



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
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TRENTON, NJ 08625-0803

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

September 16, 2013

Padraig Flanagan
Florio, Perrucci, Steinhardt & Fader

[REDACTED]

Re: Sylvia Petillo v Local Finance Board
LFB Complaint #11-146

Dear Mr. Flanagan:

Please find enclosed the Final Agency Decision of the Local Finance Board regarding the above referenced complaint filed against your client, Township of Hopatcong Mayor Sylvia Petillo, which was adopted by the Local Finance Board at its meeting of September 11, 2013.

You may contact Nick Bennett at (609) 292-0479 should you have any questions.

Sincerely,

Thomas H. Neff, Chair
Local Finance Board

THN:ah
C. George Cohen, DAG

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LOCAL FINANCE BOARD
FINAL AGENCY DECISION
LFB Complaint #11-146

SYLVIA PETILLO
Petitioner

v.

LOCAL FINANCE BOARD,
Respondent

Hearing Date: December 12, 2012

Final Agency Action: September 11, 2013

This matter came before the Local Finance Board ("Board") by way of a complaint filed against Sylvia Petillo, the Mayor of the Borough of Hopatcong, pursuant to the Local Government Ethics Law, N.J.S.A. 40A:9-22.1 et seq. The complaint alleged that the Mayor used public resources for political gain when she used municipal funds to print, fold, stuff, and send a letter advocating support for a measure to be voted on as a ballot question in the November 2011 election, while she was up for re-election, in violation of the following provision of the Local Government Ethics Law:

N.J.S.A. 40A:9-22.5(c) No local government officer or employee shall use or attempt to use his official position to secure unwarranted privileges or advantages for himself or others.

The Board authorized an investigation of this complaint on March 14, 2012. By letter dated April 16, 2012, the Board notified Mayor Petillo that an ethics complaint had been filed



against her, and the Board was undertaking a formal inquiry in accordance with N.J.S.A. 40A:9-22.9. Mayor Petillo submitted a response to the complaint on May 3, 2012. She included in her response copies of the July 6, 2011 and August 3, 2011 Borough Council meeting minutes and a copy of Borough Ordinance 23-2011 entitled "Ordinance Petitioning the Clerk of Sussex County to Place on the Ballot a Referendum to Create a Single Land Use Board in the Borough of Hopatcong." She also described the financial conditions and other practical considerations which, in her view, argued for a merger of the Borough's Planning and Zoning Boards. Beyond this, she stated that the ordinance placing the decision to merge the boards on the ballot for public vote passed first reading unanimously, and was adopted by a 5-1 vote, in which Mayor Petillo did not participate.¹ She stated that, "following the adoption of the Ordinance and the question being placed on the November ballot, [she] decided to send a letter to the residents of the Borough of Hopatcong explaining the issue and advising the residents that [she] supported the passage of the ballot question in [her] role as Mayor of Hopatcong because [she] believed it to be in the best interest of the Borough."

Mayor Petillo additionally responded that the claim that she violated the Local Government Ethics Law is "completely unsubstantiated and is frivolous. [She] received no personal benefit by writing the letter to the residents supporting the ballot question. [She] wrote the letter in [her] role as Mayor because [she] felt it to be in the best interest of the Borough. The issue of whether the Boards were to be combined could not personally benefit [her] in any way. [She is] confident that the letter [she] wrote as Mayor of Hopatcong was objective, was well supported by the facts, and was consistent with the statements made by Council members at public meetings and given as the reasoning for supporting the Ordinance creating the ballot question. Although [she] was up for election in the same election where the ballot question was to be presented. (sic) [She] ran unopposed and the issue of combining the Boards had no relationship whatsoever to [her] re-election."

The Mayor concluded by reserving a right to make further statements and arguments in her defense after having an opportunity to view the complaint.²

Based on its investigation and in consideration of the response submitted, the Board determined at its meeting on June 13, 2012 that Mayor Petillo was in violation of the Local Government Ethics Law when she used \$2,316.11 of Borough funds to print, stamp, stuff and mail a letter recommending that the recipient vote in favor of a ballot question to combine the Borough's Planning Board and Zoning Board of Adjustment, constituting the use or attempted use of her official position to secure an unwarranted privilege or advantage for herself or others in violation of N.J.S.A. 40A:9-22.5(c) of the Local Government Ethics Law because the letter included the statements "I recommend that you consider answering the Municipal Proposal on the election ballot with a "YES", which would consolidate these Boards" and "I recommend that

¹ In the Borough form of government, the Mayor votes only to break a tie.

² The Board notes that Mayor Petillo's response included a request for a copy of the complaint. Consistent with the Adopted Rules and Complaint Procedures of the Local Finance Board, N.J.A.C. 5:35-1.1 et seq., the Board did not provide a copy of the complaint at that time.

you consider answering the Municipal Proposal with a "Yes" which would consolidate these Boards."³

The Board assessed a \$100 fine for Mayor Petillo's actions in violation of N.J.S.A. 40A:9-22.5(c). It waived the fine, for the reason that no personal financial benefit was derived through the action.

Mayor Petillo was notified of the Board's determination in a Notice of Violation dated June 25, 2012, and advised of her right to an administrative hearing to contest the violation. She was advised that any request for an administrative hearing shall be filed with the Local Finance Board within thirty (30) days receipt of the Notice.

By letter dated July 25, 2012, received by the Board on July 26, 2012, Mayor Petillo officially requested a hearing on this matter. By way of a letter dated August 6, 2012, Douglas J. Steinhardt, Esq., entered his appearance on behalf of Mayor Petillo and requested that all future correspondence to be directed to him.

The Board decided to conduct a hearing on this matter at its meeting of August 8, 2012, and informed Mr. Steinhardt of this decision in a letter dated October 9, 2012. The hearing was originally scheduled for the Board's November 7, 2012 meeting. Mr. Steinhardt requested an adjournment to the next available hearing date. This request was granted, and the hearing was rescheduled for the Board's December 12, 2012 meeting.

Mr. Steinhardt submitted a prehearing letter brief on December 6, 2012.

The hearing was conducted on December 12, 2012. Pdraig P. Flanagan, Esq. appeared for the appellant. George Cohen, Deputy Attorney General, appeared for the Board. No witnesses were called and Mayor Petillo did not attend the hearing.

A list of items entered as evidence is attached as Attachment A.

Factual Background

The operative facts are not disputed. Counselors Flanagan and Cohen jointly agreed that there was no need for evidentiary testimony. Based on Petitioner's pretrial brief, and other written submissions, the facts can be summarized as follows.

On November 8, 2011, Election Day, the voters of Hopatcong Township were to consider a ballot question that would authorize the combination of the Planning Board and the Zoning Board of Adjustment into a single Borough Land Use Board.

³ This letter is found at item J-3 in Attachment A.

The reorganization of a Zoning Board of Adjustment and a Planning Board into a single body is required by N.J.S.A. 40:55D-25(e), which states:

“In any municipality in which the planning board exercises the power of a zoning board of adjustment pursuant to subsection c. of this section, a zoning board of adjustment may be appointed pursuant to law, subject to voter referendum permitting reconstitution of the board. The public question shall be initiated through an ordinance adopted by the governing body.”

Subsection (e) of that section refers to population classifications. Hopatcong, at 15,147 people, according to the 2010 US census, is required to adhere to public referendum laid out in N.J.S.A. 40:55D-25(e).

The Township Council’s vote was unanimous in support of the introduced ordinance #23-2011 at the July 6, 2011 meeting. On second reading at the August 3, 2011 Council meeting, the ordinance passed 5-1. The Mayor did not vote.

Mayor Sylvia Petillo signed a letter sent to 4,700 Hopatcong voters explaining the Borough’s motivation for combining the Boards. The Mayor’s letter included the bold-faced sentence “I recommend that you consider answering the Municipal Proposal on the election ballot with a “YES,” which would consolidate these Boards.” This sentence was essentially repeated at the conclusion of the letter, which was printed on Municipal letterhead and bore the sole signature of Sylvia Petillo. These were the only sentences in the letter subject to an emphatic typeface.

Borough Clerk Catherine Gleason submitted to the Board a copy of the purchase order that paid for this mailing. On November 2, 2011, check number 30330 was sent to Sussex County Mailing Service in the amount of \$2,316.11, pursuant to approved purchase order number 11-00889. The vendor submitted this purchase order for \$1,230.00 for “printing, folding, stuffing, Printing 4700 copies, Printing #10 envelope with mailing permit, Prep Mailing Complete, Postage.” There was also a \$1,086.11 charge for “Postage for mailing.” This equals approximately \$0.23 in postage for each letter mailed. The Borough Clerk confirmed that purchase order 11-00889 was submitted for the Mayor’s message of support for the ballot question.

The ballot question passed, 1493 to 479.

Analysis

N.J.S.A. 40A:9-22.5(c) of the Local Government Ethics Law is applicable to situations where a local government officer or employee uses or attempts to use her official position to secure unwarranted privileges or advantages for herself or others. The unwarranted privilege or

advantage may be the use of a public resource that would not generally be available to the general public of that municipality.

The Board's approach is supported by Formal Opinion 21, issued August 27, 1975, by Acting Attorney General Robert J. Del Tufo. Though this formal opinion predates the Local Government Ethics Law, the foundation for the opinion still guides the Local Finance Board when considering whether a violation of provision (c) has occurred. The Formal Opinion was issued in response to the question whether it is permissible for a governmental entity to actively promote or advocate an affirmative vote on a public referendum. The Attorney General advised that a governmental unit has the "authority and responsibility to commit its resources in furtherance of a strictly informational function. However, the authority to inform must not be conducted in a manner to urge or advocate an affirmative vote." The Formal Opinion cited the State Supreme Court ruling in Citizens to Protect Public Funds v. Board of Education, et al, 13 N.J. 172 (1953) where Justice Brennan wrote "the board made use of public funds to advocate one side only of the controversial question without affording the dissenters the opportunity by means of that financed medium to present their side, and thus imperiled the propriety of the entire expenditure."

Formal Opinion 21 concluded that public funds and facilities may not be used to promote or advocate an affirmative vote on a public referendum, but the resources of the governmental unit may be used to disseminate information which would enable the public to make an informed choice on this issue at the polls.

An unwarranted privilege or advantage "would be one that is unjustified or unauthorized, one that would permit the municipal official to obtain something otherwise not available to the public at large." In Re Zisa, 385 N.J. Super. 188 (A.D. 2006).

Furthermore, the Division of Local Government Services regularly circulates Local Finance Notices. Local Finance Notices are newsletters issued to provide guidance and information to local municipalities, agencies and officials concerning legal and regulatory aspects of various functional areas and programs. In LFN 2011-9, *CY 2011 Municipal Levy Cap Referendum Procedures* issued February 25, 2011, the topic of using public funds to promote a ballot question was addressed. The Notice stated:

The attention of municipal officials is called to long-established guidance concerning how government funds and resources can be used regarding informing the public about public referendum. It has long been held that a government agency "has the authority and responsibility to commit its resources in furtherance of a strictly informational function. However, the authority to inform must not be conducted in a manner to urge or advocate an affirmative vote."

Thus while municipal resources (newsletters, mailings, website) can be used to inform the public about the referendum, that information must be strictly informational. Nothing,

however, prohibits individual public officials from offering their personal opinions through other means (i.e., personal contacts, press interviews, letters to the editor, etc.).

Following the opinion rendered in Formal Opinion 21, the holding in Zisa, and the guidance provided in Local Finance Notice 2011-9, the governing body of a municipality is permitted to distribute newsletters and press releases intended to inform residents of the municipality of issues and actions taken by that governing body.

The Board reviews the totality of the circumstances when confronted with questions such as this. The review includes whether the subject matter of the item in controversy can be independently confirmed by statistics or official documents. This test allows the Board to distinguish between items that are informational and those which advocate policy initiatives. Public funds can be allocated to informational mailings, but cannot be used to compel action. It is not the Board's intent to limit the ability of a public official to articulate policies that impact the operations of government in a municipality.

The appellant asserts that she did not obtain an unwarranted privilege or advantage by writing the letter to the residents of Hopatcong because she did not obtain anything of value or derive any benefit that was not available to the general public.

The Board disagrees. A local government officer or employee need not derive a personal benefit or obtain anything of value personally to be found in violation of N.J.S.A. 40A:9-22.5(c). The statute states:

N.J.S.A. 40A:9-22.5(c) No local government officer or employee shall use or attempt to use his official position to secure unwarranted privileges or advantages for himself or *others*;

The Board's holding is that the use of \$2,316.11 of public funds to distribute a letter signed by Mayor Sylvia Petillo advocating a vote in favor of a ballot question constitutes an unwarranted privilege and thus violates the Local Government Ethics Law.

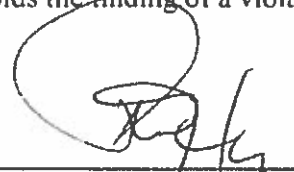
It is recognized by the Board that the Mayor did not herself derive a personal financial benefit, and it was therefore appropriate to waive the fine.

The Board determined that the general public did not have the same access to the funds of the Borough of Hopatcong to advocate for an opposing policy position. The use of public funds by an individual advocating a specific position on a public ballot question constitutes the use of one's official position to secure unwarranted privileges or advantages for one side in this ballot question.

The Board determined that the language in the letter goes beyond a factual description of the impact of combining the Zoning Board of Adjustment and the Planning Board into a single body. Public funds were used to advocate for an affirmative vote on the ballot question.

The Local Finance Board agrees, and hereby upholds the finding of a violation.

DATE: September 11, 2013



THOMAS H. NEFE, CHAIR
LOCAL FINANCE BOARD

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