MEMORANDUM

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SUPREME COURT - SUFFOLK COUNTY
PRESENT:
HON. PAUL J. BAISLEY, JR., J.S.C.

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In the Matter of ROBERTA FISHMAN, MADELINE C. SERPE, PAULINE M. HAZARD and JAMES EDWARD HAZARD, JR.,

Petitioners,

-against-

BOARD OF EDUCATION OF THE SOUTH COUNTY CENTRAL SCHOOL DISTRICT, JOSEPH L. CIPP, JR. and GREGORY C. MIGLINO, JR.,

Respondents,

For Relief Pursuant to Article 78 of the New York Civil Practice Law and Rules.

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I.A.S. PART 36

By: Baisley, J.S.C.

Dated: February 6, 2012

INDEX NO.: 29131/2010
MOT. NO.: 003 MOT D

PETITIONERS' ATTORNEY:
REGINA SELTZER, ESQ.
30 South Brewster Lane
Bellport, New York 11713

RESPONDENTS' ATTORNEY:
GUERCIO & GUERCIO, LLP
77 Conklin Street
Farmingdale, New York 11735

Petitioners Roberta Fishman, Madeline C. Serpe, Pauline M. Hazard and James Edward Hazard, Jr. commenced the instant proceeding for a judgment pursuant to CPLR Article 78, CPLR §3001, Public Officers Law Article 7, General Municipal Law §51, Civil Service Law §102 and New York State Constitution Article VIII, Section 1, declaring illegal, unconstitutional, null and void, arbitrary and capricious the appointment by the Board of Education (the "Board") of the South Country Central School District (the "District") on May 12, 2010 of Gregory C. Miglino, Jr. to the position of Building Services Administrator and the appointment on June 2, 2010 of Joseph L. Cipp, Jr. to the position of Superintendent of the South Country schools; and directing respondents Miglino and Cipp to return and restore to the School District all illegal and unconstitutional payments made to them.

Petitioners' claims herein arise out of the following alleged facts: Respondent Gregory C. Miglino, Jr. was a trustee and the president of the South Country School Board on May 12, 2010, when the Board voted (with Miglino abstaining) to appoint Miglino to the newly created part-time position of Building Services Administrator at an annual salary of $61,200. The Board had previously voted (on March 24, 2010) to establish a residence preference for Civil Service positions in the district. Miglino, who placed 15th on the Civil Service list of certified eligible candidates for the position of Building Services Administrator in 2009, was not otherwise reachable for the position, but was the only District resident on the Civil Service list. Miglino, whose term as Board trustee expired on June 30, 2010, assumed his new employment position with the District effective July 1, 2010.

Respondent Joseph L. Cipp, Jr. served as a trustee on the South Country School Board from 2007 to 2009, when he became an assistant principal in the District. On February 3, 2010, then-Superintendent of Schools Raymond Walsh resigned, and the Board voted to appoint Cipp Interim

Superintendent of Schools at a salary of $1,000 a day. On June 2, 2010, the Board voted to appoint Cipp Superintendent of Schools at an annual salary of $240,000. Cipp's term as Superintendent of Schools commenced on July 1, 2010.

Petitioners, who allege that they are residents and taxpayers of the District, assert four causes of action in their amended verified petition arising out of the foregoing actions. In the first cause of action they allege that the Board violated the Open Meetings Law (Public Officers Law Article 7) by making the foregoing determinations in executive session without public notice or public discussion. In the second cause of action, petitioners allege that the Board violated the state Constitution by making an unlawful gift of public funds to Miglino and Cipp, and seek to void the allegedly unauthorized or *ultra vires* acts of the Board and compel the restoration of the funds to the District. In the third cause of action, petitioners seek a declaration declaring null and void the resolutions appointing Miglino and Cipp to their respective positions, on the ground that respondents have unlawfully wasted District money and illegally used public funds for improper purposes. Petitioners further allege that the appointment of Miglino violated Education Law §3016, which assertedly requires a super-majority vote, and that the appointment by a board of one of its members to an employment position is improper. In the fourth cause of action, petitioners allege that the Board acted unlawfully and unconstitutionally when it conspired with Miglino in acts of self-dealing that constituted a breach of fiduciary responsibility and a violation of the Civil Service Law and the Constitution. Petitioners further allege that Miglino does not meet the minimum qualifications for the position of Building Services Administrator because he does not possess the required degree and does not have the required experience, and that as president of the Board Miglino colluded with the Board to establish a residence preference for the position as a way to bypass the Civil Service list. Finally, petitioners allege that the residency requirement failed to comply with Civil Service Law §20, which they assert requires a public hearing. Petitioners allege that all of the foregoing violates public policy and accordingly the Board's actions should be cancelled and set aside.

Respondents served an amended verified answer to the amended petition, in which they urge the denial of the petition on various grounds. They allege, *inter alia*, that petitioners were required to file a notice of claim prior to commencing the instant proceeding; that petitioners' claims are outside the primary jurisdiction of the court and should be determined by the Commissioner of Education; that petitioners lack standing; and that petitioners' constitutional claims fail to state a cause of action. Respondents contend that respondents' actions in appointing respondents Cipp and Miglino were in all respects appropriate and their acceptance of their respective appointments was likewise proper. Respondents' amended verified answer is supported by numerous exhibits apparently intended to comprise the record of the proceedings (but not certified as required by CPLR §7804(e)), together with the affidavits of Richard A. Kollar, Nelson Briggs and Nancy Poulos, the District's Interim Assistant Superintendent of Human Resources, Assistant Superintendent of Human Resources, and District Clerk, respectively.

The Court finds, in the first instance, that respondents' assertion that petitioners' claims fall outside the primary jurisdiction of the Court is without merit. Petitioners' claim that respondents violated the Open Meetings Law is not within the scope of the authority granted to the Commissioner of Education by Education Law §310 (*Dombroske v Board of Education*, 118 Misc 2d 800 [Sup Ct 1983]), and petitioners' further claims of, *inter alia*, waste of public funds, self-dealing and constitutional violations do not require the Commissioner's specialized knowledge and expertise.

Respondents' affirmative defense that petitioners lack standing is also without merit. Petitioners' allegations that they are residents and taxpayers of the District are sufficient to establish their standing with respect to their claims that respondents wasted public funds (General Municipal Law §51; Civil Service Law §102; *Rampello v East Irondequoit Cent. Sch. Dist.*, 236 AD2d 797 [4th Dept 1997]). Petitioners' further allegations that respondents violated the Open Meetings Law establish their standing as aggrieved persons under Public Officers' Law §107.

Moreover, contrary to respondents' arguments, this is not a proceeding that requires petitioners to have served a notice of claim as a prerequisite to commencing the proceeding. Manifestly the petition seeks vindication of a public interest rather than enforcement of private rights; accordingly a notice of claim is not required (*Cayuga-Onondaga Counties Bd. of Coop. Educ. Servs. v Sweeney*, 89 NY2d 395 [1996]; *Eldridge v Carmel Cent. School Dist. Bd. of Educ.*, 82 AD3d 1147 [2d Dept 2011]).

Respondents' remaining affirmative defenses are factually unsupported and are similarly without merit. Accordingly, the Court proceeds to determine the merits of the petition.

Upon a review of the record and the parties' various submissions, the Court is constrained to agree with petitioners that the Board's actions with respect to Miglino were improper in various respects. In the first instance, the Board's action in appointing one of its own members to an employment position was on its face improper (*Wood v Town of Whitehall*, 120 Misc. 124, *aff'd*, 206 AD 786 [3d Dept 1923]). Miglino's position as president of the Board and his close association with the other Board members may be presumed to have unduly influenced the other Board members in his favor. The impropriety of the Board's action was not cured by the fact that Miglino himself did not vote, or by the fact that his appointment did not become effective until the day after his term as an active Board member expired (*Wood, supra*). Indeed, the issue apparently prompted one Board member to propose an ethics resolution "so that board members do not in any way, within one year of service, profit from being on the board" (April 21, 2010 minutes, item Y). The minutes reflect that "Trustee Miglino objected strongly to the word 'profit', stating that people are entitled to earn a living and not be discriminated against if they're qualified for a job. He stated that [Human Resources] has been clear that the particular individual has gone through all the appropriate background checks, filled out the appropriate paperwork, fingerprints and otherwise, so in his estimation that is nothing more than discrimination, not profiteering." Although the "particular individual" was not identified in the public portion of the meeting, it is clear in retrospect from the context that Miglino's statement was both self-serving and self-referential.

Moreover, the machinations that led up to the Board's appointment of Miglino to the position occurred out of the public view – either in executive session or without public disclosure that Miglino was the intended beneficiary of the Board's various actions. There was, for example, no public discussion of the Board's March 24, 2010 resolution to create a District residency requirement for Civil Service positions, a resolution that was co-introduced by Miglino, who, as the sole District resident on the Civil Service eligibility list for the Building Services Administrator position, had a vested but undisclosed interest in its passage. Indeed, Miglino, who was ranked 15th on the list because of his comparatively low score on the exam, could not even have been considered for the position without the residency requirement Miglino himself engineered.

There was no public discussion of the fact that the District had petitioned the Civil Service Commission to change the title of the existing vacant position of "Plant Facilities Administrator" to "Building Services Administrator" – a title change that redounded exclusively to the benefit of Miglino.

The Board's adoption on April 21, 2010 of a resolution approving the use of the Building Services Administrator title and releasing the position for posting, although nominally "public," manifestly did not give notice to District residents of Miglino's interest in the position, his position on the Civil Service eligibles list, and the personal advantage he had gained as a result of the residency preference approved by the Board of which he was the presiding member.

The record reflects that in fact the first public discussion of Miglino's interest in the position was on May 5, 2010 – just one week before the Board voted, *sub rosa*, to award Miglino the position. The record thus confirms petitioners' allegation that – contrary to respondents' assertions – there was virtually no public notice or public discussion of the Board's plan to create a new administrative position and to appoint one of its own members to that position.

Although there was no public discussion of the Building Services Administrator position prior to the Board's appointment of Miglino on May 12, 2010, the record reflects that there was extensive public discussion thereafter. The minutes of the May 26, 2010 business meeting of the Board reflect that statements in opposition to the Board's action were read into the record by several District residents (including petitioners' attorney in this proceeding). The minutes reflect that questions were raised regarding the necessity of the Building Services Administrator position, the legality of the residency preference, as well as financial and ethical considerations, and that the school attorney attempted to address those issues.

Opposition to the position by other District residents was also expressed at the June 2, 2010 meeting, the June 16, 2010 meeting, and the July 7, 2010 meeting. The minutes of the July 21, 2010 business meeting reflect that ultimately the Board voted to hold an "informational meeting" regarding the Building Services Administrator position on July 28, 2010. All of the foregoing demonstrates that the appointment of Miglino to the Building Services Administrator position was a matter of significant public interest and that the public was wrongfully excluded from the Board's deliberations regarding it.

While respondents correctly assert that personnel matters are properly the subject of executive sessions (Public Officers Law §105(1)(f)), only matters that relate to the appointment of a particular individual may be conducted in executive session, so all of the Board's deliberations leading up to Miglino's appointment were required to be open and public. It appears that instead, the Board impermissibly voted while in executive session to create the new position and to take the necessary steps to ensure that the position was awarded to one of its own members. This clearly violated both the letter and the spirit of the Open Meetings Law (Public Officers Law Article 7; *Matter of Gordon v Village of Monticello*, 207 AD2d 55 [3d Dept 1994]). Moreover, as one of the purposes of the Open Meetings Law is to permit administrative action to be informed by the opinions and responses of the public, the violation cannot be cured *nunc pro tunc*.

In light of all of the foregoing, the Court determines and declares that the Board action in creating the position of Building Services Administrator and appointing its member and president Gregory J. Miglino, Jr. to the position was arbitrary and capricious and violative of the Open Meetings Law and accordingly is null and void. Petitioners' submissions do not establish, however, that the District did not receive any benefit from the services performed by Miglino in his role as Building Services Administrator from the date of his appointment to the date of this order. Accordingly, the Court declines to order that the moneys paid to him as salary be returned to the District. All of petitioners' other claims with respect to the Miglino appointment are without merit or are immaterial in light of the determination herein.

With respect to the Board's appointment of Joseph L. Cipp, Jr. to the position of Superintendent of Schools, the Court finds that petitioners' submissions are insufficient to establish that the appointment was unlawful or improper, or that it violates the Open Meetings Law or any other provisions of law cited by petitioners. Cipp, although a former member of the Board, had not been a member of the Board for nearly a year at the time of his interim appointment on February 3, 2010, which apparently was not challenged by petitioners. Petitioners have proffered no evidence that Cipp's status as a former Board member unduly influenced the Board to offer him the position of Superintendent. Moreover, the Board did not act improperly in deliberating on Cipp's appointment in executive session. Open Meetings Law §105(1)(f) specifically authorizes the Board to meet in executive session with regard to personnel matters ("matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of a particular person or corporation").

Respondents allege, without evidence to the contrary by petitioners, that the resignation of then-Superintendent of Schools Raymond Walsh on February 3, 2010 was sudden and unanticipated. The minutes of the February 3, 2010 Board meeting reflect the acceptance of Walsh's resignation and the interim appointment of Cipp, as well as the intention of the Board president to develop a committee for the purpose of finding a new Superintendent of Schools. Respondents' submissions establish that, contrary to petitioners' allegations, the Superintendent position was publicly posted and advertised, and that there were other applicants whose qualifications were reviewed along with those of Cipp. The Board's conclusion that Cipp was the preferred candidate and its determination to offer him the position is within its prerogative (Education Law §1711), and the Court will not substitute its judgment for that of the Board.

Petitioners have offered no evidence to substantiate their claims that the salary paid to Cipp is excessive or unreasonable, and there is no allegation or showing that Cipp is not otherwise qualified to perform the duties of the position. Moreover, there is no evidence that the District did not benefit from the services performed by Cipp during the term of his appointment. Accordingly, all of petitioners' claims with respect to Cipp are denied.

Settle judgment.

PAUL J. BAISLEY, JR.

J.S.C.