

The following pages indicate that a county or municipal official violated the Local Government Ethics Law. It is possible, however, that the violation was, or will be, reversed by another tribunal. For example, if the pages below reveal that an Administrative Law Judge (ALJ) found that a violation occurred, it is possible that the Local Finance Board (LFB) later rejected the ALJ's findings. Also, if the pages below reveal that the Local Finance Board found a violation, the official may have subsequently appealed to the Appellate Division of the Superior Court. In sum, readers should be aware that a finding by an ALJ or the LFB might not be the final outcome, and that further inquiries may need to be made.

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CFB 2953-06

AGENCY DKT. NO. LFB 03-021

LOCAL FINANCE BOARD,

Petitioner,

v.

MICHAEL KAFTON,

Respondent.

Daniel Reynolds, Deputy Attorney General, for petitioner (Stuart Rabner, Attorney General of New Jersey, attorney)

Michael Kafton, respondent, pro se

Record Closed: March 12, 2007

Decided: April 26, 2007

BEFORE **JOSEPH F. FIDLER**, ALJ:

The Local Finance Board charges that Michael Kafton, while acting in his official capacity as Mayor of Jackson Township, violated the Local Government Ethics Law, N.J.S.A. 40A:9-22.1 et seq., when he voted at the February 26, 2001, Township Committee meeting to approve a bill payment to Bil-Jim Construction Company in the amount of \$36,157.50. By a Notice of Violation dated July 18, 2005, the Board informed respondent of its determination that his action violated N.J.S.A. 40A:9-22.5(d). The Board assessed and then waived a fine in the amount of \$100. Mr. Kafton has denied that he committed a violation of the Local Government Ethics Law.

Mr. Kafton requested a hearing and on May 17, 2006, the Board transmitted the matter to the Office of Administrative Law 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. Telephone prehearing and status conferences were held on September 26, 2006, and January 26, 2007. The hearing was held on March 12, 2007, and the record closed on that date.

N.J.S.A. 40A:9-22.5(d) of the Local Government Ethics Law states that

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;

The Local Finance Board received complaints in September and October 2003 alleging that Jackson Township Mayor Michael J. Kafton was involved in a number of conflicts of interest. The Board determined that the allegations were within its jurisdiction and not frivolous, so it authorized an investigation. The Board dismissed all but the present allegation, and found it to be a violation of N.J.S.A. 40A:9-22.5(d) of the Local Government Ethics Law.

The material facts are undisputed. Michael J. Kafton was sworn into office as a Jackson Township Committeeman on January 1, 2001. Kafton owns Pinnacle Title Agency, Inc. (Exhibit P-4). On March 28, 2000, prior to Kafton taking public office, Pinnacle received an order from the attorney for Bil-Jim Construction Company for the issuance of a title commitment. On February 26, 2001, Kafton voted at a Township Committee meeting to approve a bill payment to Bil-Jim Construction Company in the amount of \$36,157.50. The closing of Pinnacle's title business with Bil-Jim Construction Company did not take place until August 9, 2001.

Case Manager Erin Knoedler investigated the complaints in this matter. Following a preliminary investigation, some of the allegations were dismissed as having no reasonable factual basis, and this was stated in the Notice of Investigation provided to Kafton on February 25, 2005 (Exhibit P-1). By letter dated March 8, 2005, Kafton

responded to the remaining allegations (Exhibit P-2). Noting that Pinnacle received the order for issuance of a title commitment for Bil-Jim Construction prior to his being sworn into office, Kafton emphasized that he had abstained from voting on Township Resolutions concerning Bil-Jim Construction on February 5, April 9, and June 11, 2001. As for the Committee Meeting of February 26, 2001, however, Kafton acknowledged that

[u]pon reviewing the minutes of the Township Meeting held on February 26, 2001, apparently I did vote for payment of an invoice to Bil-Jim Construction. It was one of 125 bills voted on that evening. The bill was for a bid for snow removal which bid was approved prior to my taking office and which service Bil-Jim Construction provided prior to my taking office. I was certainly cognizant of the fact that I should not vote on matters concerning Bil-Jim during this time period, as evidenced by my abstentions on the above referenced Resolutions. My vote on this bill was obviously an oversight. It should be noted, that even without my vote, the bill would have been paid as all the other committeemen present voted for it.

When Kafton testified in this matter, he restated the fact that Bil-Jim Construction's work had already been approved and completed before he voted on the bill payment on February 26, 2001, and that it would have passed without his vote. He further pointed out that Pinnacle had been engaged by Bil-Jim Construction's attorney to do a title search and provide title insurance to Bil-Jim Construction, and the payment for these services was made by the attorney, not by Bil-Jim Construction.

The preceding evidence is undisputed and believable and is thus **FOUND AS FACT.**

The Local Government Ethics Law was enacted by the Legislature in recognition that local public officers and employees hold their 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. N.J.S.A. 40A:9-22.2a and N.J.S.A. 40A:9-22.2b. The purpose of the Act is to provide a method of assuring that

standards of ethical conduct and financial disclosure requirements for local government officers and employees shall be clear, consistent, uniform in their application, and enforceable on a statewide basis, and to provide these officers and employees with advice and information concerning possible conflicts of interest which might arise in the conduct of their public duties. N.J.S.A. 40A:9-22.2e. To effectuate this purpose, the Act established a statewide statutory Code of Ethics governing the conduct of local government officials and employees. N.J.S.A. 40A:9-22.5. The Local Finance Board has jurisdiction to govern and guide the conduct of local government officers or employees who are not otherwise regulated by a county or municipal code of ethics promulgated in accordance with the Act.

The Legislature found that even the perception of a conflict between the private interests and the public duties of a government officer or employee can imperil the public's trust and confidence. N.J.S.A. 40A:9-22.2c. N.J.S.A. 40A:9-22.5(d), as set forth above, prohibits a local government officer, such as respondent, from acting in his official capacity in any matter in which he 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. This prohibition codifies a long standing principle of common law, that is, that a public official is disqualified from acting in a matter in which he has a conflicting interest that may interfere with the impartial performance of his public duty. Wyzykowski v. Rizas, 132 N.J. 509, 523, (1993), citing Scotch Plains-Fanwood Bd. of Educ. v. Syvertsen, 251 N.J. Super. 566, 568 (App. Div. 1991).

In determining whether a particular interest is sufficient to disqualify, “[t]he 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.” Wyzykowski, supra, citing Van Itallie v. Franklin Lakes, 28 N.J. 258, 268 (1958). 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."

[Wyzykowski, supra, 132 N.J. at 523-24, quoting Graham v. United States, 231 U.S. 474, 480, 34 S.Ct. 148, 151, 58 L.Ed. 319, 324 (1913).]

Even so, the Court in Wyzykowski further explained that 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. Griggs v. Borough of Princeton, 33 N.J. 207, 219, (1960) (citing Aldom, supra, 42 N.J. Super. at 502). A conflicting interest arises when the public official has an interest not shared in common with the other members of the public. Id. 33 N.J. at 220-21. 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." LaRue v. Township of East Brunswick, 68 N.J. Super. 435, 448 (App. Div. 1961).

[Wyzykowski, supra, 132 N.J. at 524.]

In Griggs v. Princeton Borough, supra, 33 N.J. 207, the Court considered whether an employment relationship, even a limited one, is a sufficient connection between a public official and an outside entity such that the official's acting in an official capacity upon matters involving that entity constituted a conflict of interest in violation of the Code of Ethics, even where there was no allegation of actual corruption. The Court found that two professors associated with Princeton University who were also members of the local borough council voted on a matter involving a blighted area in which a

municipal improvements corporation owned a significant amount of property. The University held a controlling interest in the improvements corporation. The Court held that the professors' conduct violated the Ethics Law. Their interests as employees of the University, which itself had a significant interest in this matter of public concern upon which these council members voted, created a conflict. The Court said that

It is true that the prime interests of [the professor-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 for psychological influences cannot be ignored . . . We do not hold that these matters had an effect in the instant case . . . [n]evertheless, 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.

[Id. at 220.]

The Judiciary has applied the above common-law principles to several different types of conflict cases. These cases can be “distilled” into four types of conflicting “interests” that require disqualification: direct pecuniary interests, indirect pecuniary interests, direct personal interests, and indirect personal interests. Wyzykowski, supra, at 524-25 (citing Michael Pane, Conflict of Interest: Sometimes a Confusing Maze, Part II, New Jersey Municipalities, March 1980 at 8, 9). Regarding application of N.J.S.A. 40A:9-22.5(d), it may be stated plainly that this provision of the Local Government Ethics Law “demands that an officeholder discharge duties with undivided loyalty.” McDougall v. Weichert, 144 N.J. 380, 401 (1996). Specifically, “if the direct or indirect financial or personal involvement attaches to: (1) the officer or employee, (2) a member of the officer's or employee's ‘immediate family’ or (3) a ‘business organization’ in which the officer or employee has an ‘interest,’ this is sufficient to disqualify the officer or employee if it rises to the level that it ‘might reasonably be expected to impair his/her objectivity or independence of judgment.’” Martine v. Local Fin. Bd. 96 N.J.A.R. 2d (CAF) 111, 115 (footnotes omitted).

Martine was a member of the Borough Council that approved payments to Bergen Community Health Care (BCHC), for whom she worked as part-time registered nurse. The Board of Health had contracted with BCHC for the provision of health services to the Borough. Bills rendered for services provided were approved by vote of the Borough Council and Martine voted to approve the bills. The Board determined that she had violated N.J.S.A. 40A:9-22.5(d). Martine appealed and Chief Administrative Law Judge Harned upheld the Board's decision. She found that Martine had a direct financial interest based upon her employment relationship with BCHC and that such an interest could reasonably be expected to impair Martine's objectivity and independence in the exercise of her Council duties. The Judge 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 themselves and as to whether the services provided by her employer to the Board of Health satisfied its contractual obligations. Martine, supra, at 113. The Board adopted Chief Judge Harned's determination.

In Lawrence J. Tighe, Jr. v. Local Finance Board, 97 N.J.A.R. 2d (CAF) 76, Tighe was a member of the Independence Township Board of Adjustment and was also the President and co-owner of Radio New Jersey, Inc., which owned and operated a local radio station. He was found to have acted in conflict with the Code of Ethics when he voted on a motion to approve a use variance and a site plan submitted by Bell Atlantic Mobil Systems, Inc. to construct a cellular telephone tower and utility building. Tighe had a financial interest with Bell, because Bell leased space on a transmission tower owned by Radio New Jersey, Inc. That lease contained an option for extensions for three additional five-year periods.

The Administrative Law Judge found that Tighe's financial involvement with Bell could not reasonably be expected to have impaired his objectivity or independence of judgment and that his actions were not in violation of N.J.S.A. 40A:9-22.5(d). The Judge stated that while he recognized that an actual conflict of interest was not necessary in order to prove any involvement that might reasonably be expected to impair objectivity or independence of judgment, nevertheless, it is minimally necessary to be able to articulate how or in what way that could occur. Tighe, supra, 97 N.J.A.R.

2d (CAF) at 78. The Board reversed. It found that Tighe's involvement with Radio New Jersey, Inc., which had much to gain if Bell renewed its lease, was an interest that could have reasonably been seen as affecting the undivided loyalty that N.J.S.A. 40A:9-22.5(d) demanded of Tighe. Thus, Tighe acted in violation of the Code of Ethics and the Board assessed a fine. Id. at 80-81. The Board made clear its view that once an involvement is shown, only a fanciful or nebulous potential for conflict will defeat the charge. Id. at 81.

In the present matter, it is undisputed that Kafton voted at a Township Committee meeting on February 26, 2001, to approve a bill payment to Bil-Jim Construction Company in the amount of \$36,157.50. It is also undisputed that Bil-Jim Construction was the recipient of services ordered by its attorney from Kafton's company, Pinnacle Title Agency, Inc., on March 28, 2000, and completed on August 9, 2001. Kafton emphasized that he abstained from voting on other Township Resolutions concerning Bil-Jim Construction, and he stated that his vote on February 26, 2001, to pay for Bil-Jim Construction's work that had already been approved and completed was an oversight. Kafton further argues that Pinnacle did its business on the relevant matter with the attorney for Bil-Jim Construction, and not directly with Bil-Construction.

There is no direct evidence to suggest that Kafton's vote on February 26, 2001, authorizing payment to Bil-Jim Construction in the amount of \$36,157.50, was anything but an oversight on his part. This is supported by the undisputed facts that well over a hundred bills were approved for payment at that meeting and that Kafton abstained from voting on several other Resolutions involving Bil-Jim Construction on other dates. However, I do not accept Kafton's contention that Pinnacle did not have a business relationship with Bil-Jim Construction. The attorney who ordered and paid for the services from Pinnacle was acting on behalf of Bil-Jim Construction. The title search Pinnacle performed was on behalf of Bil-Jim Construction and the title policy Pinnacle provided was for Bil-Jim Construction. I **FIND** that Pinnacle and Bil-Jim Construction had a business relationship.

Bil-Jim Construction was a customer of Pinnacle Title Agency's services when Kafton voted to pay Bil-Jim Construction's bill for services rendered to Jackson Township. Based upon the undisputed facts, I **FIND** that the public could have reasonably questioned whether Kafton's ability to be objective was compromised, both in respect to the amount of the bills and to whether Bil-Jim Construction had met its obligations to the Township. Thus, I further **FIND** that Kafton's vote on February 26, 2001, authorizing payment to Bil-Jim Construction in the amount of \$36,157.50, was an act in his official capacity in a matter where a business organization in which he had an interest, Pinnacle Title Agency, had an indirect financial involvement that might reasonably be expected to impair his objectivity or independence of judgment. I **CONCLUDE** that Kafton's action constitutes a violation of N.J.S.A. 40A:9-22.5(d) of the Local Government Ethics Law. While the potential for conflict was neither nebulous nor fanciful, Kafton's action was nonetheless inadvertent. Under these circumstances, the appropriate administrative penalty is to assess and then waive a fine in the amount of \$100.

I so **ORDER**.

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 days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **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.

April 26, 2007

DATE

JOSEPH F. FIDLER, ALJ

Date Received at Agency:

Mailed to Parties:

DATE

OFFICE OF ADMINISTRATIVE LAW

EXHIBITS

For Petitioner:

- P-1 Notice of Investigation dated February 25, 2005
- P-2 Response to Notice of Investigation dated March 9, 2005
- P-3 Notice of Violation dated July 18, 2005, with attachments
- P-4 2001 Annual Financial Disclosure Form for Michael Kafton
- P-5 Jackson Township Committee meeting minutes, February 26, 2001
- P-6 Letter from Michael Kafton to DAG Reynolds dated September 28, 2006

For Respondent:

None

WITNESSES

For Petitioner:

Erin Knoedler

For Respondent:

Michael Kafton