

*State of New Jersey*  
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**

OAL DKT. NO. CFB 03624-05

AGENCY DKT. NO. LFB-00-013

**JAMES O'BRIEN,**

Petitioner,

v.

**LOCAL FINANCE BOARD,**

Respondent.

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**Kevin D. Kelly, Esq.**, for petitioner (Kelly & Ward, LLC, attorney)

**Daniel P. Reynolds**, Deputy Attorney General, for respondent (Stuart Rabner, Attorney General of New Jersey, attorney)

Record Closed: November 8, 2006

Decided: December 26, 2006

BEFORE **MARGARET M. MONACO**, ALJ:

**STATEMENT OF THE CASE**

The Local Government Ethics Law prohibits a local government officer from acting in his official capacity in any matter where the official has a direct or indirect financial or personal involvement that might reasonably be expected to impair his objectivity or independence of judgment. N.J.S.A. 40A:9-22.5(d). Petitioner James O'Brien, in his official capacity as a member of the governing body of the Borough of Hopatcong, voted on three resolutions involving his employer. Specifically, petitioner voted to appoint his employer to the position of licensed water operator for the Borough on January 1, 2000

and, thereafter, voted to authorize the payment of bills submitted by his employer on January 19, 2000 and March 1, 2000. The undersigned concludes that petitioner's employment constituted a disqualifying interest and his actions in voting on the matters violated N.J.S.A. 40A:9-22.5(d).

### **PROCEDURAL HISTORY**

The Local Finance Board (LFB) issued a Notice of Violation, dated June 9, 2004, assessing a \$300 fine based on its determination that petitioner's actions, as detailed above, violated N.J.S.A. 40A:9-22.5(d) "because he had a direct or indirect financial or personal involvement that might reasonably be expected to impair his objectivity or independence of judgment." The Notice of Violation also included other alleged violations, which the LFB withdrew prior to the hearing. Petitioner requested a hearing and the LFB transmitted the matter to the Office of Administrative Law where, on March 31, 2005, it was filed for determination as a contested case. Following adjournments of the hearing scheduled for November 15, 2005 and March 6, 2006 at petitioner's request, the hearing was held on September 15, 2006. After the conclusion of testimony, the record remained open for the receipt of post-hearing submissions. The parties submitted briefs and reply briefs in support of their respective positions, after which the record was closed.

### **FINDINGS OF FACTS**

Prior to the hearing, the parties submitted a Stipulation of Facts with attached exhibits, which was introduced in evidence as J-1. The parties stipulate to the following facts, which the undersigned adopts as **FINDINGS OF FACT** in this matter:

1. Petitioner James O'Brien (O'Brien or petitioner) served as a member of the governing body of the Borough of Hopatcong (Hopatcong or Borough) from January 1, 1999 to December 31, 2001 and was serving as a member of the Borough's governing body on January 1, 2000, January 19, 2000 and March 1, 2000.

2. O'Brien was employed by Frederick Yoerg and Associates from July 1999 through January 2001 and was employed by Frederick Yoerg and Associates on January 1, 2000, January 19, 2000 and March 1, 2000. See Exhibit 1 attached to the Stipulation of Facts.
3. The municipal governing body of Hopatcong voted at its meeting on January 1, 2000 to appoint Frederick Yoerg (of Frederic Yoerg and Associates) to the position of licensed water operator for the Borough for a term of one year. See Exhibit 2 attached to the Stipulation of Facts.
4. At its January 1, 2000 meeting, the Borough Council voted unanimously (6-0) to appoint Frederick Yoerg and ten (10) other professional appointments.
5. At the time that the municipal governing body of Hopatcong voted at its meeting on January 1, 2000 to appoint Frederick Yoerg (of Yoerg and Associates) to the position of licensed water operator for the Borough for a term of one year, O'Brien voted in the affirmative to approve this appointment. See Exhibit 2 attached to the Stipulation of Facts.
6. The municipal governing body of Hopatcong voted at its meeting on January 19, 2000 to authorize the payment of various bills that had been submitted by various vendors to the Borough for payment. Included among the bills that were approved for payment by the municipal governing body of Hopatcong at its meeting on January 19, 2000 was a bill that had been submitted to the Borough by Frederick Yoerg in the amount of \$2,718.75. See Exhibit 3 attached to the Stipulation of Facts.
7. At its January 19, 2000 meeting, the Borough Council voted unanimously (6-0) to pay Frederick Yoerg and forty-seven (47) other vendors as part of the Consent Agenda which included eleven (11) other actions/items.
8. At the time that the municipal governing body of Hopatcong voted on January 19, 2000 to approve the payment of the bill that had been submitted to the Borough by Frederick Yoerg in the amount of \$2,718.75,

O'Brien voted in the affirmative to approve the payment of that bill. See Exhibit 3 attached to the Stipulation of Facts.

9. The municipal governing body of Hopatcong voted at its meeting on March 1, 2000 to authorize the payment of various bills that had been submitted by various vendors to the Borough for payment. Included among the bills that were approved for payment by the municipal governing body of Hopatcong at its meeting on March 1, 2000 was a bill that had been submitted to the Borough by Frederick Yoerg in the amount of \$2,443.75. See Exhibit 4 attached to the Stipulation of Facts.
10. At its March 1, 2000 meeting, the Borough Council voted unanimously (3-0) to pay Frederick Yoerg and thirty-three (33) other vendors as part of the Consent Agenda which included eight (8) other actions/items.
11. At the time that the municipal governing body of Hopatcong voted on March 1, 2000 to approve the payment of the bill that had been submitted to the Borough by Frederick Yoerg in the amount of \$2,443.75, O'Brien voted in the affirmative to approve the payment of that bill. See Exhibit 4 attached to the Stipulation of Facts.

At the hearing, O'Brien testified on his own behalf. Based upon a consideration of the testimony presented, I **FIND** the following additional **FACTS**:

12. During the relevant time frame, O'Brien held a full time position with Frederick Yoerg and Associates.
13. At the time O'Brien cast the three votes in issue, O'Brien's only interest in the business of Frederick Yoerg and Associates was that of an employee.
14. The Borough attorney, who was present at the meetings when O'Brien voted, did not advise O'Brien that he should abstain from voting on the items in issue.

O'Brien further testified that he did not discuss the appointment or the payment of the bills with his employer, and he did not receive any benefit from his employer, such as a bonus, as a result of his votes. O'Brien denied that his objectivity and independence of judgment as a public officer was compromised in any way due to his employment relationship.

### **LEGAL DISCUSSION**

This matter arises under the Local Government Ethics Law, N.J.S.A. 40A:9-22.1 to -22.25 (the "Ethics Law"). In enacting this law, the Legislature recognized the "public trust" that accompanies public office and employment and that "[t]he vitality and stability of representative democracy depend upon the public's confidence in the integrity of its elected and appointed representatives." N.J.S.A. 40A:9-22.2(a) and (b). See Shapiro v. Mertz, 368 N.J. Super. 46, 51-52 (App. Div. 2004). The purpose of the statutory scheme is "to promote public confidence in the integrity of elected and appointed representatives and to prevent conflicts between the private interests and public duties of government officers." Department of Community Affairs, Local Finance Board v. Cook, 282 N.J. Super. 207, 209 (App. Div. 1995). In this regard, the Ethics Law embodies the Legislature's finding that public confidence in such representatives is "imperiled" "[w]hensoever the public perceives a conflict between the private interests and the public duties of a government officer or employee...." N.J.S.A. 40A:9-22.2(c) (emphasis added). The intent of the law is to provide "a method of assuring that standards of ethical conduct... for local government officers and employers shall be clear, consistent, uniform in their application, and enforceable on a statewide basis...." N.J.S.A. 40A:9-22.2(e).

In furtherance of these laudable objectives, the Legislature established a statutory code of ethics applicable to officers and employees of most local governments. N.J.S.A. 40A:9-22.5. In general, the LFB is charged with the duty of implementing the code of ethics. See N.J.S.A. 40A:9-22.4; N.J.S.A. 40A:9-22.9.<sup>1</sup> To enable the LFB to

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<sup>1</sup> The Ethics Law includes provisions authorizing a county or municipality, at its option, to establish its own ethics board, adopt a local code of ethics that meets the statutory requirements and enforce that

accomplish its statutory mission, the Legislature vested the LFB with broad powers including, among others, the review of complaints with regard to possible violations of the Ethics Law and, if a violation is found, the assessment of a fine of not less than \$100 nor more than \$500. N.J.S.A. 40A:9-22.7; N.J.S.A. 40A:9-22.9; N.J.S.A. 40A:9-22.10.

The code of ethics sets forth the minimum standards of conduct that must be observed by a "local government officer" and a "local government employee." The statutory provisions govern "virtually every person who serves in local government, except individuals appointed to purely advisory bodies, and officials, such as school board members and municipal court personnel, who are guided by other equally rigorous requirements." Cook, supra, 282 N.J. Super. at 209. It is beyond debate that O'Brien, in his capacity as a member of Hopatcong's governing body, falls within the purview of a "local government officer," thereby subjecting him to the dictates of N.J.S.A. 40A:9-22.5. See N.J.S.A. 40A:9-22.3(g) (defining "local government officer" as including "any person whether compensated or not, whether part-time or full-time" "elected to any office of a local government agency" or "serving on a local government agency which has the authority to enact ordinances, approve development applications or grant zoning variances"); N.J.S.A. 40A:9-22.3(e) (defining "local government agency" as including "any agency, board, governing body...or other instrumentality within a county or municipality...but shall not include a school board"); N.J.S.A. 40A:9-22.3(c) (in the case of a municipality, defining "governing body" as "the commission, council, board or body, by whatever name it may be known, having charge of the finances of the municipality").

The Ethics Law, similar to the Conflicts of Interest Law governing state officers and employees (N.J.S.A. 52:13D-1, et. seq.), represents one of the many efforts on the part of the State to combat official corruption and maintain public confidence in its governmental institutions. See State v. Gregorio, 186 N.J. Super. 138, 142-43 (Law Div. 1982). "It is fundamental that the public is entitled to have its representatives perform their duties free

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code of ethics. See N.J.S.A. 40A:9-22.13 to -22.18 (governing a county ethics board) and N.J.S.A. 40A:9-22.19 to -22.24 (governing a municipal ethics board). No county or municipal ethics board is implicated in this matter, which is proceeding under the jurisdiction of the LFB.

from any personal or pecuniary interests that might affect their judgment.” Barrett v. Union Township Committee, 230 N.J. Super. 195, 200 (App. Div. 1989) (emphasis added). Equally well settled is that public officials “stand in a fiduciary relationship to the people whom they have been elected or appointed to serve” and “[a]s fiduciaries and trustees of the public weal they are under an inescapable obligation to serve the public with the highest fidelity.” Driscoll v. Burlington-Bristol Bridge Co., 8 N.J. 433, 474 (1952). “These principles are not mere platitudes” but “represent the first rule of good government.” Gregorio, supra, 186 N.J. Super. at 143.

The Notice of Violation issued by the LFB in this matter alleges that O’Brien violated N.J.S.A. 40A:9-22.5(d), which directs:

No local government officer... shall act in his official capacity in any matter where he, a member of his immediate family, or a business organization in which he has an interest, has a direct or indirect financial or personal involvement that might reasonably be expected to impair his objectivity or independence of judgment.

Simply put, N.J.S.A. 40A:9-22.5(d) “demands that an officeholder discharge duties with undivided loyalty.” MacDougall v. Weichert, 144 N.J. 380, 401 (1996).

Toward this end, the statute mandates that a local government officer shall not act in his/her official capacity in any matter where either the officer, a member of the officer’s “immediate family” or a “business organization” in which the officer “has an interest”, “has a direct or indirect financial or personal involvement that might reasonably be expected to impair his objectivity or independence of judgment.” N.J.S.A. 40A:9-22.5(d) (emphasis added). See N.J.S.A. 40A:9-22.3 (defining “business organization” as “any corporation, partnership, firm, enterprise, franchise, association, trust, sole proprietorship, union or other legal entity” and “interest” as “the ownership or control of more than 10% of the profits, assets or stock of a business organization but shall not include the control of assets in a nonprofit entity or labor union”). In other words, “if the direct or indirect financial or personal involvement attaches to: 1) the officer ... 2) a member of the officer’s ... ‘immediate family’ or 3) a ‘business organization’ in which the officer ... has an

‘interest,’ this is sufficient to disqualify the officer ... if it rises to the level that it ‘might reasonably be expected to impair his/her objectivity or independence of judgment.’” Martine v. Local Finance Bd., 96 N.J.A.R. 2d (CAF) 111, 115.

Prior to the enactment of the Ethics Law in 1991, the courts recognized the long-standing common law principle that “[a] public official is disqualified from participating in judicial or quasi-judicial proceedings in which the official has a conflicting interest that may interfere with the impartial performance of his duties as a member of the public body.” Wyzykowski v. Rizas, 132 N.J. 509, 523 (1993) (quoting Scotch Plains-Fanwood Bd. of Educ. v. Syvertsen, 251 N.J. Super. 566, 568 (App. Div. 1991)). The decisional law addressing disqualifying interests is instructive inasmuch as N.J.S.A. 40A:9-22.5(d) essentially codifies the common-law conflict of interest principles. South Brunswick Associates v. Township Council of Monroe Township, 285 N.J. Super. 377, 381 (Law Div. 1994). At least one commentator has interpreted N.J.S.A. 40A:9-22.5(d) “to broaden the areas of disqualification” through its use of the word “involvement” instead of “interest.” Wyzykowski, supra, 132 N.J. at 529 (citing William M. Cox, New Jersey Zoning and Land Use Administration 30 (1993)).

The analysis of whether a particular interest rises to the level sufficient to disqualify is “necessarily a factual one and depends upon the circumstances of the particular case.” Van Itallie v. Borough of Franklin Lakes, 28 N.J. 258, 268 (1958). The touchstone in each case “will always be whether the circumstances could reasonably be interpreted to show that they had the likely capacity to tempt the official to depart from his sworn public duty.” Ibid. The New Jersey Supreme Court succinctly described the controlling principles as follows:

Actual proof of dishonesty need not be shown.... An actual conflict of interest is not the decisive factor, nor is ‘whether the public servant succumbs to the temptation,’ but rather whether there is a potential for conflict.... A conflicting interest arises when the public official has an interest not shared in common with the other members of the public.... Another way of analyzing the issue is to understand that ‘[t]here cannot be a

conflict of interest where there do not exist, realistically, contradictory desires tugging the official in opposite directions.’

[Wyzykowski, supra, 132 N.J. at 524 (citations omitted).]

Stated differently, “the validity of the officer’s action does not rest upon proof of fraud, dishonesty, loss to the municipality or whether he was in fact influenced by his personal interest, or whether the contract or other type [of] governmental step was desirable or undesirable from a public standpoint.” Aldom v. Roseland Borough, 42 N.J. Super. 495, 503 (App. Div. 1956). As explained in Barrett, “[t]he question is whether there existed an interest creating a potential conflict and not whether [the public official] yielded to the temptation of it.” Barrett, supra, 230 N.J. Super. at 204. Similarly, the court articulated in Zell v. Roseland Borough, 42 N.J. Super. 75, 82 (App. Div. 1956):

That the ‘interested’ member of the public body is in fact completely free of any improper or pecuniary motivation for his official action is immaterial if he has what in law amounts to an interest in the transaction.... The purpose of the statute is prophylaxis against misconduct and its effect can be exerted fully only if it is applied indiscriminately where applicable.

In Wyzykowski, the New Jersey Supreme Court articulated four categories of interests requiring disqualification: direct pecuniary interests, indirect pecuniary interests, direct personal interests and indirect personal interests. Id. at 525-26 (citing Michael A. Pane, Conflict of Interest: Sometimes a Confusing Maze, Part II, New Jersey Municipalities, March 1980, at 8, 9). A review of these disqualifying interests provides guidance for purposes of resolving the issue under review.

A “direct pecuniary interest” is “when an official votes on a matter benefiting the official’s own property or affording a direct financial gain.” Wyzykowski, supra, 132 N.J. at 525. See Scotch Plains-Fanwood Bd. of Educ., supra, 251 N.J. Super. at 569-70 (holding board member was barred from attending executive sessions at which litigation instituted by the member against the board was discussed); Tighe v. Local Finance Board, 97 N.J.A.R. 2d (CAF) 76, 79-81 (finding member of the board of adjustment violated N.J.S.A. 40A:9-22.5(d) when he voted to approve an application involving a business organization

in which he had a financial interest); Wargacki v. Local Finance Board, 97 N.J.A.R. 2d (CAF) 1 (holding mayor violated N.J.S.A. 40A:9-22.5(d) when he acted in his official capacity to attempt to establish an amnesty program for illegal multi-family dwellings when the mayor had a direct interest in the program, i.e., the avoidance of monetary penalties arising from multi-family dwellings owned by him); Catarcio/Cape May County Bridge Comm. v. Local Finance Board, 96 N.J.A.R. 2d (CAF) 99 (finding bridge commissioner violated N.J.S.A. 40A:9-22.5(d) when he voted on a resolution providing for a substantial raise in his salary after he assumed full-time administrative duties).

A situation involving an “indirect pecuniary interest” is “when an official votes on a matter that financially benefits one closely tied to the official, such as an employer, or family member.” Wyzykowski, *supra*, 132 N.J. at 525. See Griggs v. Borough of Princeton, 33 N.J. 207 (1960); Pyatt v. Mayor and Council of Dunellen Borough, 9 N.J. 548 (1952); Care of Tenafly, Inc. v. Tenafly Zoning Bd. of Adjustment., 307 N.J. Super. 362 (App. Div. 1998), *certif. denied*, 154 N.J. 609 (1998); Sokolinski v. Woodbridge Township Municipal Council, 192 N.J. Super. 101 (App. Div. 1983); Aldom, *supra*, 42 N.J. Super. at 505-08; Hanselman v. Local Finance Board, CFB 00152-01, Initial Decision, (July 17, 2001), *adopted*, Local Finance Board (August 8, 2001) <<http://lawlibrary.rutgers.edu/oal/search.html>>; Martine, *supra*, 96 N.J.A.R. 2d (CAF) at 113-15.

A disqualifying “direct personal interest” is said to exist “when an official votes on a matter that benefits a blood relative or close friend in a non-financial way, but a matter of great importance.” Wyzykowski, *supra*, 132 N.J. at 525. See Barrett, *supra*, 230 N.J. Super. at 204-05 (holding council member voting in favor of zoning ordinance amendment had a disqualifying interest when his mother resided in a nursing home owned by individuals who would be favored by the amendment).

Finally, an “indirect personal interest” is “when an official votes on a matter in which an individual’s judgment may be affected because of membership in some organization and a desire to help the organization further its policies.” Wyzykowski,

supra, 132 N.J. at 525-26. See Marlboro Manor, Inc. v. Montclair Township Bd. of Comm'rs., 187 N.J. Super. 359 (App. Div. 1982) (vacating resolution denying place-to-place transfer of liquor license based on the disqualifying interest of voting council members who were members of a church which was a principle objector to the transfer); Zell, supra, 42 N.J. Super. at 81–83 (invalidating zoning ordinance amendment that benefited a church in which participating planning board member was a member); Gunthner v. of Bay Head Borough Planning Bd., 335 N.J. Super. 452, 461 (Law. Div. 2000) (finding conflict of interest where planning board members were members of a yacht club that could be impacted by the development application “notwithstanding the absence of any overt showing that they cannot be impartial, and despite their affirmative claim that they can judge fairly”); Scott v. Town of Bloomfield, 94 N.J. Super. 592, 600-01 (Law Div. 1967), aff'd., 98 N.J. Super. 321 (App. Div. 1967), appeal dismissed, 52 N.J. 473 (1968) (invalidating resolution authorizing the lease of municipal property to the boys’ club resulting, in part, from the mayor’s affiliation with the organization).

The courts have previously considered whether an employment relationship is a sufficient connection between a public official and an outside entity, such that action by the public official upon matters involving that entity amounts to a conflict of interest in violation of the Ethics Law.

In Pyatt, supra, the New Jersey Supreme Court set aside an ordinance for the vacation of a public street, which abutted the property of a company that employed two councilman. The Court invalidated the ordinance notwithstanding the fact that the company was the largest local industry, employed a substantial number of citizens, and the councilman was a comparatively minor employer. In so ruling, the Court observed that “it is most doubtful that participation by a councilman in a municipal action of particular benefit to his employer can be proper in any case.” Pyatt, supra, 9 N.J. at 557.

The Court revisited the issue in Griggs, supra. There, the Supreme Court invalidated a council resolution approving a “blighted area” determination because two

members of the council were professors at the university that stood to benefit from the resolution. The Court explained:

In the instant case, it is true that the prime interests of [the professors/councilmen] in the University are in its academic affairs. But the same long standing association which gives these men security in their positions could tend to bind their loyalties to the University in such a manner that they would be interested in all matters affecting the institution....The potential of psychological influences cannot be ignored....We do not hold that these matters had an effect in the instant case. Nevertheless, we perceive the rule to be that the mere existence of a conflict, and not its actual effect, requires the official action to be invalidated.

[Griggs, supra, 33 N.J. at 220]

Similarly, in Sokolinski, supra, the Appellate Division held that certain members of the board of adjustment had a conflict and were disqualified from hearing variance applications for property owned by the board of education because they were employed by, or married to individuals employed by, the board of education. Sokolinski, supra, 192 N.J. Super. at 105-06.

In Aldom, supra, the Appellate Division declared a zoning ordinance amendment void when a councilman, who voted for the amendment, was employed by a corporation that would have benefited from the zoning change. In holding that the councilman should have “refrain[ed] from joining in the deliberative action of the governing body,” the court stated:

The interest which disqualifies is not necessarily a direct pecuniary one, nor is the amount of such an interest of paramount importance. It may be indirect; it is such an interest as is covered by the moral rule; no man can serve two masters whose interests conflict. Basically the question is whether the officer, by reason of a personal interest in the matter, is placed in a situation of temptation to serve his own purposes to the prejudice of those for whom the law authorizes him to act as a public official. And in the determination of the issue, too much refinement should not be engaged in by the courts in an effort to uphold the municipal action on the ground that his interest is so little or so indirect. Such an approach gives recognition to the moral philosophy that next in importance to the duty of the officer to

render a righteous judgment is that of doing it in such a manner as will beget no suspicion of the pureness and integrity of his action.

[Aldom, supra, 42 N.J. Super. at 502]

The LFB considered the conflict arising from an employment relationship in Martine, supra. In her capacity as a member of the borough council, Martine approved payments to Bergen Community Health Care (BCHC). The municipal board of health had contracted with BCHC for the provision of health services to the borough. Martine, who was also a registered nurse, worked in a part-time capacity for BCHC. The Administrative Law Judge (ALJ) held that Martine violated N.J.S.A. 40A:9-22.5(d) when she voted to approve the payment of bills for the BCHS services. Specifically, the ALJ concluded that Martine had a direct financial involvement in the matter based on her employment relationship with BCHC and that such an interest might reasonably be expected to impair Martine's objectivity or independence of judgment in the exercise of her duties as a public official. In this regard, the ALJ found that the public could have reasonably questioned whether Martine's ability to be objective was compromised, both in respect to her consideration of the bills and as to whether the services provided by her employer to the board of health satisfied its contractual obligations. Martine, supra, 96 N.J.A.R. 2d (CAF) at 113. The LFB adopted this determination.

More recently, in Hanselman, the LFB considered whether a councilman (Hanselman) violated N.J.S.A. 40A:9-22.5(d) when he voted on the approval of bills submitted for payment to the city council by P.H.A., Inc., a company where Hanselman was employed on a part-time basis. The ALJ concluded that Hanselman's action violated the statute, notwithstanding the absence of evidence or intimation that Hanselman was actually corrupted by his relationship with the company. The LFB agreed. In ruling that a violation occurred, Judge Mason reasoned:

In the present matter, the potential conflict between Mr. Hanselman's role in voting upon the bills submitted by P.H.A. Inc., and his part-time employment by the business creates a potential neither fanciful nor nebulous. Of course, that is not to say that Hanselman's integrity was in the slightest compromised. However, in this area, the law requires scrupulous care and

the avoidance of even the appearance of conflict. The most honest and trustworthy public servant, who would never allow a potential conflict of interest to affect his or her public responsibilities in the slightest, must, nevertheless, step aside in the face of a potential conflict, unless the potential is so evasive of definition that it reduces to the level of sheer fancy. Hanselman may well be that most honest and trustworthy public servant, but the potential for conflict in this instance is not quite so indefinable....Despite the good outcome, Hanselman's conduct was in violation of the Code of Ethics, N.J.S.A. 40A:9-22.5(d).

### **CONCLUSIONS OF LAW**

Against this backdrop, I concur with the LFB's position that O'Brien's conduct in voting on the matters violates the prohibition embodied in N.J.S.A. 40A:9-22.5(d). Succinctly stated, the instant facts are akin to those presented in the above cited cases and no reason exists to depart from the conclusions reached. I **CONCLUDE** that O'Brien had an indirect financial involvement in the matters arising from his employment with Frederick Yoerg and Associates. In addition, as the employment relationship included the payment of a salary to O'Brien, his direct financial interest was arguably implicated as well.

Plainly, the circumstances of O'Brien's employment is "an interest not shared in common with the other members of the public." Wyzykowski, supra, 132 N.J. at 524. As Wyzykowski counsels, "an actual conflict of interest is not the decisive factor," nor "is 'whether the public official succumbs to the temptation'" of putting private interests ahead of his sworn duties as a governmental official. Ibid. Rather, "it is the existence of such interests which is decisive, not whether they were actually influential." Griggs, supra, 33 N.J. at 219. In other words, the pivotal inquiry "is whether there is a potential for conflict, not whether the public servant succumbs to the temptation or is even aware of it." Ibid. The potential for conflict is enough to trigger the important public interests that demand that public officials act to avoid even the appearance of conflict and undue influence with regard to the actions and decisions they make as fiduciaries for the public. Wyzykowski, supra, 132 N.J. at 524; Driscoll, supra, 8 N.J. at 474; N.J.S.A. 40A:9-22.2.

The potential conflict between O'Brien's role as an employee and his involvement as a public official in matters that directly benefited his employer is neither fanciful nor nebulous. "The potential of psychological influences cannot be ignored." Griggs, supra, 33 N.J. at 220. Indeed, the statutory prohibition is broadly couched as extending to a direct or indirect financial or personal involvement that might reasonably be expected to impair the public servant's objectivity or independence of judgment. I **CONCLUDE** that, based upon the facts presented, such an expectation reasonably arises in this case. Simply put, an issue of divided loyalty is inescapable when a public official votes on a matter that directly benefits his employer and the public may rightly question the public official's objectivity and independence of judgment as a result of this affiliation. This is not to suggest that O'Brien was motivated by forces other than sincerity of purpose or that his integrity was in any way compromised. Indeed, O'Brien was a credible witness to whom, it appears, it simply did not occur that he may have a conflict in voting on the agenda items. Although no evidence suggests that O'Brien realized his interlocking interests or was actually influenced by his relationship with the company, O'Brien's conduct nonetheless created a potential for and appearance of conflict that ran afoul of the strict standards applicable to public officials, N.J.S.A. 40A:9-22.5(d). It is recognized that "the principles applicable to conflict of interests must be applied with an even hand where a potential for a division of loyalties exist." Marlboro Manor, Inc., supra, 187 N.J. Super. at 362. In this area, the law requires that public officials exercise extreme care and step aside when a potential for conflict exists since "[a] perceived conflict of interest is as harmful to the public's confidence in its representatives as the actual existence of such conflict." Barrett, supra, 230 N.J. Super. at 205. See N.J.S.A. 40A:9-22.2(c).

Finally, In the Matter of John F. Zisa, 385 N.J. Super. 188 (App. Div. 2006), cited in petitioner's brief, provides no solace. In short, the record is bereft of evidence demonstrating the prerequisites necessary to warrant the defense that O'Brien relied on the advice of counsel.

In sum, based upon consideration of the totality of the circumstances and the authorities cited, I **CONCLUDE** that the LFB has established, by a preponderance of the

credible evidence, that petitioner's actions violated N.J.S.A. 40A:9-22.5(d) I further **CONCLUDE** that the \$300 fine assessed by the LFB is reasonable and appropriate under the circumstances.

**ORDER**

It is **ORDERED** that the Local Finance Board's determination that petitioner violated N.J.S.A. 40A:9-22.5(d) be and hereby is **AFFIRMED** and petitioner is assessed a \$300 fine.

I hereby **FILE** my initial decision with the **LOCAL FINANCE BOARD, DIVISION OF LOCAL GOVERNMENT SERVICES**, for consideration.

This recommended decision may be adopted, modified or rejected by the **LOCAL FINANCE BOARD, DIVISION OF LOCAL GOVERNMENT SERVICES**, which by law is authorized to make a final decision in this matter. If the Local Finance Board, Division of Local Government Services, does not adopt, modify or reject this decision within forty-five (45) 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 (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **LOCAL FINANCE BOARD, DIVISION OF LOCAL GOVERNMENT SERVICES, 101 South Broad Street, PO Box 803, Trenton, New Jersey 08625-0803**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

December 26, 2006  
DATE

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**MARGARET M. MONACO, ALJ**

E-mail Receipt of Initial Decision Confirmed by the Local Finance Board on:

December 26, 2006  
DATE

Mailed to Parties:

\_\_\_\_\_  
DATE  
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OFFICE OF ADMINISTRATIVE LAW

**APPENDIX**

**List of Witnesses**

**For Petitioner:**

James O'Brien

**For Respondent:**

None

**List of Exhibits in Evidence**

**Joint Exhibits:**

J-1 Stipulation of Facts with attached Exhibits 1 through 4 (15 pp)

**For Petitioner:**

P-1 Letter to Ulrich Steinberg dated October 30, 2000 with attachments (20 pp)

**For Respondent:**

None.