

New Jersey Commissioner of Education**Final Decision**

Robert Curcio,

Petitioner,

v.

Board of Education of the South Orange-
Maplewood School District, Essex County,

Respondent.

Synopsis

Petitioner, a former employee of the respondent Board, filed a petition requesting that the South Orange-Maplewood Board of Education provide him with full indemnification in a lawsuit filed against him in Superior Court. The Board has retained an attorney, who filed an answer to the lawsuit on the Board's and petitioner's behalf, but there have yet to be any other proceedings in the Superior Court case. The Board filed a motion to dismiss the petition, which was opposed by the petitioner.

The ALJ found, *inter alia*, that: there are no material facts at issue in this case and the matter is ripe for summary decision; petitioner was employed by the Board from August 1974 to August 2003, and served as the Director of Athletics and Student Activities from January 1984 until his retirement from the District; in 2023, a lawsuit was filed in Superior Court alleging that between 1982 and 1986, two former students were sexually abused by a track coach who worked under the supervision of the petitioner when he served as Director of Athletics for the school district; the lawsuit alleges that petitioner negligently supervised the track coach, thereby enabling the abusive conduct to occur; N.J.S.A. 18A:16-6 addresses indemnification for school employees, holding that a board of education must defray all costs for any civil action brought against an employee for any act or omission arising out of the performance of the duties of the employee's position; here, it is not yet possible to know whether petitioner was acting within the scope of his duties as more than 40 years have elapsed since the alleged incidents occurred, and there has been no discovery or hearing to date; the Board has already provided petitioner with a defense in this matter, and he has suffered no harm, and is not likely to suffer any harm in the future as long as the Board maintains the status quo. The ALJ concluded that petitioner's request for full indemnification is not yet ripe for determination, and the Board is entitled to summary decision as a matter of law. Accordingly, the Board's motion to dismiss was granted without prejudice, and the petition was dismissed.

Upon review, the Commissioner concurred with the ALJ's findings and conclusion, and adopted the Initial Decision as the final decision in this matter.

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.

New Jersey Commissioner of Education
Final Decision

Robert Curcio,

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v.

Board of Education of the South Orange-
Maplewood School District, Essex County,

Respondent.

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

Upon review, the Commissioner concurs with the Administrative Law Judge that the issue of petitioner's entitlement to indemnification is not ripe for review, because the facts have yet to be developed and it is not possible at this stage in the proceedings to determine whether petitioner was acting within the scope of his employment. While *Azzaro v. Bd. of Educ. of the City of Trenton*, 477 N.J. Super. 427 (App. Div. 2023), requires an employee to provide notice to the board of education that he is seeking indemnification within a reasonable time after the initiation of an action against him, it does not require that the Commissioner decide the question of entitlement to indemnification prior to the conclusion of the action filed against the employee.

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

IT IS SO ORDERED.¹



ACTING COMMISSIONER OF EDUCATION

Date of Decision: June 24, 2024
Date of Mailing: June 26, 2024

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

OAL DKT. NO. EDU 04142-24

AGENCY DKT. NO. 40-2/24

ROBERT CURCIO,

Petitioner,

v.

SOUTH ORANGE MAPLEWOOD

BOARD OF EDUCATION,

Respondent.

Vito Gagliardi, Esq., for petitioner (Porzio, Bromberg & Newman, P.C., attorneys)

Patrick Carrigg, Esq., for respondent (Lenox Law Firm, attorneys)

Record Closed: May 14, 2024

Decided: May 22, 2024

BEFORE **ANDREA PERRY VILLANI**, ALJ:

STATEMENT OF THE CASE

Robert Curcio, former school employee, asks the South Orange Maplewood Board of Education (Board) to indemnify him in a lawsuit. The Board retained an attorney and filed an answer on his behalf, but there have been no other proceedings in the case. Is Curcio's request for full indemnification ripe for determination? No. A case is not ripe when there's no hardship to the parties and the issues are not yet fit for judicial review. K. Hovnanian Cos. of N. Cent. Jersey, Inc. v. N.J. Dep't of Env'tl. Prot., 379 N.J. Super. 1, 9 (App. Div. 2005).

PROCEDURAL HISTORY

On February 26, 2024, Curcio filed a petition of appeal with the Commissioner of the New Jersey Department of Education seeking an order requiring the Board to indemnify him under N.J.S.A. 18A:16-6.

On March 20, 2024, the Board filed a Motion to Dismiss.

On March 22, 2024, the Department of Education transmitted the case to the Office of Administrative Law (OAL) 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 -23, for a hearing under the Uniform Administrative Procedure Rules, N.J.A.C. 1:1-1.1 to -21.6.

On March 28, 2024, Curcio filed Opposition to the Motion to Dismiss, and on April 10, 2024, the Board filed a Reply to Curcio's Opposition.

On April 15, 2024, I held a prehearing telephone conference. Counsel agreed that no material facts are in dispute, and that I should render a decision as a matter of law.

On May 14, 2024, counsel submitted a Joint Statement of Material Facts, and I closed the record.

FINDINGS OF FACTS

Counsel submitted a Joint Statement of Material Facts as follows and, as such, I **FIND as FACT:**

1. Respondent South Orange Maplewood Board of Education (Board) is established under the laws of the State of New Jersey and is the governing body of the South Orange Maplewood School District.

2. The Board supervises, controls, and regulates each of the public schools located within the District, including Columbia High School (CHS).
3. Curcio was the former Director of Athletics and Student Activities at the District.
4. Curcio was employed by the Board from August 1974 to August 2003.
5. Curcio served as the Director of Athletics and Student Activities from January 1984 until his retirement from the District.
6. On July 24, 2023, an individual identified only as “Jane Doe” filed suit against the District, the former principal of CHS, and a former CHS teacher and track coach named Leonard Klepack (Defendant Klepack) in the Superior Court of New Jersey, Mercer County, Law Division, Civil Part under docket number MER-L-1412-23 (Superior Court Action). (J-1.)
7. In the Superior Court Action, Jane Doe alleged that Defendant Klepack abused her from 1982 to 1986 while he was her track coach. (J-1.)
8. On November 6, 2023, a First Amended Complaint was filed in the Superior Court Action with leave of the Superior Court. (J-2.)
9. The First Amended Complaint added a second plaintiff (Plaintiff Two) to the Superior Court Action and re-designated Jane Doe as “Plaintiff One.” (J-2.)
10. The First Amended Complaint also named Curcio as a defendant in the Superior Court Action. (J-2.)
11. The First Amended Complaint alleges that Curcio “negligently supervised Defendant Klepack and lacked or failed to comply with rules, policies, guidelines or regulations which enabled Defendant Klepack to sexually abuse Plaintiff One.” (J-2.)

12. The First Amended Complaint further alleges that Curcio “failed to supervise Defendant Klepack in school and when he took Plaintiff Two to track meets and competitions alone” and “exercised no oversight or supervision of Defendant Klepack and failed to request or require permission or authorization by Plaintiff Two’s parents to allow Plaintiff Two to travel to track meets alone with Defendant Klepack.” (J-2.)
13. The First Amended Complaint also alleges that Curcio “lacked or failed to comply with policies, rules, guidelines or regulations when Defendant Klepack took Plaintiff Two to multiple track events and sexually abused her in motels and hotels.” (J-2.)
14. The First Amended Complaint in the Superior Court Action alleges that Curcio negligently supervised Defendant Klepack. (J-2.)
15. On December 4, 2023, Curcio’s counsel wrote to counsel for the Board demanding that the Board provide Curcio with full indemnity pursuant to N.J.S.A. 18A:16-6. (J-3.)
16. On December 11, 2023, the New Jersey Schools Insurance Group (NJSIG) issued a coverage and reservation of rights letter and agreed to provide the District and Curcio with a defense in the Superior Court Action. (J-4.)
17. The NJSIG letter disclaimed coverage for any claims by Plaintiff One occurring prior to July 1, 1985 because the policies it issued only covered the period from July 1, 1985 to July 1, 1988. (J-4.)
18. Furthermore, the NJSIG letter disclaimed coverage for any claims by Plaintiff Two occurring after July 1, 1988 for the same reason. (J-4.)
19. On December 19, 2023, the District’s insurance carrier, Chubb, issued a Coverage and Reservation of Rights letter and agreed to provide the District and Curcio with a defense in the Superior Court Action. (J-5.)

20. Chubb expressly disclaimed coverage of any claims asserted by Plaintiff Two because her alleged injuries occurred outside the policy's coverage period. (J-5.)
21. Chubb also determined that "the 1986-1987 INA Policy would likewise not apply to Plaintiff Two's claims of negligent supervision against Curcio." (J-5.)
22. Chubb further determined that, notwithstanding its decision to provide a defense to Curcio, it "may nevertheless owe no indemnification to Curcio under the 1986-1987 INA Policy." (J-5.)
23. On December 28, 2023, the undersigned counsel for Curcio again wrote to counsel for the Board demanding that the Board provide full indemnity, pursuant to N.J.S.A. 18A:16-6, irrespective of whether insurance coverage was available (J-6). Neither the Board nor any attorney acting on its behalf responded to this letter or the prior letter.
24. On January 9, 2024, the law firm of Anderson & Shah, LLC filed an Answer to the First Amended Complaint on behalf of the District and Curcio in the Superior Court Action. (J-7.)

CONCLUSIONS OF LAW

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 the moving party is entitled to prevail as a matter of law. N.J.A.C. 1:1-12.5(b). Even where a hearing is required by statute, a court or agency may dispense with the hearing and render summary decision if no dispute as to any material fact exists. See Contini v. Newark Bd. of Educ., 286 N.J. Super. 106, 120 (App. Div. 1995) (quoting In re Farmers' Mut. Fire Assurance Ass'n of N.J., 256 N.J. Super. 607, 618 (App. Div. 1992) ("[a]n evidentiary hearing is mandated only when the proposed administrative action is based on disputed adjudicatory facts")).

In this case, summary decision is appropriate because no genuine issue of material fact exists. Indeed, the parties agree on the most important fact: the Board is already providing Curcio with a defense in the lawsuit filed against him. This key fact establishes that there has been no harm to Curcio in the case thus far. Therefore, the question of whether Curcio is entitled to “full indemnity,” including a “commitment [by the Board] to defend him in the future” (J-8, p.4, emphasis added), is not yet ripe for determination, and the Board is entitled to summary decision as a matter of law.

The ripeness doctrine is rooted in prudential limitations on the exercise of judicial authority. Murphy v. New Milford Zoning Comm'n, 402 F.3d 342, 347 (2d Cir. 2005). The general inquiry is whether the court would benefit from deferring initial review until the claims presented for resolution have arisen in “a more concrete and final form.” Ibid. The doctrine's “basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements.” Ibid. A case's ripeness depends on two factors: (1) the fitness of issues for judicial review and (2) the hardship to the parties if judicial review is withheld at this time. K. Hovnanian Cos. of N. Cent. Jersey, Inc. v. N.J. Dep't of Env'tl. Prot., 379 N.J. Super. 1, 9 (App. Div. 2005) (quoting 966 Video, Inc. v. Mayor & Tp. Comm. of Hazlet Tp., 299 N.J. Super. 501, 515-16 (Law Div. 1995)).

Most importantly, Curcio's request for full indemnification is not yet ripe for review because the Board has already provided him with a defense in the lawsuit filed against him and, consequently, he has suffered no hardship under factor two of the ripeness test. As set forth above, it is undisputed that: the Board retained an attorney through their insurance carriers; the attorney filed an answer to the complaint on Curcio's behalf; and the Board's attorney continues to represent Curcio. Curcio has suffered no harm, and he is likely to suffer no harm in the future as long as the Board maintains the status quo.

Curcio's claim for full indemnification also fails factor one of the ripeness test because it is not fit for judicial review at this time. In determining whether an issue is fit for judicial review, we consider whether review would require additional factual development. 966 Video, Inc., 299 N.J. Super. at 516. In this situation, proper judicial review requires additional factual development around one very important question: whether Curcio was acting within the scope of his employment when he committed the

acts alleged in the complaint. Indeed, New Jersey law is clear that this is the crucial determination that must be made on an indemnification claim.

N.J.S.A. 18A:16-6 is the statute that addresses indemnification for school employees. N.J.S.A. 18A:16-6 holds, in pertinent part, that a board of education must defray all costs for any civil action that has been brought against a board employee for any act or omission arising out of the performance of the duties of such employment. The New Jersey Supreme Court has further stated that “[t]he only question to be answered when a school board employee seeks civil indemnification under N.J.S.A. 18A:16–6 is whether the employee was acting within the scope of his or her employment duties.” L.A. v. Bd. of Educ. of Trenton, 221 N.J. 192, 205-6 (2015).

In this case, we do not yet know whether Curcio was acting within the scope of his employment during the incidents alleged in the complaint. The plaintiffs added Curcio to their lawsuit a mere six months ago. There have been no court proceedings. There has been no discovery. The alleged incidents occurred about forty years ago, back in the 1980s. As a result, few facts are known at this time, but more will likely emerge in discovery. It is possible that those facts will reveal Curcio was not acting within the scope of his employment and is not entitled to indemnification.

Also, it is not possible to gather and have a hearing on those facts at the present time. Many of the relevant facts are known only to the plaintiffs in the Superior Court Action. For instance, of particular importance to the plaintiffs’ case against Curcio will be the observations of witnesses (e.g. school staff, coaches, other students, etc.) who have first-hand knowledge of Curcio’s relationship and interactions with Defendant Klepack. While the Board may have some knowledge of who those potential witnesses are, the plaintiffs in the lawsuit are in the best position to identify who was present at the alleged incidents. But, again, we do not have the plaintiffs’ evidence as there has not been any discovery or court proceedings in the Superior Court Action. As such, it would be highly impractical, if not impossible, to have a hearing at this time.

The most recent reported decision on the issue of indemnification for a school employee supports the notion that a hearing at this early stage of litigation would be premature. See Azzaro v. Bd. of Educ. of City of Trenton, 477 N.J. Super. 427 (App. Div.

2023). In Azzaro, the Appellate Division held that an employee must provide a school board with reasonable notice after the initiation of a proceeding that she is seeking indemnification. Id. at 2. However, that does not mean that a school board must fully indemnify an employee immediately at the start of the proceeding. Azzaro further held that, even though N.J.S.A. 18A:16-6 suggests a board's obligation to provide a defense arises when the action is instituted, “a board may initially deny defense costs” and “will ultimately be responsible for reasonable legal fees if it is later determined that the employee was, in fact, working within the scope of their employment.” Id. at 10, 16-17 (emphasis added).

Likewise, in this case, it should later be determined – when more facts are available – if Curcio was, in fact, working within the scope of his employment. It should also be emphasized that, although Azzaro contemplates, “a board may initially deny defense costs,” the Board in this case has *not* denied Curcio defense costs. Thus, he has suffered no harm. For all of the foregoing reasons, I **CONCLUDE** that Curcio’s request for full indemnification is not yet ripe for determination, and the Board is entitled to summary decision as a matter of law.

ORDER

Given my Findings of Fact and Conclusions of Law, I **ORDER** that the Board’s Motion to Dismiss is **GRANTED**, and that the petitioner’s petition of appeal is **DISMISSED, WITHOUT PREJUDICE**, subject to petitioner’s right to re-file when the issue of indemnification is ripe for adjudication.

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 is authorized by law to make a final decision in this case. 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 under 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.

May 22, 2024

DATE

ANDREA PERRY VILLANI, ALJ

Date Received at Agency

May 22, 2024

Date Mailed to Parties:
sej

May 22, 2024

APPENDIX

WITNESSES

For Petitioner:

None

For Respondent:

None

EXHIBITS

Joint

- J-1 July 24, 2023 Complaint
- J-2 November 6, 2023 First Amended Complaint
- J-3 Curcio's December 4, 2023 Letter
- J-4 NJSIG's December 11, 2023 Letter
- J-5 Chubb's December 19, 2023 Letter
- J-6 Curcio's December 28, 2023 Letter
- J-7 January 9, 2024 Answer to First Amended Complaint
- J-8 Curcio's February 26, 2024 Verified Petition of Appeal
- J-9 Board's March 20, 2024 Motion to Dismiss, Curcio's March 28, 2024 Opposition,
and Board's April 10, 2024 Reply

For Petitioner:

None

For Respondent:

None