SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1699-16T4

PAUL J. KENNEDY,

Petitioner-Appellant,

v.

LOCAL FINANCE BOARD,

Respondent-Respondent.

Submitted January 22, 2018 – Decided March 12, 2018

Before Judges Sabatino, Ostrer and Whipple.

On appeal from the Local Finance Board, Department of Community Affairs, Docket No. LFB 14-018.

Kelaher, Van Dyke & Moriarty, attorneys for appellant (Peter J. Van Dyke, on the briefs).

Gurbir S. Grewal, Attorney General, attorney for respondent (Melissa H. Raksa, Assistant Attorney General, of counsel; Melanie R. Walter, Deputy Attorney General, on the brief).

PER CURIAM

Paul J. Kennedy appeals from the Local Finance Board's final decision that he violated N.J.S.A. 40A:9-22.5(c), (d), (e), and (g) of the Local Government Ethics Law. The Board imposed a $500

fine.[1] The Board's finding arises out of Kennedy holding various paid positions in the Ocean Gate Borough government, in addition to his position as mayor. We affirm the finding of violations, but vacate the imposition of a penalty, and remand.

After the Board's initial finding, and Kennedy's demand for a hearing before the Office of Administrative Law (OAL), the parties eventually filed cross-motions for summary decision. In a written opinion that the Board adopted in its entirety, the Administrative Law Judge (ALJ) denied Kennedy's motion and granted the Board's.

We presume the reader's familiarity with the facts that the ALJ reviewed at length. It suffices to note here that Kennedy, while serving as the Borough's unpaid mayor, performed many duties that would normally be assigned to a municipal administrator, personnel director, insurance administrator, and ADA coordinator, whose positions were all vacant. Kennedy suggested to the Borough Council that it formally appoint him to those positions and pay him a salary without pension or other benefits. The Council agreed, first appointing him Acting Administrator and two years

[1] Kennedy does not appeal the Board's finding that he violated N.J.S.A. 40A:9-22.6(a)(1) by filing incomplete financial disclosure statements and fining him $100. N.J.S.A. 40A:9-22.10(b). Therefore, we do not address that finding.

later, adding the other positions in an "acting" capacity.[2] By then, the administrator's salary had risen from $15,000 to $30,000. The other positions added another $20,000 in salary.

On appeal, Kennedy renews arguments he presented to the Board that: (1) his actions did not violate the Ethics Law; (2) he reasonably relied on the advice of counsel; and (3) if his counsel's affidavit is deemed insufficient, the matter should be remanded for a plenary hearing.

We begin with our standard of review. The test for granting a motion for an administrative agency's summary decision under N.J.A.C. 1:1-12.5(b) is "substantially the same" as the one governing a motion to a trial court for summary judgment under Rule 4:46-2. Contini v. Bd. of Educ. of Newark, 286 N.J. Super. 106, 121 (App. Div. 1995). However, our review of an agency's summary decision differs from our de novo review of a court's grant of summary judgment. See Henry v. N.J. Dep't of Human Servs., 204 N.J. 320, 330 (2010). While we review de novo an agency's determination that there are no genuine issues of material fact, we "strive to 'give substantial deference to the interpretation [the] agency gives to a statute that the agency is

[2] The Council also made the mayor's position salaried, with a range of $1 to $5000. The record does not include a Council resolution approving a particular salary level for Kennedy's service as mayor.

charged with enforcing.'" In re Application of Virtua-West Jersey Hosp. Voorhees for a Certificate of Need, 194 N.J. 413, 423 (2008) (citing Saint Peter's Univ. Hosp. v. Lacy, 185 N.J. 2, 15 (2005)). We generally will affirm an agency's final quasi-judicial decision unless it is "arbitrary, capricious, or unreasonable." Russo v. Bd. of Trustees, Police and Firemen's Ret. Sys., 206 N.J. 14, 27 (2011). Nonetheless, we are "in no way bound by the agency's interpretation of a statute or its determination of a strictly legal issue." Mayflower Sec. Co. v. Bureau of Sec., 64 N.J. 85, 93 (1973).

Applying this standard of review, we affirm the Board's specific conclusion that Kennedy violated multiple provisions of the Ethics Law substantially for the reasons stated in the ALJ's decision. Using his position as mayor, Kennedy was the moving force in his own hiring. The method he used also deprived others of an equal chance to apply for the positions. As the ALJ observed, Kennedy never even considered seeking other candidates. Consequently, he "use[d] . . . his official position to secure unwarranted . . . advantages for himself. . . ." N.J.S.A. 40A:9-22.5(c); he used the non-public information about the hiring process he obtained as mayor "for the purpose of securing financial gain for himself," N.J.S.A. 40A:9-22.5(g); and he "act[ed] in his official capacity . . . where he . . . ha[d] an interest, [or]

. . . direct . . . financial or personal involvement that might reasonably be expected to impair his objectivity or independence of judgment . . . ." N.J.S.A. 40A:9-22.5(d). Additionally, as a multi-office-holder, Kennedy created the risk that his use of the mayoral veto of Council actions under N.J.S.A. 40A:60-5(d) could be affected by the Council's power to fire him from the various other offices he held. Thus, he had "undertake[n] . . . employment . . . which might reasonably be expected to prejudice his independence of judgment in the exercise of his official duties." N.J.S.A. 40A:9-22(e).

Our decision in Gayder v. Spiotta, 206 N.J. Super. 556 (App. Div. 1985), upon which Kennedy relies, does not compel a different result. In Gayder, we held that a village president, equivalent to a mayor, could vote for his appointment as the police administrator. Disqualification because of personal interest was not required because the statute authorized filling the position from the village board of trustees, on which the village president served. By contrast, Kennedy's actions were not contemplated by statute. He used his office to propose his hiring, thereby violating a principle the Gayder panel reaffirmed: "[A] public official may not exercise his office to confer a personal benefit upon himself," including securing "another office or position." Id. at 562.

Nor does it matter that Kennedy did not vote for his employment. Kennedy highlights that fact to distinguish himself from the council member in Grimes v. Miller, 113 N.J.L. 553 (Sup. Ct. 1934), who wrongfully withheld a vote, leaving a tie in place that secured his appointment to an office. Kennedy still used his power to place himself in office. That was the fundamental wrong that Grimes identified. Id. at 557-58. In sum, we discern no basis to disturb the Board's conclusion that Kennedy's actions violated the Ethics Law.

We turn next to Kennedy's advice-of-counsel defense. We recognized the defense in dictum in In re Zisa, 385 N.J. Super. 188, 198-99 (App. Div. 2006). Although we held that Zisa's activities did not violate the Ethics Law, we held that even if they did, the Board erred in rejecting Zisa's advice-of-counsel defense. To establish the defense: (1) an officer must receive the advice before taking the questioned action; (2) the officer must make "full disclosure of all pertinent facts and circumstances"; (3) the advisor must "possess[] authority or responsibility with regard to ethical issues"; and (4) the officer must "comply with the advice received, including any restrictions

it might contain." Ibid.[3] We noted that the Executive Commission on Ethical Standards applied a similar test in In re Howard, 93 N.J.A.R.2d (Vol. 5A) 1 (Executive Comm'n on Ethical Standards 1993), aff'd as modified, 94 N.J.A.R.2d (Vol. 5A) 1 (App. Div. 1994). In re Zisa, 385 N.J. Super. at 199. The advice-of-counsel defense lies although an officer can, instead of seeking advice of counsel, seek an advisory opinion from the Board itself. See N.J.A.C. 5:35-1.5.

We found nothing in the record to support the Board's conclusion that Zisa's reliance on counsel was unreasonable, apart from those four factors. Id. at 197-98. In particular, we rejected the Board's conclusion that it was unreasonable to rely on an oral opinion of the municipal attorney, absent evidence that written opinions were the usual practice. Ibid. We also rejected the Board's conclusion that Zisa's experience and astuteness made it unreasonable for him to follow the attorney's advice. Id. at 198.

[3] Although not expressly stated, the attorney-advisor must also be independent, and not saddled with a conflict of his or her own in providing advice. Cf. Mortensen v. Comm'r, 440 F.3d 375, 387 (6th Cir. 2006) ("In order for reliance on professional tax advice to be reasonable, however, the advice must generally be from a competent and independent advisor unburdened with a conflict of interest and not from promoters of the investment.").

However, the defense does not vitiate a finding of an Ethics Law violation that does not hinge upon a public servant's state of mind. Cf. id. at 197 (stating the defense is not a "absolute defense"). It is a defense to a penalty. There is no element of the substantive statutory violations to which good faith reliance on counsel's advice would be relevant.[4] By contrast, for example, in the tort setting, reliance on counsel's advice "erases the 'absence of probable cause' element of the tort of malicious use of process. . . ." See LoBiondo v. Schwartz, 199 N.J. 62, 106 (2009); see also id. at 95 (noting that prior cases held that "reliance on the advice of counsel . . . will defeat the separate element of malicious intent"). The defense approved in Zisa pertains to whether a local office-holder should be subject to an otherwise mandatory penalty of between $100 and $500 for a violation. See N.J.S.A. 40A:9-22.10(b).

[4] The Executive Commission on Ethical Standards found that the defense was relevant to establishing a knowing conflict under N.J.S.A. 52:13D-23(e)(7). "[A]n employee who received prior approval for a particular action cannot be found to have acted in a knowing fashion in violation of N.J.S.A. 42:13D-23(e)(7) . . . ." In re Howard, 93 N.J.A.R.2d at 14. However, the Appellate Division panel held that the "knowing" state-of-mind pertains to the act itself; but proof of subjective knowledge "that the act will be perceived as a breach of trust" is not required. The court noted the test is an objective one. In re Howard, 94 N.J.A.R.2d at 5.

The ALJ, and the Board by adoption, found that Kennedy's reliance on the advice of counsel was unreasonable. In support of Kennedy's motion for summary decision, the Borough Attorney stated in an affidavit that Kennedy requested his advice before he accepted the various municipal offices; Kennedy made him "aware of the facts and the circumstances surrounding" his contemplated acceptance; the attorney advised him there was no "legal rule or principle that forbade his accepting those positions"; and Kennedy thereafter accepted the positions.

The ALJ did not directly ascertain Kennedy's compliance with the four Zisa factors — a point we shall discuss. Instead, the ALJ found that the attorney's affidavit was too conclusory to "allow an assessment of the reasonableness of his advice." The ALJ also faulted Kennedy for failing to identify ambiguity in the Ethics Law that prompted him to seek legal advice. The ALJ concluded that the law so clearly prohibited his conduct that it was unreasonable to rely on the Borough Attorney's advice to the contrary.[5]

[5] The ALJ cited Cooper v. United States, 834 F.Supp. 669, 670 (D.N.J. 1993), aff'd, 9 F.3d 1539 (3d Cir. 1993), wherein the district court held that a taxpayer did not establish "reasonable cause" under 26 U.S.C. § 6651(a) to fail to file a timely tax return. The court held that it was unreasonable for the taxpayer to rely on "facially extraordinary" advice that a filing could be postponed while the taxpayer was the subject of an ongoing criminal

The ALJ and the Board misapplied the defense. It does not directly depend on the reasonableness or correctness of the attorney's advice. It depends instead on the reasonableness of the office-holder's reliance. Although it would be unreasonable to rely upon wildly implausible advice, those instances should be exceedingly rare.

Rather, an officer should be able to reasonably rely on the advice of an independent attorney responsible for providing it. An officer should not be required to pinpoint ambiguities in the law to justify seeking legal advice in the first place. Rather, it should usually suffice that the officer "'evidenced sensitivity to the issue of a potential conflict . . . and sought legal advice." In re Zisa, 385 N.J. Super. at 198 (citation omitted).

In other contexts, courts have concluded that clients should be free to rely in good faith on their attorney's advice. See United States v. Boyle, 469 U.S. 241, 251 (1985) (noting, in the tax context, "[w]hen an accountant or attorney advises a taxpayer on a matter of tax law, such as whether a liability exists, it is reasonable for the taxpayer to rely on that advice"); McKeown-Brand v. Trump Castle Hotel & Casino, 132 N.J. 546, 558 (1993) (noting, in applying frivolous litigation statute, "a client who

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investigation into prior returns, particularly since the taxpayer did not request an extension. Id. at 672-73.

relie[d] in good faith on the advice of counsel cannot be found to have known that his or her claim or defense was baseless"). The local official who is not an expert in local government ethics law should rarely be obliged to second-guess the responsible attorney. The United States Supreme Court observed, regarding taxpayers' reliance on counsel's advice:

> Most taxpayers are not competent to discern error in the substantive advice of an accountant or attorney. To require the taxpayer to challenge the attorney, to seek a "second opinion," or to try to monitor counsel on the provisions of the Code himself would nullify the very purpose of seeking the advice of a presumed expert in the first place.
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> [Boyle, 469 U.S. at 251.]

The same holds true for a local governmental official seeking ethics advice.

While the existing record does not support a finding that Kennedy acted unreasonably in relying on the advice he received, the Borough Attorney's affidavit provided insufficient detail to enable the Board to assess fairly Kennedy's compliance with the four elements of the advice-of-counsel defense articulated in Zisa. The attorney does not state when Kennedy sought his advice, particularly whether he sought his advice before the Council actually approved the resolutions appointing him to the several paid positions. The attorney also does not describe in any detail

the facts and circumstances provided to him. Evidently, the ALJ did not explicitly analyze those factors once he concluded that Kennedy's reliance was unreasonable.

Therefore, it is appropriate to vacate the imposition of the $500 penalty and remand the case to the Board to provide Kennedy with an opportunity to supplement the record with additional evidence in support of his defense that he reasonably relied on counsel and satisfied the four elements in Zisa. We leave it to the Board to determine whether additional discovery is warranted, and whether the matter should be referred again to the OAL for a plenary hearing. Although Kennedy moved for summary decision, he did not waive the opportunity to supplement the record under the circumstances. See O'Keeffe v. Snyder, 83 N.J. 478, 487 (1980) (stating that a movant may assert that the facts are undisputed according to its theory of the case, while contending genuine issues of fact remain if the court adopts the opponent's theory).

Affirmed in part. Vacated and remanded in part. We do not retain jurisdiction.