluded, *inter alia*, that: post-election, Russo would come under the definition of a “member”; petitioner’s challenge to the authority of the County Superintendent to fill the vacancy left by Russo’s disqualification can be decided as a matter of law; it is the responsibility of the County Superintendent to fill the vacancy, and Title 18A only provides the authority to fill it as a temporary one-year post. Accordingly, the ALJ granted the Bergen County Office of Education and County Superintendent’s motion for summary decision, and ordered that the appeal be dismissed with prejudice.

Upon review, the Commissioner concurred with the findings and conclusions of the ALJ. Accordingly, the Initial Decision was adopted as the final decision in this matter and the petition was dismissed.

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.

OAL DKT. NO. EDU 2764-17  
AGENCY DKT. NO. 37-2/17

|                                    |   |                           |
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| OF LODI, BERGEN COUNTY,            | : |                           |
|                                    | : |                           |
| RESPONDENTS.                       | : |                           |

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The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. The parties did not file exceptions to the Initial Decision.

Upon a comprehensive review of the record, the Commissioner concurs with the Administrative Law Judge's (ALJ) determination that – for the reasons thoroughly expressed in the Initial Decision – the motion for summary decision filed by respondents, Bergen County Office of Education and the Interim Executive County Superintendent Norah Peck, should be granted. Accordingly, the recommended decision of the ALJ is adopted as the final decision in this matter and the petition of appeal is hereby dismissed.

IT IS SO ORDERED.\*

COMMISSIONER OF EDUCATION

Date of Decision: August 31, 2017

Date of Mailing: August 31, 2017

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



**State of New Jersey**  
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**

**SUMMARY DECISION**

OAL DKT. NO. EDU 02764-17

AGENCY DKT. NO. 37-2/17

**ALFONSO MASTROFILIPO, JR.,**

Petitioner,

v.

**BERGEN COUNTY OFFICE OF EDUCATION,  
INTERIM – EXECUTIVE COUNTY SUPERINTENDENT  
NORAH PECK, AND BOARD OF EDUCATION OF  
THE BOROUGH OF LODI, BERGEN,**

Respondents.

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**Alfonso Mastrofilipo, Jr.**, petitioner pro se

**Lauren A. Jensen**, Deputy Attorney General, for respondents Bergen County Office of Education and Interim-Executive County Superintendent Norah Peck (Christiphor S. Porrino, Attorney General of New Jersey, attorneys)

**Jaclyn M. Morgese**, Esq., for nominal respondent Board of Education of the Borough of Lodi (Sciarrillo Cornell, attorneys)

Record Closed: June 16, 2017

Decided: July 20, 2017

BEFORE **GAIL M. COOKSON**, ALJ:

## **STATEMENT OF THE CASE**

Petitioner Alfonso Mastrofilipo, Jr. (petitioner) asserts that he has been deprived illegally or without authority from his seat on the Board of Education of the Borough of Lodi (Board) following the election held on November 8, 2016. As more fully detailed below, petitioner presently holds a seat on that Board but only for a temporary one-year term to fill an unrelated vacancy. He filed a Petition of Appeal as well as a Petition for Emergent Relief, individually as a citizen and not as a current temporary Board member, in order to obtain a determination that another vacancy should not be filled by the Bergen County Office of Education or the Interim-Executive County Superintendent for Bergen County (collectively referred to as "DOE Respondents") and that any seat he holds should be deemed to be a position to a three-year term. Petitioner denominated the Board as a nominal respondent, seeking relief principally against the DOE Respondents in this forum.

## **PROCEDURAL HISTORY**

On February 24, 2017, petitioner filed both his Petition for Emergent Relief with the Commissioner of Education and his merits Petition. On February 27, 2017, this matter was transmitted to the Office of Administrative Law (OAL) by the Bureau of Controversies and Disputes for a hearing on the requested emergent relief. The matter was assigned to the undersigned on March 2, 2017, and oral argument was heard on March 6, 2017, at 1:30 p.m. The DOE Respondents submitted a legal brief on the emergency application under cover of March 6, 2017. The Board as nominal respondent asserted that it would abide by whatever decision is reached herein, although it also specified its agreement with the position of the DOE Respondents. After a long discussion off the record, oral argument was conducted on the record, facts were stipulated as not in dispute, and the record was left open for one day for the Deputy to submit a final reply due to the late service in open court of a final response by the petitioner. I entered an Order on March 7, 2017, denying the requested emergent relief.

On June 2, 2017, the DOE Respondents filed a Notice of Motion for Summary Decision on the merits of petitioner's appeal, with supporting Certification of Lauren A. Jenson, D.A.G. Petitioner filed his opposition to the motion on or about June 16, 2017, consistent with the stipulated filing date. The matter is now ripe for determination. For the reasons set forth herein, and also largely discussed in the Order on Emergent Relief, incorporated herein, I hold that the DOE Respondents' Motion for Summary Decision must be granted.

**STATEMENT OF UNDISPUTED FACTS**

On November 8, 2016, an election was held to fill three seats on the Board for three-year terms. There were ten candidates on the ballot, eight of whom were new office-seekers and two of whom were incumbents. Petitioner was one of the new candidates. After the election returns were tabulated and announced, it was determined that petitioner came in fourth place. Accordingly, he was not deemed to be a successful candidate or member-elect. However, in the month just prior to the election, another then-current member of the Board, Joseph J. Licata, resigned because he had moved his personal residence out of the school district.

Following this election, the three highest recipients of votes were subject to statutory examination of their qualifications, including criminal background checks, pursuant to N.J.S.A. 18A:12-1.2(a). Also following the election, the Board announced that it would be accepting applications for the vacant seat left by Licata. Petitioner applied on or before that deadline of November 16, 2016. After the interview process was completed, petitioner was advised that he had been selected for the Licata seat on or about December 14, 2016.

On or about December 20, 2016, member-elect Vincent J. Russo and the Board were notified by the New Jersey Department of Education that his background review had turned up a disqualifying criminal offense. Petitioner was sworn in to fill the Licata vacant seat on December 21, 2016, just one day after Russo was disqualified from serving. The first organizational meeting of the Board was held on January 4, 2017.

On January 17, 2017, petitioner filed a civil action in the Superior Court of New Jersey, Bergen County, Chancery Division, against the same parties named herein. He sought equitable relief in the form of designation as the successor member-elect to the seat contested in the November 8, 2016, election and now open due to the disqualification of Russo. That lawsuit was dismissed without prejudice by the Honorable Menelas W. Toskos, J.S.C., on February 22, 2017, “for the reasons set forth

on the record” after oral argument.<sup>1</sup> That Order also stayed any action by ECS Peck until March 1, 2017. As set forth above, petitioner filed his Petition and Emergent Petition with the Department on February 24, 2017, and same was decided by the undersigned on March 7, 2017.

### **LEGAL DISCUSSION**

It is well established that if there is no genuine issue as to any material fact, a moving party is entitled to prevail as a matter of law. Brill v. The Guardian Life Insurance Co. of America, 142 N.J. 520, 540 (1995). The purpose of summary decision is to avoid unnecessary hearings and their concomitant burden on public resources. Under the Brill standard, a fact-finding hearing should be avoided “when the evidence is so one-sided that one party must prevail as a matter of law.”

There are two aspects to petitioner’s appeal, and both of them require legal construction on the basis of the undisputed facts. First, petitioner requests an order mandating that only the Board can fill the seat left empty by Russo’s disqualification, which is to say, that ECS Peck should be prohibited from filling the vacancy. Second, petitioner wants an order establishing himself as the rightful successor to Russo’s seat as a full three-year term on the Board. As to the latter, petitioner is of the opinion that he is the rightful occupant of the seat as a result of being the third highest qualified candidate who sought the public’s endorsement through a duly-held election. With respect to the former, petitioner thinks it is unseemly to have a citizen appointed to the Board by ECS Peck when neither she nor the applicant might have the knowledge and interest to discuss matters of great and specific importance to the Board. Ultimately, the issue comes down to whether petitioner must run again next November in order to continue on the Board.

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<sup>1</sup> The Deputy represented at the argument on the emergent matter that the court case was dismissed because it raised school law issues under Title 18A over which the Commissioner has primary jurisdiction. Petitioner stated his disagreement with that characterization during this oral argument and said that Judge Toskos was advised instead by the Deputy that ESC Peck had authority to appoint petitioner to a three-year term on the Board. Since the Order on Emergent Relief and as part of this motion for summary decision, I have reviewed those transcribed Superior Court proceedings. It is clear to me that Judge Toskos ruled that she did not have jurisdiction over Title 18A disputes and that it was unlikely that any forum would be ordering that petitioner be deemed to have a three-year position.

Title 18A establishes a clear mechanism for filling vacancies and it is because those appointments circumvent the election system that they are statutorily limited to a one-year term. Title 18A makes provision for the filling of any vacancy on a board through several means, depending on the circumstances that caused the vacancy to occur.

Vacancies in the membership of the board shall be filled as follows:

a. By the county superintendent, if the vacancy is caused by the absence of candidates for election to the school board or by the removal of a member because of lack of qualifications, or is not filled within 65 days following its occurrence;

\* \* \*

f. By a majority vote of the remaining members of the board after the vacancy occurs in all other cases.

Each member so appointed shall serve until the organizational meeting following the next annual election unless the member is appointed to fill a vacancy occurring within the 60 days immediately preceding such election if the annual election is held in April, or occurring after the third Monday in July if the election is held in November, to fill a term extending beyond such election, in which case the member shall serve until the organizational meeting following the second annual election next succeeding the occurrence of the vacancy, and any vacancy for the remainder of the term shall be filled at the annual election or the second annual election next succeeding the occurrence of the vacancy, as the case may be.

[N.J.S.A. 18A:12-15]

There are additional sub-parts, not relevant herein, that establish other means if an election results in a tie, etc.

Here, the parties disagree as to whether the DOE Respondents are authorized to fill the vacancy because petitioner claims that Russo cannot be deemed to be a "member." I **CONCLUDE** that post-election, Russo would come within the definition of

a “member.” The argument posited by petitioner is that Russo could not be a member removed for lack of qualifications because he had not yet been sworn in onto the Board. I agree with respondents that he is mis-reading the statutory provisions and that the above-cited portion must be read in tandem with the following:

Each member of any board of education, within 30 days of election or appointment to that board, shall undergo a criminal history background investigation for the purpose of ensuring that the member is not disqualified from membership due to a conviction of a crime or offense listed in N.J.S.18A:12-1.

[N.J.S.A. 18A:12-1.2(a)]

This provision is specifically part of the subtitle that addresses qualifications or the lack thereof of members elected to or already sitting on a board of education. The fact that a successful electoral candidate becomes a member and yet is still required to submit to a background check by the Department “within 30 days of election” is specific and clear, notwithstanding that an oath of office has not yet been administered. Accord N.J.S.A. 18A:12-2.1, which sets forth that a “member” takes an oath “before entering upon the duties of his office.” While the Legislature could have made a distinction between a “member-elect” and a “member,” it determined not to do so.

Based upon the above legal discussion and analysis, I **CONCLUDE** the petitioner’s challenge to the authority of the DOE Respondents to fill the vacancy left by Russo’s disqualification can be decided as a matter of law and must result in the granting of the respondents’ motion for summary decision. I **CONCLUDE** that it is the DOE Respondents who ultimately must fill the Russo vacancy and that Title 18A only provides the authority to fill it as a temporary one-year post. Petitioner cannot obtain the ultimate relief he seeks from the Office of Administrative Law and the Department of Education, namely, to be deemed as filling a three-year seat on the Board. While authority to fill the three-year position could have been granted under the school laws by the Legislature to the Department, the Legislature opted not to write the law that way. I am obligated to apply the law as written. “Because the regulation of elections is exclusively a legislative matter, courts, even when they question the wisdom of

legislation, must respect the legislative scheme. Sharrock v. Keansburg, 15 N.J. Super. 11, 16-17 (App. Div. 1951).” In re Mun. Election Held, 139 N.J. 553, 558 (1995).

Contrary to petitioner’s assertions, it appears that no forum has the power to simply declare that petitioner will henceforth have a three-year position. Even if irregularities in the election process were discovered and proven in a timely manner, Title 18A (and hence under the authority of the Commissioner) still controls over those circumstances, albeit it mirrors Title 19 in how any special election must be conducted:

By special election if there is a failure to elect a member at the annual school election due to improper election procedures. Such special election shall be restricted to those persons who were candidates at such annual school election, shall be held within 60 days of such annual school election, and shall be conducted in accordance with the procedures for annual and special school elections set forth in Title 19 of the Revised Statutes[.]

[N.J.S.A. 18A:12-15(d)]

### **ORDER**

Accordingly, and for the reasons articulated above, it is **ORDERED** that the motion of respondents Bergen County Office of Education and Interim-Executive County Superintendent Norah Peck for an Order Granting Summary Decision is hereby **GRANTED**. It is further **ORDERED** that the appeal of petitioner Alfonso Mastrofilipo, Jr., for relief under Title 18A is hereby dismissed with prejudice consistent with the reasons set forth above.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless

such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.



July 20, 2017  
\_\_\_\_\_  
DATE

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**GAIL M. COOKSON, ALJ**

Date Received at Agency:

7/20/17  
\_\_\_\_\_

Date Mailed to Parties:

\_\_\_\_\_

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