

Navigating the Indemnification Rapids for Board of Education Members

by Marc H. Zitomer

In today's litigious society, it is not unusual for a board of education member to find him or herself as the defendant in a lawsuit or the respondent in an administrative action by virtue of that member's seat on the board. The New Jersey Legislature did not want this circumstance and the possibility of financial exposure to deter a member of the public from running for a school board, particularly because board members are not compensated for their service. Accordingly, the Legislature enacted N.J.S.A. 18A:12-20, which entitles board members to indemnification for legal fees in certain types of legal proceedings. The statute provides, in full, as follows:

Whenever a civil, administrative, criminal or quasi-criminal action or other legal proceeding has been or shall be brought against any person for any act or omission arising out of and in the course of the performance of his duties as a member of the board of education, and in the case of a criminal or quasi-criminal action such action results in final disposition in favor of such person, the board of education shall defray all costs of defending such action, including reasonable counsel fees and expenses, together with costs of appeal, if any, and shall save harmless and protect such person from any financial loss resulting therefrom. Indemnification for exemplary or punitive damages shall not be mandated and shall be governed by the standards and procedures set forth in N.J.S.A. 59:10-4. Any board of education may arrange for and maintain appropriate insurance to cover all such damages, losses, and expenses.

Under this statute, a board member is entitled to indemnification if the complaint arose out of, and in the course of the performance of, the board member's duties. In *Errington v. Mansfield Twp. Bd. of Educ.*,¹ the Appellate Division found the purpose of the indemnification statute is "to make manifest the implied power of boards of education to provide for legal defense of a member of the board who is sued individually for

some action by him in furtherance of his prescribed duties."² With respect to civil and administrative matters, this statute has been liberally interpreted by the courts, so board members are not inhibited from acting for what they believe is the public good without fear of economic loss.³

For instance, in *Quick v. Old Bridge*, the Old Bridge Board of Education appealed a decision of the New Jersey State Board of Education, which ordered that Quick, a board member, be reimbursed for legal expenses in her defense of an action brought by the board seeking to prevent her from attending certain closed-session meetings due to a perceived conflict. The state board found that, because the provisions of N.J.S.A. 18A:12-20 were to be liberally construed, Quick was entitled to indemnification because, whether her legal argument was correct or not, she was drawn into the board's action only because she was a board member.⁴ The state board further found that failing to indemnify the board member in such a situation might also discourage citizens "from even seeking membership on a district board."⁵

The Appellate Division affirmed the state board's decision, noting that "where a school board member is sued 'by reason of such membership,' the member is entitled to have his or her counsel fees on the trial and on the appeal borne by the local board of education."⁶ The court emphasized that in civil matters the outcome of the action is irrelevant.⁷ Rather, the focus of whether to indemnify or not must be on the litigation where the expenses were incurred, and that if the lawsuit arises because of the board member's status on the board, he or she is entitled to reimbursement for legal fees associated with the defense of such an action.⁸ Put differently, it appears, based on the court's holding in *Quick*, that a board member is entitled to indemnification for the defense of actions brought against the individual because he or she is a board member.

What some boards of education have difficulty grasping when faced with a request by a board member for indemnification is that the statute, in the words of the *Quick* court,

"protects both successful and unsuccessful litigants."⁹ Thus, even when a board member is unsuccessful in a civil or administrative action, he or she must be indemnified to the extent that his or her act or omission arose out of and in the course of the performance of the board member's duties. An example might be a case where a member of the public files an ethics charge against a board of education member for voting to appoint his or her spouse to a teaching position in the same district—a clear conflict of interest. If that board member were to seek indemnification for his or her legal fees incurred in defending against the ethics charge, that member would likely be entitled to indemnification, even if the School Ethics Commission were to find the person guilty, as one would expect, of the flagrant ethics violation.

Again, the ultimate outcome of the decision is irrelevant. The issue is whether the action was brought against the member for something that arose out of and in the course of the performance of his or her duties as a board member. Clearly, voting on a particular matter, at a duly convened board meeting, is something that satisfies this standard, even if the board member voted on something he or she should not have.

To date, there is only one published commissioner of education decision involving the indemnification of a board member for an ethics complaint brought against that member. In *Matthews v. Englewood*,¹⁰ the administrative law judge (ALJ) issued an initial decision holding that Matthews was entitled to indemnification by the board of education for his legal fees, even though he was found guilty of violating certain provisions of the board member code of ethics, which is codified in N.J.S.A. 18A:12-24.1.¹¹ The underlying charges for those sections of the code were that Matthews, while a member of the board, attended a meeting with a committee of his own board (a committee he was allegedly not select-

ed to be part of) and the superintendent of another school district, without the approval of his own board of education. In concluding that Matthews violated the code of ethics by attending the meeting, the ALJ nevertheless held that "the subject matter and the meeting were within the purview of all Board members." Moreover, the ALJ noted that "[a]lthough the other participants were unhappy about his appearance at the meeting they included and accepted his attendance."

The second code violation took place on another occasion, when Matthews allegedly engaged in "combative and insulting dialogue" with a district employee. Specifically, the allegation was that Matthews not only identified himself as a board member to the staff member in an attempt to influence an affirmative action investigation the employee was assigned to conduct, but allegedly berated her to the point that it caused her to resign. The ethics commission in the underlying action noted that Matthews "raised valid issues about the authority of the employee to conduct the investigation." However, he failed to "support and protect school personnel in proper performance of their duties," in violation of N.J.S.A. 18A:12-24(i).

On this charge, the ALJ found that:

[s]ince boards of education have the authority to hire and fire personnel, this requirement is intended to prevent board members from using that authority to improperly intimidate district employees—a circumstance peculiar to board members. Thus, I conclude this charge arises out of Petitioner's role as a board member, since it is that authority which makes any inappropriate conduct destructive in the school environment.

The deputy commissioner of education, upon review of the ALJ's initial

decision, adopted the analysis and conclusions of the ALJ pertaining to Matthews' eligibility for indemnification for those allegations that resulted in findings of violations by the ethics commission. However, the deputy commissioner remanded the matter to the ALJ for further proceedings because "[the] record [did not] contain documentation and argument enabling the Deputy Commissioner to make informed determinations regarding the full panoply of actions underlying the complaint before the Commission for which petitioner here seeks indemnification, including a substantial number of the allegations dismissed at various points in the Commission's proceedings."

In other words, the fact that various counts against Matthews were dismissed during the course of the proceedings did not automatically entitle him to indemnification for his defense of those counts. The deputy commissioner also noted "the unique difficulties" posed by the case, since proceedings arising under the School Ethics Act "involve a plethora of diverse allegations rather than claims arising from a single act which may be discretely analyzed in terms of the statutory standard for indemnification." It remains unclear how indemnification is to be determined in the event that some of the acts or omissions satisfy the requirements for indemnification while others do not.

For instance, if it were determined that five out of 10 counts in a civil or administrative action satisfy the standard for indemnification set forth in N.J.S.A. 18A:12-20, does that mean that the board member would only be entitled to have 50 percent of his or her legal fees and costs paid for by the board of education? The answer would presumably be yes, but because the *Matthews* case ultimately settled after it was remanded to the ALJ, the issue has been left for a future tribunal to decide.

Another interesting issue, recently

addressed by the Appellate Division in *Castriotta v. Board of Education of the Tp. of Roxbury* is what constitutes a "legal proceeding" entitling a board member to indemnification.¹² In that decision, Castriotta, a board member, had been notified by the board of education that it was going to consider adopting a resolution censuring her for certain actions allegedly taken by her in connection with a student protest that took place at the district's high school. Castriotta was informed of her right to be represented by counsel at the censure hearing, to present witnesses on her behalf and to address the board directly with her defenses.

She did ultimately attend the proceeding before the board with her own counsel and refuted the allegations. The board then voted to censure Castriotta for her alleged conduct. Castriotta appealed the board's action to the commissioner of education, who concluded the board's action was *ultra vires* because only the School Ethics Commission can enforce the code of ethics for board members. Nevertheless, the commissioner adopted the ALJ's determination that Castriotta was not entitled to indemnification by the board because the censure hearing before the board of education was not a 'legal proceeding' under the statute. The ALJ defined a legal proceeding as "one brought in a legal forum, such as before a court or administrative agency."

The Appellate Division reversed the ALJ and commissioner. The court explained that the board was acting in a quasi-judicial capacity when it censured Castriotta. She was served with charges, and apprised of her right to have counsel and her right to present a defense. At the hearing, the board: "(1) heard the testimony of the two administrators who had accused petitioner; (2) considered and rejected petitioner's counsel's legal objections; (3) heard petitioner's response to the allegations against her;

(4) weighed the evidence presented, including the credibility of the testimony; and (5) found petitioner guilty of conduct unbecoming a member of the Board and sanctioned her accordingly."¹³ The court emphasized that these are "core judicial functions," and that this matter "conformed in all material respects to a due process hearing and constitutes a 'legal proceeding' under N.J.S.A. 18A:12-20."¹⁴

A final issue that is not directly resolved by the indemnification statute is determining at what point in the litigation action the board member will be entitled to indemnification. For criminal and quasi-criminal matters the answer is obviously at the end of the proceeding, since the law requires that the action results "in final disposition in favor of such person." However, since the outcome of the matter is not dispositive for indemnification in civil, administrative or other legal proceedings, the issue is not always black and white. Some boards of education will agree to indemnify the board member at the outset of the matter and pay the member's legal fees from the inception solely if it is clear the action satisfies the statutory standard. Other boards will wait until the matter is finally adjudicated and a record is established to make the determination about the board member's entitlement, if any, to indemnification. It is recommended the board consult with its legal counsel for an opinion on the preferable course of action, depending upon the facts of the case. Of course, the fees must ultimately satisfy the 'reasonableness' standard even if indemnification is deemed to be appropriate. ♪

Endnotes

1. 100 N.J. Super. 130 (App. Div. 1986).
2. *Id.* at 138.
3. *Quick v. Old Bridge Bd. of Educ.*, 308 N.J. Super. 338, 343 (App. Div. 1998).

4. *Id.* at 341.
5. *Id.* at 342.
6. *Id.* citing *Jones v. Kolbeck*, 119 N.J. Super. 299, 301, 291 A.2d 378 (App. Div. 1972).
7. *Id.* at 343.
8. *Id.* at 344.
9. *Id.* at 343.
10. *Matthews v. Englewood Board of Education*, OAL Dkt. No. EDU 1228-08 (OAL, 2010).
11. The author represented Matthews in the matter before the School Ethics Commission and in his case for indemnification before the commissioner.
12. 427 N.J. Super. 592 (App. Div. 2012).
13. *Id.* at 603.
14. *Id.* at 595 & 603.

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