

***State of New Jersey***

OFFICE OF ADMINISTRATIVE LAW

**ORDER ON**

**EMERGENT RELIEF**

 OAL DKT. NO. EDU 06947-20

 AGENCY DKT. NO. 166-8/20

**RALPH JOHNSON,**

Petitioner,

 v.

**BOARD OF EDUCATION OF TOWNSHIP OF**

**PISCATAWAY, MIDDLESEX COUNTY,**

Respondent.

**Brett M. Pugach**, Esq., for petitioner (Bromberg Law LLC, attorneys)

**Howard B. Mankoff**, Esq., for respondent (Marshall, Dennehey, Warner, Coleman & Goggin, LLP, attorneys)

BEFORE **KIM C. BELIN**, ALJ:

**STATEMENT OF THE CASE**

Petitioner Ralph Johnson (petitioner or Johnson), a former member of the Piscataway Township Board of Education (Board or respondent), challenges his removal from the Board and seeks an order pending a final decision from the Commissioner of Education (Commissioner): (1) staying the enforcement of respondent’s resolution passed on July 9, 2020, which removed petitioner from the Board for allegedly missing three consecutive Board meetings without good cause; (2) granting emergent relief enjoining and restraining the Board from taking any steps to fill the vacancy caused by petitioner’s removal and from proceeding with an election to fill the remainder of the unexpired term at the November 3, 2020, election; and/or (3) determining this matter in an expedited manner and issuing a scheduling order to ensure that the Commissioner’s final decision can be issued prior to September 14, 2020, which is the deadline for preparation of official general election ballots for printing.

**PROCEDURAL HISTORY**

On August 3, 2020, Johnson filed with the Commissioner, New Jersey State Department of Education, Bureau of Controversies and Disputes, a petition of appeal and notice of motion for stay and emergent relief and for expedited review, alleging that the Board’s action of July 9, 2020, to remove him as a member of the Board was void *ab initio* and its determination that Johnson’s absences were without good cause was arbitrary, capricious and unreasonable and induced by improper motive. Johnson seeks an order nullifying the Board’s action of July 9, 2020, and restoring him to membership on the Board, awarding him reasonable attorney fees and costs and such other relief as the Commissioner deems appropriate.

On August 5, 2020, the Commissioner transmitted the petition and motion for emergent relief to the Office of Administrative Law. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13; N.J.A.C. 1:1-8.2. Argument on the matter was held on August 11, 2020.

**FACTUAL DISCUSSION AND FINDINGS**

 Based upon a review of the documents from the parties, the facts in this case are not disputed. Johnson was first elected to the Board on November 5, 2013, for a three-year term and was re-elected for two additional terms serving a total of seven years until 2020. (Petition of Appeal, ¶ 2-4.) During his tenure, Johnson has attended 85% of all Board meetings. (Id. at ¶ 6.) Johnson is employed as a Lieutenant by the Essex County Department of Correctional Police where he is assigned as a Shift Commander. (Id. at ¶ 7.) Prior to March, 2020, when assigned to work shifts that coincided with Board meetings, which are typically held on Thursday evenings, Johnson has used personal time, vacation days, compensatory time and swapped shifts with his partner through a reciprocal program in order to attend the Board meetings. (Id. at ¶ 9.)

 On March 9, 2020, the Governor of New Jersey, through Executive Order 103, declared a public health emergency and state of emergency in New Jersey. (Id. at Exh. B.) On March 16, 2020, Governor Murphy issued Executive Order 104 which ordered all public, private and parochial elementary and secondary schools closed. (Id. at Exh. D.) As a result, the Board transitioned to its first video teleconference meeting on April 9, 2020. (Id. at ¶ 16.) Johnson was assigned to work on April 9, 2020, but he used his break time to participate in the Board meeting. (Id. at ¶ 16.) He had to use his personal cell phone because the correctional facility does not have wifi and the cellular service is unreliable. (Id.) After several unsuccessful attempts to dial into the meeting using the Zoom dial-in number on his cell phone, he was able to connect into the meeting by contacting the Director of Administrative Services who used her cell phone to place Johnson on speaker phone which enabled him to participate in the meeting. (Id.) However, after thirteen minutes, the connection was lost, and Johnson was unable to subsequently reconnect into the meeting despite repeated attempts. (Id.)

 The minutes from the April 9, 2020, Board meeting reflect that Johnson was present at the meeting, arriving at 5:55 p.m., exiting at 6:08 p.m. and the meeting adjourned at 7:02 p.m. (Id. at ¶ 17; Exh. E.) The April 9, 2020, minutes of the Business Meeting and Executive Session showing Johnson’s attendance were unanimously approved by the Board without revision on April 30, 2020. (Id. at Exh. F.) At the following Board meeting held on April 30, 2020, three Board members also experienced connection challenges calling into the meeting and were marked present. (Id. at ¶ 21; Exh. F.)

 It is undisputed that Johnson missed the March 12, 2020, in-person Board meeting, and video conference meetings via Zoom on April 30, 2020, and May 14, 2020, due to his work schedule. (Id. at ¶ 15-22.) Johnson’s absences were attributable to the changes in his work schedule which was altered by the COVID-19 pandemic and state of emergency requiring him to work additional hours to cover for employees who tested positive for the virus and had to be quarantined. (Id. at 15-22; 34.) As a correctional police lieutenant, Johnson was on call as an essential worker who had to report to work. (Respondent’s letter brief; Transcript of July 9, 2020 meeting, p. 50a, lines 5-8.) Johnson notified the Superintendent and Board President of his absences for the April 30 and May 14, 2020, meetings. (Id. at ¶ 21,22; Respondent’s Letter Brief, Exh. 5a, 6a, 7a.)

Johnson’s request for a shift change was granted, effective May 16, 2020, and he has attended all Board meetings until his removal on July 9, 2020. (Id. at ¶ 23-25.)

 The Board voted six in favor and three opposed to remove Johnson on July 9, 2020. (Id. at ¶ 30.) Johnson’s removal creates a vacancy of over two years left on his term of office. (Id. at ¶ 37.)

 Board meetings start with a one-hour executive session which is private and allows the Board to discuss confidential matters followed by the public portion of the meetings which includes presentations by staff and students, public discussion of issues as appropriate under the Open Public Meetings Act, N.J.S.A. 10:4-8 *et* *seq*., and formal voting on the Board agenda. (Certification of Shelia Hobson, p. 2.) Accordingly, at the April 9, 2020, meeting, Johnson was present for only a portion of the executive session and did not vote on any public matters. (Id. at 3.)

**LEGAL ANALYSIS AND CONCLUSION**

***Emergent Relief***

The regulations governing controversies and disputes before the Commissioner of Education provide that “[w]here the subject matter of the controversy is a particular course of action by a district board of education . . . the petitioner may include with the petition of appeal, a separate motion for emergent relief or a stay of that action pending the Commissioner’s final decision in the contested case.” N.J.A.C. 6A:3-1.6(a). The regulations further provide that the Commissioner may “[t]ransmit the motion to the OAL for immediate hearing on the motion.” N.J.A.C. 6A:3-1.6(c)(3).

At such a hearing, a petitioner must show that he/she satisfies each of the following four standards:

1. The petitioner will suffer irreparable harm if the requested relief is not granted;

2. The legal right underlying petitioner’s claim is settled;

3. The petitioner has a likelihood of prevailing on the merits of the underlying claim; and

4. When the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted.

[N.J.A.C. 6A:3-1.6(b) (citing Crowe v. DeGioia, 90 N.J. 126 (1982)).]

Thus, the purpose of emergent relief is “to ‘prevent some threatening, irreparable mischief, which should be averted until opportunity is afforded for a full and deliberate investigation of the case.’” Crowe, 90 N.J. at 132 (citing Thompson ex rel. Bd. of Chosen Freeholders v. Paterson, 9 N.J. Eq. 624, 625 (Sup. Ct. 1854)).

***Irreparable Harm***

Johnson has demonstrated that he will suffer irreparable harm if the requested relief is not granted, because “harm is generally considered irreparable in equity if it cannot be redressed adequately by monetary damages,” Crowe, 90 N.J. at 132–33. In addition, the irreparable harm standard contemplates that the harm be substantial and immediate. Subcarrier Communications v. Day, 229 N.J. Super. 634, 638 (App. Div. 1977). Here, Johnson persuasively argues, and the Board does not dispute, “[n]o monetary award can adequately address [his] rights in this matter or protect the public interest and as such temporary restraints should issue.” (Petitioner’s Memorandum of Law in Support of Motion for Emergent Relief, at 8.) “If the vacancy remains in place, candidates who have already submitted petitions for nomination for the unexpired term will be included in a ballot draw (on August 10, 2020) to determine the order that candidate names will appear on a ballot for an election that should not even take place.” Id.

 Moreover, “the subsequent election of another candidate to replace [Johnson] could potentially moot the ability of the Commissioner or a Court to grant reinstatement. See, Esteves v. Bd. of Ed. of the Town of Kearny, OAL Docket No. EDU 13424-15, 2016 N.J. AGEN LEXIS 101, \*11-13 (March 7, 2016).” Id. at 9.

***Right to Claim is Settled***

Next, emergent relief “should be withheld when the legal right underlying plaintiff’s claim is unsettled.” Crowe, 90 N.J. at 133 (citing Citizens Coach Co. v. Camden H. R. Co., 29 N.J. Eq. 299, 304–05 (E & A 1878)). Here, however, the law regarding removal from membership on a board of education is settled by N.J.S.A. 18A:12-3, which provides in relevant part:

. . . any member who fails to attend three consecutive meetings of the board without good cause may be removed by it.

[Ibid.]

The Board asserts that Johnson’s thirteen-minute presence at the April 9, 2020, Board meeting did not constitute attendance and thus he failed to attend three consecutive meetings having missed the March 12, April 9, April 30, and May 14, 2020, meetings which violates the above-referenced statute. Petitioner counters that the interruption of his attendance at the April 9 meeting was the result of technical difficulties beyond his control; difficulties that three fellow Board members similarly experienced at a subsequent meeting. He did not choose to leave the meeting early. (Petitioner’s post-hearing reply letter brief, at 3.)

A review of the Board minutes for the April 9, 2020, meeting show that Johnson was marked present and these minutes were approved unanimously at the following meeting. The minutes do not reveal that any Board member challenged Johnson’s attendance at the prior meeting. Petitioner persuasively states: “That Johnson was unable to remain for the entire duration of the meeting due to a connectivity issue, in light of April 9, 2020, being the first meeting where the new teleconferencing format of the Board was adopted in the wake of the COVID pandemic . . . does not in any way negate the fact that he attended the meeting.” Id. at 11. Neither statute, case law nor Board policy dictate that attendance for thirteen minutes is insufficient to qualify as attendance at a Board meeting. Importantly, an “action of the local board which lies within the area of its discretionary powers may not be upset unless patently arbitrary, without rational basis or induced by improper motives.” Kopera v. Bd. of Educ. of W. Orange, 60 N.J. Super. 288, 294 (App. Div. 1960) (citations omitted).

The Board offers no rational basis for its determination that thirteen minutes does not qualify as attendance at a Board meeting, especially under the circumstances presented here where absent the technical difficulties, Johnson would have remained on the call. Indeed, following the Board’s logic would render the statute as a “gotcha” law wherein a Board member can be removed for committing a violation without being advised of the conditions which will warrant their removal (i.e. that attending a Board meeting for thirteen minutes constitutes a violation of the attendance statute). This “fits the very definition of arbitrary and capricious action” and is an untenable position. (Petitioner’s post-hearing reply letter brief, at 3.)

Moreover, Johnson contends that even if he missed three consecutive meetings, there was “good cause.” Johnson relies upon Commissioner’s and court decisions that address this issue. First, in Golaine v. Cardinale, 142 N.J. Super. 385 (Law Division, 1976), *aff’d* 163 N.J. Super. 453 (App. Div. 1978), the plaintiff, a member of the planning board, was removed because he had to take an eleven-month leave of absence because of a job reassignment overseas. He notified the board of his absence and offered to resign or take a leave of absence with the intent to return. The planning board granted him a six-month leave of absence. Plaintiff requested an extension; however, the newly elected mayor advised plaintiff that he would be removed for neglect of duty unless he resigned. Plaintiff refused to resign and was removed by the planning board.

The court entered judgment for the plaintiff ordering him reinstated to the planning board finding that his absences did not constitute actionable neglect of duty.[[1]](#footnote-1) The court was persuaded that the notice provided by plaintiff was sufficient and adequately conveyed his intention to return to his duties. He also had more than a year and a half of his term remaining. In addition, the court reasoned that unpaid voluntary service by members of the community “is a burden whose undertaking should be encouraged, at least by the insistence upon fair dealing by the community to those who have undertaken that burden. In that light, the circumstances hardly warrant the stigma and opprobrium of a removal for neglect of duty.” Id. at 400. However, the court cautioned that “prolonged, continuous absence for whatever reason” could constitute grounds for removal. Id.

 The statute in question in Golaine, 142 N.J. Super. 385 (Law Division, 1976), *aff’d* 163 N.J. Super. 453 (App. Div. 1978) applied to the removal of planning board members, however, the court addressed the “good cause” standard required under N.J.S.A. 18A:12-3 which is instructive. The court stated: “‘[g]ood cause’ in that as yet unconstrued legislation clearly means, in the particular circumstances obtaining, without a ‘reasonable excuse’ as that term is generally understood as a matter of plain common sense.” Id. at 398.

Petitioner also relies upon the Commissioner’s decision in Daniel Esteves v. Bd. of Ed. of Town of Kearny, (citation omitted) wherein petitioner was removed from the board of education for failure to attend three consecutive meetings without good cause. Esteves was a police officer assigned to work the night shift which conflicted with the board meetings. He missed approximately sixteen meetings in 2014 and 2015. He argued that his work schedule was good cause for missing the meetings. The board defended on grounds that it had the discretion to determine good cause. The commissioner relied upon the general definition of “cause” as stated in Golaine, (citation omitted) which requires “substantial cause touching qualifications appropriate to the office or employment or to its administration.” Id. at 396 quoting Berardi v. Rutter, 42 N.J. Super. 39, 27 (App. Div. 1956), *aff’d sub nom.* In re Berardi, 23 N.J. 485 (1957). In addition, [i]t also necessarily implies such degree of misconduct or culpability on the part of the office holder as clearly implicates the public interest in precluding his continuance in that particular office.” Esteves, 2016 N.J. AGEN LEXIS at \*9-10, quoting Golaine, 142 N.J. Super. at 396. The commissioner concluded there must be an act of “misfeasance or nonfeasance,” and must be, “an element of fault.” Id. at \*11. However, the commissioner conceded that based upon the holding in Golaine, (citation omitted) “’the misfeasance or nonfeasance’ of not attending the [b]oard meetings cannot be based on behavior that he can be faulted with – he was on-duty when the meetings were held.” Id. at \*12.

Applying this standard to the facts, the commissioner ruled that the petitioner did not sustain its burden of proof that the board’s decision was improper. The commissioner distinguished the facts in Golaine (citation omitted) finding that Esteves’ term was due to expire at the end of the year, “a replacement [b]oard member was elected in November 2015, and it is not clear whether the petitioner will be able to return to office given his work schedule.” Id. at \*12. The commissioner also stated . . . “the [b]oard could have concluded that his numerous absences were inimical to its interests.” Id.

The Board conversely asserts that there is no decisional law that defines whether “good cause” applies to each absence or the series of absences and thus, the law in this regard is unsettled and emergent relief cannot succeed. (Respondent’s post-hearing reply letter brief, at 2.) The Board relies upon the commissioner’s decision in Wesley Smith v. Bd. of Ed. of the Twp of Hazlet, EDU 53-99; 1999 N.J. AGEN LEXIS 1370 (March 8, 1999) in which the commissioner reversed the administrative law judge’s order granting emergent relief. The commissioner was not persuaded that the law underlying the petitioner’s legal claim was settled but instead determined that there was no case law which “resolves the question of whether ‘good cause’ is required for each individual board member absence or for the period of absence.” Id. at \*7.

 However, the decision in Golaine, 142 N.J. Super. 385 (Law Division, 1976), *aff’d* 163 N.J. Super. 453 (App. Div. 1978) does specifically articulate a definition of “good cause” that is applicable to the relevant statute in this case, namely N.J.S.A. 18A:12-3. As stated above, this definition provides:

‘Good cause’ in that as yet unconstrued legislation clearly means, in the particular circumstances obtaining, without a ‘reasonable excuse’ as that term is generally understood as a matter of plain common sense.

Id. at 398.

Applying this definition to the present controversy requires a finding that based upon the particular circumstances, Johnson had a “‘reasonable excuse’ as that term is generally understood as a matter of plain common sense” for not being present for the entire Board meeting on July 9, 2020. And the “circumstances here hardly warrant the stigma and opprobrium of a removal” for failure to attend a meeting where the failure was due to technical difficulties experienced at the Board’s first Zoom meeting during a global pandemic. Id. at 400.

 Moreover, the commissioner’s decision to sustain the board’s removal of Esteves is distinguishable to the facts herein in that the commissioner underscores the uncertainty of Esteves’ ability to return to office in light of his work schedule and the expiration of his term by 2015 and an elected replacement board member. Esteves, 2016 N.J. AGEN LEXIS at \*12. The petitioner herein has changed his schedule to accommodate the Board meetings and has attended every Board meeting until his removal. In addition, Johnson has more than two years left on his term and currently his seat remains vacant. Thus, the Board’s decision to remove him appears arbitrary, without rational basis or induced by improper motive.

***Likelihood of Success on the Merits***

Under the third emergent relief standard, “a plaintiff must make a preliminary showing of a reasonable probability of ultimate success on the merits.” Crowe, 90 N.J. at 133 (citing Ideal Laundry Co. v. Gugliemone, 107 N.J. Eq. 108, 115–16 (E. & A. 1930)). This typically “‘involves a prediction of the probable outcome of the case’ based on each party’s initial proofs, usually limited to documents.” Brown v. City of Paterson, 424 N.J. Super. 176, 182–83 (App. Div. 2012) (quoting Rinaldo v. RLR Inv., LLC, 387 N.J. Super. 387, 397 (App. Div. 2006)). However, emergent relief “should not issue where all material facts are controverted.” Crowe, 90 N.J. at 133 (citing Citizens Coach, supra, 29 N.J. Eq. at 305–06). Here, the material facts are not controverted. Johnson failed to attend the March 12, April 30 and May 14 meetings because of his work schedule which was altered by the Governor’s state of emergency declaration that required Johnson to work more hours because of the impact of COVID-19 on his unit. However, he did attend the April 9 meeting but was cut off after thirteen minutes because of technical challenges. He made numerous attempts to reconnect but to no avail. At the following Board meeting, three other Board members had similar technical difficulties. The decision in Golaine, and Esteves support Johnson’s likelihood to prevail on the merits.

***Balancing of the Equities***

The fourth and final emergent relief standard involves “the relative hardship to the parties in granting or denying relief.” Crowe, 90 N.J. at 134 (citing Isolantite Inc. v. United Elect. Radio & Mach. Workers, 130 N.J. Eq. 506, 515 (Ch. 1941), mod. on other grounds, 132 N.J. Eq. 613 (E. & A. 1942)). It is a balancing of the equities and the interests of the parties. Here, the Board asserts that it will suffer greater harm because it will be prohibited from voting on important issues concerning District governance if all Board members are not present. (Respondent’s Post-hearing letter brief, at 9.) The Board also submits that Johnson’s failure to attend meetings constitutes a failure to fulfill his duties as a Board member. Id. The Board also takes issue with Johnson calling into the Board meetings from a prison stating there are “serious, legitimate concerns surrounding privacy and distraction.” Id. at 10.

The evidence, however, reveals that Johnson has attended 85% of the Board meetings during his tenure. He had trouble attending several meetings during an unprecedented global pandemic and state of emergency which required that he work longer hours without breaks. He communicated his inability to attend the meetings with the Superintendent and copied the Board President.[[2]](#footnote-2) In addition, he requested a shift change which was granted and since the change, has attended all Board meetings until his removal in July. The Board failed to demonstrate that it was unable to conduct its business as a result of Johnson’s truncated attendance on July 9, 2020, or that there was any confidentiality breach.

 Johnson has more than two years left on his term and thus his removal undermines the will of the public who elected him and unduly smears his reputation. In addition, Johnson points out if his unexpired term is filled at the upcoming November election, it is unlikely any remedy can be afforded to him. (Petitioner’s Memorandum of Law at 9, citing Esteves, 2016 N.J. AGEN LEXIS 101, \*13.) All these factors support that Johnson will suffer greater harm than the Board if relief is not granted.

**Conclusion**

Based on the foregoing, the motion for emergent relief is granted.

**ORDER**

I **ORDER** that the motion for emergent relief is **GRANTED**. Petitioner is ordered reinstated as a member of the Board.

The parties have advised me that no other issues remain once the emergent relief matter is resolved.

 This order on application for emergency relief may be adopted, modified or rejected by **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who/which by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five days following the entry of this order. If **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** does not adopt, modify or reject this order within forty-five days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.



August 20, 2020

DATE **KIM C. BELIN**, ALJ

Date Received at Agency: August 20, 2020

Date Mailed to Parties:

 /vj

**APPENDIX**

**WITNESSES**

**For petitioner:**

 None

**For respondent:**

 None

**EXHIBITS**

**For petitioner:**

  Petition, Memorandum of Law, and Post-hearing Letter Brief

**For respondent:**

 Answer, and Post-hearing Letter Brief

1. The relevant removal statute, N.J.S.A. 40:55-1.4, requires a showing of neglect of duty. [↑](#footnote-ref-1)
2. During oral argument, counsel for the Board conceded there was no Board policy mandating a Board member contact the Board President to report an absence. [↑](#footnote-ref-2)