

New Jersey Commissioner of Education

Final Decision

Alphonso Mastrofilipo, Jr.,

Petitioner,

v.

Board of Education of the Borough of Lodi,
Bergen County,

Respondent.

Synopsis

In this consolidated matter, the petitioner – a former member of the respondent Board of Education, who had resigned to run for another public office – alleged that his rights were violated when the Board filled two vacancies without interviewing the petitioner for the positions. Petitioner claimed that the Board lacked a quorum when it voted to fill the two Board vacancies and further alleged that the Board violated the New Jersey Election Law by not interviewing petitioner nor considering his application as a candidate to fill one of the vacancies. The Board denied petitioner’s allegations. The parties filed cross motions for summary decision.

The ALJ found, *inter alia*, that: there is no genuine issue as to any material fact here, and the matter is ripe for summary decision; petitioner did not have a legal entitlement to be interviewed for a vacancy on the Board; the Board did not violate any law or otherwise abuse its discretion in declining to grant petitioner an interview for one of the two vacancies; and the Board’s bylaws cannot supplant the common law quorum rule, under which the Board had a quorum when it voted to fill the vacancies on the Board. Accordingly, the ALJ granted the Board’s motion for summary decision and dismissed the petition.

Upon review, the Commissioner concurred with the ALJ’s findings and conclusion in this matter. Accordingly, the Board’s motion for summary decision was granted, and the consolidated petitions of appeal were 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.

302-21

OAL Dkt. Nos. EDU 00290-21 and EDU 09416-20 (Consolidated)

Agency Dkt. Nos. 208-9/20 and 210-9/20

New Jersey Commissioner of Education

Final Decision

Alfonso Mastrofilipo, Jr.,

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v.

Board of Education of the
Borough of Lodi, Bergen County,

Respondent.

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

Upon review, the Commissioner concurs with the Administrative Law Judge (ALJ) that petitioner does not have a legal entitlement to be interviewed for a vacancy on the Board, and that the Board did not violate any law or otherwise abuse its discretion in declining to grant petitioner an interview. The Commissioner further concurs with the ALJ that the Board's bylaws cannot supplant the common law quorum rule, under which the Board had a quorum when it voted to fill the vacancies on the Board.

Accordingly, the Board's motion for summary decision is granted, and the petitions of appeal are hereby dismissed.

IT IS SO ORDERED.¹


ANGELINA ALLEN McMILLAN, Jd.S.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: November 29, 2021

Date of Mailing: December 1, 2021

¹ This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A. 18A:6-9.1*. Under *N.J.Ct.R. 2:4-1(b)*, a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
GRANTING RESPONDENT'S
MOTION FOR SUMMARY
DECISION

(CONSOLIDATED)

OAL DKT. NO. EDU 09416-20

AGENCY DKT. NO. 210-9/20

ALFONSO MASTROFILIPO JR.,

Petitioner,

v.

**BOARD OF EDUCATION OF THE BOROUGH
OF LODI, BERGEN COUNTY,**

Respondent.

and

OAL DKT, NO. EDU 00290-21

AGENCY DKT. NO. 208-09/20

ALFONSO MASTROFILIPO JR.,

Petitioner,

v.

**BOARD OF EDUCATION OF THE BOROUGH
OF LODI, BERGEN COUNTY,**

Respondent.

Alfonso Mastrolilipo Jr., petitioner, pro se

Joseph A. Garcia, Esq., for respondent (Cleary, Giaccobe, Alfieri, Jacobs,
attorneys)

Record Closed: June 10, 2021

Decided: October 14, 2021

BEFORE **ERNEST M. BONGIOVANNI**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, Alfonso Mastrofilipo Jr. (Petitioner or Mastrofilipo) alleges his rights were violated when, on or about September 16, 2020, respondent the Board of Education of Lodi (BOE) filled two vacancies on the Board, without first interviewing him for the positions. On September 28, petitioner filed two Petitions of Appeal with the New Jersey Department of Education, one alleging that the BOE lacked a quorum when it voted to fill two vacancies, the other alleging the Board violated the New Jersey Election Law by not interviewing petitioner nor considering his application as a candidate to fill one of the two vacancies. On September 29, 2020, Mastrofilipo filed a Petition for Relief on an Emergent Basis and sought to enjoin the Board from filing the vacancies pending adjudication of his Petition of Appeal. On October 6, 2020, the New Jersey Department of Education, Office of Controversies and Disputes, transmitted this case to the Office of Administrative Law (OAL) for hearing as a contested case and for resolution of the petitioner's motion for emergency relief. The case was received by the OAL on October 8, 2020 and was heard the next morning October 9, 2020. By Order dated October 13, I dismissed the petitioner's request for Emergent Relief, finding among other things that petitioner failed to establish a likelihood of prevailing on the merits. By Consent Order dated March 31, 2021, the two matters were consolidated.

On this underlying appeal and request by both sides for summary decision, as in the application for emergent relief, the petitioner alleges that the BOE's appointments filling the two vacancies were unlawful 1) because he was not permitted to be interviewed as a prospective possible BOE member and 2) there was no quorum present when the two vacancies were filled. Respondent denies all the allegations, claims there are no real factual disputes, and filed electronically a Motion for Summary Decision on July 20, 2020. Petitioner also filed a motion for Summary Decision (Cross Motion) on July 23, 2020. The parties elected to proceed summarily agreeing to and signing a lengthy Joint Stipulation

of Facts. Briefs were submitted and argument was heard on June 10, 2021, at which time the record closed.

I agree with the BOE and grant summary decision in its favor and dismiss the consolidated complaint.

FACTUAL DISCUSSION

While there were additional facts stipulated to, the most relevant and probative to concluding the legal issues presented are the following stipulated facts¹ are:

1. On August 31, 2021, petitioner resigned his seat on the BOE, as a condition to his submitting a nominating petition to run for a new three-year term on the Lodi Borough BOE at the upcoming election in November 2020.
2. The Lodi Borough BOE is a nine member Board.
3. At the scheduled time for the September 16, 2020 meeting, three members of the BOE, Kerry Mastrofilipo, Jeffrey Telep and Joseph Ramos were absent from said meeting.
4. With four of the remaining seven BOE trustees present at said meeting, the BOE declared a quorum was satisfied under the common law quorum rule.
5. In view of the two vacancies, and the absence of the three remaining BOE members from the meeting, the BOE attorney advised the BOE that Bylaw 163 did not govern the quorum determination. Rather the BOE Attorney counseled the BOE that the common law quorum rule applied and a quorum was determined to exist pursuant to the common aw quorum rule.

¹ Some of the stipulated “facts” are actually legal arguments or conclusions which I cannot find to be facts. I have also edited some of the stipulated facts for clarity or brevity. Otherwise, I have adopted and find only the facts that have been so stipulated.

6. Although BOE Bylaw 163 requires five BOE members for a quorum, Bylaw 140 also provides for a nine member board which did not exist on September 16, 2020.²
7. The BOE Trustees in attendance at the at the September 16, 2020 Work Session determined that a quorum was present , and so proceeded to the meeting.
8. The BOE's September 16, 2020 Work Session certified minutes note that the BOE complied with its own policies and that a quorum was present.
9. In accordance with Bylaw 143, the BOE posted public notice of two BOE vacancies and advised that interested parties must submit their resumes to the BOE Secretary/Business Administrator James R Selesky ("Selesky") on or before Thursday September 10, 2020, at 4:00 p.m.
10. On or about September 10, 2020, at 3:55 p.m. petitioner sent an email to Selesky notifying him and the BOE in his "interest" in filling one of the vacancies as stated on the BOE's website. The email said in relevant part:
 - a. "I have 3 years experience as a Former Lodi Board Trustee with extensive knowledge of Bylaws and Roberts Rules of Order and Procedures. I have ten years as a PTA/PTO Member and many school and no-school events. I have years of experience as a coach and working with [C]hildren. I have been told by many that I am a people person, I look forward to volunteering my time to improve Lodi Education" (Exhibit A)
11. Selesky concluded that the petitioner did not satisfy the requirement of submitting a resume by 4:00 p.m. on September 10, 2020.
12. On September 10, 2021, at 10:31 p.m., petitioner sent an email to Selesky attaching a document entitled "Al Mastrofilipo resume", and stated in the email "Here is the deficiency you asked me I rectify, which includes my resume. However, Selesky denies ever requesting Petitioner rectify a deficiency."³

² The Board consisted at that time of seven members with two vacancies.

³ The two statements contradict each other and therefore are not useful as stipulated "facts"

13. On September 11, 2020, at 7:03 a.m. Selesky emailed petitioner regarding the interview process and the qualifications to be a school board member in New Jersey, in accordance with BOE Bylaws and N.J.S.A. 18A:12-1
14. Petitioner emailed Selesky on three separate occasions (September 11, 2020, September 15 and September 16, 2020 inquiring as to his interview time slot.
15. On September 16, 2020, Selesky informed petitioner that he had failed to meet the qualifying criteria (of submitting a resume no later than 4:00 p.m. on September 10, 2020) to be considered as a candidate to fill one of the two vacant BOE slots.
16. A BOE member cannot occupy two seats at the same time.
17. Joseph Bigica was interviewed for a vacant BOE trustee position.
18. Joseph Bigica appeared on the ballot for membership to the BOE during the November 3, 2020 general election.
19. Following his interview, Joseph Bigica was not selected to fill a vacant BOE trustee position.
20. The underlying basis as to why each candidate was or was interviewed was not recorded at the September 16, 2020 Work Session certified meeting minutes.
21. Petitioner filed for an Advisory opinion with the School Ethics Commission alleging three BOE trustees have conflicts of Interest. By Advisory Opinion A-18-20, sated September 29, 2020, the School Ethics Commission determined that the identified BOE trustees do not have per se conflicts in participating in discussions and voting on the individuals to fill the vacant BOE seats.

LEGAL ANALYSIS

Both petitioner and respondent move for summary decision on the basis of the Joint Stipulations of Fact and Joint Exhibits A and B.

Pursuant to N.J.A.C. 1:1-12.5(b), a summary decision “may be rendered if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law.” This rule is substantially similar to the summary

judgment rule embodied in the New Jersey Court Rules, R. 4:46-2. See Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67, 74 (1954). In connection therewith, all inferences of doubt are drawn against the movant and in favor of the party against whom the motion is directed. Id. at 75. In Brill v. Guardian Life Insurance Co., 142 N.J. 520 (1995), the New Jersey Supreme Court addressed the appropriate test to be employed in determining the motion:

[A] determination whether there exists a 'genuine issue' of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party. The 'judge's function is not . . . to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial'.

[Brill, 142 N.J. at 540 (citations omitted).]

The Motion judge must "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party...are sufficient to permit a rational fact finder to resolve the alleged dispute in favor of the non-moving party. Brill v. Guardian Life Insurance Co., 142 N.J. 520 (1995). Even if the non-moving party comes forward with some evidence, the judge must grant summary decision if the evidence is "so one sided that [the moving party] must prevail as a matter of law" Id. at 536.

Actions of a board of education are presumed legitimate and will be upheld by the Commissioner of Education "absent a showing of bad faith, illegal motive or a lack of a rational basis." Raimondi v. Westwood Regional Board of Educ., OAL Docket No. EDU 5904-04, 2005 W.L. 2428743*5. (Initial Decision September 26, 2005), aff'd 2007 W.L. 2247246 (App. Div 2007). In challenging these actions, the petitioner bears the burden of proving the Board's actions were unlawful arbitrary capricious or unreasonable.

Respondent contends that in all respects the BOE's actions were lawful and violated no law, regulation or policy, nor anyone's rights. Respondent argues there are no genuine material issues of fact, and that three distinct identifiable issues, when

considered in light of the undisputed facts, entitle the BOE to a decision for Respondent as a Matter of Law. Petitioner also concedes what the three issues are and that there are no genuine issues of fact among them, but contrarily, he is entitled to summary decision. In light of that, I agree that there are no genuine issues of material fact, and for the reasons that follow, that the Respondent is entitled to summary decision in its favor

1. The Quorum Requirement

Respondent argues that pursuant to the common law quorum rule “ a majority of a municipal governing body constitutes a quorum ; and in the event of vacancy, a quorum consists of a majority of the remaining members.” Citing M.J. Law Enf’t Comm’n v Divincenzo, 445 N.J. Super 187, 199 (App.Div. 2016) which quotes Ross v, Miller, 115 N.J. L. 1935. As noted in Divincenzo, a vacant position “is not counted to determine what the legal quorum is. Id. at 200. Absent an applicable statute to the contrary, respondent argues, the common law quorum rule applies, citing Bihilla v. Local Finance Bd., 2016 W.L. 3408396 #2 (App. Div. 2016).

If Respondent is legally correct on this issue, then a lawful quorum existed when the Board filled the two vacancies on September 16, 2020, because there is no dispute that the Lodi Board of Ed is a 9 member Board, that is, a “full board” consists of 9 members. However at the time of the September 16, 2020 meeting, the Board had only seven members because of two vacancies. If the common law rule applies, the Board had a quorum at that time because four BOE members (trustees) were present.

Petitioner however bases his argument on Lodi BOE Bylaw 163, which provides that a quorum shall consist of five Board members, as well as State of New Jersey Office of the Attorney General Opinion # 3, on Edgewater Park Twp. Committee v. Edgewater Park Housing Authority 187 N.J. Super 588 (1982) and Prezlak v. Padrone, 67 N.J. 95, 102 (Law Div. 1961).

I agree with respondent however, that Board Bylaw 163 which states that a quorum consists of five members cannot supplant the common law quorum rule which is a matter of State law. I agree that since the Board’s Bylaw was not specifically authorized by a

statute, the bylaw if enforced would unduly prohibit the BOE from exercising its authority and its lawful responsibility to govern, by in effect requiring a supermajority of Board members to be present when all meetings and all actions are taken. State law makes it clear that in absence of a statute which in relatively few instances require a supermajority vote, almost all actions by a local BOE may be taken by a simple majority of those present at a meeting. Respondent properly cites to Matawan Regional Teachers Ass'n v. Matawan-Aberdeen Regional School Dist. Bd. of Educ 233, N.J. Super 504, 506-508 (App.Div. 1988) which held that the Board was not bound by its bylaw requiring a supermajority (in this case two-thirds) for a vote to close and sell a school, where no such enabling statute authorized that quorum requirement. Here with no enabling statute whatsoever requiring certain numbers of Board members to be present when taking essential actions such as determining the composition of the Board when vacancies are created, the common law must be presumed to apply. Moreover, unintended chaos would occur if individual boards set their own unique numerical requirements for votes to fill vacancies. For example, a nine person Board with two vacancies which had a 8 person quorum requirement could not conduct business at all (except by the seldom used doctrine of necessity) and it would be a common occurrence where Boards with extra majority requirements for conducting general business could be effectively governed by the Board members in the minority who simply chose to be absent or even resign and thereby prevent the majority from taking action which the minority disfavor.

2. Petitioner's Eligibility for Office

Respondent argues that petitioner was not eligible for appointment on September 16, 2021, because he was a candidate for office to the same Board for a term years. They cite Kuken v Guzman, 1990 S.L.D. 527 where the Commissioner of Education determined a a nominating position to stand for another term for a different term of years (i.e. a term other than seeking reelection to the same office) trustee with time remaining on his term must resign before submitting his nominating petition.

Although petitioner did not counter this point with another argument, I find there is not enough in the record to determine whether petitioner was disqualified to fill out the balance of one of the terms of the two vacancies simply because he was nominated for

a longer term. The Board clearly thought candidates for office should not be appointed because they also, as noted in the Joint Stipulation of facts refused to appoint another such would be appointee who was, like Mastrofilipo also running for office, but who was interviewed and considered for the position. But the Board's preferences are not enough to as a matter of law, to disqualify the would be appointee. To the respondent's point that Mastrofilipo when he was a Board member was forced to resign before submitting his petition to stand for office for a longer term, then logically, if petitioner had been appointed at the September 16, 2020 meeting he could have been compelled to withdraw his candidacy as a condition to assuming his office. I therefore conclude that at this stage there is insufficient proof that petitioner was disqualified to fill the vacancy simply because he stood for office in the upcoming election for another, longer term.

3. The Board's requirements for filling vacancies.

The Board clearly and deliberately chose not to interview petitioner for one of the two vacant positions. As both sides agree, there is no written record of why the Lodi BOE chose not interview Mastrofilipo for the position, and to speculate on such possible reasons would do neither side any good. The Board did require any person wanting to be considered to submit a resume by the September 16, 2020, 4 P.M. deadline. Mastrofilipo could argue that his email expressing interest in the position, where he wrote about some of his qualifications for the job could constitute a resume, and the email was received before the September 16, 2020, 4:00 p.m. deadline, albeit by five minutes. One wonders why Mastrofilipo would wait so long and why he would submit something less than the usual resume if he sought serious consideration. His email neglects basic information such as his home address, particularly important as candidates to fill vacancies in a municipal Board of Education only qualify if they have resided in the district for at least one year. Further Mastrofilipo's submission at 10:31 p.m., 6 hours after the deadline, of a resume, seems a tacit admission, as Mastrofilipo said, his application for the vacancy was deficient.

However, petitioner's argument need not be decided over what constitutes a resume. The fact is, and what Mastrofilipo protests, is that he was never given an interview by the BOE to consider his qualifications. However, no statute, regulation,

Board policy, or legal principle has been cited, nor can be found, which holds that every person, otherwise qualified to serve on a local Board of Education has a right to be interviewed for the position. Since the BOE has the right to fill the vacancy among the presumably great number of legally qualified residents of Lodi (who numbered 24,136 in the 2010 Census), it is axiomatic that they have the broadest discretion in determining to whom the Board wishes to give serious consideration to fill a vacancy, which consideration assumes might include granting an interview. As petitioner certainly has not raised even a hint of any invidious discrimination against him, in this case, the BOE had every right to ignore petitioner's interest or application for the vacancy and to refuse to grant him an interview. As for any due process issue, only Bylaw 143 is implicated in terms or helping to determine what process Mastrofilipo, and any other would-be candidate for the vacancy had to expect. But here, BOE Bylaw 143 merely requires the BOE give public notice of the vacancy and "invite any qualified person to submit a written request for consideration..." The BOE followed its policy by the posting of the public notice of the two vacancies. The Bylaw merely requires the invitation of the written requests to fill the vacancies. It does not require the Board to grant interviews. Therefore, the BOE did not violate its Bylaw 143.

CONCLUSIONS OF LAW

Summary decision may be granted when the papers and discovery that have been filed show that there is no genuine issue as to any material fact challenged and the moving party is entitled to prevail as a matter of law. N.J.A.C. 1:1-12.5(b). No evidentiary hearing need be held if there are no disputed issues of material fact. Frank v. Ivy Club, 120 N.J. 73, 98, cert. denied, 498 U.S. 1073 (1991). "When the evidence is so one-sided that one party must prevail as a matter of law, the [tribunal] should not hesitate to grant summary [decision]." Della Vella v. Bureau of Homeowner Prot., New Home Warranty Program, CAF 17020-13, Initial Decision (March 31, 2014), adopted, Comm'r (May 12, 2014), <http://njlaw.rutgers.edu/collections/oal/> (quoting Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 529 (1995)).

Where, as here, no further evidentiary hearing need be held as there are disputed issues of material fact, and the burden of proof rests with the petitioner, and considering

the undisputed proofs, **I CONCLUDE** respondent is entitled to summary decision as a matter of law. I agree that with respondent's contention that there is no evidence that the BOE abused its discretion, and further that petitioner's claims that a quorum did not exist for the BOE's September 16, 2020 meeting and/or that he should have been granted an interview before the Board chose persons to fill the vacancies, have no basis in law or fact. Nor is there any reasonable argument to deny the Board's reasonable exercise of discretion as exemplified in the agreed upon stipulated facts. I therefore **CONCLUDE** that petitioner's requested relief must be **DENIED** and his Complaint be **DISMISSED**.

ORDER

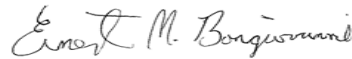
I hereby **ORDER** that respondent's requested motion to summary decision is **GRANTED**, and accordingly, these matters are hereby **DISMISSED**.

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.

October 14, 2021



DATE

ERNEST M. BONGIOVANNI, ALJ

Date Received at Agency:

10/14/21

Date Mailed to Parties:

10/14/21

EMB/id