

INITIAL DECISION

OAL DKT. NO. CFB 2317-00 &
CFB 2318-00

(CONSOLIDATED)

AGENCY DKT. NO. LFB-A99-
001

**MICHAEL HEGARTY AND JOSEPH
HOFF,**

Petitioners,

v.

**TOWNSHIP OF OLD BRIDGE ETHICS
BOARD, DIVISION OF LOCAL
GOVERNMENT SERVICES,
DEPARTMENT OF COMMUNITY
AFFAIRS,**

Respondent.

Michael Hegarty, petitioner, *pro se*

William L. Doyle, Esq., for petitioner Joseph Hoff (Woliansky & Doyle, attorneys)

James Cooney, Esq., for respondent (Weissman & Mintz, attorneys)

Record Closed: March 13, 2001

Decided: April 27, 2001

BEFORE **JOSEPH LAVERY**, ALJ:

STATEMENT OF THE CASE

Petitioners, Michael Hegarty and Joseph Hoff, bring these consolidated appeals from a \$100 fine imposed on each by the Township of Old Bridge Board of Ethics (Ethics Board).

The respondent Old Bridge Township Ethics Board contests the appeals.

Today's initial decision overturns the adjudication of the Old Bridge Township Ethics Board.

PROCEDURAL HISTORY

These cases were declared contested and filed in the Office of Administrative Law (OAL) on March 28, 2000. Prehearing convened on September 21, 2000, and a prehearing letter order issued on September 22, 2000. Subsequently, a hearing convened on December 7, 2000, followed by a letter-order of the same date in which the intent to submit motions for summary decision was confirmed. Thereafter, briefs, accompanying motions and stipulations were filed, the last of which arrived in the OAL on March 13, 2001. On that date, the record closed.

ANALYSIS OF THE RECORD

Background:

The material facts in this case are not in dispute, and the parties have reduced them to jointly executed stipulations, quoted in their entirety as follows:

I. ESTABLISHMENT OF LOCAL ETHICS BOARD

1. By Ordinance No. 61-94 (“Ordinance”), effective October 25, 1994, the Township of Old Bridge (“Township”) established the respondent Local Ethics Board pursuant to *N.J.S.A. 40A:9-22.1, et seq.* (J1-9).¹

2. The Ordinance further stated, in part, that the Ethics Board would be comprised “of six members who are residents, at least three of whom shall be clergy members,” and that “no more than three members of the Board shall be of the same political party” (J4).

3. The Ordinance further stated, in part, that the Ethics Board member appointments were for five years, “except that of the members initially appointed, two of the clergy members shall be appointed to serve for a term of five years, one member shall be appointed to serve for a term of four years, and the remaining members shall be appointed to serve for a term of three years.” (J4).

4. The Ordinance further stated, in part, that the Ethics Board, “shall promulgate by resolution a code of ethics for all officers and employees serving the Township. Officers and employees serving a Township independent authority shall be deemed to be serving the Township for purposes of this Section... ” (J5)

5. The Ordinance further stated, in part, “The code of ethics promulgated by the Board shall be either identical to the provisions set forth in *N.J.S.A. 40A:9-22.5* or more restrictive, but shall not be less restrictive.” (J6)

6. The Ordinance further stated, in part, that the Ethics Board had the power, “To initiate, receive, hear and review complaints and hold hearings with regard to possible violations of the municipal code of ethics...” and “To enforce the provisions of the code of ethics ... with regard to officers or employees serving the Township and to impose penalties for the violation thereof as authorized by this Section.” (J6-8)

7. The Ordinance further required that the Ethics Board, “... notify the officer or employee of the Township of Old Bridge against whom the complaint was filed of the nature of the complaint and the facts and circumstances set forth therein.” (J7)

¹J_ refers to the joint exhibits annexed hereto.

8. The Ordinance further required that, “ those charged with violations of the code of ethics be provided with the procedural rights afforded "under the ‘Administrative Procedures Chapter’ *N.J.S.A. 52-14 B-1 et seq.*" and that they "be accorded due process of law, including but not limited to", right to counsel, pretrial discovery, right to take testimony, right to reasonable notice of hearing, right to subpoena persons and documents, right to make a stenographic record of the hearing, and right of examination and cross examination. (J5)

9. By letter of October 5, 1994, the Ordinance was submitted by the Township to the State of New Jersey Department of Community Affairs, Local Finance Board (“Local Finance Board”) (J129)

II. ADOPTION OF LOCAL ETHICS CODE

10. The Ethics Board was appointed with a composition as designated in the Ordinance and in 1995 adopted by resolution its "Ethical Standards for Officers and Employees of The Township of Old Bridge" (“Local Ethics Code”), and submitted it for approval to the Local Finance Board under *N.J.S.A. 40A:9-22.21* (J10-13) by letter dated July 15, 1996 (J130-132, J10-13).

11. By letter dated May 30, 1997, the State Local Finance Board advised the Ethics Board that it had approved of the Local Ethics Code (J14).

III. HIRING OF MR. HOFF BY MUNICIPAL UTILITIES AUTHORITY

12. Mr. Hoff was appointed on October 28, 1996 as a sitting Commissioner (First Alternate) of the Old Bridge Municipal Utilities Authority (“MUA”), with an effective term of October 29, 1996 through January 31, 1999 (J15).

13. Mr. Hegarty was appointed on January 1, 1998 as a sitting Commissioner of the MUA, with an effective term from February 1, 1998 through January 31, 2003 (Id).

14. At 8:53 p.m. at its October 7, 1998 meeting, the MUA went into executive session to consider, among other things, personnel matters (J30).

15. Mr. Hoff, who remained a sitting Commissioner on that date, was not present, and did not participate, in the executive session (Id).

16. At 9:35 p.m., the MUA returned to public session, at which time Mr. Hegarty made a motion to hire Mr. Hoff for the position of Project Management/Construction Field Coordinator, at a salary not to exceed \$55,000.00 (J31-32).

17. The motion was approved by votes of Mr. Hegarty, and Commissioners Rocco Donatelli, Joseph Murray, Charles Searlaski and Robert Reck (J32).

18. Commissioner Thomas J. English and Mr. Hoff were absent during the vote (Id).

IV. FILING OF ETHICS COMPLAINT & PROCEEDINGS

19. The Complaint in this matter was filed by Peter A. Mannino ("Mr. Mannino"), by way of letter to the Ethics Board dated October 22, 1998 (J36-37).

20. The complaint named as parties Mr. Hoff and all of the MUA Commissioners who voted in favor of hiring Mr. Hoff to his position, including Mr. Hegarty (Id).

21. The complaint alleged that immediately prior to his hiring as an MUA employee, Mr. Hoff was a sitting commissioner of the MUA, and also a councilman of Old Bridge Township (Id).

22. The complaint further alleged that the hiring of Mr. Hoff was in violation of Sections B-3 and C of the Local Ethics Code, as well as State Ethics Code *N.J.S.A. 40A:9-22.5* alleging that these ethics codes set time limits by which councilmen and MUA commissioners must be out of office before they can seek employment with the MUA.

23. Finally, the complaint alleges that the individual MUA Commissioners violated the Local Ethics Code by voting to hire Mr. Hoff to his employment (Id).

24. By letter dated October 28, 1998, Douglas S. Crawford, Esq. ("Mr. Crawford"), entered his appearance as counsel on behalf of the MUA in this matter. (J43) Per Mr. Crawford's request, the Ethics Board provided him with a copy of the Local Ethics Code (J38). Mr. Crawford filed an answer to the complaint, which stated, in part, that the complaint presented "no viable claims against the [MUA] Commissioners" and that the "Commissioners, by merely voting, should not be subject to penalty, and there is no allegation that any Commissioner was in a conflict situation." Mr. Crawford further requested that a hearing be scheduled as soon as possible (J39-42).

25. Mr. Mannino had also forwarded his complaint to the State's Local Finance Board, for consideration by the State of any ethical violations, but by letter dated December 4, 1998, the Chairperson of the State Local Finance Board advised Mr. Mannino that the State would take no action on his complaint since Old Bridge Township had its own Local Ethics Board (J45).

26. By letter dated December 7, 1998, Mr. Mannino advised the Ethics Board of the State Local Finance Board's position and requested a reply to his complaint (J44).

27. By letter dated December 14, 1998, the Ethics Board requested clarification from MUA attorney Mr. Crawford as to whom he was representing on behalf of the MUA (J46).

28. By letter dated January 14, 1999, MUA attorney Mr. Crawford responded to the Ethics Board's request by indicating that he represented the individual members of the MUA, but not Mr. Hoff (J49).

29. By letter dated January 7, 1999, the Ethics Board advised Mr. Mannino that it did not have a quorum based upon the recent departure of one of its members and was temporarily unable to take any action on the Complaint (J47-48).

30. On February 10, 1999, a new member of the Ethics Board was sworn in, providing the required quorum (J50).

31. As of that date, the Ethics Board was comprised of Board Chair Eileen Tabert, and Board Members Rev. Eugene Schellberg, Rev. Michael A. Makara and Mr. John Muir with two vacancies (J51).

32. By its April 1, 1999 letter, the Ethics Board advised that it would take action on the pending complaint (J52).

33. By letter dated April 9, 1999, Mr. Crawford informed the Ethics Board that his law firm was no longer counsel to the MUA, and that Louis E. Granata, Esq. ("Mr. Granata"), was new counsel to the MUA and he was transferring the file to Mr. Granata (J53).

34. By letter dated May 19, 1999, the Ethics Board provided notice of a June 3, 1999 public meeting to review the allegations set forth in the complaint, and any other relevant information provided by the parties, to determine whether further action would be required by the Ethics Board as provided by *N.J.S.A. 40A:9-22.24* (J54).

35. By letter copied to Mr. Hoff dated May 21, 1999, Mr. Granata informed the Ethics Board that he was general counsel to the MUA, but had consulted with Mr. Hoff before Mr.

Hoff's appointment to the MUA and there was a conflict in the case for Mr. Granata. Mr. Granata requested that the June 3 meeting be adjourned until such time as special counsel was appointed by the MUA to participate in the matter. He also stated "It is my understanding that Mr. Hoff is in the hospital and may wish to participate to provide 'other relevant information that you outline in your letter'" (J56).

36. By letter dated May 27, 1999, the Ethics Board acknowledged receipt of Mr. Granata's May 21, 1999 letter and stated that "The Board has determined that it will meet on June 3, 1999, but anticipates going into executive session to discuss this matter with its counsel, as permitted under New Jersey Open Public Meeting Act *N.J.S.A. 10:4-12.*" It further stated that "No formal action will be taken at that time with respect to the pending ethics complaint. The Board has further determined to extend the time by which the parties may provide additional relevant information, up to and including June 18, 1999. Upon the Board's review of the complaint and any other relevant information, it will determine whether to proceed with the hearing or otherwise adjudicate the complaint as provided under *N.J.S.A. 4A:9-22.24*" (J57-58).

37. On June 3, 1999, the Ethics Board met in open session. Three members of the Ethics Board were present as well as its counsel and the complainant, Mr. Mannino. The counsel for the MUA and Mr. Hoff were not present. The Ethics Board requested that Mr. Mannino make a presentation. Mr. Mannino proceeded to make an unsworn presentation after which he was questioned by members of the Ethics Board. The Ethics Board then went into executive session and discussed the case. The chairperson of the Ethics Board directed its counsel to contact Mr. Granata and the MUA so that another meeting could be scheduled to hear the position of Mr. Hoff and the MUA members. Then counsel to the Ethics Board reminded the Board that Mr. Hoff and the MUA members had been notified of the meeting and were invited to attend and participate and could present written information in support of their respective positions. (J59-61).

38. By letter dated June 16, 1999, the Ethics Board advised Mr. Granata of the June 18, 1999 deadline for respondents to provide information concerning the complaint. The Board further advised Mr. Granata that if it did not receive any response by the respondents, it would proceed to rule on the matter based upon the information on hand (J62).

39. By letter dated July 11, 1999, Peter Chamas, Esq. ("Mr. Chamas") notified the Board that he had been appointed by the MUA as special counsel to handle this matter (J63).

40. By letter dated July 29, 1999, the Ethics Board advised that it would render its decision in this matter at an August 12, 1999 meeting and noted its understanding that Mr. Chamas would notify Mr. Hoff and the MUA commissioners of the meeting (J64-65).

41. By letter dated July 30, 1999, Mr. Chamas advised the Board that he had been retained to represent only the MUA Commissioners and not Mr. Hoff (J133).

42. By letter dated August 2, 1999, the Ethics Board notified Mr. Hoff of the August 12, 1999 meeting, and advised him that Mr. Chamas had informed the Ethics Board that he was not representing Mr. Hoff (J67).

43. By letter to the Ethics Board dated August 9, 1999, Mr. Hoff indicated that he had been away on business the previous week and just received the Ethics Board's August 2, 1999 letter regarding the August 12, 1999 meeting. He requested an adjournment of the scheduled meeting. He further indicated that who was his legal counsel had not been made clear to him until he received the Ethics Board's August 2, 1999 letter. He stated his request for "legal support" to the MUA had not been answered. He stated he needed to make arrangements with an attorney and time for that attorney to prepare the case. He requested postponement of 2 to 3 weeks.

V. DECISION OF ETHICS BOARD

44. The Ethics Board met on August 12, 1999, at 6:00 p.m. at the Township Municipal Building, for purposes of rendering its decision. Counsel for the Ethics Board, counsel for the MUA and Mr. Mannino were present. Neither Mr. Hoff nor members of the MUA were identified as being present. Counsel for the MUA stated that the purpose of the meeting was to render and vote on a proposed written decision in the matter which had been prepared prior to the meeting (J69-75).

45. In its decision, the Ethics Board made the following findings of fact:

- (1) Joseph G. Hoff was a sitting Commissioner of the MUA up until approximately October 7, 1998. He also was and is presently a sitting member of the Old Bridge Council.
- (2) On or about October 7, 1998, the MUA hired Mr. Hoff as a paid

employee, in the position of Building Coordinator, with an annual salary of approximately \$52,000.00, plus benefits.

- (3) Michael Hegarty, Rocky Donatelli, Joseph Murray, Robert Reck and Charles Serlaski are the current and/or former MUA Commissioners who voted to hire Mr. Hoff.
- (4) Mr. Hoff did not vote as a Commissioner with respect to the MUA's decision to hire him.

46. In its decision, the Ethics Board made the following conclusions of law:

The Local Ethics Code provides as follows, in pertinent part:

- b. Neither the Township of Old Bridge nor any independent local authority shall, for a period of two (2) years next subsequent to the termination of office of a member of that authority or member of the Township Council:
 - (1) award any contract which is not publicly bid to a former member of that authority or to a member of the Township Council.
 - (2) allow a former member of that authority or member of the Township Council to represent, appear for or negotiate on behalf of any other party before that authority; or
 - (3) employ for compensation, except pursuant to open competitive examination in accordance with Title 11A of the New Jersey Statutes and the rules and regulations promulgated pursuant thereto, any former member of that authority or any former member of the Township Council.

It shall be unethical for any person to vote to confer such benefits or for any person to receive such benefits. The restrictions contained in this subsection shall also apply to any business organizations which the former authority member or member of the Township Council holds an interest;

- c. No officer or employee shall use or attempt to use his or her official position to secure unwarranted privileges or advantages for himself or others;

The foregoing provisions prohibit the paid employment by an independent local authority, such as the MUA, of a former member of that authority for a period of two years, and prohibit a former member from accepting such employment. The Local Ethics Code also prohibits an individual from voting to confer such paid employment on a former member.

In the present case, Mr. Hoff violated the Local Ethics Code by accepting paid employment with the MUA within two years of his former membership on the MUA. The individual MUA Commissioners who voted to hire Mr. Hoff also violated the Local Ethics Code by employing him within the two-year period.

Since we have found violation of the Local Ethics Code, we find it unnecessary to pass on the question of whether respondents have also violated the State Ethics Code.

47. The Ethics Board issued the following Order as part of its decision:
- (1) Joseph G. Hoff is found to be in violation of the Local Ethics Code by accepting paid employment with the MUA within two years of his membership on the MUA.
 - (2) Michael Hegarty, Rocky Donatelli, Joseph Murray, Robert Reck and Charles Serlaski are found to be in violation of the Local Ethics Code by voting to employ Mr. Hoff within two years of his membership on the MUA.
 - (3) Each of the above-named respondents is issued a fine in the sum of \$100.00, as required by *N.J.S.A. 40A:9-22.10*.
 - (4) The Ethics Board recommends that the MUA take action to comply with this decision by immediately removing Mr. Hoff from his paid employment.
 - (5) The Ethics Board further recommends that the Old Bridge Township Council review this matter to determine whether it should take any appropriate action with respect to Mr. Hoff's actions, as a sitting council member, for violating the Local Ethics Code.

48. The Ethics Board's decision was approved by votes of Board Chair Tabert, and Board Members Makara and Muir. Board Member Schellberg was not present at the meeting (Id).

49. The Ethics Board served a copy of its decision on each person who was found to have violated the Local Ethics Code, as well as counsel for the MUA, the Township Attorney and the complainant (J76-83).

VI. MUA'S TERMINATION OF MR. HOFF'S EMPLOYMENT

50. The MUA terminated Mr. Hoff's employment on September 1, 1999, based upon the Ethics Board's finding that such employment was in violation of the Local Ethics Code (J84-92).

51. Prior to his termination from employment, Mr. Hoff earned \$961.80 in 1998 and \$38,886.06 in 1999 from his position of Project Coordinator (J93).

VII. FILING OF APPEALS BY MR. HOFF & MR. HEGARTY

52. On or about August 30, 1999, Mr. Hoff notified the Township Clerk of his intention to file an appeal from the Ethics Board's decision who in turn notified the Ethics Board (J94-95).

53. Subsequently, by letter dated September 10, 1999, Mr. Hoff's counsel filed with the Local Finance Board a letter outlining the bases of Mr. Hoff's appeal and supplemented his Notice of Appeal (J96-97) (without exhibits).

54. By letters dated September 2, 1999 to the Local Finance Board and the Ethics Board, the MUA's special counsel filed an appeal on behalf of Mr. Hegarty (J98-99).

55. By letters dated September 17, 1999 and January 19, 2000, the Local Finance Board acknowledged receipt of the appeals of Mr. Hoff and Mr. Hegarty, and requested that the Ethics Board transmit its complete file (J104-105).

56. By letter dated February 3, 2000, the Ethics Board provided the Local Finance Board with a copy of its file, and further provided copies to appellants' counsel (J108-112).

57. By letter dated February 4, 2000, the MUA provided the Local Finance Board with a statement of its position in this matter (J113-117).

58. By letter dated February 7, 2000, the Township Clerk provided to the Local Finance Board a copy of requested materials concerning the Ethics Board and this case (J118-119).

59. By letter dated March 20, 2000, the Local Finance Board notified the parties that this case had been referred to the Office of Administrative Law (J127-128).

60. Respondent requested that a *de novo* hearing be provided to appellants, but appellants declined this request.

These stipulations of fact were accompanied by exhibits which are encompassed within the pages, Exhibit J-1 (pages 1 through 132)².

Arguments of the Parties

Petitioner Hoff's argument:

Petitioner Joseph Hoff³ argues that the fine and findings of the Ethics Board should be dismissed for constitutional reasons. He argues that the Board itself, the code of ethics it enacted, and the proceedings undertaken against him were invalid, because they were unconstitutional.

According to petitioner, the Ethics Board itself is invalid under both the United States and New Jersey Constitutions because it is created by an ordinance which commands that three of its members shall be clergyman. This is at variance with the United States Constitution, at Article VI, the First Amendment, and also the New Jersey Constitution, at Article I. Moreover, the New Jersey Supreme Court has ruled that requirement of separation of church and state is identical to that prescribed by the United States Supreme Court in its interpretation of the United States Constitution. Where a tribunal lacks constitutional foundation because it has failed to separate church from state, our Court has held, it may not prosecute a violation of a state statute.

Additionally, as a matter of law, once the state Local Finance Board approves a municipal Ethics Board, as here, it is the municipal ethics code which must prevail, since that is the code which has been charged as having been violated. There can be no prosecution and finding of

² The references to documents are by the pages numbers which they encompass.

³ Petitioner Michael Hegarty did not submit a brief.

guilt under the state ethics code when the charge springs from application of the municipal ethics code. More specifically, the Local Finance Board may not now resort to the Local Government Ethics Law (*N.J.S.A* 40A:9-22.1 through - 22.25; the Act) to justify what has been unconstitutionally imposed by the Ethics Board through its municipal ethics code, which is the exclusive determinant.

Petitioner argues finally that respondent Board's reliance on the test of *Lemon v. Kurtzman*, 403 U.S. 602 (1971) is misplaced, and, in any event, that test has not been satisfied, because of the inherent religious entanglement created by the municipal ethics code's mandated appointment of three clergy members. That command will inevitably lead to the infusion of decisions with reasoning based on the tenets of religious faith.

Respondent Ethics Board's argument:

Respondent Ethics Board maintains that the joint stipulations of fact and exhibits reveal that there has been a violation of the municipal ethics code, as well as the code set forth in the Act⁴, and it is insufficient, in the Board's view, for petitioner, in this tribunal, to complain of the validity or the constitutionality of the Ethics Board and its municipal ethics code. That argument may only be pursued in Superior Court, which alone has jurisdiction.

Nevertheless, respondent argues, even if the substance of petitioners' complaints were considered here, that substance cannot carry the day. The reason is that the municipal ethics code makes clear that neither the Township of Old Bridge nor any independent local authority, such as the Old Bridge Municipal Utilities Authority (OMUA), may permit a former member of that authority or the township council to be employed by it for compensation, except through Title 11A of the Civil Service Act. Here, petitioner Hoff violated the municipal ethics code by assuming such employment within two years, and Mr. Hegarty, by voting for that appointment, was in violation as well. Notwithstanding that these actions were violations of a municipal ethics code, the ALJ may decide the issues nonetheless.

Addressing the substantive legal arguments, the Board contends first, that three of the four members who filled the six Ethics Board positions were present, and that was enough, since it constituted a quorum of all the members appointed.

Second, petitioners did not appear at the Ethics Board session during which the action was taken, after prior notice, and for that reason they cannot now object. The Board insists that it did provide due process to petitioner Hoff, since he did receive notice of the complaint against him. When given the opportunity, he did not provide the Board with sufficient information. The Ethics Board adds that petitioner had a year between the filing of the complaint and the decision by the Ethics Board within which to obtain counsel. He elected to retain counsel only after the Board rendered its decision. Moreover, over petitioner Hoff's objection, the Board pressed for a *de novo* hearing, which obviates the due process objections of either petitioner Hoff or petitioner Hegarty. Further, there is no *ultra vires* element in the Ethics Board's decision.

Third, the Ethics Board contends that neither the administrative law judge nor the Local Finance Board can resolve constitutional claims, because the necessary jurisdiction reposes only in the New Jersey Superior Court. The municipal ethics code was promulgated pursuant to applicable State law, and approved by the Local Finance Board. The creation of the Local Finance Board itself was through ordinance with a purely secular purpose, which neither advances nor inhibits religion. No selection of clergy was dependent on any particular religious affiliation, nor does the ordinance create excessive government entanglement with religion. Both the municipal ethics code and the Ethics Board itself satisfy the governing case law, beginning with *Lemon v. v. Kurtzman*, 403 U.S. 602 (1971).

As to the OMUA's decision to terminate petitioner Hoff from his appointment because of a conflict with the municipal ethics code, the Ethics Board itself has no such power to compel his removal. Likewise, it would have no power to require petitioners' reinstatement, were no ethical violation found before this tribunal. Neither the municipal ethics code nor the Act provides such authority.

⁴ *N.J.S.A* 40A:9-22.5

As to the past practice of appointments identical to that of petitioner Hoff, no part of the record confirms such a past practice, the Ethics Board argues. Whether or not that occurred, it would not justify an appointment now which has been found to be in conflict with the municipal ethics code.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Ripeness for Summary Decision:

This dispute is ripe for summary decision pursuant to *N.J.A.C. 1:1-12.5*. (b). That rule states:

The motion for summary decision shall be served with briefs and with or without supporting affidavits. The decision sought may be rendered if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law. When a motion for summary decision is made and supported, an adverse party in order to prevail must by responding affidavit set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding. If the adverse party does not so respond, a summary decision, if appropriate, shall be entered.

[*N.J.A.C. 1:1-12.5*; *See also, Judson v. Peoples Bank and Trust Co. of Westfield*, 17 *N.J.* 67, 73-75 (1954)]

Additionally, the facts must be considered in the light most favorable to the opposing party, *Boyer v. Anchor Disposal*, 135 *N.J.* 86 (1994).

Moreover, under the most recent guidelines delivered by our New Jersey Supreme Court, summary judgment is encouraged when the proper circumstances present themselves. *Brill v. Guardian Life Ins. Co. of America*, 142 *N.J.* 520, 541 (1995). The court there elaborated on its intent:

Under this new standard, a determination whether there exists a “genuine issue” of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party. The “judge’s function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.” *Liberty Lobby, supra*, 477 U.S. at 249, 106 S.Ct. at 2511, 91 L.Ed.2d at 212. Credibility determinations will continue to be made by a jury and not the judge. If there exists a single, unavoidable resolution of the alleged disputed issue of fact, that issue should be considered insufficient to constitute a “genuine” issue of material fact for purposes of Rule 4:46-2. *Liberty Lobby, supra*, 477 U.S. at 250, 106 S.Ct. at 2511, 91 L.Ed.2d at 213. The import of our holding is that when the evidence “is so one-sided that one party must prevail as a matter of law,” *Liberty Lobby, supra*, 477 U.S. at 252, 106 S.Ct. at 2512, 91 L.Ed. 2d at 214, the trial court should not hesitate to grant summary judgment. [Id. at 540]

Since all the material facts have been stipulated, the above standards have been met.

Applying the law to the facts:

Issues:

The general and specific issues in this case were set forth in the prehearing letter-order of September 22, 2000:

The general issue in these consolidated cases is whether petitioners committed the ethical violations for which they were penalized (appointment of Mr. Hoff, a commissioner, as Executive Director of the OMUA) in the amount of \$100.00 (with the further result that Mr. Hoff was removed from his position). Subsidiary issues are those outlined in the transmittal from the State Local Finance Board, and those raised during the pre-hearing telephone conferences. They are:

- a. Insufficient number of ethics board members participating and voting;

- b. Appellant's due process rights violated;
- c. *Ultra vires* decision;
- d. Improperly adopted ethics board and code;
- e. Constitutional First Amendment violation in requiring that three ethics board members be clergy;
- f. Whether this tribunal may recommend or the Local Finance Board may decide that Mr. Hoff, if successful on appeal, would be entitled to reinstatement with the OMUA;
- g. Whether (a) there was a past practice of appointing a commissioner of the OMUA as executive director, and (b) whether this past practice validates the appointment of Mr. Hoff and the appointing vote by Mr. Hegarty.

Constitutional and statutory rights:

The questions of petitioner's constitutional and statutory rights appear to be addressed in issues c, d and e. None of these *per se* rights have been violated. There is no dispute that the Board was created by lawful ordinance (Stipulation No. 1), nor is it in contention that the standards for a municipal ethics code were likewise adopted therein. Similarly, it is agreed that, procedurally, at least, a municipal ethics code for Old Bridge Municipal Ethics Board was approved by the Local Finance Board pursuant to the terms of the Act.

In New Jersey, it is within the authority of an administrative agency, and, by extension, an administrative law judge, to pass on constitutional issues, where relevant and necessary to the resolution of a question concededly within its jurisdiction. *Christian Brothers Institute of N.J. v. North N.J. Interscholastic League*, 86 N.J. 409, 416 (1981). If an administrative law judge, though allowed, does not rule on constitutional issues, they should still be noted and a factual presentation should be made to insure an adequate record for appellate review. *Rosko v. Pagano*, 466 F. Supp. 1364, 1371, at fn. 7 (D.N.J. 1979). However, it is beyond the purview of this tribunal under the Act to rule on any *per se* constitutional challenge of legislation. The determination of the constitutionality of an act of the legislature rests with a judicial body alone.

Baldwin Constr. Co. v. Essex County Bd. Of Taxation, 24 N.J. Super. 252, 272 (Law Div. 1952).
Per se determinations may be addressed only by the New Jersey Superior Court.

Thus, it could be logically concluded that a State administrative agency may not pass on the constitutionality *per se* of the municipal ordinance creating the Ethics Board, Ordinance No. 61-94, which is local legislation. Here, the legislated municipal ethics code and the legislated Ethics Board itself are challenged. These challenges seem to fall outside the jurisdiction of both an administrative law judge and the Local Finance Board to overturn, unless it violates the Act. With respect to application of the Act, it is clear that no provisions of the Old Bridge Ordinance are *facially* barred.

Yet, if straight application of the Act's provisions or its implementing rules to the facts of record do not resolve a controversy, the Local Finance Board, and administrative law judges conducting hearings of their contested cases, may resolve constitutional issues turning on an "as applied" set of facts. For example, under *Christian Brothers, supra*, it is arguable that the constitutionality of clergy membership established by ordinance could not be resolved administratively. On the other hand, if it were found that clergy members of the Ethics Board applied religious tenets to a decision adjudicating violation of the Act, the constitutionality of that decision could be addressed.

However, in view of today's holding, and notwithstanding the above analysis, other than to gather a record of all the arguments on the facts of record, there need not be rulings on constitutionality issues, because of the decision and reasoning below.

Power of the Local Finance Board to reinstate petitioners:

Neither the Act nor its implementing rules includes the power to either compel removal of an employee or to *reinstate* an employee whose charge of ethical violation has been dismissed. No language in the Act supports that opinion. The Ethics Board and the Local Finance Board may only *recommend* discipline, not compel it. *N.J.S.A. 40A:9-22.10; N.J.S.A. 40A:9-22.24*, at the last paragraph. There is no provision for recommending reinstatement.

Past practice:

There is nothing in the record stipulated which concedes specific past practice of prior appointments from the OMUA within the proscribed timeframe. This, however, is a non-issue. Even if that had been the case, a clear violation of the Ethics Board's municipal ethics code and the Act, would bar continuance of past practice, no matter how well settled.

Petitioners' due process rights:

This is the dispositive issue. It is **RULED** that petitioners' due process rights were violated. The Ethics Board which rendered the decision that a violation occurred was not lawfully constituted under the Act. The Board had only four appointed members, and only three voted. Three votes is not the 2/3 of a six-member Board which is required under the Act. *N.J.S.A. 40A:9-22.24*. Close reading of the Act supports this view:

A municipal ethics board may initiate, receive, hear and review complaints and hold hearings to ascertain violations, or not, of the municipal ethics code. *N.J.S.A. 40A:9-22.22a*. Where there is such a board and a municipal ethics code, the Local Finance Board may not intervene. It may entertain or initiate complaints only in the absence of such a municipal ethics code and administering board. *N.J.S.A. 40A:9-22.9*. Its role in that instance is only to hear and determine any appeal from a decision of the municipal ethics board, and to determine whether there was a violation of the Act. *N.J.S.A. 40A:9-22.7*. (Stipulation 25; Exhibit J-45)

A municipal ethics board, when dealing with a complaint, must determine whether a reasonable doubt exists as to whether an officer or employee is in conflict with the municipal code of ethics, and in so finding, it must conduct a hearing with all the procedural and due process safeguards available under the New Jersey Administrative Procedure Act (APA), as far as possible. *N.J.S.A. 40A:9-22.12*, *N.J.S.A. 40A:9-22.24*. Thereafter, within 30 days, if a violation is found by 2/3 of the six-member municipal ethics board, an appeal may be taken to the Local Finance Board. *Ibid.*

The Local Finance Board has power to hear that appeal. *N.J.S.A.* 40A:9-22.7c, as noted above, and, if it finds a violation, it may impose a \$100 to \$500 fine, and may recommend further discipline to the appointing authority. *N.J.S.A.* 40A:9-22.10. The latter is of no small significance because under *N.J.S.A.* 40A:9-22.11, if found guilty, the violator may be subject not only to the monetary fine, but to any disciplinary penalty recommended by the Local Finance Board. *N.J.S.A.* 40A:9-22.11. *Ibid.* Additionally, the Act maintains that any finding of violation “shall be sufficient cause for his removal, suspension, demotion or other disciplinary action by the officer or agency having the power of removal or discipline.”⁵ Petitioner Hoff, in fact, was removed from his employment following the action of the Old Bridge Municipal Ethics Board.

The foregoing discloses the seriousness of a finding by the Ethics Board. Its action here was an imposition of a penalty. It is well settled law that a statute imposing a penalty must be strictly construed. *State v. Perretti*, 9 *N.J. Super.* 97, 100 (App. Div. 1950); *Smith, et al. v. City of Asbury Park*, 3 *N.J. Super.* 161, 164 (App. Div. 1949); *Norman J. Singer, Southerland Statutory Construction*, Section 59.03 (4th Ed. 1986). Consequently, every element of the Act must be accorded its clear and restricted intent.

Here, *N.J.S.A.* 40A:9-22.19 directs that a municipal ethics board consist of six members and meet the conditions of Subsection a. Under *N.J.S.A.* 40A:9-22.22. The Act is unambiguous in stating that, in any decision finding the conduct of an officer or employee in conflict with the code of ethics, there must be a vote by no less than 2/3 of all members of the Ethics Board. *Ibid.* There is no dispute that at the time of the decision the Ethics Board was comprised of only four members (Stipulation 30, Exhibit J-50). On August 12, 1999, the approval of the decision finding a violation by petitioners was by vote of only three members (Stipulation 48). Consequently, under the terms of the Act, and the ordinance creating the Board (Exhibit J-1 through 9), the Ethics Board was not lawfully constituted. Since the complaint was ruled on by a board which fell short of its full required membership of six members, and since it was decided by a vote which had less than 2/3 of that six-member requirement, the ruling was *void ab initio*, or invalid from the very outset. This may be concluded from an application of section *N.J.S.A.*

40A:9-22.22 of the Act, which must be strictly construed. Consequently, the finding must be dismissed.

Although it is also arguable, as petitioners insist, that petitioners were not given the hearing opportunity called for by the Act, *N.J.S.A.* 40A:9-22.24, that point is moot. Petitioners are granted *de novo* consideration before the ALJ, conducting a hearing for the Local Finance Board. This hearing cures any shortcomings in the exercise by the Ethics Board of its scheduling or hearing discretion. The *de novo* review has been under conditions set forth at *N.J.A.C.* 5:35-1.4(d) through (g), and *N.J.S.A.* 40A:9-22.12 .⁶

Conclusion:

In sum, the charged violations by petitioners must be overturned. The decision by the Old Bridge Municipal Ethics Board was made by three members of the only four members appointed to an ethics board which is required by the Act to have six members. The Act further commands that 2/3 of a six-member board must vote. This did not occur. Finally, when a penalty is imposed, the Act must be strictly construed.

ORDER

I **ORDER**, therefore based on the above reasoning, that the violations charged as having been committed by petitioners be, and hereby are, **DISMISSED**.

I **ORDER** further that the \$100 fines levied on petitioners Hoff and Hegarty be remitted.

I hereby **FILE** my initial decision with the **LOCAL FINANCE BOARD, DIVISION OF LOCAL GOVERNMENT SERVICES**, for consideration.

⁵ Title 11A is apparently not involved in this case. *N.J.S.A.* 40A:9-22.11.

⁶ This ruling was made earlier in a letter order of December 7, 2000.

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.

April 27, 2001
DATE

JOSEPH LAVERY, ALJ

Receipt Acknowledged:

DATE

LOCAL FINANCE BOARD

Mailed to Parties:

DATE

OFFICE OF ADMINISTRATIVE LAW

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DOCUMENTS

Stipulations of Fact 1 through 60.