58-21

New Jersey Commissioner of Education

Final Decision

Charles Avellone,

Petitioner,

v.

Board of Education of the City of Hackensack, Bergen County,

Respondent.

Synopsis

In June 2020, petitioner filed an appeal asserting that the respondent Board violated *N.J.S.A.* 18A:20-34 by improperly granting the use of school premises from April 2020 through August 2020, free of charge, to a private condominium association. Specifically, on June 15, 2020, the Board passed a resolution permitting residents of Devonshire Condominium Association (Devonshire) to use the Hackensack High School parking lots during a period of construction on Devonshire's parking area. This agreement coincided with a period of remote educational services at the high school because of the Covid-19 epidemic. Petitioner sought to set aside the parking agreement with Devonshire, contending that political corruption on the part of members of the Board of Trustees had led to the grant of improper use. The Board denied petitioner's allegations. The parties filed cross motions for summary decision.

Upon review, the ALJ found, *inter alia*, that: there are no material facts at issue in this case, and the matter is ripe for summary decision; *N.J.S.A.* 18A:20-34 confers wide discretion on the Board regarding community use of its facilities; the Board did not violate its policy for use of school facilities by outside groups when it allowed the condominium association to use the parking lots for free while they were not in regular use by the school community during the Covid-19 epidemic; authorizing such use did not interfere with the orderly conduct of a thorough and efficient system of education; such use is contemplated by *N.J.S.A.* 18A:20-34(c) and the Board's Policy 7510; the Board's granting of this use was not arbitrary, capricious or unreasonable; and, further, any allegations of violation of the School Ethics Act by members of the Board must be initiated by filing a complaint with the School Ethics Commission, and petitioner has not filed such a complaint. Accordingly, the ALJ granted the Board's motion for summary decision, and the matter was dismissed.

Upon review, the Commissioner, *inter alia*, concurred with the ALJ that the petition must be dismissed for the reasons well detailed in the Initial Decision. Accordingly, the Initial Decision of the OAL was adopted as the final decision in this matter, and the petition was dismissed.

March 15, 2021

OAL Dkt. No. EDU 06749-20
Agency Dkt. No. 145-6/20

New Jersey Commissioner of Education

Final Decision

Charles Avallone,

Petitioner,

v.

Board of Education of the City of Hackensack, 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.

Petitioner in this matter alleges that the Board violated *N.J.S.A.* 18A:20-34 and its own policy when it allowed residents of a local condominium association to use the parking lots at Hackensack High School at no cost when the school was operating remotely due to the Covid-19 pandemic. The Administrative Law Judge (ALJ) granted the Board's motion for summary decision, finding that *N.J.S.A.* 18A:20-34 confers wide discretion on the Board regarding community use of its facilities, and that the Board did not violate its policy by allowing the condominium association to use the parking lots for free. The ALJ further noted that any allegation of violations of the School Ethics Act by members of the Board must be initiated by filing a complaint with the School Ethics Commission, and that petitioner had not filed any such complaint.

Upon review, the Commissioner concurs with the ALJ that summary judgment is appropriate and that the Board's actions did not violate the statute or its policies, for the reasons thoroughly detailed in the Initial Decision.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter and the petition is hereby dismissed.

IT IS SO ORDERED.[1]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: March 15, 2021
Date of Mailing: March 16, 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

SUMMARY DECISION

OAL DKT. NO. EDU 06749-20
AGENCY DKT. NO.

CHARLES AVALLONE,
Petitioner,
v.
CITY OF HACKENSACK BOARD OF EDUCATION, BERGEN COUNTY,
Respondent.

Richard Salkin, Esq. appearing on behalf of petitioner

Ashfan Ajmiri Giner, Esq. appearing on behalf of respondent (Florio, Perrucci, Steinhardt, Cappelli, Tipton & Taylor, LLC, attorneys)

Record Closed: January 12, 2021 Decided: January 29, 2021

BEFORE **NANCI G. STOKES**, ALJ:

STATEMENT OF THE CASE

The Hackensack School District (District) allowed Devonshire Condominium Association (Devonshire) residents to use the Hackensack High School (HHS) parking lot at no cost during remote educational services because of the COVID-19 pandemic. Did those actions violate N.J.S.A. 18:20-34? No. The Hackensack Board of Education (Board) adopted rules authorizing the use of school premises by community organizations when not in use for school purposes with a fee schedule identifying no user fees for parking areas.

PROCEDURAL HISTORY

On June 19, 2020, petitioner filed a Verified Petition with the Commissioner of Education (Commissioner) asserting that the Board violated N.J.S.A 18A:20-34 by improperly granting school premises use from April 2020 through August 2020, without cost, to a private condominium association. Specifically, on June 15, 2020, the Board passed a resolution permitting Devonshire residents to use the HHS parking lots during Devonshire's parking area construction. Petitioner also maintains that political corruption led to the grant of improper use.

Petitioner seeks to set aside the June 15, 2020, resolution or any other agreement allowing Devonshire's use of school parking lots as "null and void."

On July 14, 2020, the District answered the petition denying petitioner's allegations.

On July 15, 2020, the Department of Education (DOE) transmitted this case to the Office of Administrative Law, as a contested case under the Administrative Procedure Act, N.J.S.A. 52:14B-1 to-15, and the act establishing the OAL, N.J.S.A. 52:14F-1 to-13, for a hearing under the Uniform Administrative Procedure Rules, N.J.A.C. 1:1-1.1 to -21.6.

On August 26, 2020, I held a pre-hearing conference and established a discovery schedule.

On October 8, 2020, I held a status conference during which the parties agreed that the material facts were undisputed, and no hearing was necessary to resolve the legal issue presented.

On December 15, 2020, petitioner filed a motion for summary decision.

On January 4, 2021, the District opposed petitioner's application. The District's opposition will be considered a cross-motion because the District seeks summary decision in its favor dismissing the petitioner's appeal.

On January 12, 2021, petitioner replied, and I closed the record.

FINDINGS OF FACT

Based on the documents submitted in support of and opposition to the motion and cross-motion for summary decision, and when viewed in the light most favorable to the non-moving party, I **FIND** the following as **FACT** for purposes of these motions only:

Petitioner resides in Hackensack, New Jersey. Devonshire is also in Hackensack, close to the HHS.

Three Board members selected in the 2019 and 2020 Board elections ran as "Hackensack Smart Schools, Inc." (Smart School) candidates. After the April 21, 2020, election, Smart School members constituted a majority of the Board.

On April 26, 2019, Smart Schools filed a Receipts and Expenditures Quarterly Report with the New Jersey Election Law Enforcement Commission (ELEC), noting that Devonshire residents provided $4000 of the $11,500 in campaign contributions.

In the spring of 2020, the District transitioned to remote learning due to the COVID-19 pandemic. During this time, HHS students and staff members did not use the parking lot for academic purposes.

On March 18, 2020, the District administratively approved Devonshire's request to use the HHS parking lot while HHS students and staff were not regularly parking in the lot. At this time, Devonshire's parking area was under construction.

The District uses an online system to schedule events at its school and facilities, and a Devonshire resident completed the "event" request describing it as a "rental of [sic]

parking lot" at the HHS. The event application also included insurance information noting liability insurance of $1,000,000 and sought the use of 40 parking spots.

The Devonshire resident completing the "event" request was an unsuccessful Smart Schools Board candidate and a contributor to the Smart Schools campaign.

On June 15, 2020, the Board held its regularly scheduled meeting and approved Resolution E-1 that authorized Devonshire residents to use the parking lot at the HHS from April 1 until August 30, 2020. No Smart Schools Board member voting in favor of Resolution E-1 resides at Devonshire. Although petitioner was virtually present at the meeting, the Board did not answer his questions concerning Devonshire's use fees.

Board Policy 7510 (Policy 7510) addresses the use of school facilities. Policy 7510 acknowledges that the facilities belong to the community that paid for them and permits facility use outside of school operating schedules by community organizations and others when it "does not interfere with the orderly conduct of a thorough and efficient system of education."

Regulation 7510 establishes a "Tier" system that sets conditions for facility use by individuals or organizations, including service or rental fees, and which entity bears the cost of custodial and operational services. Any request requires the organization to assume liability for damage to school property and maintain insurance in an amount not less than $50,000.

Notably, Regulation 7510 only identifies hourly fees for using specific school facilities, not parking lots. Regulation 7510 considers Tier II use for "divisions of the local municipal governments, local public school district, local nonpublic schools and regular meetings of the local community groups, or other approved community groups."

Section F of Regulation 7510, "Fees," states that the District only charges a Tier II organization to use the HHS football field with lights, the weight room with supervision, the pool, and custodian services. A Tier II organization's use of all other school facilities involves no charge, including the gym, cafeteria, classrooms, and auditorium. Regulation

7510 permits the Board to waive fees if the applicant submits a written request before the date of use.

The District grants Tier I free use of school facilities for all school clubs and groups, parent associations, meetings of the particular school, and Scouts.

Tier III encompasses use for fund-raising or other events sponsored by local community groups and educationally oriented associations. Tier IV comprises any private interest group not directly or indirectly related to Hackensack Schools or any organization or individual "outside the community." Tier III and IV require various fees.

The "school business administrator/Board Secretary" is authorized to approve and schedule the use of school facilities.

The District considered Devonshire a "Tier II" user not required to pay for the use of the parking lot; the District did not charge Devonshire.

However, the District charged church groups, the Wheelchair Sports Federation, the Bergen County Coaches Association, and another county high school to use school facilities.

In June 2020, Beechwood Heights and Stratford House, two other Hackensack condominium associations, also sought to use the parking lots. Yet, the District did not approve the requests.

DISCUSSION AND CONCLUSIONS OF LAW

Summary Decision Standard

A party may move for summary decision upon all or any of the substantive issues in a contested case. N.J.A.C. 1:1-12.5(a). The motion shall be served with briefs, with or without affidavits. When the filed papers and discovery, together with any affidavits, show that no genuine issue of material fact exists and that the moving party is entitled to prevail as a matter of law, the judge may grant the motion. N.J.A.C. 1:1-12.5(b). When such a motion is made and supported, an adverse party, to prevail, must submit an affidavit

setting forth specific facts showing that a genuine issue of material fact exists that can only be determined in an evidentiary proceeding. Ibid.

Even though a statute calls for a "hearing," a motion for summary decision supported by documentary evidence where the objector submits no evidence to demonstrate that a genuine issue of material fact exists, the motion procedure constitutes the hearing, and no trial-type hearing is necessary. Contini v. Newark Bd. of Educ., 286 N.J. Super. 106, 120-21 (App. Div. 1995), certif. denied, 145 N.J. 372 (1996).

To determine whether a genuine issue of material fact exists that precludes summary judgment, 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 demonstrate that the moving party is entitled to a judgment as a matter of law. Brill v. Guardian Life Ins., 142 N.J. 520, 540 (1995).

Moreover, even if the non-movant comes forward with some evidence, the court must grant summary judgment if the evidence is "so one-sided that [movant] must prevail as a matter of law." Ibid. at 536. If the non-moving party's evidence is "merely colorable or is not significantly probative," the judge should not deny summary judgment. Bowles v. City of Camden, 993 F. Supp. 255, 261 (D.N.J. 1998).

In this case, no genuine issue as to the material facts exists; the only question presented is whether the District's and Board's actions violated N.J.S.A. 18A:20-34 and established policies and regulations for the use of school facilities. More pointedly, no genuine issue exists that the District allowed Devonshire residents to use the HHS's parking lot without cost when the staff members and students could not use the areas for educational purposes. Also, evidence supports that many Devonshire residents contributed to the Smart Schools Board candidate campaigns that hold a majority on the Board. Moreover, the District later denied the parking requests of other similarly situated condominium associations. Since these facts are clear and undisputed, I **CONCLUDE** that this case is ripe for summary decision.

Alleged Board Misconduct

Initially, the Board maintains that the Commissioner does not have jurisdiction over any dispute relating to school board elections and improper political conduct. Under N.J.A.C. 1:1-3.2, the OAL's statutory authority to hear contested cases is derivative from the agency that is empowered to hear and

determine the issue. Thus, the OAL has jurisdiction over the case if the Commissioner has jurisdiction over the case and transmits it to the OAL.

Under N.J.S.A. 18A:6-9, the Commissioner's jurisdiction is defined, and is limited to "controversies and disputes arising under the school laws." In Dunellen Bd. of Educ. v. Dunellen Ed. Assoc., 64 N.J. 17, 23 (1973), the New Jersey Supreme Court concluded that "the Legislature enacted provisions entrusting school supervision and management to local school boards . . . subject to the supervisory control [of] . . . the State Commissioner of Education."

However, "[t]he sweep of the Department's interest and the Commissioner's jurisdiction does not extend to all matters involving boards of education." Archway Programs v Pemberton Twp. Bd. of Educ., 352 N.J. Super. 420, 424-25 (App. Div. 2002). Significantly. N.J.S.A. 18A:6-9 states that "controversies and disputes concerning the conduct of school elections shall not be deemed to arise under the school laws." See N.J.S.A. 19:1-1 ("'Election" means the procedure whereby the electors of this State or any political subdivision thereof elect persons to fill public office or pass on public questions.").

Yet, petitioner does not assert Devonshire residents improperly contributed to the board member campaigns or that Smart Schools candidates failed to report those contributions requiring petitioners to present their claims to ELEC. See N.J.S.A. 19:44A-5, 44B-7 (ELEC charged with enforcing violations of the New Jersey Campaign Contributions and Expenditures Reporting Act, N.J.S.A. 19:44A-1 to -47, and candidate financial disclosure requirements under N.J.S.A. 19:44B-1 to -10).

Irrespective, petitioner asserts Board members acted in a manner favoring political supporters, e.g., Smart School Board members have a conflict of interest. Alleged unethical actions by Board members fall under the jurisdiction of the School Ethics Commission (SEC). The Legislature passed the School Ethics Act in 1991. See L.1991 c. 393 § 7. The Legislature later amended the Act to include a separate Code of Ethics. See L. 2001 c. 178 § 5. As written, the Act is a conflict of interest statute, which addresses "prohibited acts," while the Code is an ethics code, which lists "affirmative duties." See L. 2001 c. 178 § 5.

Under N.J.S.A. 18A:12-27, the Legislature established the SEC within the Department of Education to enforce those ethical standards guiding school officials through a procedure for reviewing ethical violations and investigating those complaints and ultimately rendering recommendations to the Commissioner as to the imposition of sanctions when demonstrating violations occurred. N.J.A.C. 6A:28-1.1(b).

Under the Act, the SEC must first determine whether sufficient probable cause exists to credit the allegations in the complaint against a school official. N.J.A.C. 6A:28-10.7(b)(1). Significantly, under

N.J.A.C. 6A:28-10.7(c)2, OAL proceedings are limited to those allegations in which the SEC has found probable cause. Yet, petitioner did not bring his complaints to the SEC, and there has been no SEC determination of "probable cause" or SEC transmittal to the OAL.

Therefore, I **CONCLUDE** that the Board's alleged unethical conduct in passing Resolution E-1 granting Devonshire use of school premises is not properly before the OAL.

Use of School Facilities

Instead, the issue is whether the District or Board violated N.J.S.A. 18A:20-34 or the District's policy and regulation implemented under the statute. A presumption of lawfulness and good faith applies to a board of education's actions. In challenges to board actions, the challenger bears the burden of proving that such acts were unlawful, arbitrary, capricious, or unreasonable. Schuster v. Bd. of Educ. Montgomery Twp., 96 N.J.A.R.2d (EDU) 670, 676 (citing Schnick v. Westwood Ed. of Educ., 60 N.J. Super. 448 (App. Div. 1960), and Quinlan v. Bd. of Educ. of North Bergen Twp., 73 N.J. Super. 40 (App. Div. 1962).

In enacting N.J.S.A. 18A:20-34, the Legislature recognized that schools may use their premises for additional lawful purposes when not needed for education. For example, the statute enumerates certain suitable functions, including use as polling places, lecture halls, gathering places for civic, social, artistic, entertainment purposes, or public libraries. However, under N.J.S.A. 18A:20-34(c), a board may also allow the use of school property and grounds "for such other purposes as may be approved by the board." Moreover, these activities may produce revenue for the school district. Courts will afford the Legislature's chosen language its natural meaning when no ambiguity, or competing intentions, is presented. See, e.g., Merin v. Maglaki, 126 N.J. 430 (1992).

N.J.S.A. 18A:20-34 confers discretion on school boards to respond to the community's needs for its facilities. Resnick v. East Brunswick Twp. Bd. of Educ., 77 N.J. 88, 99 (1978). In Resnick, the New Jersey Supreme Court approved the temporary use of school property for religious purposes, though the statute makes no mention of worship services. Id. at 102. The lack of strict limitations and only minimum guidelines demonstrate the statutory discretion afforded boards of education: when not in use for school purposes and when permitted according to the board's rules. Id. at 98–100.

Building on Resnick, the Board maintains that N.J.S.A. 18A:20-34 encompasses various functions, both stated and implied. The Board highlights that nothing in the statute or in Policy and Regulation 7510 precludes Devonshire's use of the parking area. Indeed, as permitted by N.J.S.A. 18A:20-34, the Board adopted rules long before this dispute determining the manner in "which school properties may be used when not in use for school purposes." Id. at 98.

Notably, Policy and Regulation 7510 do not generally require Board action to approve and schedule the use of school facilities, and Policy 7510 allows submission to the Board when the "Business Administrator deems it advisable." Initially, the District administratively approved Devonshire's request and later submitted the application to the Board via Resolution E-1.

Petitioner asserts that section (c) requires any allowed activities permit "group interaction, emotional lease, regular participation of a portion of the community, and character building." While Resnick discusses these factors likening worship services to "social, civic, and recreational meetings and entertainments," an activity need not demonstrate such traits for approval. Id. at 99–100. Indeed, contrary to petitioner's position, the New Jersey Supreme Court explained that the language "other purposes as may be approved by the board" intends no such limitations:

> Had N.J.S.A. 18A:20-34(c) merely provided for "civic, educational and recreational" use, the legislative intent might aptly be termed as limiting the use of school premises exclusively to those terms listed. However, such a construction would render the following phrase, "and such other uses as may be approved by the board," meaningless. Moreover, the absence of a qualifying term such as "like," "similar" or "related," with respect to the above phrase, indicates that the legislature intended to grant wide discretion to boards of education in such matters. Thus, additional uses are not strictly limited to civic, social and recreational uses. . . . the object of [N.J.S.A. 18A:20-34] was merely to entrust to local school boards, within certain guidelines, the determination of the uses beyond the purely educational to which school property might be devoted.
>
> [Id. at 99–100. (emphasis added).]

Undeniably, Devonshire is a community organization that requested to use the parking lot during construction on its parking area when the school did not require its use. Therefore, I **CONCLUDE** that authorizing such use "did not interfere with the orderly conduct of a thorough and efficient system of education," and that such use is contemplated by N.J.S.A. 18A:20-34(c) and Policy 7510.

Devonshire is not outside the community, did not fund-raise, sponsor an event, or use the facilities for profit; Tiers III and IV are not applicable. Devonshire is not a school club, Scout group, or related to school activities, making it ineligible for Tier I classification. Instead, I **CONCLUDE** that Devonshire is a community group correctly categorized as a Tier II user.

Regulation 7510 lists a schedule of fees for using various school facilities but does not identify a separate fee for just parking lot use. Tier II users can utilize most school facilities without payment. Indeed, Devonshire did not request any school area designated for user fees and also supplied insurance

information on its application. Therefore, I **CONCLUDE** that Regulation 7510 permits the District and Board to authorize Devonshire's use of the HHS parking lot at no cost.

Petitioner correctly notes that the District charged other organizations but did not demonstrate that those fees were improper. Initially, fees are permitted for organizations "outside the community" or events of educationally oriented associations such as a high school from another school district. Regardless, petitioner fails to demonstrate that the charged groups were outside of Tier II, III or IV uses requiring fees, identifying the school areas used by the charged groups, or providing the events' nature for which the District charged fees. Yet, because Devonshire did not request to use any school facilities requiring fees, I **CONCLUDE** that the distinction between charged groups and Devonshire is immaterial.

Moreover, petitioner provides little evidence regarding Beechwood Height's and Stratford House's parking area requests to buttress his position. Beechwood Heights Condominium made a facilities' use request on June 17, 2020, after the March 18, 2020, administrative approval, and the Board's resolution passed on June 15, 2020. Petitioner also relies upon a July 14, 2020, email exchange between District personnel to demonstrate that Stratford House also made a parking lot use request. Yet, the email notes that the requests of Beechwood Heights and Stratford House were about " a month ago." In other words, the District received other requests after the District and Board allowed Devonshire residents to use the HHS parking lots. Despite petitioner's suggestion that the Board improperly favored Devonshire over the other condominium associations, the evidence supports that the other condominium associations' requests came after Devonshire obtained approval to use the HHS parking lot.

Therefore, I **CONCLUDE** that the evidence supports that neither the administrative approval of Devonshire's parking request nor Resolution E-1 violated Policy and Regulation 7510 or N.J.S.A. 18A:20-34(c), or that these actions were unreasonable or arbitrary.

ORDER

Given my findings of fact and conclusions of law, I **ORDER** that petitioner's motion for summary decision is **DENIED** and that the Board's cross-motion for summary decision is **GRANTED**. Further, I **ORDER** that petitioner's appeal is **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.

January 29, 2021

DATE

NANCI G. STOKES, ALJ

Date Received at Agency: January 29, 2021

Date Mailed to Parties: January 29, 2021

ljb