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MAR 2 8 2016
ARTHUR BERGMAN, J.S.C

PERTH AMBOY BOARD OF EDUCATION, **Plaintiff / Counterclaim Defendant,** **v.** **CITY OF PERTH AMBOY,** **Defendant / Counterclaim Plaintiff,** **and ELAINE JASKO, CITY CLERK,** **Counterclaim Plaintiff.**	**SUPERIOR COURT OF NEW JERSEY LAW DIVISION: MIDDLESEX COUNTY** **CIVIL ACTION** **DOCKET NO. MID-L-1075-16** **ORDER**

This matter having been opened to the Court by the opposing Order to Show Cause applications of Machado Law Group, as attorneys for the Perth Amboy Board of Education ("the Board") (Jessika Kleen, Esq., appearing), and DeCotiis, FitzPatrick & Cole, LLP, as attorneys for the City of Perth Amboy ("the City") (Benjamin Clarke, Esq. and Arlene Quiñones Perez, Esq., appearing), and further appearing Deputy Attorney General George N. Cohen, Esq., as attorney for the Middlesex County Board of Elections, and the Court having reviewed the submitted papers of the parties, having held a telephonic conference on March 9, 2016, having held oral argument on the matter on March 21, 2016 at 10 a.m., and setting forth its findings of fact and conclusions of law on the record, to be more fully addressed in a written opinion to follow, and for good cause shown,

IT IS on this 24th day of March, 2016,

ORDERED that the Resolution of the Perth Amboy Board of Education, adopted at the Special Meeting of the Board on January 12, 2016 pursuant to N.J.S.A. 19:60-1.1 (b)(1), is declared substantively invalid, because the Board lacks the authority to divest its members of the

length of their terms and may only extend terms or create vacancies, and is procedurally invalid for failure of the Board to comply with the requirements of the Open Public Meetings Act, N.J.S.A. 10:4-8 (d); and it is further

ORDERED that the Resolution of the City of Perth Amboy, adopted at the Regular Meeting of the City Council on February 10, 2016 pursuant to N.J.S.A. 19:60-1.1 (a)(1), is therefore moot; and it is further

ORDERED that the Perth Amboy Board of Education, should it properly comply with the Open Public Meetings Act, N.J.S.A. 10:4-8 (d) and the substantive requirements set forth above, has the valid authority to change the date of school elections pursuant to N.J.S.A. 19:60-1.1 (b)(1); and it is further

ORDERED that the City Council also has the valid authority to change the date of school elections pursuant to N.J.S.A. 19:60-1.1 (b)(1); and it is further

ORDERED the date of school elections remains scheduled on November 8, 2016; and it is further

ORDERED that a copy of this Order shall be served on all counsel of record by the Court via email.

Hon. Arthur Bergman, J.S.C.

NOT FOR THE PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

FILED
MAR 29 2016
ARTHUR BERGMAN, J.S.C

PERTH AMBOY BOARD OF EDUCATION,	SUPERIOR COURT OF NEW JERSEY COUNTY OF MIDDLESEX
Plaintiff / Counterclaim Defendant,	LAW DIVISION: CIVIL PART
v.	DOCKET NO. MID-L-6976-15
CITY OF PERTH AMBOY,	
Defendant / Counterclaim Plaintiff, and ELAINE JASKO, CITY CLERK,	OPINION

Decided: March 29, 2016

Jessica Kleen, Esq., Janelle Winters, Esq., Machado Law Group, Clark, N.J., Attorneys for Plaintiff/Counterclaim Defendant Perth Amboy Board of Education;

Benjamin Clarke, Esq., Arlene Perez, Esq., Jeffrey Fucci, Esq., Decotiis, FitzPatrick & Cole, LLP, Teaneck, N.J., Attorneys for Defendant/Counterclaim Plaintiffs City of Perth Amboy, and Elaine Jasko, City Clerk

George Cohen, Esq., Deputy Attorney General, Attorney for the Middlesex County Board of Elections

Arthur Bergman, J.S.C.

This matter comes before the court on competing orders to show cause to either move the date for the 2016 election of members to the Perth Amboy Board of Education (hereinafter Board) back from November to April, as embodied in the School Board's resolution adopted on January 12, 2016, or retain the election in November, as embodied in the City Council's resolution of February 12, 2016

Beginning in 2012, after passage of P.L. 2011, C.203, the school board election has been held each November for the past four years. On January 12, 2016, the Board met in a special meeting and voted to move the 2016 election back to April. On February 10, 2016, the City Council (hereinafter City) voted to rescind the BOE's action and restore the election to its November date.

This Court is now asked to determine the validity, and if necessary, the supremacy, of these respective legislative actions.

I. Procedural Validity of the Board Resolution.

The City asserts that the Board's resolution does not comply with the Open Public Meetings Act (OPMA), N.J.S.A. 10:4-1, et seq., and is thus invalid. It contends that the Board

failed to give adequate public notice as required under N.J.S.A. 10:4-8. The OPMA requires "adequate notice" of any meeting. In this case, as it was not a regularly scheduled meeting as disclosed by its annual published notice (that meeting having taken place on January 7, 2016) adequate notice was required.

The record in the City Order to Show Cause reflected that the Affidavit of Service of Notice of Special Meeting executed by the Assistant School Board Administrator/Assistant Board Secretary on January 8, 2016 is devoid of any service of notice other than (a) delivery by hand to Board Members and other enumerated employees; (b) posting of the notice in the Bulletin Board in the lobby of the Board of Education Headquarters; and (c) filing a copy with the City Clerk.

In its original reply brief filed in response to the City's Order to Show Cause, the Board relied upon unsworn and uncertified handwritten notes regarding public notices for publication.

In response to the Court's request for supplemental briefing on a number of issues raised in the original briefs, the Board now provides an Affidavit, dated March 17, 2016, from the author of the handwritten notes that she "caused [the] meeting notice ... to be provided to the newspapers" previously identified via Gannett NJ. However, even on its face, the certification does not satisfy the requirement of adequate notice. Taken in context with the contemporaneous

handwritten notes, it is obvious that adequate notice was not provided.

The Board relies on language in Bernards Township v. State Department of Community Affairs, 233 N.J. Super. 1 (App. Div. 1989) that "OPMA does not require that notice be published by the newspapers, only that it be sent to the newspapers 48 hours before the meeting." To the extent that the DCA had, in that case, met that standard by mailing notice to the requisite newspapers some 19 days prior to the meeting in question, the standard was met. However, the Bernards Township court cited as authority for its conclusion the case of Worts v. Upper Township, 176 N.J. Super 78,81 (Ch. Div. 1980). In Worts, the court had opined that:

> When a public body sends meeting notices to newspapers for publication and, to the actual or readily ascertainable knowledge of that body, those newspapers cannot publish the notice at least 48 hours in advance of the meeting, there is no compliance with the Open Public Meetings Act. Logic demands this conclusion: were the opposite true, the purpose of the law would be circumvented easily. The legislative intent reflected in the act requires this interpretation. N.J.S.A. 10:4-8 d provides that public bodies must designate newspapers for the publication of notices which have 'the greatest likelihood of informing the public within the area of jurisdiction of the public body of such meetings . . .' Further, in the language of Houman (at 167), it is expected that 'all

> reasonable effort to notify the public' will be made. The minimum notice to which the public is entitled is set forth in section 8 of the act, which requires 'written advance notice of at least 48 hours.' Thus, it is only when a public body has given 48 hours' advance notice to newspapers capable of timely publication that it can be concluded that all reasonable effort has been made. It is therefore the obligation of every public body affected by the act, when preparing calendars and sending notices of meetings, to fix dates, except in emergent circumstances, which permit the required notice to be given, having in mind newspaper publication dates, and to use only those newspapers for notice purposes which have the ability to publish notices at least 48 hours in advance of meeting dates.

It is patently obvious from the exhibits presented that the Board knew it could not have published the notice in a timely fashion for the scheduled meeting. To the extent that no exigency existed for holding the meeting on January 12, the requirement for adequate notice is not met.

II. Substantive Validity of the Board Resolution.

The Court had requested supplemental briefs on the issue of whether N.J.S.A. 19:60-1.1 authorized any governmental entity to move an election back from November to April, as opposed to forward. The sole response from the Board is that "the statute specifically contemplates a board of education moving school elections to April after they have been moved to

November." That cannot be gainsaid. However, the question posed by the Court was whether this statute, any other statute, or any case decided in this state, would permit the premature termination of a board member's tenure.

Under N.J.S.A. 18A:12-11, the terms of all board members shall be three years, "except as otherwise provided herein". The only exception is N.J.S.A. 18A:12-15.1, which extends the term of a school board member from April to November when the election is moved from April to November. Given the language of N.J.S.A. 18A:12-11 and 15, and the lack of any express language in N.J.S.A. 19:60-1.1 to the contrary, it appears that the Legislature did not authorize moving of a school election back from November to April, where that would result in divesting a sitting board member's tenure.

By remaining silent on this issue, the legislature may have evaluated the likelihood of such a choice remote, and any vacancy existing for those three year terms expiring in November until an upcoming election the following April would be subject to the provisions of N.J.S.A. 18A:12-15. If the Legislature simply overlooked this potential issue, they are always at liberty to remediate the situation by expressly providing for the terms of board members to either be specifically extended when an election is moved from November to April, rather than creating a vacancy, or to specifically divest a board member's remaining seven months

in office and expressly permit an election to be moved back in time from November to April.

These are legislative determinations that the Senate and Assembly may consider. In the absence of such determinations, the law as adopted must be read to prohibit the termination of a lawfully elected board member's tenure. This is so, even here, where the Board members themselves seek an early termination of their own terms in favor of a new election. By doing so, it would negate the voice of the voters who elected them for the mandated term. While they are all welcome to resign voluntarily, in which case the vacancy statute would be utilized, the Legislature has not provided any other mechanism to shorten terms to accommodate a desire to move an election back in time.

III. Procedural and Substantive Validity of the City's Resolution.

The record reflects that the City's adoption of the February resolution met procedural requirements of the law. For the reasons articulated in Sections I and II above, the action of the City is, therefore, moot. There having been no valid Board action to move the election back to April, the City's Resolution is of no substantive effect.

However, one of the issues raised by the Board is whether the City is an authorized entity to move a school board election.

The Board asserts that the language is N.J.S.A. 19:60-1.1 does not authorize the City to take such an action.

The relevant portion of N.J.S.A. 19:60-1.1(b)(1) reads:

> The date of the annual school election may be moved to the third Tuesday in April without voter approval, upon the adoption of a resolution by the board of education of a local or regional school district, other than a Type II district with a board of school estimate, or the governing body or bodies of the municipality or municipalities constituting the district. Prior to holding a meeting for the adoption of the resolution to move the date of the annual school election, the governing body or bodies of the municipality or municipalities constituting the district shall provide adequate notice of the meeting to the affected board or boards of education.

The language of the statute clearly authorizes either the Board or the City to move the election from November to April.

IV. DOES THE LAW PROVIDE SUPREMACY OR PRIMACY BY ONE AUTHORIZED ENTITY OVER ANOTHER?

The more relevant inquiry is whether there is any provision in the law to favor one entity's actions over the other.

N.J.S.A. 19:60-1.1(b)(1) also provides the following:

> No resolution may be adopted and no petition may be filed pursuant to this subsection until at least four annual school elections have been held in November.

This language raises two questions not readily answered by the Legislature. The first is whether this provision is intended to mean that if an election were validly moved by one entity to April, and then returned validly to November once again, would the April favoring entity be required to wait another four years after the election were moved to November a second time?

Perhaps even more crucial for the parties to this matter, the other question apparently left open is whether the ability of one of these parties to move an election to another date is subordinate to the other, whether it is essentially a race to the first valid resolution, or whether it ultimately would reflect a legislative Ping Pong® match between the parties?

Given the Court's determinations above, there is no need to discern the answer presently. However, given the likelihood that the Board may wish to validly move the election forward from November to April, and the City may wish to retain the election in November, hopefully the Legislature may wish to consider these questions and act upon them. It is always in the best interests of our tripartite form of government for the Legislature to express its intent clearly, so that this dispute, between two public legislative bodies themselves, might be better understood and resolved by the parties themselves, rather than by recourse to the Court.