

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CFB 06736-06S

AGENCY DKT. LFB #05-010

LOCAL FINANCE BOARD,

Petitioner,

v.

ROBERT SHOCKLEY,

Respondent.

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

William J. Caldwell, Esq., for respondent (Carter, Van Rensselaer & Caldwell, attorneys)

Record Closed: January 19, 2007

Decided: February 1, 2007

BEFORE **JEFF S. MASIN**, ALJ:

The Local Finance Board (“LFB”) charges that Robert Shockley, a member of the Township Committee of the Township of Franklin, Hunterdon County, violated N.J.S.A. 40A:9-22.5 (d) by “acting” in his official capacity in a “matter where he, a member of his immediate family . . . has an interest, or has a direct or indirect financial or personal involvement that might reasonably be expected to impair his objectivity or independence of judgment.” More specifically, it is stipulated that Mr. Shockley, acting through counsel, filed a Tort Claim Notice on January 17, 2005, on behalf his son, a minor, against the Board of Education, Franklin Township Elementary School and certain employees of the Board or school district, concerning an alleged assault by students upon his son. This Notice advised that he sought approximately \$500,000 for severe emotional distress, medical and psychological costs and attorney’s fees and costs. It is asserted that this Notice predated the Board’s consideration of the school Board’s budget for the fiscal year 2005-2006, which the board reviewed after the voters of Franklin Township voted down the board’s proposed budget on April 19, 2005. The Board and the Committee met at a joint public meeting on May 10, where the budget

was discussed and Mr. Shockley was allegedly an active participant. The board then met at its regular meeting on May 12 and adopted a resolution which cut funds from the school budget. Mr. Shockley abstained from this vote, but comments he made at that meeting showed his detailed involvement on behalf of the Board in negotiating a resolution of the budget issue. The LFB received a complaint on June 30, 2005, alleging that Mr. Shockley had violated the Ethics law. It issued a Notice of Violation to Mr. Shockley on May 18, 2006, in which it imposed a \$100 fine upon Shockley. However, as it found that he had acted in good faith reliance upon legal advice received from the Franklin Township attorney, it waived the fine. Mr. Shockley requested a hearing and the matter was transferred to the Office of Administrative Law on September 15, 2006. A hearing was held on December 5, 2006, and thereafter a brief was received from respondent. The record closed on January 19, 2007.

The transcript of the joint meeting of the Township Committee and the Board of Education held on May 10, 2005, includes comments made in connection with the defeated school budget. Mr. George Burdick raised the question as to whether it was appropriate to dismiss Mr. Shockley from the meeting due to his "having a law suit against" the Board. However, Mayor McGeary stated that Shockley would remain. There is no reference in these minutes to any comments made by Mr. Shockley during the public session. There was a short Executive session held for approximately eleven minutes. The minutes of the regular Township Committee meeting on May 12, 2005, show that Mr. Shockley was present for the meeting. Mayor McGeary reported that after the joint session held on May 10, there was a dialog and an agreement was reached that satisfied the school board and would not impact the children negatively. Resolution 2005-52 was read and then voted upon. Mr. Shockley is listed as having abstained from this vote, which resulted in the adoption of the Resolution. The minutes reflect that several members of the public commented unfavorably concerning the amount of the budget reduction. Thereafter, members of the Township Committee commented upon the public comments and included in these comments was comment attributed to Mr. Shockley, who

wanted to make it clear that in now (sic) way was the dollar amount reduction in the budget pushed down anybody's throat. He said he negotiated this settlement and he does consider it a settlement. There

were 2 options available: come to a dollar amount agreement that everyone could live with or let it go to the State. He commented on having 2 children in the school and a reason to care about what happens in the school. His personal feeling is that he does not want the budget to go to the State and that is why he asked the Mayor if he could take the lead to try to negotiate an acceptable agreement. Without going into details re how it was reached, a settlement was reached. If the school board was concern by the school board or if there was negativity or dissatisfaction with the settlement, he said they had the opportunity. He was charged with the settlement, the Committee supported him, the person he negotiated with from the Board of Education said that he had the same authority to negotiate with the township. . . .

[Minutes, Franklin Twsp. Comm. Regular Meeting, 5/12/05, page 7 & 8]

There are additional comments by Mr. Shockley attributed to him in the Minutes, but these simply reinforce that he was the chief representative and negotiator for the Committee with the School Board concerning the defeated budget.

On April 7, 2006, in response to the Local Finance Board's letter of March 29, 2006, seeking a response from Mr. Shockley regarding the alleged ethical violation, William J. Caldwell, Esq., of the law firm of Carter, Van Rensselaer & Caldwell, attorney for the Township of Franklin, wrote to Susan Jacobucci, Chair of the Local Finance Board, to advise that Mr. Shockley had disclosed to him the existence of the Tort Claim Notice filed by Mr. Shockley's attorney and had sought Mr. Caldwell's guidance "regarding the fulfillment of his statutory duties as a member of the Township Committee." Mr. Caldwell wrote that he advised Shockley that he "believed that he could participate. "

Following the hearing, I inquired of counsel whether the Board was self-insured or carried insurance coverage for the type of liability asserted in the Tort Claim Notice. By letter of January 15, 2007, Mr. Caldwell responded that the Board is insured for such liabilities.

Applicable Statutory Provisions

N.J.S.A. 40A:9-22.5 provides

Local government officers or employees under the jurisdiction of the Local Finance Board shall comply with the following provisions:

. . . .

d. 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;

N.J.S.A. 18A:22-37 reads,

If the voters reject any of the items submitted at the annual school election, the board of education shall deliver the proposed school budget pursuant to section 5 of P.L.1996, c.138 (C.18A:7F-5) to the governing body of the municipality, or of each of the municipalities included in the district within two days thereafter. The governing body of the municipality, or of each of the municipalities, included in the district shall, after consultation with the board, and by May 19, determine the amount which, in the judgment of the body or bodies, is necessary to be appropriated for each item appearing in the budget, pursuant to section 5 of P.L.1996, c.138 (C.18A:7F-5) and certify to the county board of taxation the totals of the amount so determined to be necessary for each of the following:

- a. General fund expenses of schools; or
- b. Appropriations to capital reserve account.

Within 15 days after the governing body of the municipality or of each of the municipalities included in the district shall make the certification to the county board of taxation, the board of education shall notify the governing body or bodies if it intends to appeal to the commissioner pursuant to section 5 of P.L.1996, c.138 (C.18A:7F-5) the amount which the body or bodies determined to be necessary to be appropriated for each item appearing in the proposed school budget.

Discussion

Conceding that the term “act” used in the statute has a broad meaning that goes beyond the act of voting, and thereby apparently agreeing that the fact that Mr. Shockley abstained from the May 12 vote on the resolution is not in and of itself a defense to the charge, Mr. Shockley defends his actions on two grounds. First, he argues that there was no conflict of interest in his actions regarding the Committee’s review of the budget and, second, that the “advice of counsel” which he received from

Mr. Caldwell after full disclosure of the Tort Claim Notice that counsel believed it was proper for him to participate insulates him from liability for any alleged ethical violation.

Was there a conflict?

Mr. Shockley contends that his involvement in the school budget review neither advanced nor retarded his interest regarding the Tort Claim Notice. His interest in regard to the defeated budget “was no different than other members of the public.” The budget review did not include any consideration of his claim. While a conflict of interest may arise from either a direct or an indirect pecuniary interest or a direct or indirect interest of a non-financial nature, Wyzykowski v. Rizas, 132 N.J. 509 (1993), the likelihood of the alleged conflict must be more than a fanciful possibility, Aronowitz v. Planning Board, 257 N.J. Super. 347 (Law Div. 1992).

Mr. Shockley had formally notified the Board of Education that his son had a claim against the Board for damages allegedly sustained due to a lack of proper supervision by school district employees. This claim was quite substantial in amount. Significantly, the Board was insured for this type of liability. Thus, there is no indication that the budgeted funds would have been encumbered if such liability were determined, unless perhaps the ultimate recovery (most likely after a lawsuit) exceeded the policy limits. (The record does not reveal the coverage limits). The purpose of the Tort Claim Notice is to provide an opportunity for the public entity notified of such a potential claim to evaluate the claim and to determine whether to attempt to resolve the claim before it becomes a lawsuit. Thus, at the time that the Township Committee and the School Board met to attempt to deal with the defeated school budget, the School Board was aware that Mr. Shockley, a member of the Township Committee charged by law to review that defeated measure, a person who took a very active, indeed, seemingly, a lead position for the Committee in the discussions, was a person who was seeking substantial monies from the Board as the representative of his minor child. To an extent this very fact could have possibly asserted some influence *upon the Board* in its dealings with Shockley about the budget, but the test here is whether his interest might reasonably be expected to impair his objectivity or independence of judgment. Given that the budget itself would not appear to have been subject to encumbrance for any

liability that might eventually be determined, I cannot readily conclude that the situation did present such a danger of a loss of objectivity or independence of judgment. On the other hand, I readily acknowledge that there is here something that does not seem quite right, and it would have been better for Mr. Shockley to have completely refrained from any involvement in the discussion about the budget. But I cannot conclude that he committed an offense against N.J.S.A. 40A:9-22.5 (d). I **CONCLUDE** that no violation occurred, but as will be seen, even if a violation is found, Mr. Shockley cannot be held liable for that offense.

Advice of Counsel

Mr. Shockley asserts that even if there was a conflict of interest resulting from the existence of the Tort Claim Notice which made his involvement in the Board's consideration of the defeated budget improper, he is protected from condemnation for his actions because he relied upon the advice of counsel who advised him that his involvement was proper. The Appellate Division recently considered the advice of counsel defense in In re Zisa, 385 N.J. Super. 188 (App. Div. 2006). There a municipal official relied upon the advice of the City Attorney that he did not have a conflict of interest regarding an award of a paving contract. The administrative law judge and the Local Finance Board concluded that he violated the Local Government Ethics Law, specifically in regard to the N.J.S.A. 40A:9-22.5(d), the very section at issue here. The Appellate Division, relying in part on the decision of the Executive Commission on Ethical Standards in In re Howard, 93 N.J.A.R. 2d (Vol.5A) 1 (Executive Comm'n on Ethical Standards), aff'd as modified, 94 N.J.A.R.2d (Vol.5A) 1 (App. Div. 1994), held that Zisa was entitled to rely upon the advice he had received and therefore did not violate the Ethics Law.

In Howard, the Executive Commission found that there were four prerequisites to the defense of advice of counsel. These are

1. That the approval or advice was received prior to the action being taken.
2. That the individual who offered the advice or approval relied upon possessed authority or responsibility with regard to ethical issues.

3. That the individual seeking advice or approval made a full disclosure of all pertinent facts and circumstances.

4. That the individual comply with the advice received, including any restrictions it might contain.

[In re Howard, supra. at 14; In re Zisa, 385 N.J. Super. at 198-199.]

In this case, I **FIND** that Mr. Shockley sought advice from Mr. Caldwell, the attorney for the Township. He did so before the May 10 joint meeting. He disclosed the existence of the Tort Claim Notice. Caldwell advised him that his participation in the Committee's consideration of the defeated budget was proper. He did not advise Shockley of any restrictions on his participation and did not advise him that he should refrain from voting on the Committee Resolution regarding the budget, but Shockley chose to abstain out of an abundance of caution. Nevertheless, to the extent that he participated in the discussions that led to the determination of the outcome of the Committee's review, as was clearly disclosed in his comments at the regular Committee meeting on May 12, I **FIND** that he did so with the advice from the Township Attorney that he could ethically participate. I **CONCLUDE** that Mr. Shockley's actions met the four criteria set forth in Howard and cited with approval in Zisa. Thus, even to the extent that a conflict may have existed, I **CONCLUDE** that he is protected from any liability under the Ethics Law.

I **CONCLUDE** that Mr. Shockley is not liable for any violation of the statute. The charge is **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.

February 1, 2007

DATE

JEFF S. MASIN, ALJ

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

February 1, 2007

DATE

Mailed to Parties:

DATE
mjm

OFFICE OF ADMINISTRATIVE LAW

EXHIBIT LIST

FOR THE PETITIONER:

- P-1 Minutes Franklin Township Committee Special Meeting Tuesday, May 10, 2005
- P-2 Minutes Franklin Township Committee Regular Meeting, Thursday, May 12, 2005
- P-3 Request for Public Records dated 9/29/05, tort claim filed by Robert Schockley
- P-4 Letter dated 4/7/06 from William J. Caldwell to Susan Jacobucci
- P-5 Letter dated 3/29/06 from Susan Jacobucci to Robert Schockley

FOR THE RESPONDENT:

None.



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State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS

JON S. CORZINE
Governor

SUSAN BASS LEVIN
Commissioner

RE: FINAL AGENCY DECISION

OAL DOCKET NO. CFB 06736-06S

AGENCY REF. NO. LFB 05-010

LOCAL FINANCE BOARD,
Petitioner

VS.

FINAL AGENCY DECISION

ROBERT SHOCKLEY,
Respondent

Regarding the above-referenced case which was sent, as a contested case, to the Office of Administrative Law, pursuant to N.J.S.A. 52:14B-1 and N.J.S.A. 52: 14F-1 et seq., the Local Finance board has **adopted** as its Final Decision the Initial Decision of the Administrative Law Judge, which ordered that the complaint be dismissed.

3/24/07
DATE

SUSAN JACOBUCCI, CHAIR
LOCAL FINANCE BOARD

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