

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NOS. CFB 09702-06 and
CFB 09703-06
AGENCY DKT. NOS. LFB # 05-005 and
LFB # 05-009 (A)

DAVID MOSNER,

Petitioner,

v.

LOCAL FINANCE BOARD,

Respondent.

CONSOLIDATED

Daniel Reynolds, Deputy Attorney General, for petitioner (Anne Milgram,
Attorney General of the State of New Jersey, attorney)

Gary A. Kraemer, Esq., for respondent

Record Closed: November 26, 2007

Decided: December 20, 2007

BEFORE **BARRY E. MOSCOWITZ**, ALJ:

STATEMENT OF THE CASE

Mosner, while serving as a member of the Andover Town Council, participated in discussions and voted on resolutions concerning procedural matters involving the police department when Mosner was facing criminal and civil charges. Mosner's actions on these procedural matters, however, were consistent with his sworn public duty. Nevertheless, did his actions constitute a conflict of interest? No. An interest is a conflicting one if it would tempt the official to depart from his sworn public duty.

PROCEDURAL HISTORY

On June 26, 2006, the Local Finance Board served Mosner with a notice of violation. The notice alleged that on March 10, 2004, Mosner was involved in a conflict of interest under N.J.S.A. 40A:9-22.5(d). The alleged conflict was his participation in a discussion at a town council meeting concerning the appointment of the chief of police and the removal of two police officers from the streets under the DARE program. The notice explained that this participation was a violation because Mosner's brother was a police officer in the police department and was one of the two police officers to be removed from the streets under the DARE program. The underlying complaint explained that this participation was a violation because Mosner was a defendant in a criminal and in a civil complaint both pending in Superior Court.

The notice of violation also alleged that on March 24, 2004, Mosner was involved in another conflict of interest under N.J.S.A. 40A:9-22.5(d). The alleged conflict was his "official actions" on a resolution at a town council meeting to appoint Phillip A. Coleman as chief of police. The notice explained that these actions were violations because Mosner's brother was a police officer in the police department. The underlying complaint again stated that this was a violation because Mosner was a defendant in a criminal and in a civil complaint both pending in Superior Court.

On June 26, 2006, the Local Finance Board served Mosner with a second notice of violation. The notice alleged that on June 22, 2005, Mosner was involved in yet another conflict of interest under N.J.S.A. 40A:9-22.5(d). The alleged conflict was his participation in the discussion at a town council meeting and vote on a resolution to "rescind the previous meeting's resolution to interview for lieutenant and sergeant based upon the possible reinstatement of Lieutenant Monaco after the civil service period and to wait to do any promotions or temporary promotions until the civil service period and additional 30 day period has run, to protect the town from any possible liability of litigation."

The notice explained that this was a violation because Mosner had been indicted for assault with a motor vehicle and for leaving the scene of an accident and had received advice from the Township attorney not to participate in any discussions or votes concerning police personnel. The underlying complaint again stated that this was a violation because Mosner was a defendant in a criminal and in a civil complaint both pending in Superior Court.

On July 5, 2006, Mosner requested an administrative hearing. On September 11, 2006, these matters were transmitted to the Office of Administrative Law as contested cases under N.J.S.A. 52:14B-2(b). On September 6, 2007, I heard these matters. On November 26, 2007, I received the final post-hearing submissions and closed the record.

STIPULATION OF FACTS

1. The Petitioner David Mosner served as a member of the Township Committee for the Township of Andover in the County of Sussex during the period from January 1, 2004, to December 31, 2006.
2. David Mosner's brother, Rod Mosner, was employed as a member of the Police Department of the Township of Andover in the County of Sussex during the period from January 1, 2004, to December 31, 2005.
3. Rod Mosner is not an "immediate family member" of David Mosner within meaning of the term "member of immediate family" as that term is defined in N.J.S.A. 40A:9-22.3(i). Rod Mosner is thirty-seven years old, married with two children and maintains his own separate household.
4. The Police Department of the Township of Andover had a total of twelve police officers in 2004.
5. A criminal complaint was filed against David Mosner by Detective Joseph Costello of the Sussex County Prosecutor's Office in the Superior Court in Sussex County on December 18, 2003, charging David Mosner with driving a vehicle recklessly and causing serious bodily injury to David McInnes and also with knowingly leaving the scene of an accident. The

investigation of the incident was initiated and conducted under the auspices of the Sussex County Prosecutor's Office. A copy of this complaint is attached hereto.

6. A civil complaint was filed against David Mosner by David McInnis in the Superior Court in Sussex County alleging negligence and severe bodily injuries in David Mosner's operation of a snowmobile.
7. David Mosner, while serving as a member of the Township Committee of the Township of Andover, participated in discussions conducted by the Township Committee during a meeting of the Township Committee on March 10, 2004, with regard to the appointment of a Chief of the Police Department of the Township of Andover. David Mosner's participation in such discussions is reflected on pages 6 and 7 of the minutes of the Township Committee's meeting on March 10, 2004. A copy of these minutes is attached hereto.
8. David Mosner, while serving as a member of the Township Committee of the Township of Andover, participated in discussions conducted by the Township Committee during a meeting of the Township Committee on March 10, 2004, concerning the assignment of two police officers, one of whom was David Mosner's brother, to the Township Police Department's DARE Program. David Mosner's participation in such discussions is reflected on pages 6 and 7 of the minutes of the Township Committee's meeting on March 10, 2004. A copy of these minutes is attached hereto.
9. On March 16, 2004, Joel L. Shain, Esq., (Shain) the municipal attorney for the Township of Andover, issued an opinion letter with regard to the participation of David Mosner in matters pending before the Township Committee relating to the Township's Police Department. A copy of this March 16, 2004, opinion letter is attached hereto.
10. David Mosner, while serving as a member of the Township Committee of the Township of Andover, participated in certain actions taken by the Township Committee during a meeting of the Township Committee on March 24, 2004 relating to Resolution # 2004-64, providing for the appointment of Phillip A. Coleman as Chief of the Police Department of

the Township of Andover. More specifically, David Mosner participated on three separate occasions with regard votes relating the Resolution # 2004-64. First, David Mosner voted “no” on a motion to approve Resolution # 2004-64. Then, David Mosner voted “yes” on a motion to amend the agenda for the March 24, 2004, meeting of the Township Committee in order to include consideration of Resolution # 2004-64 as part of the agenda for that meeting. Third, David Mosner abstained from voting on a second motion to approve Resolution # 2004-64. David Mosner’s votes on these three motions are reflected on pages 3 and 4 of the minutes of the Township Committee’s meeting on March 24, 2004. A copy of these minutes is attached hereto.

11. In an opinion letter provided to the Township Committee on June 13, 2005, Richard A. Rafanello, Esq., (Rafanello) advised the Township Committee that David Mosner was not precluded from voting on a resolution authorizing a subcommittee of the Township Committee to conduct an interview with potential candidates for the positions of sergeant and lieutenant. A copy of this opinion letter is attached hereto.
12. David Mosner, while serving as a member of the Township Committee of the Township of Andover, participated in discussions conducted by the Township Committee during a meeting of the Township Committee on June 22, 2004, with regard to the matters relating to the Police Department of the Township of Andover. More specifically, David Mosner participated in discussions regarding the staffing, shifts, overtime, vacations and promotional interviews for the positions of sergeant and lieutenant in the Township’s Police Department. Additionally, discussion occurred during the meeting of the Township Committee on June 22, 2004, regarding the opinion letter that had been issued by Joel L. Shain, Esq., regarding the conflict of interest of David Mosner in matters involving the Township’s Police Department. David Mosner’s participation in such discussions is reflected on pages 8, 9, 10, 11 and 12 of the minutes of the Township Committee’s meeting on June 22, 2004. A copy of these minutes is attached hereto.

13. David Mosner, while serving as a member of the Township Committee of the Township of Andover, took action during a meeting of the Township Committee on June 22, 2004, relating to a motion to rescind a resolution approved at a previous meeting of the Township Committee to conduct interviews with regard to the positions of lieutenant and sergeant in the Police Department of the Township of Andover. David Mosner's vote on this resolution is reflected on page 12 of the minutes of the Township Committee's meeting on June 22, 2004. A copy of these minutes is attached hereto.
14. Subsequent to the meeting of the Township Committee on June 22, 2004, several other opinion letter were provided to the Township Committee by Richard A. Rafanello, Esq., Shain's law partner and municipal counsel for the Township of Andover, with regard to the participation of David Mosner in matters pending before the Township Committee relating to the Township's police department. Copies of these opinion letter, dated June 27, 2005, July 12, 2005, and July 14, 2005, are attached hereto.
15. The Township of Andover is a small municipality with a population of 6300 and is located in a rural area in Sussex County.
16. Richard A. Rafenello, Esq., forwarded a letter to the Local Finance Board on July 29, 2005, to request an advisory opinion regarding a number of issues relating to the participation of David Mosner in voting on matters relating to the Andover Township Police Department. A copy of this letter is attached hereto. Susan Jacobucci, Chair of the Local Finance Board, forwarded a letter to Rafenello on November 4, 2005, to respond to the request in Rafenello's July 29, 2005, letter. A copy of this letter is attached hereto.

CONCLUSIONS OF LAW

March 10, 2004

First, Mosner is alleged to have been involved in a conflict of interest under N.J.S.A. 40A:9-22.5(d) for participating in a discussion at a town council meeting concerning the appointment of the chief of the police and the removal of two police officers from the streets under the DARE program at a time when Mosner's brother was a police officer in the department, his brother was one of the police officers to be removed from the streets under DARE program, and Mosner was the defendant in a criminal and in a civil complaint both pending in Superior Court.

Under N.J.S.A. 40A:9-22.5(d), no local government officer shall act in his official capacity when he has an interest or involvement that might reasonably be expected to impair his judgment:

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.

To be violation, the participation must have been part of the deliberative process or it must have affected the deliberative process. Szoke v. Zoning Bd. of Adjustment, 260 N.J. Super. 341, 343 (App. Div. 1992).

On this date, Mosner's participation was not part of the deliberative process nor did it affect the deliberative process because no deliberation took place. In other words, Mosner's participation was not in consideration of a vote. In fact, no resolution was even presented. Therefore, no conflict exists here.

In addition, Mosner's brother was not a member of Mosner's "immediate family" as N.J.S.A. 40A:9-22.3 defines it. Under that statutory provision, an "immediate family member" is "the spouse or dependent child of a local government officer or employee residing in the same house." In this case, Mosner's brother is neither his spouse, dependent child, nor employee residing in his house – a fact to which the parties also stipulated. Therefore, no conflict exists here either.

Given this analysis, I **CONCLUDE** that Mosner did not violate N.J.S.A. 40A:9-22.5(d) when he participated in discussions at a town council meeting on March 10, 2004, concerning the appointment of the chief of police and the removal of two police officers from the streets under the DARE program.

March 24, 2004

Second, Mosner is alleged to have been involved in a conflict of interest under N.J.S.A. 40A:9-22.5(d) for taking "official actions" at a town council meeting on a resolution to appoint Phillip A. Colman chief of police at a time when Mosner's brother was a police officer in the department and Mosner was a defendant in a criminal and in a civil complaint both pending in Superior Court.

A review of the minutes reflects that Mosner voted two times on procedural matters. The first was on a resolution to promote the chief of police from provisional status to permanent status. Mosner voted no because the resolution was not on the agenda. The second was on a resolution to put the matter on the agenda. Mosner voted yes to accomplish this. Mosner did not vote on the substantive resolution. He abstained.

As the New Jersey Supreme Court has noted, an interest is a conflicting one depending upon the circumstances of the case. Wyzykowski v. Rizas, 132 N.J. 509, 523 (1993). "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." Ibid. (citing Van Itallie v. Franklin Lakes, 28 N.J. 258, 268

(1958)). The decisive factor is when the public official has an interest not shared with other members of the public. Id. at 524.

On this date, Mosner's procedural votes could not reasonably be interpreted to show that he had the likely capacity to depart from his sworn public duty. In fact, his procedural votes reflect that he upheld his sworn public duty by ensuring that the Township committee followed procedure to avoid the invalidation of any resolution. Indeed, this is an interest he shares with public. Therefore, no conflict exists here.

And again, Mosner's brother is not a member of his immediate family as statutorily defined, so no conflict exists here either.

Given this analysis, I **CONCLUDE** that Mosner did not violate N.J.S.A. 40A:9-22.5(d) when he voted on procedural resolutions at a town council meeting on March 24, 2004, concerning the appointment of the chief of police.

June 22, 2005

Finally, Mosner is alleged to have been involved in a conflict of interest under N.J.S.A. 40A:9-22.5(d) for participating in the discussion at a town council meeting and then the vote on a resolution to "rescind the previous meetings resolution to interview for lieutenant and sergeant based upon the possible reinstatement of Lieutenant Monaco after the civil service period and to wait to do any promotions or temporary promotions until the civil service period and additional 30 day period has run, to protect the town from any possible liability of litigation."

The stipulation of facts states that Mosner was advised by the Township attorney that he could vote on this resolution. Moreover, a review of the minutes reflects that Mosner participated in the discussion concerning the appointment of a subcommittee to interview for lieutenant and sergeant and then voted no on the procedural resolution to rescind the resolution to appoint that subcommittee. Mosner was not a member of that subcommittee.

According to the New Jersey Supreme Court, four prerequisites must be met to assert the affirmative defense that one relied upon the advice of counsel. First, the advice must have been received before one relied upon it; second, the advice must have been received from someone who had the authority to give it; third, the advice must have been based upon full information; and fourth, the advice must have been followed. In re Zisa, 385 N.J. Super. 188, 198-99 (App. Div. 2006).

On this date, Mosner received the advice from the Township attorney that he could participate in discussion concerning the appointment of a subcommittee to interview for lieutenant and sergeant before he voted on the resolution. Moreover, the Township attorney gave the advice in an opinion letter that contained full information. Therefore, Mosner had a right to rely on the advice.

In addition, Mosner's procedural vote could not reasonably be interpreted to show that he had the likely capacity to depart from his sworn public duty. In fact, his procedural vote once again reflects that he upheld his sworn public duty by ensuring that a subcommittee was established to interview for lieutenant and sergeant. As such, this is yet another interest he shared with the public. Since Mosner was not on the subcommittee, no conflict exists here.

Given this analysis, I **CONCLUDE** that Mosner did not violate N.J.S.A. 40A:9-22.5(d) when he participated in the discussion at a town council meeting on June 22, 2005, and then voted on a resolution concerning the establishment of a subcommittee to interview for lieutenant and sergeant.

ORDER

Based upon the stipulation of facts and conclusions of law, I **ORDER** that the ethics charges against Mosner be **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 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, P.O. 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 20, 2007 _____

DATE

BARRY E. MOSCOWITZ, ALJ

Date Received at Agency: _____

Mailed to Parties:

DATE

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OFFICE OF ADMINISTRATIVE LAW

APPENDIX

Witnesses

For Petitioner

David Mosner

For Respondent

None

Exhibits

Joint:

J-1 Stipulation of Facts