Decision No. 17,263

(November 27, 2017)

Douglas L. Thomas & Associates, attorneys for petitioner, Douglas L. Thomas, Esq., of counsel

Raiser & Kenniff, P.C., attorneys for respondent Board of Education of the Hempstead Union Free School District, Ethan D. Irwin, Esq., of counsel

Law Offices of Douglas A. Spencer, PLLC, attorneys for respondents Maribel Touré, Melissa Figueroa, Gwendolyn Jackson, and Mary Crosson, Douglas A. Spencer, Esq., of counsel

ELIA, Commissioner.--Petitioner appeals from the decision of the Board of Education of the Hempstead Union Free School District ("board") and board trustees Maribel Touré ("Touré"), Melissa Figueroa ("Figueroa"),[1] and Gwendolyn Jackson ("Jackson"), to remove him from office. The appeal must be sustained in part.

Petitioner is a taxpayer and resident of respondent's district and former trustee on the board, having served his first term from July 1, 2013 through June 30, 2016. He was board president from July 1, 2014 through June 30, 2015. On May 16, 2017, petitioner was re-elected to the board for a second three-year term, from July 1, 2016 through June 30, 2019.

At respondent's May 16, 2017 annual election, respondent Figueroa lost her board seat to Randy Stith ("Stith"). According to petitioner, previously Figueroa, Touré, and Jackson, serving as the board's majority, "dominated the BOE's conduct for the entire 2016-2017 school year." Further, according to petitioner, "[the Figueroa-Touré- Jackson] power bloc was at risk of transitioning into the minority on the BOE after the election." According to petitioner, the "majority" would now consist of petitioner, Stith, and trustee David Gates as of July 1, 2017.

At respondent board's meeting on May 31, 2017, a resolution was passed, appointing respondent board's counsel as special counsel to investigate "allegations concerning the unlawful disclosure of personnel information" by petitioner "and to take further action at the discretion of the board." Respondents Figueroa, Jackson, and Touré voted in favor of the resolution and petitioner and trustee Gates voted against the resolution.

At respondent board's meeting on June 8, 2017, a majority of the board voted to proceed with formal charges seeking petitioner's removal pursuant to Education Law §1709(18).[2] The resolution read as follows:

> WHEREAS, the Board of Education of the Hempstead Union Free Schools [sic] District ("Board") is the duly constituted governance body of the School District; and
>
> WHEREAS, La[m]ont Johnson is a member of the Board and bound by the District policy and legal requirement that he not disclose confidential information acquired by him in the course of his official duties as a member of the board; and,
>
> WHEREAS, the Board has been advised that La[m]ont Johnson violated his duty of confidentiality regarding the confidential disclosure of district employees' names and home addresses; and,
>
> WHEREAS, the remaining members of the Board have consulted with Special Counsel on the legal options available to address this serious concern.
>
> IT IS THEREFORE RESOLVED, THAT:
>
> 1.The Board authorizes an action to seek removal of La[m]ont Johnson from the Board pursuant to Education Law Section 1709(18) and District Policy for his official misconduct.
>
> 2.The written charges dated June 8, 2017 are hereby approved and preferred against Lamont Johnson.
>
> 3.Pursuant to its authority, the Board designates Raymond L. Colon, Esq. as hearing officer for said charges and to provide an oral or written report of the hearing, together with any recommendations, to the Board President as soon as possible after conclusion of the hearing.

By notice dated June 8, 2017, the board charged petitioner with official misconduct pursuant to Education Law §1709(18) and Board Policies §§2110.1 and 9160, as follows:

> 1.You are a member of the Board of Education of the Hempstead Union Free School District and have been a member since on or about 2013. You also previously held the position as President of the Board.
>
> 2.At all relevant times herein, you were present for and/or participated in various discussions related to Board elections and candidates. You did so in your official capacity as a member of the Board.

3.Prior to the 2017 Board elections, you assisted Randy Stith (hereinafter, "Stith") in his campaign for election to the Board. As part of your assistance, you provided Stith with names and home addresses of various District employees, without permission, consent, or authority to do so for the purpose of creating political campaign literature, or otherwise, in furtherance of his candidacy to the Board.

4.On or about April 11, 2017, during, before, or after a Board meeting, you took part in a conversation with another Board member during which you revealed that you disclosed to Stith, in violation of the aforementioned District policies and Education Law, said names and addresses.

5.As a Board member, you have taken and sworn to the Constitutional Oath of Office, and to uphold all Board and District policies, including the aforementioned. Notwithstanding these facts, you violated the District policy of the strict non-disclosure of District employees' names and home addresses:

a.Copies of the Stith campaign literature was received by multiple District employees.

b.You were observed having a private conversation with Board member Jackson by a third-party.

c.During that private conversation, you acknowledged and admitted to Board member Jackson that you provided Stith with the names and home addresses of District employees.

6.Notwithstanding your understanding and acceptance of the District policies and the Law, you violated the policy and the confidentiality and trust of the District employees and residents of the District.

7.Your actions as described herein constitute official misconduct as you have used your official position as Board member for personal and/or political benefit. As a member of the Board, you have an obligation to maintain the confidentiality of information pursuant to General Municipal Law Section 805-a(b), applicable Education Law and decisions of the Commissioner of Education, District policies, and your oath of office. The identity of the District employees' names and home addresses is confidential and was obtained by you in your capacity as a member of the Board in the course of your official duties. Disclosure of those identities to

> Stith, or any individual, constitutes a violation of your duties and obligations as a member of the Board.
>
> 8.By violating your duties and obligations as a member of the Board, you compromised the District, the employees, and the integrity of the position of Board member. You also caused distress to those individuals who received the correspondence. As a result of the foregoing, you must be removed from the Board of Education of the Hempstead Union Free School District.

The letter further informed petitioner that he had ten days to respond to the written charges, and that a hearing was scheduled for June 19, 2017, at which time he would be afforded a full and fair opportunity to refute the charges.

On June 13, 2017, petitioner commenced an Article 78 proceeding in Supreme Court, Nassau County, and a temporary restraining order ("TRO") was granted that day, staying the removal proceeding.[3] On June 19, 2017, the stay was lifted and a hearing session was held. Additional hearing sessions were held on June 21, 23, 28, 29,[4] and 30, 2017. On June 27, 2017, petitioner was admitted to the hospital for a cardiac emergency, and remained hospitalized until on or about the evening of June 30, 2017. As a result, a second stay of the removal proceeding was granted by the court on June 28, 2017. By order dated June 29, 2017, the Nassau County Supreme Court (Anzalone, J.) lifted and vacated the stay imposed on June 28, 2017. The order provided that, "[i]f Mr. Johnson finishes his tests today and he gets out of the hospital tonight or tomorrow morning, and there is a continuation of the hearing tomorrow, he can participate in person. If he remains in the hospital or on bed rest at home, he can participate by telephonic means."

On June 30, 2017, the hearing officer concluded the hearing and gave an oral recommendation on the record, recommending petitioner's removal based on official misconduct. Specifically, the hearing officer concluded that "the Board has met their burden by a preponderance of the evidence, that Mr. Johnson has in fact committed official misconduct, by virtue of him not complying or violating Board policies, the applicable law, the rules and regulations of the Department of Education and in that, he actually did either produce, disseminate distribute or cause or importune to distribute, disseminate or produce employees', District employees' personal information, names and home addresses."

On June 30, 2017, following the hearing, by a vote of three to one, respondent board voted to remove petitioner from the board. Respondent board found petitioner guilty of the charges set forth in the notice of removal dated June 8, 2017.[5] By a vote of three to one, the board then voted on June 30, 2017, to appoint Mary Crosson ("Crosson") to fill the vacancy created by virtue of petitioner's removal.[6]

This appeal ensued. Petitioner's request for interim relief was denied on August 22, 2017.

Petitioner asserts that he did not engage in any misconduct; the district's charges are refuted by the facts; the district failed to prove that any misconduct occurred; the charges were not supported by evidence of misconduct warranting removal of petitioner; respondents violated petitioner's procedural due process rights to proper service; respondents violated petitioner's substantive due process rights to present witnesses and testify himself; and that the decision to remove petitioner from the board was "ripe with conflicts of interest" and improperly carried on the vote of a board member that was both a witness and judge in the same proceeding.

Petitioner requests an order determining that the June 30, 2017 decision by the board by a vote of 3-1 was arbitrary and capricious; annulling the June 30, 2017 decision to remove petitioner from the board; "unseating Mary Crosson as a Trustee/Member of the board";[7] annulling the June 30, 2017 decision to appoint Crosson to fill the vacancy created by petitioner's removal; reinstating petitioner as a trustee of the board; and annulling "any and all decisions, votes, or appointments by the [board] in which Mary Crosson was in the majority and the vote of the [b]oard was 3-2."

Respondent board denies "any and all allegations of collusion, impropriety, and illegality." It asserts many "affirmative defenses,"[8] including that the appeal must be dismissed as untimely and for lack of standing; the Commissioner lacks subject matter jurisdiction; and petitioner has not acquired jurisdiction over a necessary party. Respondent board generally asserts as affirmative defenses the doctrines of laches, waiver, and unclean hands. It further contends that the action is duplicative of another pending action and may not be maintained because of the doctrines of collateral estoppel, res judicata, and election of remedies, since petitioner commenced petitions in supreme court pursuant to Article 78. Respondent board asserts that its official actions constitute a good faith exercise of discretion and judgment, for which respondent and its employees, agents, and/or representatives are immune.

I must first address the procedural issues. By letter dated August 16, 2017, petitioner's counsel indicated that he "discovered a document scanning and production error for Exhibit 11 to the Verified Petition" and that the wrong document was provided as Exhibit 11. Enclosed therewith he provides "the actual document that is the 'Filed 7-3-17 Notice of Voluntary Discontinuance without Prejudice,'" from the Article 78 proceeding in supreme court in which a temporary restraining order had initially been granted staying the board's removal proceedings, to be substituted as Exhibit 11 to the petition. By letter dated August 23, 2017, respondent board's counsel objected to such request because an answer and affirmation in opposition was already filed relying on the petition and supporting documentation. It appears that the error was inadvertent. Moreover, the petition refers to Exhibit 11 as the "Filed 7-3-17 Notice of Voluntary

Discontinuance without Prejudice" and the record indicates that respondent board was familiar with such document. Therefore, I have accepted for filing the corrected Exhibit 11 to the petition.

In his reply, petitioner asserts that respondents Touré, Figueroa, Jackson, and Crosson (the "individual respondents") defaulted in answering the verified petition despite having been served on July 25, 2017, and as such, the factual allegations in the petition as to the individual respondents must be deemed true. By letter dated August 23, 2017, my Office of Counsel informed the individual respondents[9] that Commissioner's regulations §§275.9 and 275.13 "require that each respondent upon whom a copy of a petition has been served shall serve and file an answer thereto" and that "no answer was filed with my Office within the time allotted." By letter dated August 22, 2017, then-counsel for the individual respondents alerted my Office of Counsel that she was retained by the individual respondents on August 17, 2017, and requested an extension of time in which to serve an answer. By letter dated August 28, 2017, my Office of Counsel advised the individual respondents' counsel that their answers were due on August 14, 2017, and that, "[b]ecause the time in which to serve an answer pursuant to §275.13 of the Commissioner's regulations has passed," no extension of time would be granted.

By letter dated September 11, 2017, the individual respondents, by and through new counsel, made an application to interpose a verified answer. Petitioner objected to the individual respondents' late answer. Section 275.13 of the Commissioner's regulations requires each respondent to answer the petition within 20 days from the time of service. Extensions may be granted in the discretion of the Commissioner upon timely application therefor (8 NYCRR §276.3). Further, a late answer may be considered in the discretion of the Commissioner upon consideration of the proffered reason for the delay (Appeal of Ortiz, 47 Ed Dept Rep 383, Decision No. 15,731; Appeal of a Student with a Disability, 46 id. 540, Decision No. 15,589). The Commissioner, in his/her sole discretion, may excuse a failure to serve an answer within the time prescribed (8 NYCRR §273.13[b]). The reasons for such failure shall be set forth in the answer (8 NYCRR §273.13[b]). In the absence of a sufficient excuse for a late answer, the factual allegations set forth in the petition will be deemed to be true statements (8 NYCRR §275.11; Appeal of Hamblin, et al., 48 Ed Dept Rep 421, Decision No. 15,902; Appeal of Smith, 48 id. 125, Decision No. 15,813).

The September 11, 2017 letter indicates that counsel "was only recently appointed by the Respondent Board, namely August 24, 2017 with respect to Trustees Toure, Jackson, and Crosson, and September 7, 2017 with respect to former Trustee Figueroa. Under the circumstances, I would urge the same represents good cause for delay and would accordingly ask that the Commissioner consider our filing nonetheless." I do not, however, find this excuse compelling. Initially, I note that the proposed answer contains no explanation for individual

respondents' failure to serve an answer within the time prescribed (8 NYCRR §275.13[b]). Moreover, I do not find credible the purported excuse in counsel's September 11, 2017 letter. The record indicates that the individual respondents were served during the same time frame as respondent board. Respondent board's counsel interposes an answer on behalf of respondent board only, with the help of the individual respondents. Indeed, the board's answer contains affidavits in support sworn to by the individual respondents, and is verified by respondent Touré. Furthermore, the record indicates that the individual respondents retained their former counsel on August 17, 2017, and current counsel on August 24, 2017; yet, the application to serve a late answer was not served until September 11, 2017, after petitioner had already served his verified reply and memorandum of law. The individual respondents provide no explanation for their failure to retain counsel or request an extension of time until after the deadline to submit an answer had passed. Accordingly, I have not accepted the individual respondents' answer, and petitioner's factual statements as to the individual respondents are deemed to be true (see 8 NYCRR §275.11(a); Appeal of Hamblin, et al., 48 Ed Dept Rep 421, Decision No. 15,902; Appeal of Smith, 48 id. 125, Decision No. 15,813).

Petitioner also contends that the individual respondents' answer must be excluded for improper verification. Because the individual respondents' answer has been excluded as untimely, I need not address this issue.

By letter dated September 22, 2017, the individual respondents, by and through their new counsel, requested permission to submit a memorandum of law. Petitioner objected to the individual respondents' late memorandum of law. Section 276.4 of the Commissioner's regulations requires respondent to serve a memorandum of law on petitioner in accordance with §275.9 within 30 days after service of the answer or 20 days after service of the reply, whichever is later.

The Commissioner may permit the late filing of a memorandum of law where a party has established good cause for the delay and demonstrated the necessity of such memorandum to the determination of the appeal (8 NYCRR §276.4[a]; Appeals of McLoughlin and Wood, 55 Ed Dept Rep, Decision No. 16,886). In the September 22, 2017 letter, the individual respondents' counsel states that, "we understand the time to file an [a]nswer has since passed. To this end, I reiterate this office was only recently appointed by the [r]espondent [b]oard, namely August 24, 2017 with respect to Trustees Toure, Jackson, and Crosson, and September 7, 2017 with respect to former Trustee Figueroa. Under the circumstances, I would urge the same represents good cause for delay and would accordingly ask the Commissioner to consider [the] filing." Counsel further concludes that, "[t]o that end, enclosed please find [individual r]espondents' [m]emorandum of [l]aw together with proof of service in connection with the same." For the reasons discussed above, I do not find the proffered excuse to be compelling. Additionally, I

have already declined to accept the individual respondents' late answer upon which the memorandum of law is based. Accordingly, the individual respondents' request to submit a late memorandum of law is denied.

Petitioner also contends that the individual respondents' memorandum of law must be excluded for lack of proper service. Because the individual respondents' memorandum of law has been excluded as untimely, I need not address this issue.

Next petitioner asserts that respondent board's memorandum of law must be rejected as untimely, as improperly adding exhibits, and as containing inaccurate and misleading statements. As noted above, Section 276.4 of the Commissioner's regulations requires respondent board to serve a memorandum of law on petitioner in accordance with §275.9 within 30 days after service of the answer or 20 days after service of the reply, whichever is later. According to the record, respondent board's answer was served on August 11, 2017, and petitioner's reply was served on August 24, 2017. Further, respondent's memorandum of law was served on September 8, 2017. Petitioner asserts that respondent board failed to serve its memorandum of law by August 31, 2017, as represented in its July 27, 2017 letter to my Office of Counsel. However, respondent board's memorandum of law was served within 20 days after service of the reply. Therefore, I will not reject respondent board's memorandum of law as untimely.

Petitioner also asserts that respondent board's memorandum of law "seeks to surreptitiously submit (slide-in)" new exhibits. A memorandum of law should consist of arguments of law (8 NYCRR §276.4). It may not be used to add belated assertions or exhibits that are not part of the pleadings (Appeal of Bruning and Coburn-Bruning, 48 Ed Dept Rep 84, Decision No. 15,799; Appeal of Wright, 47 id. 202, Decision No. 15,668). Further, additional affidavits, exhibits and other supporting papers may only be submitted with the prior permission of the Commissioner (8 NYCRR §276.5). While this provision permits the submission of additional evidence, it cannot be used to add new claims against a respondent for which notice has not been provided (Appeals of Gonzalez, 48 Ed Dept Rep 405, Decision No. 15,898; Appeal of Marquette, et al., 48 id. 193, Decision No. 15,833). I will not accept materials that raise new issues and introduce new exhibits that are not relevant to the claims originally raised in the appeal (Appeals of Gonzalez, 48 Ed Dept Rep 405, Decision No. 15,898; Appeal of Marquette, et al., 48 id. 193, Decision No. 15,833). Respondent board's memorandum of law seeks to attach two new exhibits that were not previously included with its answer. One exhibit contains various orders from the Article 78 proceeding, without specification, and the other exhibit is a hearing officer's report dated August 11, 2017.[10] No application to introduce additional exhibits was made at any time prior to respondent board's filing of its memorandum of law. Nor did respondent board request to submit such additional exhibits along with its memorandum of law

or explain how they could not have been submitted when respondent board served its answer. Indeed, the record contains no indication that respondent board attempted to serve or introduce the hearing officer's report dated August 11, 2017, until after petitioner had already served his verified reply and memorandum of law, even though the hearing officer's report bears the same date as respondent board's answer. Further, respondent board did not respond to petitioner's objections in this regard in its October 6, 2017 letter to my Office of Counsel. Rather, in that letter counsel for respondent board advocated in favor of allowing the individual respondents' answer and memorandum of law.[11] Therefore, to the extent respondent board's memorandum of law seeks to include new exhibits, I have not considered them. However, I have considered respondent board's memorandum of law to the extent it contains arguments of law responsive to the pleadings.

Respondent board alleges that since petitioner previously challenged the removal proceeding in State supreme court, he is barred from seeking the same relief in an appeal under Education Law §310 under the doctrines of collateral estoppel and res judicata. However, respondent board's claim that the petition should be dismissed because petitioner commenced a proceeding in supreme court has been rendered moot by the discontinuance of petitioner's Article 78 proceeding by notice of voluntary discontinuance without prejudice dated July 3, 2017 (Appeals of Gill and Burnett, 42 Ed Dept Rep 89, Decision No. 14,785, judgment granted dismissing petition to review sub nom., Gill v. Mills, et al., Sup Ct., Albany Co., Bradley, J., October 6, 2003, n.o.r.; cf. Appeal of Friedman, 32 id. 447, Decision No. 12,882). Moreover, the record indicates petitioner did not receive a determination on the merits which would bar petitioner from relitigating those issues here (cf. Appeal of Friedman, 32 id. 447, Decision No. 12,882; Appeal of Tobin, 30 id. 315, Decision No. 12,477; Appeal of Roth, 26 id. 165, Decision No. 11,715; Matter of Monaco, 24 id. 348, Decision No. 11,421).

Turning to the merits, petitioner challenges the determination of respondent board to remove him for official misconduct. Pursuant to Education Law §1709(18), the board of education of every union free school district has the power, among other things, "[t]o remove any member of their board for official misconduct" after a hearing, provided that "a written copy of all charges made of such misconduct shall be served upon him at least ten days before the time appointed for a hearing of the same; and he shall be allowed a full and fair opportunity to refute such charges before removal."

In an appeal to the Commissioner, a petitioner has the burden of demonstrating a clear legal right to the relief requested and the burden of establishing the facts upon which petitioner seeks relief (8 NYCRR §275.10; Appeal of Aversa, 48 Ed Dept Rep 523, Decision No. 15,936; Appeal of Hansen, 48 id. 354, Decision No. 15,884; Appeal of P.M., 48 id. 348, Decision No. 15,882).

On the record before me, I find that petitioner was not afforded sufficient due process to satisfy the standard set forth in Education Law §1709(18). Further, based on my review of the record, including the hearing transcript, I find insufficient proof to establish grounds for petitioner's removal.

Petitioner asserts that respondent board failed to serve a written copy of all charges made of such misconduct upon him at least ten days before the hearing regarding the same. According to respondent board, it attempted to serve the June 8, 2017 notice of charges upon petitioner personally at the June 8, 2017 board meeting, but neither petitioner nor his attorney would accept service. Respondent indicates that the charges were then served by certified mail on June 8, 2017, but were never claimed by petitioner. Respondent contends that, subsequently, three attempts at service were made on June 9, 2017, and another attempt was made on June 10, 2017, but that no one came to the door. Respondent board's process server then affixed the charges to petitioner's door and sent them by regular mail on June 10, 2017.

Petitioner asserts that he was never personally served and that respondent board did not serve him until June 10, 2017, which was only 9 days before the hearing was to commence on June 19, 2017. However, the record indicates that petitioner was present at the June 8, 2017 board meeting, at which the board voted to prefer the charges, and was thus aware that charges were preferred against him. Petitioner provides no explanation for his or his counsel's

refusal to accept service at that meeting.[12] As long as a petitioner receives adequate notice of the charges, due process is served (Appeal of Jones-White, 44 Ed Dept Rep 347, Decision No. 15,194 ["The record reflects that on July 17, 2003, respondents' attorney hand-delivered to petitioner a copy of the charges and notice of the hearing, and sent the same by certified letter dated July 18, 2003, and the hearing was held on August 7, 2003, more than ten days later"]; Appeals of Gill and Burnett, 42 id. 89, Decision No. 14,785, judgment granted dismissing petition to review sub nom., Gill v. Mills, et al., Sup Ct., Albany Co., Bradley, J., October 6, 2003, n.o.r.). As noted above, in an appeal to the Commissioner, a petitioner has the burden of demonstrating a clear legal right to the relief requested and the burden of establishing the facts upon which petitioner seeks relief (8 NYCRR §275.10; Appeal of Aversa, 48 Ed Dept Rep 523, Decision No. 15,936; Appeal of Hansen, 48 id. 354, Decision No. 15,884; Appeal of P.M., 48 id. 348, Decision No. 15,882). Based on the record before me, I cannot conclude that petitioner carried his burden of establishing that notice of the charges was inadequate in this case.

However, based on the totality of the circumstances, the record indicates that respondent board failed to provide petitioner with a full and fair opportunity to refute such charges before his removal.[13] The removal hearing began on June 19 and continued on June 21, 23, 28, 29, and

30, 2017. Respondent board presented its case through the testimony of its witnesses on June 19, 21, 23, and 28. During that time, petitioner filed several orders to show cause and was also hospitalized from June 27 through June 30, 2017 for his heart condition. By letter dated June 27, 2017, petitioner's counsel updated the hearing officer and respondent board's counsel as to petitioner's health condition and his objection to presenting petitioner's case in one day, June 30, 2017. He noted that, "[s]ince the School board Majority's case is not yet complete and would have consumed over three (3) days before it is concluded, the clear implication is that you are willing to go non-stop from 1:00 PM until 2:00 AM, if necessary, to conclude the hearing on Thursday morning. This means I will be forced to perform the herculean feat of putting the entirety of Lamont Johnson's defense case on in a single day of exhaustive hearings that even the stenographer has complained she cannot endure." He noted that each of the other hearing dates were three to four hours long, and were held in the evening so that it was convenient to call the board's witnesses after work hours. Petitioner's attorney explained that petitioner was able to attend those sessions, and would need to attend all hearing sessions, but anything longer than that would be difficult for him. He noted that if he were required to put on petitioner's case in a 13-hour marathon session, as the hearing officer would be requiring, it would cause undue cardiac distress on petitioner, which was already exacerbated by these proceedings. Finally, petitioner's counsel outlined a list of witnesses he planned to call, and summarized their testimony. He also confirmed that petitioner planned to testify in his defense.[14]

On June 30, 2017, the hearing convened at 9:56 a.m. According to petitioner, the hearing was supposed to continue for 13 hours with all of petitioner's witnesses testifying, including petitioner. However, the hearing officer closed the hearing within 20 minutes, based on petitioner's counsel's non-appearance, and then promptly gave his oral recommendation to remove petitioner and closed the record at 10:33 a.m. According to petitioner, his attorney was to arrive at 11:00 a.m. based on his text message to the hearing officer.[15] Additionally, petitioner had 12 witnesses, including trustee Gates, waiting in the auditorium to be called to testify, some of whom apparently knocked on the door of the hearing room at 10:30 a.m.

According to respondent board, petitioner and his counsel refused to make themselves available for the hearing such that it would be completed in a reasonably timely fashion. As such, according to respondent board, petitioner voluntarily forfeited the opportunity to defend himself. However, in light of all of the above, and the fact that petitioner was facing removal from a position to which he had recently been re-elected, I cannot find that he was provided with a full and fair opportunity to be heard. Indeed, the court order dated June 29, 2017, which lifted and vacated the stay imposed on June 28, 2017, provided that, "[i]f Mr. Johnson finishes his tests today and he gets out of the hospital tonight or tomorrow morning, and there is a continuation of the hearing tomorrow, he can participate in person. If he remains in the hospital or on bed rest at

home, he can participate by telephonic means." The hearing officer interpreted the order to allow the hearing to continue in petitioner's absence. I disagree and find that there is sufficient evidence in the record indicating that petitioner wished and intended to participate in the hearing on June 30, 2017, and had in fact made arrangements to do so from his hospital bed or from home if he were released that day. Moreover, the hearing officer was advised that petitioner's attorney was en route and expected to be present by 11:00 a.m. and the record indicates that petitioner had witnesses present and waiting to testify. Therefore, I find that the hearing officer erred in closing the record at 10:33 a.m. and that petitioner was not afforded sufficient due process to satisfy the standard in Education Law §1709(18).

I also find that respondent board deprived petitioner of due process by allowing respondent Jackson to vote to remove petitioner from office. Respondent Jackson was the primary witness to the charge against petitioner and also voted in favor of his removal (see Komyathy v. Bd. of Educ. of Wappinger Central School Dist., 75 Misc.2d 859, 867 [a board member harboring an "adverse animus" should not be allowed to participate in the "decision-rending" aspect of a removal proceeding]). Petitioner further contends that respondent Figueroa should also have been disqualified from voting to remove petitioner. However, I find that petitioner has not met his burden of proof in this regard. Therefore, I need not address respondent board's contentions regarding the doctrine of necessity because without respondent Jackson's vote, the board would still have a quorum.

Additionally, based on my review of the record, including the hearing transcript, I find insufficient proof to establish grounds for petitioner's removal. To constitute grounds for removal pursuant to Education Law §1709(18), the "official misconduct" must clearly relate to a board member's official duties, either because of the allegedly unauthorized exercise of the member's powers or the intentional failure to exercise those powers to the detriment of the school district (Appeal of Jones-White, 44 Ed Dept Rep 347, Decision No. 15,194; Appeals of Gill and Burnett, 42 id. 89, Decision No. 14,785, judgment granted dismissing petition to review sub nom., Gill v. Mills, et al., Sup Ct., Albany Co., Bradley, J., October 6, 2003, n.o.r.; Appeal of Balen, 40 id. 479, Decision No. 14,532; Appeal of Cox, 27 id. 353, Decision No. 11,973).

I find insufficient proof in the record to sustain the charge, which alleged that petitioner "provided Stith with names and home addresses of various district employees, without permission, consent, or authority to do so for the purpose of creating political campaign literature, or otherwise, in furtherance of his candidacy to the Board" in violation of General Municipal Law §805-a(b), applicable Education Law provisions and decisions of the Commissioner of Education, district policies, and his oath of office. Respondent was unable to establish how, in fact, petitioner allegedly obtained the names and home addresses of the district

employees in question. Thus, on this record, respondent has failed to prove that petitioner disclosed "confidential information acquired by him in the course of his duties" (emphasis added), or used such information to further his personal interests, which is what General Municipal Law §805-a(b) prohibits. Further, the district policy that petitioner allegedly violated was not clearly identified, and the testimony on the subject was unclear. Moreover, petitioner was deprived of an opportunity to present witness testimony, but in this appeal he submits affidavits from 14 witnesses, many of whom have refuted under oath the allegations against petitioner. Petitioner denies providing the Stith campaign with names and home addresses of district employees. Although respondent Jackson testified at the hearing that on April 11, 2017, petitioner told her he disclosed names and home addresses of district employees to the Stith campaign, petitioner denies any such admission and maintains that it was Jackson who kept asking him whether he did such a thing and he thought it was odd that she was even talking to him because they did not have a civil relationship. At best, respondent adduced testimony that confirmed that two district employees had access to an employee mailing list, but no connection was made at the hearing between such list and petitioner. Therefore, I find that the record evidence does not support the charge of official misconduct (see generally, Appeals of Hoefer, 45 Ed Dept Rep 66, Decision No. 15,263). Moreover, petitioner submits affidavits from 11 individuals refuting the charges, including those two district employees who specifically refute the inferences against petitioner.

Based on the totality of the record, I am constrained to annul respondent board's determination to remove petitioner for official misconduct. The entire record demonstrates that in respondent board's haste to investigate, charge, and remove petitioner from office by an arbitrary deadline of June 30, 2017, when the board membership would be shifting, respondent failed to balance its desire to quickly establish its case, with its need to ensure due process was provided. Petitioner had just been re-elected by the will of the voters, and the record indicates that the hearing officer failed to exercise appropriate caution to ensure that petitioner was afforded a full and fair opportunity to present his case. Even if I were to accept respondent's arguments that petitioner and his attorney had actively sought to delay the hearing prior to June 30, 2017, and that petitioner's attorney was late for the hearing on June 30, that does not justify the hearing officer's action in closing the record when it was clear that petitioner had witnesses present and waiting to testify that day and therefore was ready to present his case when the attorney arrived a half hour later.

Finally, petitioner requests a determination annulling "any and all decisions, votes, or appointments by the [board] in which Mary Crosson was in the majority and the vote of the [b]oard was 3-2." It is understood, however, that respondent Crosson was a de facto member of the board of education until the date of this decision and that no actions of the board in which she

participated as a de facto member are invalidated as a result of this decision (see Appeal of Reed, 55 Ed Dept Rep, 16,871; Appeal of Roy, 31 id. 497, Decision No. 12,713).

In light of this determination, I need not consider the parties' remaining contentions.

Finally, I am compelled to comment on the controversy surrounding respondent board in recent years which continues to plague this district, as evidenced by the record in this and several other cases involving the district (see e.g. Appeal of Watson, et al., 56 Ed Dept Rep, Decision No. 17,082; Appeal of the Bd. of Educ. of the Hempstead Union Free School Dist., 55 id., Decision No. 16,878; Appeal of Touré, et al., 54 id., Decision No. 16,660). Due to the significant academic and school governance issues the district continues to experience, effective October 6, 2017, I appointed a Distinguished Educator to the district in accordance with Education Law §211-c. In light of the above, I again admonish the district and the board, as I have in previous appeals, to take all steps necessary to ensure that such controversy does not continue and that the district's leadership and resources are focused on the paramount goal of providing successful outcomes for students. To this end, I am directing Dr. Jack Bierwirth, the appointed Distinguished Educator, to provide guidance and technical assistance to the district to ensure that this occurs.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that respondent's June 30, 2017 action in appointing Mary Crosson as a trustee or member of the Board of Education of the Hempstead Union Free School District is hereby annulled; and

IT IS FURTHER ORDERED that petitioner Lamont Johnson be reinstated to his position as a trustee or member of the Board of Education of the Hempstead Union Free School District, effective immediately.

END OF FILE

---

[1] Figueroa is a former board trustee, having served on the board until June 30, 2017. However, at all times relevant to the claims in the instant appeal, Figueroa was a board trustee.

[2] The minutes from the board's June 8, 2017 meeting indicate that, after the board voted 3-2 to prefer charges against petitioner, trustee Gates made a motion to table the resolution, in part because "there's no documentation to prove there are such grounds, therefore in good faith I cannot make a decision, I'm asking that this be tabled until the Board as a whole can review the documentation."

[3] The record indicates that petitioner filed a total of six orders to show cause, on June 13, 19, 20, 23 (two), and 28, 2017.

[4] The record indicates that the June 29, 2017 hearing session was convened and then adjourned due to some confusion as to whether the TRO had been lifted.

[5] According to the record, trustee Gates made a motion to suspend the resolution until petitioner's witnesses could have an opportunity to testify, but such motion failed.

[6] The record indicates that, on July 5, 2017, the board voted to change Crosson's appointment from the remainder of petitioner's term (26 months) to a term until the next election on May 15, 2018 (10.5 months), to correct its original error in appointing Crosson for the remainder of the term.

[7] To the extent petitioner is attempting to bring an application for the removal of Crosson, he has not provided the requisite notice for bringing a removal action under Education Law §306 nor has he alleged any wilful violation by respondent Crosson as required under Education Law §306.

[8] In its verified answer, respondent board lists 17 "Affirmative Defenses." Respondent board, however, did not submit evidence supporting several of these defenses with its answer or memorandum of law. Under these circumstances, respondent has waived, abandoned or

otherwise failed to establish all defenses which are not expressly addressed herein (seeAppeal of Kenton, 54 Ed Dept Rep, Decision No. 16,649; Application of Simmons, 53 id., Decision No. 16,596; see also Woods v. Design Ctr., LLC, 42 AD3d 876, 878 ["[D]efendant did not address in Supreme Court or on appeal the issue.... We therefore conclude ... that defendant conceded" the issue]; New York Commercial Bank v. J. Realty F Rockaway, Ltd., 108 AD3d 756, 757 ["the defendants never raised that affirmative defense in their opposition papers and, thus, by their failure to do so, waived it"]; Polite v. Goord, 49 AD3d 944 ["Although petitioner arguably raised the issue of substantial evidence in the petition ..., he has since abandoned this claim by not raising it in his brief"]).

[9] The August 23, 2017 letter was also sent to Gates and Stith, who are named as necessary party-respondents herein.

[10] To the extent respondent board argues that it relied on such report in determining to remove petitioner, I note that the report is dated August 11, 2017 – six weeks after respondent board voted to remove petitioner on July 30, 2017.

[11] By letter dated September 14, 2017, petitioner objected to respondent board's memorandum of law on various grounds. By letters dated September 15 and 28, 2017, petitioner objected to the individual respondents' answer and memorandum of law, respectively. By letter dated October 6, 2017, respondent board provided a "formal response" to petitioner's letters of objection, but did not discuss petitioner's September 14, 2017 letter objecting to respondent board's memorandum of law.

[12] In his reply, petitioner asserts that the individual who submitted an affidavit with respondent board's answer averring that he attempted personal service on petitioner and his counsel at the June 8 board meeting did not in fact do so. In this regard, petitioner points to the hearing transcript in which such individual states that he was not "the direct process server." In any event, I note that petitioner does not refute respondent's assertion that both he and his attorney refused to accept personal service at the June 8 meeting.

[13] Preliminarily, I note that petitioner claims that respondent board should have held a public hearing.  However, Public Officers Law §107 vests exclusive jurisdiction over complaints alleging violations of the Open Meetings Law in the Supreme Court of the State of New York, and alleged violations thereof may not be adjudicated in an appeal to the Commissioner (Appeal of McColgan and El-Rez, 48 Ed Dept Rep 493, Decision No. 15,928; Applications and Appeals of Del Río, et al., 48 id. 360, Decision No. 15,886; Appeals of Hoefer, 45 id. 66, Decision No. 15,263; Appeals of Gill and Burnett, 42 id. 89, Decision No. 14,785.  Therefore, I have no jurisdiction to address the Open Meetings Law allegations raised in this appeal.

[14] Petitioner brought an order to show cause on June 28, 2017, containing an emergency medical affirmation from petitioner's treating physician, and a TRO was issued enjoining the Education Law §1709(18) proceeding until June 29, 2017.

[15] There is no dispute that the hearing was to resume on the morning of June 30, 2017; however, the parties disagree about the start time. Petitioner's counsel sent a text message to the hearing officer at 8:44 a.m. indicating that he would be there between 10:30 and 11:00 but would not be able to call until after 10 a.m.  The hearing officer responded "10-4" and then at 10:22 a.m. petitioner's counsel advised that he was on his way; at 10:52 that he was "about 7 minutes out"; and at 10:59 "I am here!"  The hearing officer indicated that by "10-4" he meant he was acknowledging the text message; however, petitioner's counsel interpreted it to mean that the hearing would be starting at 10:00 a.m., which would mean that he was late in appearing.