

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CFB 902-04

AGENCY DKT. NO. LFB-02-033(2)

JOYCE PINTO,

Petitioner,

v.

LOCAL FINANCE BOARD,

Respondent.

Darrell Fineman, Esq., for petitioner (Capizola, Fineman, & Lapham, attorneys)

Daniel P. Reynolds, Deputy Attorney General, for respondent (Peter Harvey, Attorney General of New Jersey, attorney)

Record Closed: August 3, 2004

Decided: August 9, 2004

BEFORE **DONALD J. STEIN**, ALJ:

STATEMENT OF THE CASE

The Local Finance Board (Board) has charged that petitioner Joyce Pinto, while employed as Borough Clerk in the Borough of Runnemede, was involved in a conflict of interest in violation of the Local Government Ethics Law, *N.J.S.A. 40A:9-22.1 et seq.*, because she was living with Mayor Yarabinee; and (1) on September 3, 2002, she refused to recuse herself and leave the room when the Borough Council convened for the purpose of discussing a disciplinary matter concerning the Mayor's two sons; and (2) on September 17, 2002, again refused to recuse

herself and leave the room when the Borough Council convened for the purpose of discussing a disciplinary matter concerning the Mayor's two sons.

PROCEDURAL HISTORY

The Board issued a Notice of Violation, alleging the foregoing conduct and determined that petitioner had committed two violations each of *N.J.S.A. 40A:9-22.5(c)* and *N.J.S.A. 40A:9-22-5(d)*. Pursuant to *N.J.S.A. 40A:9-22.10*, the Board assessed a civil penalty in the amount of \$100. Petitioner requested a hearing and the Board transferred the matter to the Office of Administrative Law (OAL) for determination as a contested case, pursuant to *N.J.S.A. 52:14B-1 to -15* and *N.J.S.A. 52:14F-1 to-13* on March 3, 2004. During a prehearing conference, both counsel agreed that there were no facts in dispute and briefs would be filed. On July 9, 2004, counsel for the petitioner has moved for summary decision, pursuant to *N.J.A.C. 1:1-12.5*, and on July 30, 2004, counsel for the Board filed a response and cross motion for summary decision. The papers were received on August 3, 2004 and the record closed at that time.

STATEMENT OF FACTS

The facts in this matter are not in dispute. Petitioner has been the municipal clerk of the Borough of Runnemede since 1992. In approximately 2000, she began living with the former Mayor, John J. Yarabinee. On September 3, 2002, both Mayor Yarabinee and the petitioner were asked to leave the Borough Council closed session meeting in which the disciplinary matters of the former Mayor's two sons, Michael and Jason Yaribinee, were going to be discussed. The solicitor stated they both should leave. They both remained at the meeting and council voted to proceed with discussions regarding Michael and Jason Yarinibee (P-1).

On September 17, 2002, another closed session meeting of Borough Council took place to discuss the employment issues regarding Michael and Jason Yarinibee. Petitioner was again asked to leave the meeting and refused. The solicitor recommended that she step down from her position due to her relationship with the individual's father. She refused (P-2).

It also is not in dispute that petitioner's job duties are ministerial in nature and do not involve voting or participating in discussions. It should also be noted that petitioner's

relationship with the former Mayor began after his adult sons had moved out of the house. She never lived with them at any time. There also is no allegation that the minutes prepared for these meetings were not accurate (P-1, P-2).

The preceding information is undisputed and is thus **FOUND AS FACT**.

CONCLUSIONS OF LAW

The Summary Decision procedure in this forum is governed by *N.J.A.C.* 1:1-12.5(a), (b). This regulation, similar to the Judiciary's *R.* 4:46-1 motion for Summary Judgment, is "the determination [of] whether there exists a genuine issue with respect to a material fact challenged

. . . that requires a consideration of whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, in consideration of the applicable evidentiary standard, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party. *Brill v. Guardian Life Ins. Co.* 142 N.J.520, 523 (1953).

In the present case, there are no issues of material fact remaining between the parties, as stipulated by the parties. The only question to be decided is whether petitioner violated *N.J.S.A.* 40A:9-22.5(c) and *N.J.S.A.* 40A:9-22.5(d) by refusing to leave the room while she was the Borough Clerk and the matter involving the former Mayor's two sons were being discussed.

The Local Government Ethics Law provides a statewide process for governing the ethical conduct of local government officials and employees. It creates a Code of Ethics applicable to those personnel. *N.J.S.A.* 40A:9-22.5. The Local Finance Board enforces the Code of Ethics. *N.J.S.A.* 40A:9-22.4. A municipal or a county ethics board may be created and then may enforce a Code of Ethics, but if that Code is not identical to the State Code, the Local Finance Board must review and approve it. *N.J.S.A.* 40A:9-22.13. In the present matter, Runnemede has not adopted its own Code of Ethics.

The Local Government Ethics Law was created by the Legislature in recognition that persons holding local public offices and employment hold those positions as a public trust and that the public's confidence in the integrity of government is tied to the ethical nature with which these local officials carry out their public functions. Even the perception of unethical conduct can seriously damage that public trust and confidence. *N.J.S.A.* 40A:9-22.2. 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. *Wyszkowski v. Rizas*, 132 *N.J.* 509, 524 (1993). The Code of Ethics established by the Legislature at *N.J.S.A.* 40A:9-22.5 applies to local government officers and local government employees. *N.J.S.A.* 40A:9-22.3(g) and (f). Petitioner is charged with a violation of *N.J.S.A.* 40A:9-22.5(c), which provides that no local government officer or employee shall use or attempt to use his official position to secure unwarranted privileges or advantages for himself or others; and *N.J.S.A.* 40A:9-22.5(d), which provides:

No local government officer or employee 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.

These terms prohibit local government officers to act in any matter in which he has an interest, either direct or indirect or a financial or personal involvement that might reasonably be expected to impair his objectivity or independence of judgment. This prohibition codifies a common law principle of long standing, that is, that a public official is disqualified from acting in a matter in which he has a conflicting interest that would interfere with his public duty. *Griggs v. Borough of Princeton*, 33 *N.J.* 207, 219-220 (1960). In *Wyzykowski v. Rizas*, *supra.*, the New Jersey Supreme Court detailed the nature of such disqualifying interests. The Court has applied the above common-law principles to several different types of conflict cases, and each case can be "distilled" into four types of "interests," *i.e.*, conflicts that require disqualification: direct pecuniary interests, indirect pecuniary interests, direct personal interests, and indirect personal interests. The question of whether such an interest exists in a given case is factual and depends upon the unique circumstances attendant to the particular matter and relationships involved. The important question to be determined is 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. *Id.* at 523, citing *Van Italie v. Franklin Lakes*, 28 *N.J.* 258, 268 (1958). It is not required that actual corruption be demonstrated, 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 upon the actions and decisions they make as fiduciaries for the public. *Id.* at 524; *Driscoll v. Burlington Bristol Bridge Co.*, 8 *N.J.* 433, 474 (1952).

In *Wyzykowski*, the Court cited a commentator who had classified the nature of interests requiring disqualification. Of these, petitioner's interest would be an indirect pecuniary interest arising when an official votes upon matters that financially benefit one closely tied to the official, such as a family member or employer. *Wyzykowski, supra*, 132 *N.J.* at 525-26, citing Michael A. Pane, *Conflict of Interest: Sometimes a Confusing Maze, Part II, New Jersey Municipalities*, March 1980, at 8, 9.

I **FIND** that petitioner does have an indirect personal interest, since the matter involved the former mayor's two sons. However, another issue must be addressed. The *Wzyzkowski* case involves the vote of public officials. In the present matter, petitioner's duties and responsibilities do not include voting or decision-making. Her duties are ministerial in nature. The statute refers to an involvement that would impair his "objectivity or independence of judgment." *N.J.S.A.* 40:9-22.5(d).

There is absolutely no evidence or intimation that petitioner incorrectly prepared the minutes of the meeting. Nor is there any evidence that petitioner participated in the discussions involving the former Mayor's sons, nor voiced her opinions. She also had no vote in this situation. Petitioner was not involved in the decision-making process. A review of the minutes in this matter discloses that the Board disposed of the issues regarding the former Mayor's son unanimously and with very little discussion.

In *Shapiro v. Mertz*, 368 *N.J.Super.* 46 (A.D. 2004), the Appellate Division concluded that generally, 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." The Court then applied the following standard:

... The determination of whether a conflict of interest exists must be done on a case-by-case, fact-sensitive basis. The question 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. Actual proof of dishonesty need not be shown. The key is whether there is a potential for conflict.

Applying that standard to the present situation, I **CONCLUDE** there was nothing to tempt the petitioner to depart from her duties as Borough Clerk to record the meeting and prepare the minutes. Both sides concede the minutes were prepared properly and were approved by the Board. Additionally, petitioner's responsibilities did not involve her making any judgments or objectivity pursuant to the statute. Since her function at the closed session was to record the meeting and prepare minutes that must be approved by the Board and she did not participate in discussions or vote concerning the former Mayor's sons, I **CONCLUDE** that there is no potential for a conflict. Therefore, I **FIND** and **CONCLUDE** that petitioner did not commit any violations of *N.J.S.A. 40A:9-22.5(c)*, and *N.J.S.A. 40A:9-22.5(d)*.

ORDER

Based on the foregoing, it is **ORDERED** that Summary Decision is granted to the petitioner, since her conduct did rise to a violation of *N.J.S.A. 40A:9-22.5(c)* and *N.J.S.A. 40A:9-22.5(d)*. It is further ordered that the action of the Local Finance Board is hereby reversed.

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.

Exceptions."

8/9/04

DATE

DONALD J. STEIN, ALJ

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

DATE

Mailed to Parties:

DATE

OFFICE OF ADMINISTRATIVE LAW

/jck

WITNESSES

For the Petitioner:

None

For the Respondent:

None

EXHIBITS

For the Petitioner:

P-1

P-2

For the Respondent:

None