Potential Violation of Law - 12/7/2023 BOE Meeting/RFP's

BHCW TEAM <team@bhcw.io>

Thu 12/7/2023 2:23 PM

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1 attachments (360 KB)

nowack_decision.pdf;

Good Afternoon,

In regard to the Special BOE meeting for Dec 7th to interview architects, I have some concerns about the process that is being followed.

First, the meeting notice states that action may be taken.

The interviews are taking place during a lame duck session. If one looks at the attached Commissioner decision (Nowack v. Board of Education Borough of Manville), these types of appointments where there is no vacancy and which are made before a successor board is seated, are not to take place. This is also consistent with current NJSBA guidance.

From page 47 of the Commissioner's decision:

It may not, however, prior to its organization meeting, appoint administrators or other employees to positions in which no known vacancies exist. In the herein controverted matter, the Board at its March 17 sine die meeting was statutorily empowered to negotiate agreements with its continuing employees pursuant to N.J.S.A. 34:13A-1 et seq. However, it had no statutory authority to bind its successor Board by issuing individual contracts to those same individual employees for the ensuing school year prior to the seating of its successor Board. To do so would be to usurp the rightful prerogatives of its successor as conferred by N.J.S.A. 18A:11-1 et seq. The Board's action herein in appointing bus drivers, and appointing and awarding salary adjustments and increments to administrators a matter of minutes before the successor board's organization meeting was improper and without valid reason. The Commissioner so holds.

Given this decision, and based on NJSBA guidance, it would be strongly advisable to wait until the new board is sworn in before interviewing and awarding contracts.

And if you do not decide to appoint a firm, then the question arises as to why you are conducting interviews without the newly seated board members who would ultimately have to approve any contract award.

Second, I could not find any Board resolution authorizing the use of competitive contracting services for architectural services. Certainly, if such an RFP was issued it could not have been authorized by your Finance and Facilities or any other committee, since committees cannot authorize anything.

Yet N.J.S.A we have:

18A:18A-4.3 Competitive contracting initiated by board of education resolution; process administration.

47. a. In order to initiate competitive contracting, the board of education shall pass a resolution authorizing the use of competitive contracting each time specialized goods or services enumerated in section 45 of P.L.1999, c.440 (C.18A:18A-4.1) are desired to be contracted. If the desired goods or services have previously been contracted for using the competitive contracting process then the original resolution of the board of education shall suffice.

Given that the Board not long ago (2021) were found in violation of bidding laws, I believe it is imperative that you pay close attention to the laws and regulations.

Third, I noticed the following from N.J.S.A 18A:18A-4.5:

d. The purchasing agent or counsel or school business administrator shall evaluate all proposals only in accordance with the methodology described in the request for proposals. After proposals have been evaluated, the purchasing agent or counsel or school business administrator shall prepare a report evaluating and recommending the award of a contract or contracts. The report shall list the names of all potential vendors who submitted a proposal and shall summarize the proposals of each vendor. The report shall rank vendors in order of evaluation, shall recommend the selection of a vendor or vendors, as appropriate, for a contract, shall be clear in the reasons why the vendor or vendors have been selected among others considered, and shall detail the terms, conditions, scope of services, fees, and other matters to be incorporated into a contract. The report shall be made available to the public at least 48 hours prior to the awarding of the contract, or when made available to the board of education, whichever is sooner. The board of education shall have the right to reject all proposals for any of the reasons set forth in N.J.S.18A:18A-22.

I am requesting a copy of this report if it exists.

-Shauna Williams

Attached: Nowack v. Board of Education Borough of Manville

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Berkeley Heights Community Watch


Berkeley Heights Community Watch
Shining a Light on Local Government

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Rudolph Nowak,

Petitioner,

v.

Board of Education of the Borough of Manville, Somerset County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Rudolph Nowak, *Pro Se*

For the Respondent, Raymond R. & Ann W. Trombadore (Raymond R. Trombadore, Esq., of Counsel)

Petitioner, a resident citizen of the Borough of Manville, alleges that certain actions of the Board of Education of the Borough of Manville, hereinafter "Board," granting salary increases to administrative personnel on March 17, 1975, were illegal. The Board denies any illegality or impropriety on its part.

This matter, as originally submitted, was entitled *Manville Citizens and Taxpayers Association and Rudolph Nowak v. Board of Education of the Borough of Manville, Somerset County.* Respondent, on July 21, 1975, moved to disqualify Rudolph Nowak from representing the Manville Citizens and Taxpayers Association by reason of the fact that Mr. Nowak is not an attorney and may not represent a person or organization other than himself pursuant to *N.J.S.A.* 2A:170-79. Mr. Nowak did not resist this motion and on July 28, 1975, agreed to appear individually as petitioner, *pro se.* Thereafter, for lack of representation, the Manville Citizens and Taxpayers Association was dropped as a party petitioner to the controversy.

This matter comes directly before the Commissioner of Education in the form of Briefs, an affidavit of the Secretary to the Manville Board of Education (C-3) required at the conference of counsel on July 14, 1975, and documentary evidence received on that date by the Division of Controversies and Disputes. (C-1; C-2) The facts are these:

The annual school election was held on March 11, 1975 at which time three incumbent candidates were reelected to the Board for regular three-year terms. At this election the voters defeated both the current expense and capital outlay proposals of the Board by a substantial majority of negative votes.

Thereafter, on March 17, 1975, the Board convened a meeting at 8:00 p.m. with all members present at which time the business conducted included, *inter alia,* the following:

1. Employed a teacher to fill a position on April 1, 1975.

2. Confirmed purchase orders for supplies and services.

3. Approved use of facilities for nonschool hours.

4. Appointed a head school nurse for the 1975-76 school year at a stipend of $400.

5. Appointed a financial secretary for the student activity fund at a $1,000 stipend for the school year 1975-76. (C-1, at p. 87)

6. Established various substitute salaries for the 1975-76 school year. (C-1, at p. 87)

7. Abolished a principalship and established in its place a teaching principalship for one school for the 1975-76 school year. (C-1, at p. 87)

8. Adopted the negotiated agreement between the Board and its administrators setting forth, *inter alia,* 1975-76 salaries by name and position for principals and psychologist. (C-1, at p. 88)

9. Amended the Superintendent's tenure contract adopted February 24, 1970 to establish a salary of $28,609 for the 1975-76 school year, representing an increase of $2,112 in salary over his 1974-75 salary. (C-1, at p. 89; C-3)

10. Amended the Board Secretary-Business Manager's tenure contract adopted January 21, 1974 by establishing a salary schedule and a 1975-76 salary of $20,000, which figure represents an increase of $2,000 over his 1974-75 salary. (C-1, at p. 89; C-3)

11. Established bus drivers' salaries by name and step on scale for 1975-76.

The meeting of the Board was adjourned at 9:41 p.m. on March 17, 1975. (C-1, at p. 91)

At 10:00 p.m. on the same date the Board convened for the purpose of conducting its organization meeting pursuant to *N.J.S.A.* 18A:10-3. At this organization meeting the three successful incumbent candidates were administered oaths of office, and the Board President who had previously so served was reelected, as was a vice-president. Business conducted at this organization meeting included, *inter alia,* the appointment and in certain instances, fixing of rates of compensation for persons in the following positions: school medical inspector, assistant board secretary, custodian of school funds, school attendance officers, Board attorney and school psychologist. (C-2)

Subsequent to March 11, 1975, the Board and the municipal governing body of Manville met to discuss the defeated budget and mutually agreed to reduce the current expense portion of the Board's budget by $50,000. (C-3)

Petitioner argues that the Board's meeting at 8:00 p.m. was illegal. He further argues that the Board's organization meeting held at 10:00 p.m. was similarly illegal for failure to comply with *N.J.S.A.* 18A:10-3 which states that:

> "Each board of education shall organize annually at a regular meeting held not later than at 8 p.m. -
>
> "a. ***
>
> "b. In Type II districts on any day of the first week commencing on the first Monday following the annual school election***."

Petitioner contends that the defeat of the Board's budget removed from its authority the power to legally grant the administrative increases, *ante*. Petitioner asserts that on March 17, 1975, the Board had no approved negotiated agreement with its administrator and that it was without authority to finalize such an agreement until the budget was certified by the municipal governing body, subject only to appeal to the Commissioner. (Petitioner's Brief, at pp. 1-4)

Petitioner argues further that the salary increases granted by the Board to its administrators of up to 11.1 percent were excessive and beyond reason in the face of an overwhelming defeat of the budget by the voters. (Petitioner's Brief, at pp. 4-5)

For the foregoing reasons petitioner asks that the Commissioner set aside the acts of the Board taken on March 17, 1975 in respect to salary increases for administrators and take such further action as may be deemed appropriate.

The Board argues that the defeat of the budget by the voters did not divest it of authority to grant the controverted increases in salary, and that both the negotiation process and the awarding of contracts are typically and properly carried out and frequently finalized prior to the annual school election. (Brief of Respondent, at p. 1)

Thus the Board avers that it may properly schedule and conduct a regular meeting following the annual school election prior to its organization meeting. The Board asserts that a contrary view would result in the intolerable situation of a school district being without a viable board of education during this period. The Board argues that it complied with the statute in respect to both meetings held on March 17, 1975. (Brief of Respondent, at pp. 2-3)

Finally, the Board states that the increases granted were not excessive and the mere fact that a minority of Board members expressed an opposing opinion, as reflected in the minutes (C-1, at p. 86), in no way negates the fact that a majority of the full membership of the Board voted in favor of these increases. The Board maintains that, absent proof that it violated its discretionary authority or acted in an arbitrary or capricious manner, these actions should not be set aside. (Brief of Respondent, at pp. 3-4)

Petitioner advances the argument that the increments of its administrators were excessive and should be set aside by the Commissioner. These increases in salaries voted by the Board average 8.2 percent, and are neither unusually high nor low when compared to known increments and adjustments granted by boards to administrative personnel throughout the State for the 1975-76 school year. The Commissioner finds no evidence of frivolity, shocking abuse of discretion, or an exercise of bad faith on the part of the Board. Absent such a showing, the Commissioner will not interpose his judgment for that of the Board. It has been said by the Commissioner and affirmed by the State Board of Education and the Courts that:

> "***The School Law vests the management of the public schools in each district in the local boards of education, and unless they violate the law, or act in bad faith, the exercise of their discretion in the performance of the duties imposed upon them is not subject to interference or reversal.***" *Kenney v. Board of Education of Montclair,* 1938 *S.L.D.* 647 (1935), affirmed State Board of Education 649, 653

And,

> "***[I]t is not a proper exercise of a judicial function for the Commissioner to interfere with local boards in the management of their schools unless they violate the law, act in bad faith (meaning acting dishonestly), or abuse their discretion in a shocking manner. Furthermore, it is not the function of the Commissioner in a judicial decision to substitute his judgment for that of the board members on matters which are by statute delegated to the local boards. *Finally, boards of education are responsible not to the Commissioner but to their constituents for the wisdom of their actions.****" *Boult and Harris v. Board of Education of Passaic,* 1939-49 *S.L.D.* 7, 13, affirmed State Board of Education 15, affirmed 135 *N.J.L.* 329 (*Sup. Ct.* 1947), 136 *N.J.L.* 521 (*E.&A.* 1948) *(Emphasis supplied.)*

Petitioner's further argument that the Board was without authority to act on March 17, 1975 on a negotiated agreement or to fix salaries by reason of the defeat of the budget at the polls by the voters is similarly without merit. While a board of education in such circumstances should be reasonably responsive to the will of the electorate, it must keep as its first goal the continuance of the system of free public education for the pupils of the school district. It may not be shorn of its powers to act. The confirmation of purchase orders for supplies and services, the conclusion of the negotiation process, the filling of vacancies, and a plethora of routine matters may not be delayed unduly while awaiting the action of the municipal governing body, the determination of the Commissioner, or, on appeal, the decision of the State Board or the Courts. To hold otherwise would, in the sometimes lengthy process of litigation, threaten the constitutional guarantee of a thorough and efficient system of public education.

The Commissioner knows of no restriction that prevents a board of education from conducting a *sine die* meeting between the annual school

election and its organization meeting held pursuant to *N.J.S.A.* 18A:10-3. There are frequently matters which the outgoing board should conclude or matters that cannot reasonably await action at the organization meeting of a succeeding board of education. Certain actions of the Board, herein, at its 8:00 p.m. meeting, such as the confirmation of purchase orders, the filling of a known 1974-75 teaching vacancy, and the approval of use of facilities are, without question, matters that were deserving of attention and could properly be enacted at a *sine die* meeting such as that conducted at 8:00 p.m. March 17, 1975 by the Board.

The Board, however, acted additionally to award stipends and to fix 1975-76 school year salaries of principals, Superintendents, and Board Secretary-Business Manager for the succeeding school year. No known vacancy existed in any of these positions, nor was there any immediate urgency for taking official action thereon. The law is clear that in this State a board of education is a noncontinuous body that may legally obligate its successor only in such ways as are provided by statute. The law is similarly clear that a board may, indeed is now obligated, to enter into negotiation sessions which, if successful, may be finalized prior to the time of its successor board's organization meeting. *N.J.A.C.* 19:12-2.1 It may not, however, prior to its organization meeting, appoint administrators or other employees to positions in which no known vacancies exist. In the herein controverted matter, the Board at its March 17 *sine die* meeting was statutorily empowered to negotiate agreements with its continuing employees pursuant to *N.J.S.A.* 34:13A-1 *et seq.* However, it had no statutory authority to bind its successor Board by issuing individual contracts to those same individual employees for the ensuing school year prior to the seating of its successor Board. To do so would be to usurp the rightful prerogatives of its successor as conferred by *N.J.S.A.* 18A:11-1 *et seq.*

The Board's action herein in appointing bus drivers, and appointing and awarding salary adjustments and increments to administrators a matter of minutes before the successor board's organization meeting was improper and without valid reason. The Commissioner so holds. *Charles H. Knipple v. Board of Education of the Township of Egg Harbor, Atlantic County,* 1971 *S.L.D.* 210; *Edwin Holroyd et al. v. Board of Education of the Borough of Audubon et al., Camden County,* 1971 *S.L.D.* 214; *Henry S. Cummings v. Board of Education of Pompton Lakes et al., Passaic County,* 1966 *S.L.D.* 155; *Edmond M. Kiamie v. Board of Education of the Township of Cranford, Union County,* 1974 *S.L.D.* 218; *Skladzien v. Bayonne Board of Education,* 12 *N.J. Misc.* 602 (*Sup. Ct.* 1934), affirmed 115 *N.J.L.* 203 (*E.&A.* 1935)

The Commissioner determines further that the Board's organization meeting, beginning as it did at 10:00 p.m. on March 17, 1975, failed to comply with statutory prescription which plainly requires that a board's organization meeting must begin no later than 8:00 p.m. It is a well-established principle of law that statutes are to be given their ordinary meaning. *U.S. v. Chesbrough,* 176 *F.* 778 (*D.C.N.J.* 1910); *State v. Sperry & Hutchinson Company,* 23 *N.J.* 38 (1956); *Duke Power Company v. Patten,* 20 *N.J.* 42 (1955) The meeting was improperly scheduled and held.

The facts are plain, however, that only incumbents were to be sworn in at the organization meeting; therefore, no change in membership on the Board could have resulted from that meeting. Nor it is conceivable that the votes of those three members, who had been continuously serving and were present at the 8:00 p.m. session, would in any way have altered voting alignments or positions on the controverted salary increases or other matters if the meeting had been held on a later date. Since this is so, the Commissioner can perceive no improper or ulterior motives to the fact that the actions on appointments and salaries of Board employees were taken at the 8:00 p.m. session rather than during or following the organization meeting. Therefore, the Commissioner determines that it was only through nescience that matters were scheduled and acted upon at the *sine die* session, and that the Board's reorganization meeting was scheduled at a time other than that prescribed by *N.J.S.A.* 18A:10.3.

The Commissioner deplores such casual disregard of statutory and case law as herein shown by the Board and cautions this Board and all other local boards of education to adhere rigidly to that which is prescribed by the Legislature, the State Board of Education, and the body of educational case law in conducting the important affairs of operating the public schools. Had the precise sequence of events, herein, with votes of five to four occurred in conjunction with a change in Board membership, it could only have resulted in a determination that certain acts of the Board were *ultra vires*. However, the Commissioner can conceive of no useful purpose being served by such a declaration in view of the fact that the actions at both the 8:00 p.m. and the 10:00 p.m. sessions were taken by the same members who were all present at both sessions. (C-1; C-2) Therefore, it is determined that the acts taken at each of these sessions have full and complete validity and legality as though they had been taken in full compliance with statutory and case law. The Commissioner so holds.

While the Commissioner finds no valid reason to grant the relief which petitioner seeks, he commends petitioner for bringing to light the Board's *modus operandi*, which in altered circumstances could have resulted in confusion and financial disadvantage to the Board, its employees, and the community it serves. In such matters it is important for a board of education to avoid the very appearance of noncompliance. See *James v. State of New Jersey*, 56 *N.J. Super.* 213, 218 (*App. Div.* 1959); *Hoek v. Board of Education of Asbury Park*, 75 *N.J. Super.* 182, 189 (*App. Div.* 1962).

The Commissioner having determined that there is no basis on which the prayers of petitioner may reasonably be granted, the Petition is dismissed.

COMMISSIONER OF EDUCATION

January 20, 1976