

**INITIAL DECISION**

OAL DKT. NO. CFB 6903-05

AGENCY DKT. NO. LFB#02-034

**WILLIAM E. MISCOSKI,**

Petitioner,

v.

**LOCAL FINANCE BOARD,**

Respondent.

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**Nicholas C. Caliendo**, Esq., for petitioner, (Schottland, Manning, Caliendo, Thomson, attorneys)

**Daniel Reynolds**, Assistant Attorney General, for respondent (Zulima V. Farber, Attorney General of New Jersey, attorney)

Record Closed: February 16, 2006

Decided: February 21, 2006

BEFORE **ANA C. VISCOMI**, ALJ:

**STATEMENT OF THE CASE AND PROCEDURAL HISTORY**

Petitioner appeals from a Local Finance Board Notice of Violation (NOV) dated December 8, 2004, seeking to assess a fine in the amount of \$500.00 for an alleged violation of the Conflict of Interest Statute, N.J.S.A. 40A:9-22.5(d) when, as Deputy Mayor, petitioner voted affirmatively on township bond ordinance #100-02 to provide funds to purchase open space which incorporated a list of properties for possible purchase that contained a property owned by his mother, Ellen Miscoski. He requested a hearing on May 11, 2005, and the matter was transmitted to the Office of Administrative Law (OAL) on September 22, 2005, for a hearing as a contested case pursuant to N.J.S.A. 52:14F-1 to -13

and N.J.S.A. 52:14B -1 to -15. It was scheduled for a hearing on January 17, 2006, and heard on that date. The record remained open to allow for post-hearing summations which were received on February 16, 2006, and the record closed.

### **FACTUAL DISCUSSION**

The parties have stipulated to the following facts (J-1) as enumerated 1-4 inclusive and they shall constitute **FINDINGS OF FACT**.

1. William Miscoski served on the township committee of the Township of Upper Freehold on September 18, 2002.

2. On September 18, 2002, the Township Committee of the Township of Upper Freehold voted to adopt Ordinance 100-02. William Miscoski voted in the affirmative to adopt Ordinance 100-02. See respondent's exhibit R-1 – Ordinance 100-02 and respondent's exhibit R-2 – copy of Minutes of Meeting of Township Committee of Township of Upper Freehold reflecting consideration of and vote on Ordinance 100-02.

3. Among the properties set forth on the list incorporated by reference in section 3 of Ordinance 100-02 was Block 40, Lot 1.

4. Ellen Miscoski, mother of William Miscoski, was sole owner of record of Block 40, Lot 1 at the time that the Township Committee of the Township of Upper Freehold voted on September 18, 2002, to adopt Ordinance 100-02. (J-1).

### **testimony**

Mr. Miscoski testified the township has a committee form of government and that he has served as a "committeeman" for the past 12 years. His mother

does not live with him. Miscoski Associates, a partnership consisting of his mother, brother, sister, his father's trust and himself, respectively, own 130 acres known as Cream Ridge Golf Course located in Upper Freehold at Block 40, Lot .01.

The township master plan's primary purpose is the preservation of farmland and open space. The Township is the first municipality in the state to pass a "country code." Miscoski explained this means "we are a farming community." The township consists of 47 square miles with no water lines and no sewer lines.

With regard to Ordinance 100-02, the township was applying for a Planning Incentive Grant ("PIG") whereby it was to submit to the state a list of qualifying properties in the hopes of receiving a grant to purchase properties and maintain such properties in accordance with the master plan. In furtherance of applying for a PIG, the township engineer prepared a list of every farm assessed property in the township for inclusion on the grant list. Individual owners are not consulted with regard to whether they wish their respective property be included on the list. This was prepared prior to the eventual open meeting to vote on the ordinance. (R-1) A total of 8,349 acres were included on the list. His mother's property is included on the list. (R-1, at p.9) When applying for a PIG from the state, more acreage on the list is better, he testified. The estimated value of land purchased through a PIG was, in 2002, \$8,000.00 per acre, he testified. The present value is \$15,000.00 per acre. This is 1/30 of the value offered by developers. He testified that prior to 2002, Miscoski Associates was offered \$250,000.00 per acre by a developer for the land where the golf course is situated. Thus, he testified, farmland assessment is "a great sacrifice" and also "a gift" toward farmland preservation. There is no financial incentive to be on the list, Miscoski testified. So far, the township has succeeded in dedicating 7,000 acres toward farmland preservation and Upper Freehold Township has the most dedicated open space acres of all municipalities in New Jersey.

On September 18, 2002, the committee met to vote on the ordinance. The committee consists of five (5) members. In order to approve a PIG, a majority of 4 votes in favor of passage is required. Mayor David Horsnall attended the meeting but due to a family medical emergency left prior to the vote on the ordinance. (R-2) As Deputy Mayor, he cast the fourth vote. The vote could not be delayed; otherwise, the municipality would have missed the deadline for PIG submission to the state. The township ultimately received a \$1,000,000.00 PIG. The township committee selected the Hadler property for preservation; 53 acres as continued farmland and 30 acres for soccer and baseball fields. (R-1, at p. 8)

Respondent offered no witnesses.

### **LEGAL ANALYSIS**

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 these 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. 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. A conflicting interest arises when a public official has an interest not shared in common with the other members of the public. Griggs v. Borough of Princeton, 33 N.J. 207, 220-21(1960) 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. Wysykowski v. Rizas, 132 N.J. 509, 524 (1993). In each

case, the decisive question 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." Itallie v. Franklin Lakes, 28 N.J. 258,268 (1958), Griggs, supra, at 219.

The specific allegation against respondent is that he violated N.J.S.A. 40A:9-22.5(d), which provides:

No local government officer or employee shall act in his or her 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 or her objectivity or independence of judgment.

Further, a member of the immediate family is defined as "the spouse or dependent child of a local government officer or employee residing in the same household." N.J.S.A. 40A:99-22.3(i).

In order to determine whether an "interest" is sufficient to find that an official violated N.J.S.A. 40A:9-22.5(d), "common-law principles concerning the participation of public officials in matters in which they have a personal interest primarily govern . . ." Wyzykowski, supra, at 523. Thus, a determination concerning sufficiency of interest is a factual one and depends upon the circumstances of the particular case. No definitive test can be devised. 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." Id.

However, not every circumstance will serve to disqualify an official:

Local governments would be seriously handicapped if every possible interest, no matter how remote and speculative, would serve as a disqualification of an official. If this was so, it would discourage capable men and women from holding public office. Of course, courts should scrutinize the circumstances with great care

and should condemn anything which indicates the likelihood of corruption or favoritism. But in doing so they must also be mindful that to abrogate a municipal action at the suggestion that some remote and nebulous interest is present, would be to unjustifiably deprive a municipality in many important instances of the services of its duly elected or appointed officials. The determinations of municipal officials should not be approached with a general feeling of suspicion, for as Justice Holmes has said, "Universal distrust creates universal incompetency."

Id., at 523-24, quoting Graham v. United States, 231 U.S. 474, 480 (1913).

The Judiciary 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. Id., at 524-25, citing Michael Pane, Conflict of Interest: Sometimes a Confusing Maze, Part II, New Jersey Municipalities, March 1980 at 8,9. "Direct pecuniary interests" occur when "an official votes on a matter benefiting the official's own property or affording a direct financial gain." Id. at 525; see Scotch Plains-Fanwood Bd. of Educ., 251 N.J. Super. 568, 570 (App. Div. 1991) (barring a Board member from meetings at which a private cause of action he instituted was discussed); Tighe v. Local Fin. Bd., 97 N.J.A.R. 2d (CAF) 76, 79-81 (violation occurred when zoning board member voted to approve a project in which he had a direct financial interest); Wargacki v. Local Fin. Bd., 97 N.J.A.R. 2d (CAF) 1, 4 (violation occurred when mayor acted in his official capacity to attempt to establish an amnesty program for illegal multi-family homes in order to avoid paying fines for several such units that he owned). "Indirect pecuniary interests" occur 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, at 525; see Griggs, supra, at 222 (invalidating determination of "blighted" area by borough council when two participating councilmen were professors of a university that benefited from the designation); CARE of Tenafly v. Tenafly Zoning Board, 307 N.J. Super. 362, 373-74 (App. Div. 1998) (violation occurred when zoning board member voted on plan that directly affected the financial integrity of his mother's property); In Re Engelbert, A-4674-96T5, at 3, (App. Div. October 30, 1997) (violation found when municipal utilities authority member voted for salary increase for his son). "Direct personal interests" occur when "an official votes on a matter that benefits a blood relative

or close friend in a non-financial way, but in a matter of great importance." Wzykowski, supra, at 525; see Barrett v. Union Twp. Comm., 230 N.J. Super. 195, 196-97 (App. Div. 1989) (voiding zoning work where councilman's mother resided in a nursing home favored by a zoning amendment). "Indirect personal interests" occur when "an official votes on a matter in which an individual's judgment may be affected because of membership in some organization, and the desire to help that organization furthers its policies." Wzykowski, supra, at 526; see Marlboro Manor, Inc. v. Bd. of Common. of Montclair, 187 N.J. Super. 359, 360-363 (App. Div. 1982) (conflict of interest arose when two council members voted on place-to-place transfer of liquor consumption license even though they were members of a church opposed to the transfer); Zell v. Borough of Roseland, 42 N.J. Super. 75, 81-83 (App. Div. 1956) (conflict arose when zoning/planning board member voted on property reclassification that would have a direct impact on his church); Gunter v. Planning Board of Bay Head, 335 N.J. Super. 452, 460-61 (Law. Div. 2000) (conflict of interest arose when planning board members were also members of a yacht club that could be financially benefited by proposed plan); South Brunswick Associates v. Twp. Council of Monroe, 285 N.J. Super. 377, 383-84 (Law Div. 1994) (conflict of interest arose when mayor represented constituents at a planning board meeting; he had oversight of that board via his town council's position); Scott v. Town of Bloomfield, 94 N.J. Super. 592, (Law Div. 1967) (conflict of interest arose when a mayor voiced his opinion about giving a lease to an organization that he was both a member and a director).

If a situation does not fall within one of the above four interests, then there is no violation. Wzykowski, supra, at 524, 526.

Michael A. Pane, a recognized expert in Local Government Law, addressed potential conflicts that arise from legislative actions and stated:

the first point to be made in the area of legislative action is the rather general point that Courts do recognize that elected officials represent a variety of constituencies and are charged with solving a variety of problems. Thus, in the context of local government and in making decisions, it is not unusual for an elected official to vote on legislation promised in a campaign or to vote on legislation which benefits a particular group of constituents-sometimes even including that public official. As one case put it-a disqualification should not result from "a personal interest in the

welfare in the community" nor "the interest of nearly all businessmen in the borough in the general improvement of their businesses." Put another way in 1965 by the New Jersey Supreme Court:

...the interest which disqualifies a member of the governing body in such a situation is a personal or private one and not such an interest as he has in common with all other citizens or owners of property. [Kramer v. Board of Adjustment of Sea Girt, 45 N.J. 268, 282 (1965)]

**Similarly, favoring legislation or any policy or measure which is for the benefits of the whole community or a large segment thereof, is not an action for which one is subject to censure. Going a step further, one could even state that voting for a project or passing an ordinance which will benefit a particular neighborhood or a significant number of constituents or a particular facet or segment of the entire community would not be questionable.** For example, a vote to build a municipal park in one's neighborhood does not raise questions of conflict of interest absent other circumstances. On the other hand, a vote to put a park immediately next to one's home, thus creating a more substantial benefit for the public official than is received by others, is clearly a vote subject to serious question. The key here probably is the extent of the individual benefit conferred and the number of other citizens similarly situated and receiving benefits with the public official. [Emphasis added]

Pane, New Jersey Practice, §9.8 at 12 (3d ed.1999).

Respondent asserts by virtue of Miscoski's relationship with his mother, petitioner has an indirect financial involvement as well as a direct personal involvement that might reasonably be expected to impair his objectivity or independence of judgment in voting to adopt Ordinance No. 100-02. And, respondent asserts, the fact that Miscoski's mother is not a member of his "immediate family" is irrelevant. Respondent relies on CARE, supra, in support of its position that Miscoski had a conflict of interest and violated the statute in voting upon passage of Ordinance No. 100-02. CARE, however, is distinguishable from the facts in this matter. In CARE, a planning board member voted on a site plan application for the construction of a supermarket just fifty feet

from commercial property owned by his mother. The Appellate Division found a conflict of interest because the board member had a “significant financial interest” in the construction of the new supermarket and the Court based its “decision on the potential income generated for the mother’s property by an adjacent anchor store.” Shapiro v. Mertz, 368 N.J. Super. 46, 55 (App. Div. 2004), citing CARE, supra.

Based on the foregoing discussion of the law, and considering the evidence in this matter, including the factual stipulations, as well as the competent, credible, unrefuted testimony of petitioner Miscoski, I **FIND** that he did not violate the Conflict of Interest Statute, N.J.S.A. 40A:9-22.5(d). I make the further following **FINDINGS OF FACT** in support of this conclusion. The list prepared by the township engineer consisted of **all** 93 properties in the township that were farmland assessed. There is neither any evidence of any property being excluded nor any evidence of Deputy Mayor Miscoski having any role in the creation of this list. Further, the minutes of the meeting of September 18, 2002, reflect that the Mayor left prior to the vote to attend to a medical emergency in his family. In addition, not only did the PIG ordinance require a majority of four (4) votes for passage, only 4 members of the township committee remained. Had the vote not been taking that evening, the deadline for the township to submit its PIG proposal to the state would have passed. Miscoski, acted properly, with no actual or apparent conflict of interest in voting for the passage of Ordinance 100-02. The action he took was for the benefit of the entire township and consistent with its pre-existing, established master plan.

### **DECISION AND ORDER**

Based upon the foregoing, I **CONCLUDE** that the local finance board has not established that respondent violated N.J.S.A. 40A:9-22.5(d). I therefore **ORDER** that the Notice of Violation finding petitioner violated N.J.S.A. 40A:9-22.5(d) be **VACATED** and the suspended \$500.00 fine **DISMISSED**.

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.

2-21-05

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DATE

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**ANA C. VISCOMI, ALJ**

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

\_\_\_\_\_  
DATE

Mailed to Parties:

\_\_\_\_\_  
DATE

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

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**APPENDIX**

**LIST OF WITNESSES**

For petitioner:

William E. Miscoski

For respondent:

none

**LIST OF EXHIBITS**

Joint

J-1 Joint Stipulation

R-1 Ordinance

R-2 Meeting Minutes

WILLIAM E. MISCOSICI,  
Petitioner,  
v.  
LOCAL FINANCE BOARD,  
Respondent

OAL DOCKET NO. CFB 6903-05  
AGENCY DOCKET NO. LFB 02-034

### REMAND

This matter came before the Local Finance Board (Board) on a complaint filed pursuant to the Local Government Ethics Law, N.J.S.A. 40A:9-22.1 et seq. The complaint alleged that, while serving as a committeeman and Deputy Mayor, of the Township of Upper Freehold, the petitioner, William E. Miscosld, violated N.J.S.A. 40A:9-22.5(d) by voting in favor of a bond ordinance authorizing the purchase of private property for conservation purposes, including property owned by Miscosld's mother. Each parcel of property included in the authorization was identified on a list which had been filed with the Township Clerk, and incorporated by reference in the ordinance.

A hearing was conducted before Administrative Law Judge Ana C. Viscomi on January 17, 2006, during which Miscoski provided certain information not previously made available to the Board. He, for instance, testified that the list of properties set forth in the ordinance included all of the Township's farm assessed property, and had been compiled by the Township Engineer, without input from individual property owners. He testified that the purpose of identifying all farm property in the ordinance was to enhance the Township's chance of receiving a Planning Incentive Grant (PIG) from the State. He stated that the Township was predominantly rural, and that farmland preservation was the primary purpose of the municipal master plan. Miscoski was however unable to testify as to the actual percentage of Township property that was farm assessed, and the percentage of Township residents who owned farm property was never established.

Based on Miscoski's testimony, ALT Viscomi concluded that Miscoski did not have a conflicting interest in the ordinance; that [t]he action he took was for the benefit of the entire township and consistent with its pre-existing, established master plan[,] and, accordingly, that there was no violation of the Local Government Ethics Law. The ALJ recommended that the complaint and the \$500 fine be dismissed.

In order to accept the recommended decision, the Board must be satisfied that Miscosld's interest in enacting the ordinance was an interest shared by most of the community. *Kramer v. Board of Adjustment of Sea Girt*, 45 N.J. 268, 282 (1965). In and of itself, Miscoski's hearing testimony does not provide an adequate factual basis upon which to reach that conclusion. The matter is therefore remanded for supplemental proceedings to document the following:

1. The total area of the Township in acres.
2. The total area-of the Township, in acres, that was farm assessed on September 18, 2002, when William Miskoski cast his vote in favor of the bond ordinance.
3. The total number of line items in the Township for tax collection purposes.
4. The number of line items that were farm assessed on September 18, 2002.
5. A list of farm assessed property owners, including the lot and block numbers of the parcel(s) they own.

The foregoing determinations may be made by reference to Township tax. records, and/or any other evidence deemed probative by the AJL

SUSAN JACOBUCCI, CHAIR  
LOCAL FINANCE BOARD

DATE: May 22, 2006

**INITIAL DECISION**

OAL DKT. CFB 4179-06

(On Remand CFB 6903-05)

AGENCY DKT. NO. LFB #02-034

**WILLIAM E. MISCOSKI,**

Petitioner,

v.

**LOCAL FINANCE BOARD,**

Respondent.

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**Nicholas C. Caliendo**, Esq., for petitioner (Manning, Caliendo & Thomson, attorneys)

**Daniel Reynolds**, Senior Deputy Attorney General, for respondent (Anne Milgram, Acting Attorney General of New Jersey, attorney)

Record Closed: September 22, 2006

Decided: September 26, 2006

BEFORE **ANA C. VISCOMI**, ALJ:

The Initial Decision finding no conflict of interest on the part of petitioner William E. Miscoski, issued on February 21, 2006, is incorporated herein by reference. Thereafter, on May 22, 2006, the Local Finance Board issued a Remand Order for supplemental proceedings to document the following information: 1. the total area of the Township in acres; 2. the total area of the Township, in acres, that was farm assessed on September 18, 2002, when William E. Miscoski cast his vote in favor of the bond ordinance; 3. the total number of line items in the Township for tax collection purposes; 4. the number of line items that were farm assessed on September 18, 2002; and 5. a list of farm assessed property owners, including the lot and block numbers of the parcel(s) they own. The Remand Order also provided that the foregoing five items may be made by reference to Township tax records, and/or any other evidence deemed

probative by the ALJ. Upon return of the file, a conference call was scheduled with counsel at their first mutually convenient date of June 28, 2006. Based upon the conference call with counsel, counsel requested the opportunity to submit the requested information by way of certification.

The certification of Donna Taylor, CTA, the Assistant Tax Assessor for Upper Freehold Township, was then submitted by cover letter of September 13, 2006 and received on September 22, 2006, as a joint submission. (J-1) As the Remand Order does not request any additional fact finding on behalf of this ALJ, the certification along with the attached supporting exhibits are submitted herein to the Local Finance Board for its further consideration.

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.

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DATE

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**ANA C. VISCOMI, ALJ**

Receipt Acknowledged:

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DATE

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LOCAL FINANCE BOARD

Mailed to Parties:

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DATE

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OFFICE OF ADMINISTRATIVE LAW

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**EXHIBITS**

**Joint**

J-1 Cover letter of September 13, 2006