

IN THE SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

MICHELE ARMINIO,	:	Docket No.: A-000207-24
	:	
	:	Civil Action
PLAINTIFF	:	ON APPEAL FROM:
	:	
V.	:	SUPERIOR COURT OF NEW JERSEY
	:	LAW DIVISION, MIDDLESEX COUNTY
MONROE TOWNSHIP	:	DOCKET NO.: MID-L-6748-23
BOARD OF EDUCATION,	:	
	:	7/26/2024 ORDER DENYING SUMMARY
	:	JUDGMENT TO DEFENDANT/APPELLANT
DEFENDANT	:	AND GRANTING
	:	RESPONDENT/PLAINTIFF'S CROSS-
	:	MOTION FOR SUMMARY JUDGMENT
	:	
	:	8/16/2024 ORDER DENYING
	:	DEFENDANT/APPELLANT'S MOTION
	:	FOR RECONSIDERATION
	:	
	:	MOTION JUDGE:
	:	HON. BENJAMIN S. BUCCA, JR. J.S.C.

BRIEF OF DEFENDANT/APPELLANT, MONROE TWP. BD. OF ED.

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Preliminary Statement

This Appeal, brought by the Monroe Township Board of Education (hereinafter “the Board”), seeks redress for a decision of the Superior Court, Law Division, Middlesex County, holding that the Open Public Meetings Act (hereinafter “the OPMA”) prohibits a board of education from holding a closed session, private discussion concerning candidates who are under consideration for appointment to fill a vacancy on the board, during a closed session of a properly noticed board meeting. The Trial Court erred by misinterpreting and misapplying the relevant case law providing that a board of education may discuss the qualifications of candidates for a vacancy on the board in closed session without violating the OPMA, despite unambiguous statutory language providing that a board of education may discuss the qualifications of candidates for a vacancy on the board in closed session, without violating the OPMA.

In addition, the Trial Court also erred when it voided the Board’s public vote appointing a qualified candidate to fill a vacancy on the Board, a penalty that is not authorized by the OPMA to remedy an allegedly improper private discussion that occurred prior to taking public action at a properly noticed meeting of the Board. Finally, the Trial Court further relied upon an erroneous ruling that the votes cast by the individual who was improperly appointed to fill the vacancy on the Board must remain binding and effective on the Board,

notwithstanding the Trial Court's decision which voided and rescinded the Board's appointment of that individual to the vacant position on the Board.

In short, the Trial Court should have ruled that under the OPMA, the Board had the discretionary authority to discuss the qualifications of candidates for the vacancy during a closed session meeting which excluded the public, at a properly noticed public meeting of the Board. Such a holding regarding the permissibility of closed session discussions regarding the qualifications of candidates for a vacancy on a local school board was warranted based upon the language of the OPMA and the directly applicable case law interpreting the statute.

However, in the alternative, even if the Trial Court did not err with respect to its ruling on that issue, the Trial Court should not have directed that the remedy for the OPMA violation was an Order voiding the Board's public vote appointing a qualified candidate to fill the vacancy. Because the individual appointed to the vacancy at issue was no longer a member of the Board at the time of the Trial Court's decision, the Order voiding the Board's vote to fill the vacancy had no practical effect, and the Trial Court erred by issuing an Order providing relief to address an issue that was moot, as of the date of the Order.

In the alternative, even if the issue was not moot and the Trial Court did not err by voiding the Board's vote appointing a qualified candidate to fill the

vacancy, it was erroneous for the Trial Court to hold that the votes cast by the individual who was improperly appointed to fill the vacancy must remain in effect. If the Trial Court did not err when it voided the Board's vote to fill the vacancy – based upon its finding that the Board violated the OPMA – then it should have ordered that all votes cast by the individual who was “improperly” seated were also void. Allowing the acts of an improperly appointed member of a public body to remain binding upon the entity, and thus the public, after the appointment is held to be void, improperly incentivizes public entities to improperly appoint members for temporary expediency or other improper reasons. Instead, the interests of justice and the public require that acts improperly taken by an individual under the color of law have no force or effect, so as to protect the public from those that would intentionally act outside the bounds of the law to effectuate lasting political change against the will of the people. Here, the Trial Court should have voided those votes that were cast by the “improperly” appointed now-former Board member, as the Trial Court determined that individual who cast them was not legally empowered to do so and therefore, such votes that were cast by that individual are invalid.

In view of the foregoing, the decision of the Superior Court, Law Division, should be reversed, and the case should be remanded to the Trial Court for further proceedings as this Court deems necessary.

Procedural History

On December 1, 2023, Plaintiff Michelle Arminio (hereinafter “Plaintiff”) filed an Action in Lieu of Prerogative Writs pursuant to Rule 4:69-4, seeking a declaratory judgment that the Board’s closed session discussion of the candidates to fill a vacancy on the Board violated the OPMA, and that the Board’s subsequent public vote appointing Mr. Gorham was therefore void and must be rescinded. (Da 1). The Board had appointed Mr. Gorham to fill the vacant seat only until May 1, 2024, at which time the winner of the Board’s then-regular election, held on April 16, 2024, was sworn in.¹ (Da 16-Da 20). As a result of the April 16, 2024 election, Mr. Gorham was not elected to any position on the Board and his term of appointment naturally ended on the last day of April 2024.

The parties cross-moved for Summary Judgment pursuant to Rule 4:46-1, with the Board filing its motion on February 19, 2024 (Da 12-Da 200) and Plaintiff filing a cross-motion on March 18, 2024 (Da 201-Da 210). The Trial Court heard oral argument on the parties’ Motions for Summary Judgment on May 30, 2024 and July 24, 2024, and decided the Motions on July 26, 2024. (Da

¹ The Board has since moved its regular elections to November, with its next election scheduled for November 2025.

211-Da 212; 1T11:21-17:4)². Specifically, the Trial Court’s decision denied the Board’s Motion and granted Plaintiff’s Motion, and entered Judgment declaring that the Board’s appointment of Mr. Gorham at the October 18, 2023 meeting was void. Id.

On July 31, 2024, pursuant to Rule 4:49-2, the Board moved for Reconsideration of the Trial Court’s July 26, 2024 Order and Judgment. (Da 213-Da 235). Plaintiff opposed the motion by way of a letter brief opposition filed on August 8, 2024. On August 16, 2024, the Trial Court entered an Order denying the Board’s Motion for Reconsideration. (Da 238- Da 239; 2T30:17-36:23). The Trial Court’s Order also directed that its July 26, 2024 Order voiding the Board’s original appointment of Mr. Gorham, whose Board membership had already ceased nearly three (3) months prior to that July 26, 2024 Order, was not to have retroactive effect. Id.

The Board now appeals from the Trial Court’s Orders of July 26, 2024 and August 16, 2024.

²The oral argument and Court’s decision of July 24, 2024, is contained in Transcript Volume 1 (“1T”). The oral argument and Court’s decision of August 16, 2024, is contained in Transcript Volume 2 (“2T”).

Statement Of Material Facts

Plaintiff is a private citizen and resident of Monroe Township, Middlesex County, New Jersey. (Da 2, ¶2). On August 16, 2023, a member of the Board resigned her position, thereby creating a vacancy. (Da 3, ¶8). As a result of the vacancy, the Board had a statutorily-imposed deadline of sixty-five (65) days, pursuant to N.J.S.A. 18A:12-15, to fill the vacancy by appointing a new Board member. Id. Upon the expiration of that statutory deadline, the Executive County Superintendent would have the authority to appoint an individual to fill the vacancy on the Board. N.J.S.A. 18A:12-15(a). The Board requested that any interested candidates submit applications in order to be considered as a candidate for the vacancy, and received several applications from interested candidates. (Da 17, ¶12-13).

After proper notice of the meeting as required under the OPMA, the Board held a public meeting on October 18, 2023. (Da 18, ¶16-18). During the October 18, 2023 meeting, the remaining Members of the Board entered a closed, executive session to discuss the candidates to fill the vacant seat. (Da 18-Da 19, ¶18-26). The Board then exited the closed session and reentered public session, at which time the attorney for the Board explained the process the Board had used in selecting an individual to fill the vacant position. (Da 19, ¶23).

The Board then sought, from its Members, nominations to fill the vacancy. (Da 231). Mr. John Gorham, one of the individuals who had applied for the position, was the only candidate to be nominated, and was then appointed by public vote of the Members of the Board. (Da 231-Da 232).

The Board's appointment of Mr. Gorham to fill the vacancy did not violate the OPMA, nor did the Board's closed-session discussion of the qualifications of the candidates for the vacancy, which was immediately followed by a nominations process and a vote held during an open public meeting. The Trial Court erred when it ruled to the contrary and granted summary judgment to Plaintiff, while simultaneously denying the Board's motion for summary judgment. (Da 236-Da 237; 1T11:21-17:4). However, even if the Trial Court's ruling on that error was correct, the Trial Court nevertheless erred with respect to the remedies it ordered to address the OPMA violation, and further erred when it held that its order voiding the appointment of Mr. Gorham should have no retroactive effect. (Da 238-Da 239; 2T36:5-23).

As a result, the Board now makes this Appeal.

Argument

I. The Trial Court Erred by Holding that the Open Public Meetings Act Prohibits Private Discussion Concerning Candidates Who Are Under Consideration for Appointment to Fill a Vacancy on a Board of Education, by Members of that Board of Education, During a Closed Session of a Properly Noticed Meeting of the Board of Education. (Da 236-Da 237).

The Trial Court erred when it held that the OPMA prohibits closed session discussion regarding candidates who are under consideration for appointment to fill a vacancy on a board of education. As this ruling was contrary to the applicable law, this Court should reverse the decision of the Trial Court, and remand for the entry of an Order denying Plaintiff's motion for summary judgment and granting summary judgment to the Board.

The OPMA emphasizes the right of the public to be present for meetings, discussions, and actions of public bodies, but also recognizes that the general rule in favor of public access must be subject to exceptions. The Legislature's findings and declarations are set forth as follows in N.J.S.A. 10:4-7:

The Legislature finds and declares that the right of the public to be present at all meetings of public bodies, and to witness in full detail all phases of the deliberation, policy formulation, and decision making of public bodies, is vital to the enhancement and proper functioning of the democratic process; that secrecy in public affairs undermines the faith of the public in government and the public's effectiveness in fulfilling

its role in a democratic society, and hereby declares it to be the public policy of this State to insure the right of its citizens to have adequate advance notice of and the right to attend all meetings of public bodies at which any business affecting the public is discussed or acted upon in any way except only in those circumstances where otherwise the public interest would be clearly endangered or the personal privacy or guaranteed rights of individuals would be clearly in danger of unwarranted invasion.

Thus, this Court has ruled that the OPMA “makes explicit the legislative intent to ensure the public’s right to be present at public meetings and to witness government in action.” Kean Fed’n of Teachers v. Morell, 233 N.J. 566, 570 (2018) (citing N.J.S.A. 10:4–7). To that end, the statute requires public bodies to conduct their meetings in open session, in view of the public, unless a statutory exception applies. N.J.S.A. 10:4-12. Nevertheless, the OPMA also permits public bodies to exercise some discretion as to how they conduct their meetings. Id. (“Nothing in this act shall be construed to limit the discretion of a public body to permit, prohibit, or regulate the active participation of the public at any meeting, except that” municipal governing bodies and boards of education must set aside time for public comment).

N.J.S.A. 10:4–12(b) sets forth the circumstances in which a public body may enter into closed session. For example, closed session is permitted where a public body discusses matters which are required under federal or state law to

be kept confidential; matters of individual privacy; matters pertaining to collective bargaining or the purchase, lease, or acquisition of real property; and pending or anticipated litigation or contract negotiation in which the public body is, or may become, a party. Id.

The circumstances in which a public body is permitted to hold a closed session meeting to discuss what are commonly referred to as “personnel matters” are specifically described in the OPMA as follows, in relevant part:

A public body may exclude the public only from that portion of a meeting at which the public body discusses any:

*

*

*

matter involving the employment, *appointment*, [or] termination of employment ... of *any specific prospective public officer* or employee or current public officer or employee employed *or appointed* by the public body, unless all the individual employees or appointees whose rights could be adversely affected request in writing that the matter or matters be discussed at a public meeting....

N.J.S.A. 10:4–12(b)(8) (emphasis added).

The statute “uses plain language to express what a public body may do with respect to conducting closed sessions,” but ultimately, “[t]he choice is that of the public body. It determines whether to have the private discussion of the listed topics, as evidenced by the Legislature’s use of the word ‘may.’” Kean,

supra, 233 N.J. at 584. Thus, Kean held, in part, that the OPMA does not establish any requirements regarding the extent to which a public body must discuss a matter that falls within the scope of N.J.S.A. 10:4–12(b)(8) before it takes action. Id. at 587-88 (“OPMA does not contain a requirement about the robustness of the discussion that must take place on a topic”).

The plain language of N.J.S.A. 10:4–12(b)(8) does not include any use of the terms “personnel” or “personnel matter,” but rather, explicitly refers to and includes the “appointment” of “any specific prospective officer.” Numerous courts have held that “local school board members are public officers charged with a public duty,” and in exercising that duty, they “are obliged to examine qualifications of teachers, to exercise judgment and discretion in their selection, and to confer and compare judgments in order to reach proper results.” Matter of Bd. of Educ. of City of Trenton, 176 N.J. Super. 553, 565 (App. Div. 1980), aff’d, 86 N.J. 327 (1981); See also Cullum v. N. Bergen Twp. Bd. of Educ., 27 N.J. Super. 243, 248 (App. Div. 1953), aff’d sub nom. Cullum v. Bd. of Educ. of N. Bergen Twp., 15 N.J. 285 (1954) (“members of the board of education of a municipality are public officers holding positions of public trust,” who “stand in a fiduciary relationship to the people whom they have been elected or appointed to serve”); Visotcky v. City Council of City of Garfield, 113 N.J. Super. 263, 266 (App. Div. 1971) (recognizing that school board members are

public officers and holding that a teacher employed by a board may not be a member of that board).

When interpreting a statute, the court's primary goal is to ascertain and apply the intent of the Legislature. Frugis v. Bracigliano, 177 N.J. 250, 280 (2003). The best indicator of that intent will generally be the statutory language itself. DiProspero v. Penn, 183 N.J. 477, 492 (2005). Each word should be given its ordinary meaning and significance. Lane v. Holderman, 23 N.J. 304, 313 (1957). Courts must "avoid constructions that render any part of a statute inoperative, superfluous, or meaningless, or lead to absurd results." Innes v. Innes, 117 N.J. 496, 509 (1990) (quoting Abbotts Dairies v. Armstrong, 14 N.J. 319, 328 (1954)); Paper Mill Playhouse v. Millburn Twp., 95 N.J. 503, 521 (1984). Proper statutory interpretation also requires that "full effect should be given, if possible, to every word of a statute," and courts should not "assume that the Legislature used meaningless language." Gabin v. Skyline Cabana Club, 54 N.J. 550, 555 (1969); see also State in the Interest of K.O., 217 N.J. 83, 91 (2014) ("when construing the Legislature's words, every effort should be made to avoid rendering any part of the statute superfluous"); McCann v. Clerk of Jersey City, 167 N.J. 311, 321 (2001); Green v. Auerbach Chevrolet Corp., 127 N.J. 591, 598 (1992).

Applying these principles to N.J.S.A. 10:4–12(b)(8) reveals that this section of the OPMA must be interpreted to include school board members. Specifically, if the language referring to “the appointment” of “any prospective public officer or employee or current public officer or employee, employed or appointed by the public body” is read as excluding a board of education member, such an interpretation would render part of the statute inoperative, superfluous, or meaningless, as it would ignore the wording that expressly refers to an “appointment,” and “prospective public officer, [or a] current public officer... appointed by the public body.” N.J.S.A. 10:4–12(b)(8).

In drafting and enacting N.J.S.A. 10:4–12(b)(8), the Legislature could have omitted any of the wording including the terms “appointment,” “prospective public officer,” “current public officer,” and/or “appointed by” from the statutory language, but it chose instead to include it. Therefore, it is respectfully submitted that this Court must presume that N.J.S.A. 10:4–12(b)(8) does not contain any inoperative, superfluous, or meaningless language. The relevant statutory language is explicitly not limited to cover only the employees of a public body, since it refers to both a “prospective public officer” and a “current public officer.” To the contrary, the statute’s wording plainly *includes* prospective or current public officers who are appointed by the public body. As such, N.J.S.A. 10:4–12(b)(8) must be interpreted to include prospective or

current board of education members who are not employed by, but who are rather appointed by the board.

While board of education members are most often sworn in after having been elected, occasionally, they are appointed to a vacancy on the board. In the event of a vacancy in the membership of a board of education, the board's filling of the vacancy is governed by N.J.S.A. 18A:12-15. Generally, absent one of the exceptions set forth in the statute, a board has sixty-five (65) days within which to fill the vacancy, and if it does not meet that deadline, the county superintendent will fill the vacancy. N.J.S.A. 18A:12-15(a).

The statute further provides as follows:

Each member so *appointed* shall serve until the organizational meeting following the next annual election unless the member is appointed to fill a vacancy occurring within the 60 days immediately preceding such election if the annual election is held in April, or occurring after the third Monday in July if the election is held in November, to fill a term extending beyond such election, in which case the member shall serve until the organizational meeting following the second annual election next succeeding the occurrence of the vacancy, and any vacancy for the remainder of the term shall be filled at the annual election or the second annual election next succeeding the occurrence of the vacancy, as the case may be.

N.J.S.A. 18A:12-15 (emphasis added).

The language of N.J.S.A. 18A:12-15 quoted above repeatedly describes the effect of a board of education having “appointed” a member to fill a vacancy. Thus, the statutory language is clear that a board of education makes an “appointment” of a new member to fill a vacancy on the board. The term “appointed” in N.J.S.A. 18A:12-15 mirrors the exact language used in the relevant section of the OPMA, which refers to a “matter involving the . . . *appointment . . . of any specific prospective public officer or employee or current public officer or employee employed or appointed by the public body[.]*” N.J.S.A. 10:4–12(b)(8). Accordingly, the use of the word “appointed” and “appointment” in both N.J.S.A. 18A:12-15 and N.J.S.A. 10:4–12(b)(8) reflects that the Legislature understood and intended that the provisions of the OPMA, allowing closed-session discussion of specific types of matters, would permit such discussion of candidates who are under consideration to fill the vacancy.

Furthermore, the case law discussed above provides that a board of education member is a “public officer.” See, e.g., Matter of Bd. of Educ. of City of Trenton, supra, 176 N.J. Super. at 565. Because N.J.S.A. 10:4–12(b)(8) permits a school board to exclude the public from its discussion of any “matter involving the . . . appointment . . . of *any specific prospective public officer or employee or current public officer or employee employed or appointed by*” the board, any discussion regarding the potential appointment of any candidates for

a vacancy constitutes discussion of the appointment of “specific prospective public officers,” within the meaning of N.J.S.A. 10:4–12(b)(8). Therefore, both the case law and statutory law wholly support the principle that a board of education may exclude the public from discussion of a candidate for a vacancy, without violating the OPMA.

This conclusion is also supported by the decision of the Law Division in Gannett Satellite Info. Network, Inc. v. Bd. of Educ. of Borough of Manville, 201 N.J. Super. 65 (Law. Div. 1984). In that case, the court considered “the issue of whether the ‘personnel exception’ of the [OPMA] applies when a school board fills a vacancy created by a departing board member.” Id. at 67. The court held that “the Board *could exclude the public from its deliberations on the qualifications of the various candidates.*” Id. at 69 (emphasis added). As such, Gannett held that no violation of the OPMA occurs if a board of education discusses qualifications of candidates for a vacancy in closed session. Id.

The court in Gannett noted that the plaintiff had acknowledged that N.J.S.A. 10:4–12(b)(8), “*was intended to cover discussions by the Board, out of the presence of the candidates,*” and that it “*was not intended to cover the interview process itself.*” Id. at 68 (emphasis added). In Gannett, the board’s “interviews, nominations and voting all took place in the closed meeting. The decision was made in that session.” Id. As a result of the board having conducted

the interviews, nominations, and voting regarding the vacancy in closed session, “[t]he public did not witness any of the actions of the School Board” when the board acted to fill the vacancy. Id. Based on those facts, “no portion whatsoever” of the board’s process for filling the vacancy “was open to the public,” and the court held that “the personnel exception is not an excuse for excluding the public from the entire process.” Id.

Therefore, under Gannett, a board of education may hold a closed session meeting that consists only of deliberations or discussions regarding the qualifications of candidates for the vacancy. However, the board may not exclude the public “from the entire process.” Id. The Gannett court found that because “the interviews, nominations and voting” all took place in closed session, “[t]he decision was made in that session and [t]he public did not witness any of the actions of the School Board in connection with [the] appointment” of a candidate to the vacancy, the board violated the OPMA. Id.; see also Houman v. Mayor & Council of Borough of Pompton Lakes, 155 N.J. Super. 129, 145-46 (Law. Div. 1977) (council discussion of whether to employ outside attorney as borough attorney for purpose of processing tax appeals was within OPMA exception provided in N.J.S.A. 10:4-12(b)(8) relating to discussion of any matter involving employment or appointment of an employee).

The holding in Gannett is entirely consistent with the language of N.J.S.A. 10:4–12(b), which explicitly uses the word “discusses” in stating that a public body “may exclude the public only from that portion of a meeting at which the public body discusses any” of the matters described in N.J.S.A. 10:4–12(b)(1) through (9). In contrast, the OPMA does not authorize a public body to take any formal action or engage in any activity beyond discussion during closed session. Thus, the OPMA expressly allows for a public body to hold closed-session discussions regarding the types of matters enumerated in N.J.S.A. 10:4–12(b), but does not authorize any other closed-session conduct beyond discussions or deliberations, such as interviews of candidates for a vacancy, nominations, or voting. See Houman, supra, 155 N.J. Super. at 151 (under OPMA and legislative intent, a public body can only discuss an issue in closed session and cannot act).

The parties did not appeal the Law Division’s decision in Gannett, and the case has not been subsequently cited by any New Jersey court. However, a school law decision by an Administrative Law Judge (“ALJ”) at the New Jersey Office of Administrative Law, which was affirmed by the Commissioner of Education, discussed Gannett in detail. See Shaw v. Manchester Twp. Bd. of Educ., 1989 S.L.D. 1550 (OAL Dkt. No. EDU 5147-88, Agency Dkt. No. 219-7/88 (Initial Decision Mar. 14, 1989), aff’d, Comm’r, Apr. 26, 1989). In Shaw,

the ALJ applied the Law Division’s decision in Gannett and provided the following analysis:

Petitioner, however, cites the matter of Gannett Satellite Info. Network v. Bd. of Educ., 201 N.J. Super. 65 (Law Div. 1984) where the court held that the so-called “personnel” exception to the Act (N.J.S.A. 10:4-12 b(8)) “does not apply to elected officials whose continued retention in office is dependent on the approval of the public, not on any particular agency or department.” Id. at 70. The Gannett court did hold, however, that *a board of education could exclude the public from its deliberations on the qualifications of the various candidates eligible to fill an unexpired term.* Moreover, the court held that *the actual appointment of the successful candidate must take place in an open public session.* (emphasis added)

Id. at *7.

The decision in Shaw recognized that under the clear holding reached by the Law Division in Gannett, the board was permitted to “reasonably discuss the various candidates’ qualifications in private session.” Id. The ALJ in Shaw, whose initial decision was affirmed and adopted as a final decision by the Commissioner of Education, ultimately concluded that the board merely committed a “technical violation of the [OPMA] when it held interviews with candidates for the vacant seat in closed sessions and outside the view of the public.” Id. (citing N.J.S.A. 10:4-12); see also Donnelly v. Maurice River Bd. of Educ., 1980 S.L.D. (slip op. at 4) (May 8, 1980) (finding that a board taking

a final vote in closed session to fill a board vacancy was a violation of the OPMA).

Furthermore, although there are two (2) decisions from courts outside of New Jersey which have cited Gannett, neither of those cases addressed the issues involved in the instant case. First, in Hinds County Bd. of Sup'rs v. Common Cause of Mississippi, 551 So.2d 107, 124–25 (Miss. 1989), the court held that a county board of supervisors was not entitled to enter closed session under the “personnel matters” exception to consider appointments to fill a vacancy, where the state’s open meetings law exempted “personnel matters or the personnel matters or the character, professional competence, or physical or mental health of a person, including employment and termination of employees” from prohibition against public body “discussing and transacting in closed session.”

Second, in Lambert v. Belknap County Convention, 157 N.H. 375, 381–82, 949 A.2d 709, 716 (2008), the court held that a public body’s decision to fill a vacancy by secret ballot, rather than in open public session, violated the state’s right-to-know law. Id. at 376–77. The Lambert court cited Gannett for the principle that where “a public body is *appointing* an individual to fill a position normally filled by an elected official, the reasons for allowing public scrutiny of the *actions taken* are even more compelling.” Id. at 380 (emphasis added). Thus, Lambert did not hold that a public body may not discuss candidates for a

vacancy and their qualifications in closed session; rather, it simply held that a public body may not appoint or take other action in private, and must conduct any votes, appointments, or other action in open, public session. See also Miglionico v. Birmingham News Co., 378 So.2d 677 (Ala. 1979) (holding city council meeting to appoint board of education member must be open to public); McKay v. Bd. of Sup'rs of Carson City, 102 Nev. 644, 730 P.2d 438 (1986) (action of public body terminating city manager in closed session violated Open Meeting Law and was not within exception allowing consideration of person's character, alleged misconduct, professional competence or physical or mental health in closed session).

Neither Hinds, supra, 551 So.2d 107, nor Lambert, supra, 157 N.H. 375, involved consideration of a statute with the same or similar language as the OPMA. In Hinds, the court interpreted a Mississippi statute in which there was an exemption that specifically permitted closed session meetings to engage in discussions regarding “personnel matters,” which did not contain any language referring to “any specific prospective public officer or employee or current public officer or employee employed or appointed by the public body,” as provided in N.J.S.A. 10:4–12(b)(8). The court in that case held that the public body had violated the requirement of the Mississippi law which prohibited it from “discussing and transacting in closed session” on matters regarding

personnel. As emphasized above, the OPMA explicitly *authorizes* discussion in closed session regarding any type of matter delineated in N.J.S.A. 10:4–12(b)(8), establishing that the provisions of the New Jersey statute at issue in this matter are substantially distinguishable from the Mississippi law that was at issue in Hinds, supra, 551 So.2d 107.

In view of the foregoing, the applicable New Jersey statute and case law both provide that a board of education may enter a private, closed session meeting to discuss the qualifications of candidates who are under consideration to fill a vacancy on the board, in compliance with the OPMA. However, the relevant case law holds that a board of education would violate the OPMA by conducting any interviews, nominations, and/or voting on candidates for a vacancy in closed session, because the OPMA requires that those activities – as opposed to discussions or deliberations – must take place in open public session. See Gannett, 201 N.J. Super. at 68-69.

Here, the Board entered a closed session meeting in which it discussed the qualifications of the candidates for a vacant seat on the Board, then returned to the open, public session of its properly noticed Board meeting, and immediately proceeded with the nominations process and the vote during that same public session – in full view of the public. Therefore, it is without question that the Board acted in full compliance with the OPMA and the relevant case law

interpreting the OPMA. The Trial Court erred when it held otherwise, as it misinterpreted and misapplied Gannett and its holding to the facts of this matter.

While the Trial Court addressed Gannett in its decision, it nevertheless failed to recognize that the court in that case explicitly stated, within its analysis and application of the OPMA, and specifically, N.J.S.A. 10:4–12(b)(8), that “the Board *could exclude the public from its deliberations on the qualifications of the various candidates.*” Id. at 69 (emphasis added) (1T). The Trial Court stated as follows as part of its oral decision on the record: “Gannett is right on point and stands for the proposition that -- that there is no privilege, as asserted by the Board in this case, for there to be confidential discussion regarding the appointment of Board Member Gorham.” (1T16:9-13).

In addition, the transcript reflects that the Trial Court’s oral decision also included the following:

Gannett held that the personnel exception, which is number eight, that the personnel exception of the Open Public Meetings Act does not apply to elected officials whose retention -- whose continued retention in office is dependent on the approval of the public, which is what this case was. This was a -- this was an appointment to a position that ultimately would be an elected position.

(1T16:1-8)

However, a review of the Gannett decision reveals that although the Trial Court properly found that the case is on point and directly applicable to the facts of this matter, it erred when it found that the OPMA prohibits a board of education from holding private, closed-session discussions concerning the qualifications of candidates for a vacancy on the board. The Trial Court correctly noted that the Gannett court stated, “the personnel exception of the Open Public Meetings Act does not apply to elected officials whose continued retention in office is dependent on the approval of the public, not on any particular agency or department,” but failed to apply the holding reached in Gannett that although “the Board could exclude the public from its deliberations on the qualifications of the various candidates, the personnel exception is not an excuse for excluding the public from the entire process.” See Gannett, 201 N.J. Super. at 69-70. That holding has been followed by at least one OAL decision which was affirmed by the New Jersey Commissioner of Education. See Shaw, *supra*, 1989 S.L.D. 1550.

All of the potentially relevant case law from other states which has cited the Gannett case is not binding on this Court and is also factually and legally distinguishable from this matter. Specifically, in all of the out-of-state cases which considered Gannett, the statutory language of the law at issue was substantially different from the plain language of the OPMA, which expressly

allows public bodies to discuss – but not act on – certain topics in closed session, as described in N.J.S.A. 10:4–12(b). Moreover, to the extent that those out-of-state courts merely held that that a public body may not vote, make appointments, or take other action in closed session, and must do so only in open, public session, that principle is consistent with New Jersey law, and was entirely followed by the Board in this case.

Here, the Board only discussed the qualifications of the candidates for a vacancy on the Board in closed session, then returned to open session wherein it subsequently took action in public, when it voted to appoint a candidate to fill the vacancy. All of the directly applicable governing New Jersey law, consisting of both statutory and case law, provides that a board of education may discuss the candidates for a vacancy in a closed session meeting that excludes the public, without violating the OPMA, so long as the board does not appoint, vote, or take any other type of action during closed session, and ensures that it takes action only during open public session.

In summary, the Trial Court erroneously ruled that that the OPMA prohibits a board of education from holding closed session discussions regarding candidates for appointment to a vacancy to the board, as the applicable New Jersey case law holds to the contrary. Accordingly, this Court should reverse the

Order of the Trial Court granting summary judgment to Plaintiffs, and should remand with instructions to enter summary judgment in favor of the Board.

II. The Trial Court Erred by Voiding a Board of Education's Public Vote Appointing a Qualified Candidate to Fill a Vacancy on the Board of Education, Taken at a Properly Noticed Meeting and After Public Debate, Because the Board Discussed the Candidates in Closed Session Prior to Voting in Public Session. (Da 236-Da 237).

In the alternative, even if the Trial Court correctly held that the Board violated the OPMA by discussing candidates for a vacancy in closed session, the Trial Court erred by voiding the Board's public vote appointing a new member to fill the vacancy, which occurred at a properly noticed meeting and after public debate. The Trial Court's Order voiding the Board's action was based upon the Board's discussion of the candidates for the vacancy in closed session, prior to holding a public vote on the appointment. However, the Trial Court erred when it granted that remedy to address the OPMA violation, as the applicable law provides that such a remedy is not warranted based solely upon a closed-session discussion that is conducted in violation of the OPMA, where the public body's vote occurs in open public session and complies with the OPMA.

The OPMA permits the filing of an action in lieu of prerogative writs seeking to void action by a public body which did not comply with the statute. Specifically, N.J.S.A. 10:4-15(a) provides as follows:

Any action taken by a public body at a meeting which does not conform with the provisions of this act shall be voidable in a proceeding in lieu of prerogative writ in the Superior Court, which proceeding may be brought by any person within 45 days after the action sought to be voided has been made public; provided, however, that a public body may take corrective or remedial action by acting de novo at a public meeting held in conformity with this act and other applicable law regarding any action which may otherwise be voidable pursuant to this section; and provided further that any action for which advance published notice of at least 48 hours is provided as required by law shall not be voidable solely for failure to conform with any notice required in this act.

N.J.S.A. 10:4-15(b) further states as follows:

Any party, including any member of the public, may institute a proceeding in lieu of prerogative writ in the Superior Court to challenge any action taken by a public body on the grounds that such action is void for the reasons stated in subsection a. of this section, and if the court shall find that the action was taken at a meeting which does not conform to the provisions of this act, the court shall declare such action void.

In addition, “[a]ny person, including a member of the public, may apply to the Superior Court for injunctive orders or other remedies to ensure compliance with the provisions” of the statute, and the court “shall issue such orders and provide such remedies as shall be necessary to ensure compliance.”

N.J.S.A. 10:4-16. However, an award of injunctive relief generally will not be issued in response to a single, isolated violation of the OPMA. Rather, such

relief should not be granted absent a showing of “a pattern of non-compliance” with the OPMA by the public body. Burnett v. Gloucester County Bd. of Chosen Freeholders, 409 N.J. Super. 219, 246 (App. Div. 2009).

Finally, the OPMA also authorizes of monetary fines in specific amounts as penalties for the first violation and any subsequent violations of the OPMA. N.J.S.A. 10:4-1. In short, “[t]he statute provides for three forms of remedy for an OPMA violation: a prerogative writs action seeking to void any action taken at a meeting that did not meet OPMA’s requirements, N.J.S.A. 10:4–15; injunctive relief to assure future compliance, N.J.S.A. 10:4–16; and imposition of fines, N.J.S.A. 10:4–17.” McGovern v. Rutgers, 211 N.J. 94, 112 (2012).

In McGovern, the Court found that there had been no showing of any pattern of non-compliance with the requirements of the OPMA that would justify granting injunctive relief, and there was no evidence that any OPMA violation by the public body was knowing and thereby justifying a fine under N.J.S.A. 10:4–17. Id. at 114 (holding that based on the facts, “the statute affords plaintiff no remedy” under N.J.S.A. 10:4–15, N.J.S.A. 10:4–16, or N.J.S.A. 10:4–17). Therefore, courts should avoid simply presuming that any and all actions brought under the OPMA which result in a finding of noncompliance by the public body will always warrant ordering a remedy under N.J.S.A. 10:4–15, N.J.S.A. 10:4–16, or N.J.S.A. 10:4–17. Where the public body does not take

action following a closed session discussion that violates the OPMA, for example, McGovern stands for the principle that the court should properly decline to issue any of the potential relief described in the statute.

Furthermore, the Appellate Division has previously held that the mere fact that a public body deliberates on a matter during a closed session meeting, in violation of the OPMA, does not require that the court must issue an order voiding any public action taken regarding the same matter. See La Fronz v. Weehawken Bd. of Educ., 164 N.J. Super. 5 (App. Div. 1978), certif. denied, 79 N.J. 491 (1979). In La Fronz, the court held as follows:

The single circumstance that these resolutions previously had been set aside because the deliberations concerning them had occurred at a nonpublic meeting preceding the public meeting at which they were first adopted (April 27, 1976), does not by itself and without more invalidate the action taken at the June 29 or the July 13, 1976 meetings. A canvass of the record reveals no impropriety of similar or other nature violative of the Sunshine Law involving any of the resolutions or the action taken thereon with reference to the meeting of June 29 or the meeting of July 13, including the limited discussion of the various matters.

Id. at 8.

Therefore, La Fronz stands for the principle that even if the court finds that the public body improperly discussed a matter during a closed session meeting, in violation of the OPMA, the statute does not mandate that any action

taken in open public session by the public body regarding the same matter must be voided, in order to address the OPMA violation. While in La Fronz, the action of the public body was taken at a subsequent open public meeting, the same principle and reasoning would equally apply to an improper closed session discussion, in violation of the OPMA, which was immediately followed by an open public meeting at which the public body took public action regarding the matter that it discussed in closed session. As a result, under the holding of the La Fronz decision, a court may decline to issue an order voiding an action taken by a public body at an open public meeting, where the only OPMA violation relating to that action was a closed session discussion that should have been public, under the OPMA.

Similarly, applicable precedent decided under the OPMA also holds that a public body's violation of the statute, such as a failure to properly list an action to be taken at a public meeting on the agenda, should not necessarily result in a finding that any action taken by the public body at the same meeting must be rendered void. Rather, this Court has previously held, in cases involving the OPMA's agenda requirements, that only where it can be shown that the public body published an agenda that was calculated to mislead the public, or otherwise intentionally omitted items from the agenda which it knew would be acted on, will the action be voided. See Crifasi v. Governing Body of Borough of Oakland,

156 N.J. Super. 182, 187 (App. Div. 1978) (upholding the appointment of a placement member to the Borough Council at a regularly scheduled meeting, despite the fact that the topic had not been included in the meeting's agenda as ordinarily required by the OPMA).

In this case, the Trial Court erred when it issued an Order voiding the Board's appointment of Mr. Gorham to the vacancy on the Board, based upon its finding that the Board had violated the OPMA when it discussed the qualifications of the candidates for the vacancy in a closed session meeting, prior to voting on an action to fill the vacancy in open public session. As the case law cited above clearly provides, a court may decline to void a public body's action taken at an open public meeting, if the only OPMA violation relating to that action was a closed-session discussion that should have been held in public. Here, even assuming *arguendo* that the Trial Court correctly held that the Board violated the OPMA by discussing the candidates for a vacancy in closed session, the Trial Court failed to consider that an order voiding the Board's public vote appointing a candidate to the vacant position was not warranted under the circumstances.

More specifically, the Trial Court erred when it failed to recognize that such discussion was the only OPMA violation that was alleged to have occurred at the meeting, and that the Board conducted the entire process of seeking

nominations and conducting the Board's vote to appoint Mr. Gorham in open, public session, in full compliance with the OPMA. Simply stated, the Trial Court erred when it did not even consider that the relevant case law permitted it to decline to void the Board's appointment of Mr. Gorham to the vacancy, and failed to apply that applicable law to the facts of this case, which did not support the Trial Court's order voiding the appointment.

In view of the foregoing, this Court should conclude that the Trial Court erred when it voided the Board's appointment of a new member to fill a vacancy on the Board, based upon the Board's discussion of the candidates for the vacancy in closed session before voting in public. The OPMA and the relevant case law interpreting the statute dictates that the court should not issue such a remedy based solely upon a closed-session discussion that failed to comply with the OPMA, where the public body's vote and all other aspects of the process occurred in open, public session in compliance with the statute, which is exactly what occurred in the instant case.

III. The Trial Court Erred by Holding that the Votes Cast by an Individual, Who Was Improperly Appointed as a Member of a Board of Education, Nevertheless Remain Binding Upon the Board and the Public, Despite the Court Subsequently Voiding and Rescinding the Board's Appointment of the Individual to Fill a Vacancy on the Board. (Da 238-Da 239)

Finally, in the alternative, even if the Trial Court correctly ruled that the Board violated the OPMA by discussing candidates for a vacancy in a closed session meeting, then the Trial Court erred when it ruled that the votes cast by Mr. Gorham, who was appointed to the vacancy, must remain effective and binding upon the Board and the public, despite that Mr. Gorham's appointment occurred in violation of the OPMA.

Our courts have consistently held that where a public official is appointed to serve in a specific office, and that appointment is subsequently voided as having been made in violation of the applicable law, both the oath of office and the public official's service in the office must be considered invalid from their inception. See, e.g. Visotcky, supra, 113 N.J. Super. at 267 (a lack of conflicting interest is a qualification for membership on a board of education, rendering a board member's appointment "invalid from its inception"); O'Connor v. Calandrillo, 117 N.J. Super. 586 (Law. Div. 1971), aff'd, 121 N.J. Super. 135

(App. Div. 1972) (holding that where elected city commissioners accepted incompatible appointments to other city positions, which constituted impermissible conflicts of interest, such appointments were void); Waldor v. Untermann, 7 N.J. Super. 605 (Law Div. 1950), aff'd, 10 N.J. Super. 188 (App. Div. 1950) (lack of compliance with requirement that a board member must be a resident of the district for at least three years prior to becoming a member rendered his appointment invalid and warranted judgment removing defendant from office); McCue v. Antisell, 105 N.J. Super. 128 (App. Div. 1965) (holding that “one elected to an office does not become an incumbent of it until he assumes the office by qualifying therefor,” and that “defendant never ‘held’ the office of councilman to which he was elected because he never assumed the office by qualifying for it”).

Accordingly, if a public body’s appointment filling a vacancy is voided by a court based upon a ruling that the appointment violated the OPMA, the court should also order that all actions taken by the individual who was improperly appointed to the vacancy must be void. Such actions would necessarily include all votes cast by that individual, which could result in a change to the outcome of actions previously taken by the public body, if the individual’s vote was the deciding vote in favor of the action. In other words, if the appointment of an individual to a vacancy on a board of education violated

the OPMA, and that individual cast the deciding vote on any actions approved by the board during his or her period of improper service on the board, such actions should be rendered null and void *ab initio*, based on the court having ruled that the board's appointment was void because it violated the OPMA.

In this matter, the Trial Court issued an Order on August 16, 2024, directing that the July 26, 2024 Order voiding the Board's original appointment of Mr. Gorham, whose Board membership had already ceased nearly three (3) months prior to that July 26, 2024 Order, was not to have retroactive effect because the Trial Court found that there had been "no evidence presented that would cause harm with this order not having retroactive effect." (Da 238-Da 239). However, the Trial Court erred when it ruled that the Order would not be retroactive. Specifically, it was error for the Trial Court to issue a ruling that the Board violated the OPMA when it appointed Mr. Gorham to a vacancy, but also direct that there would be no retroactive effect that would void the actions taken by Mr. Gorham during the period in which he unlawfully was seated to fill a vacancy on the Board in violation of the OPMA.

Pursuant to the abundance of case law cited above, the Trial Court should have recognized that when a public official is improperly sworn into office in violation of the applicable law, all votes and other actions taken during the period in which he or she improperly served in the office must be deemed

ineffective and void, and thus should not be considered binding on the public body or the public itself. Because the Trial Court failed to correctly apply this principle to the facts of the present matter, as a result, the Trial Court erred by failing to rule that the votes cast by Mr. Gorham should be declared void, based upon the Trial Court's ruling that he was improperly appointed to the vacancy on the Board in violation of the OPMA.

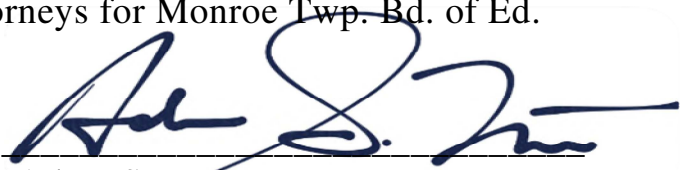
In summary, even if this Court concludes that the Trial Court correctly held that the Board violated the OPMA by discussing candidates for a vacancy in closed session, the Trial Court nevertheless erred when it ruled that all of the votes cast by the Board member, who it determined to have been improperly appointed to the vacancy, must remain binding upon the Board and the public. Therefore, even if the Trial Court's finding that Board violated the OPMA is upheld, this Court should reverse the decision of the Trial Court regarding the current effect of the votes cast by the Board member who it determined was improperly appointed to the vacancy, and remand with instructions for the entry of an Order that invalidates all of the votes cast by that Board member, to the extent that the Board member was appointed to a vacant seat on the Board in violation of the OPMA, as not doing so essentially provides judicial validation to otherwise invalid acts.

Conclusion

Therefore, for the reasons set forth more fully above, the decision and Order of the Superior Court, Law Division, Middlesex County, should be reversed.

THE BUSCH LAW GROUP LLC
Attorneys for Monroe Twp. Bd. of Ed.

By:



Adam S. Weiss, Esq.

Resubmitted: January 29, 2025

MICHELE ARMINIO, Plaintiff-Respondent, v. MONROE TOWNSHIP BOARD OF EDUCATION, Defendant-Appellant.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION CIVIL ACTION On appeal from a final judgment of the Law Division dated August 16, 2024 A-000207-24 MID-L-6748-23 SAT BELOW: HON. BENJAMIN S. BUCCA, JR., J.S.C.
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BRIEF OF PLAINTIFF-RESPONDENT MICHELE ARMINIO

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Submitted April 2, 2025

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PRELIMINARY STATEMENT

The decision of the Trial Court should be affirmed. In this case, which arises under the New Jersey Open Public Meetings Act, N.J.S.A. 10:4-6 to 10:4-21, (“the OPMA”), the Trial Court invalidated an appointment to a vacant seat on the Monroe Township Board of Education (“the Board”) because the appointment had not been made after public discussion and comment. Furthermore, the Trial Court denied a motion filed by the Board to reconsider its prior order.

Because the Board violated the clear language of the OPMA by conducting its deliberations of their appointment to the vacancy in closed executive session and failing to hold any substantive public discussion or allow the public to comment, the Trial Court correctly decided to invalidate the appointment. Moreover, the Trial Court’s decision not to make the invalidation retroactive was at the specific request of Defendants and should not be overturned now. Finally, because the Board failed to show the Trial Court that it had failed to consider probative evidence or that it had misapplied the law, the motion for reconsideration was properly denied.

For these reasons, as more fully set forth below, the orders of the Trial Court entered on July 26, 2024 and August 16, 2024 must be affirmed.

STATEMENT OF FACTUAL HISTORY

On August 16, 2023, the President of the Board announced that a Board member had resigned, creating a vacancy which, under New Jersey law, the Board had sixty-five days to fill. (Da3; Da230).

On October 18, 2023, the Board held a “meeting” within the meaning of the OPMA. (Da224; Da230-232). A quorum of the members of the BOE were present at this meeting. (Da18; Da224). During the October 18, 2023 meeting, the BOE held a closed or executive session meeting, meaning that the public was excluded from the deliberations, during which they discussed and deliberated regarding whether they should nominate Matthew Gorham to fill the open vacancy. (Da258-259). This closed session lasted from 6:34 PM to approximately 7:18 PM. (Da43).

After the executive session, the Board returned to open session. (Da230-232). Board member Chrissy Skurbe stated that

And this evening we were in close session from 6:30 to approximately 7:15. We had a very long discussion as a board. Moving forward of what action we wanted to take and we have decided that we have had ample time to review all of the applications, all of the information that was provided by those that sent in an application therefore we will not be conducting any interviews this evening.

(Da231). At that time, the Board took a vote, and with six “yeses,” two “no’s” and one abstention, passed a resolution appointing Gorham to fill the vacancy. (Ibid.).

STATEMENT OF PROCEDURAL HISTORY

On December 1, 2023, Plaintiff-Respondent Michele Arminio (“Ms. Arminio”) filed a Verified Complaint and Order to Show Cause, seeking an order which voided the Board’s appointment of Matthew Gorham. (Da1-11).

On February 19, 2024, the Board filed a motion for summary judgment, seeking a dismissal of Ms. Arminio’s complaint with prejudice. (Da12-198). On March 18, 2024, Ms. Arminio cross-moved for summary judgment. (Da199-210).

On July 24, 2024, the Trial Court held oral argument on the summary judgment motions. (1T).

The Trial Court stated that it was “voiding the appointment of Mr. Gorham because I believe, and I find that it violates the [OPMA] for the following reasons.” (1T11:21-23). First, the Trial Court recognized that when there was a vacancy on the Board,

they had scheduled the appointment to occur at a public meeting, appropriately so, and on the date of that public meeting, then the Board went into executive session that upon completion of the executive session, they came out and a -- and a board member then just immediately, without any comment, just nominated Mr. Gorham, and it was seconded and then there was a vote. And then, thereafter, Mr. Gorham came up to the dais and introduced himself.

(1T12:2-10). And while Mr. Gorham might be “a well-qualified candidate for the Board, . . . that’s not the issue”; the question was “did the Board follow the proper

procedure in appointing him to the position.” (1T12:12-15).

The Trial Court found that there were only certain statutory exceptions to the OPMA’s requirement that “citizens [have] the right to attend all meetings of public bodies at which any business affecting the public is discussed or acted upon in any way.” (1T12:19-22). The Trial Court then discussed each of the nine exceptions contained in the OPMA. With regards to the eighth exception, which the Board had argued applied, the Trial Court made specific findings to the contrary. The Trial Court stated that Gannett Satellite Information Network, Inc. v. Board of Education of Borough of Manville

held that the personnel exception, which is number eight, that the personnel exception of the [OPMA] does not apply to elected officials whose retention -- whose continued retention in office is dependent on the approval of the public, which is what this case was. This was a -- this was an appointment to a position that ultimately would be an elected position.

(1T16:1-8). As such, the Trial Court found that as a result of the OPMA violation, the “the appointment is voided.” (1T17:3-4).

On July 26, 2024, the Trial Court entered an order which denied the Board’s motion for summary judgment (Da238-239) and granted Ms. Arminio’s cross-motion for summary judgment. (Da211-212).

On July 31, 2024, the Board filed a motion for reconsideration of the Trial Court’s July 26, 2024 Order. (Da213-237). On August 16, 2024, the Trial Court held

oral argument on the motion for reconsideration. (2T).

After hearing oral argument, the Trial Court stated that “the defendant argues that the Court did not properly evaluate the New Jersey Supreme Court case of Kean Federation of Teachers [v.] Morell” and was improperly “persuaded by a reported Law Division case Gannett,” when considering what “extent of public discussion is necessary by a Board in order to fulfill the Board’s obligations pursuant to the [OPMA].” (2T31:2-11).

While the Trial Court acknowledged that a “reported Law Division case should not take precedence over a [Supreme Court] case,” it was immaterial because “the [l]aw referenced in Kean was not the reason why the Court voided the appointment[.]” (2T31:12-17). Instead, the Trial Court made clear that “the issue is not the adequacy of the public discussion. The . . . issue was the impropriety in the private discussions that occurred outside of the public’s viewing.” (2T31:19-22).

The Trial Court (again) rejected the Board’s argument that the “personnel exception . . . support[ed] their argument that it was permissible for the Board to discuss candidates for the open seat in a private session,” based on the decision of the Law Division in Gannett, which rejected the application of the personnel exception to the discussion of an appointment to an elected position. (2T31:23-32:6). And otherwise, “there was no . . . exception to the [OPMA] for the Board to have substantive discussions, which they obviously did as to the appointment of Mr.

Gorham in a private session. These just have to be done in the public.” (2T32:7-12).

In the end, the Trial Court found that the issue before it was simple: “Was it permissible for the Board to have a discussion about the candidates in private when a majority of the board members were present.” (2T34:2-5). And the answer was (again) no, “[t]here was no doubt in this Court’s mind that the [OPMA] . . . in accordance with Gannett does not permit this, and thus tainted the entire process, which ultimately warrants in this Court’s opinion rescinding the appointment . . . of Gorham.” (2T34:6-11). The Trial Court also rejected the Board’s arguments about past practices and policies permitting the actions taken by the Board, reasoning that it was “basically reduced to arguing that if other Boards are violating the [l]aw this -- this Court should allow Monroe to violate the [l]aw” which “clearly makes no sense.” (2T35:4-7).

In the end, the Trial Court found that “[s]ince there was substantive discussion of the applicants in private session in violation of the [OPMA], the only remedy to cure the error . . . is to rescind the appointment and have the Board redo the appointment in a public session.” (2T35:18-22).

On August 16, 2024, the Trial Court entered an order which denied the Board’s motion for reconsideration. (Da238-239). This order was the final order in the case, and this appeal followed. (Da240-243).

LEGAL ARGUMENT

POINT I

THE TRIAL COURT CORRECTLY ENTERED SUMMARY JUDGMENT IN FAVOR OF PLAINTIFF AND AGAINST APPELLANT

(Raised Below at 1T11:18-17:4; Da211).

The Board asks this Court to reverse the July 26, 2024 decision of the Trial Court which voided the appointment of Matthew Gorham to the Monroe Township Board of Education. In essence, the Board asks the Court to bless its practice of conducting the substantive discussions regarding appointments to elected positions in closed executive session and then going through the motions in open session (without holding any real public discussion or comments) before conducting their vote. However, the Board's actions, past practice or not, are in violation of the OPMA. As such, the Trial Court correctly granted summary judgment to Ms. Arminio, and denied summary judgment to the Board, and this Court should affirm the July 26, 2024 Order.

As a pure question of law, and as a matter of statutory interpretation, an appellate court reviews a decision of the Trial Court under the OPMA *de novo*. See Opderbeck v. Midland Park Bd. of Educ., 442 N.J. Super. 40, 44 (App. Div. 2015); see also Saccone v. Bd. of Trs. of Police & Firemen's Ret. Sys., 219 N.J. 369, 380 (2014) (“Statutory interpretation involves the examination of legal issues and is, therefore, a question of law subject to *de novo* review.”).

When discerning the meaning of a statute, the role of the Court “is to discern and effectuate the intent of the Legislature.” Saccone, 219 N.J. at 380 (quoting Murray v. Plainfield Rescue Squad, 210 N.J. 581, 592 (2012)). “If the plain language is clear, the court's task is complete.” In re Kollman, 210 N.J. 557, 568 (2012) (citing N.J. Ass'n of Sch. Adm'rs v. Schundler, 211 N.J. 535, 549 (2012)). Furthermore, “[t]he language of the statute must be construed in accordance with its ordinary and common-sense meaning. State ex rel. K.O., 217 N.J. 83, 94 (2014) (citations omitted).

Here, the plain language of the OPMA is crystal clear. The OPMA protects the public interest in four principal ways, in that it requires: (1) prior notice to the public of all meetings; (2) all meetings be held in public; (3) an opportunity to make public comment; and (4) written minutes that summarize the meeting. See N.J.S.A. 10:4-9 (requiring advance notice to the public of all meetings); N.J.S.A. 10:4-12.7(a) & (b) (except for executive sessions, all meetings must be held in public); N.J.S.A. 10:4-12.7(a) (requiring municipalities and boards of education to set aside time for public comment); N.J.S.A. 10:4-14 (requiring “reasonably comprehensible minutes of all [of a public body’s] meetings”).

The OPMA must be “liberally construed in order to accomplish its purpose”. N.J.S.A. 10:4-21; see also Opderbeck, 442 N.J. Super. at 52. The purpose of OPMA is clear: The public has “the right . . . to be present at all meetings of public bodies[.]”

N.J.S.A. 10:4-7. The public also has the right to “witness in full detail *all phases of the deliberation*, policy formulation, and decision making of public bodies” and that these rights are “vital to the enhancement and proper functioning of the democratic process[.]” Ibid. (emphasis added); see also McGovern v. Rutgers, 211 N.J. 94, 99 (2012).

“Our State's commitment to transparency in the conduct of governmental affairs has deep roots.” Opderbeck, 442 N.J. Super. at 51. “Secrecy in public affairs undermines the faith of the public in government[.]” Ibid. The Legislature declared that the purpose of the OPMA was to “insure the right of [New Jersey’s] citizens to have adequate advance notice of and the right to attend all meetings of public bodies at which any business affecting the public is discussed or acted upon in any way[.]” Ibid.

Shortly after the Legislature passed the OPMA into law, our Supreme Court held that public agencies must adhere “to the letter of the law” and that judicially created exceptions to compliance “would swallow the rule.” Polillo v. Deane, 74 N.J. 562, 578 (1977). In short, no violation of the OPMA can be ignored and substantial compliance is insufficient.

These principles were repeated in Rice v. Union Cty. Reg'l High Sch. Bd. of Ed., 155 N.J. Super. 64, 70 (App. Div. 1977). In Rice, the Appellate Division emphasized that OPMA reflected New Jersey’s “strong present-day policies

“favoring public involvement in almost every aspect of government” and that “strict adherence to the letter of the law is required in considering whether a violation of the Act has occurred.” Id. at 70.

These sentiments were more recently described again in Burnett v. Gloucester County Board of Chosen Freeholders:

To this end, the Act must be liberally construed in favor of openness, N.J.S.A. 10:4-21, and any exception from the full public disclosure mandated by the statute is to be strictly construed. When considering whether a violation of the Act has occurred, strict adherence to the letter of the law is required.

[409 N.J. Super. 219, 232–33 (App. Div. 2009) (internal citations and quotations omitted).]

In this case, the Trial Court was asked to void the October 18, 2023 appointment of Matthew Gorham to the Monroe Township Board of Education because, except for the superficial comments by the members of the Board, and then the Board’s vote, no aspect of that nomination took place in public. According to the October 18, 2023 meeting minutes, “the Board had discussions on the direction that they were going to take, adding that they had ample time review all the applications,” but that it was “decided that they would not be conducting any interviews this evening.” (Da231).

As set forth in the minutes, the Board discussed the “Board Vacancy” in closed session, but did not discuss the vacancy in open session except to say they

were not conducting interviews. (Da231). In terms of the selection of Mr. Gorham, the public only witnessed the vote itself. (Ibid.). The minutes shows that the Board President read a statement stating that they will not conduct any interviews, accepted a motion to nominate Gorham by a vote of six “yeses,” two “no’s” and one abstention, without any deliberation whatsoever. (Ibid.). Nor did the Board take any questions or comments from the public about the candidates or the process. (Ibid.). In short, by nominating and approving Gorham without any public deliberation, the Board violated the OPMA.

The above description of events is borne out in the videorecording¹ of the meeting. Starting at approximately timestamp 6:35, the Board considered the agenda item regarding the vacant seat. The majority of the intervening five minutes was taken up by the Board attorney explaining the involvement of the County Superintendent in the process. Then floor was yielded back to the Board president at timestamp 10:25, the floor was opened for nominations at timestamp 10:52, Mr. Gorham was the sole nomination at approximately timestamp 11:03, the motion was seconded at timestamp 11:08, voting began at timestamp 11:15, and the vote was concluded by timestamp 11:40. In short, though the Board would have this Court

¹ This recording was not submitted to the Trial Court as part of the motions for summary judgment or reconsideration but was viewed by the Trial Court because it is part of the public record, being posted to the Board of Education’s YouTube channel in what appears to be their regular practice. The recording can be viewed at the following link: [\[REDACTED\].youtube.com/watch?v=FoGZSl5wrek](#).

believe that there was sufficient discussion in open session, a review of the videorecorded proceeding makes it clear that a mere twenty-seven seconds was spent on the public “discussion” portion of the agenda item, with no opportunity given for public questions or comments before the vote. The agenda item itself was concluded by timestamp 15:05, with the remaining time used to explain what would have to happen before Mr. Gorham could vote with the other Board members and with Mr. Gorham’s self-introduction.

At approximately timestamp 54:15 (and continuing to approximately timestamp 1:32:7), the floor was opened for public forum, with some of the members of the public questioning the process surrounding the Board’s filling of the vacant seat. Ms. Arminio, the Plaintiff here, addressed the Board on this topic specifically, with her questions beginning at approximately timestamp 1:04:21. Ms. Arminio queried the Board about their decision to conduct discussions about the vacancy in closed session, asking specifically about which of the eight exceptions to the OPMA had been applied in doing so. In response, the Board attorney failed to answer the question, even when it was repeated by Ms. Arminio, instead stating that he had spoken with the Board president and the County Superintendent and advised them on proper procedures. Ms. Arminio’s time at the public podium concluded at approximately timestamp 1:08:48.

In Cullum v. Board of Education, 15 N.J. 285 (1954), the Supreme Court affirmed the trial court's order invalidating the appointment of a school superintendent that had taken place without any deliberation in public session. The Court affirmed that invalidation because "[a]t no time did the majority consider the needs of the local community, or seek to ascertain and evaluate the identities, qualifications and experience of the available candidates, or deliberate on the course best calculated to serve the local school system." Id. at 293-94. If a "public meeting is to have any meaning or value, final decision must be reserved until fair opportunity to be heard thereat has been afforded." Id. at 294.

Similarly, in Gannett, the Court invalidated the appointment of a Board of Education member where the public had "no opportunity whatsoever for the public to . . . 'witness the . . . deliberation, policy formulation and decision making of public bodies.'" 201 N.J. Super. at 69 (citation omitted).

The Board would ask this Court to bless their actions because it claims that it had the "discretion to discuss the qualifications of candidates in closed session." But the Board did far more in closed session than just discuss the candidates' qualifications. Had the Board discussed the candidates in closed session and then proceeded to engage in a full discussion in open session before conducting their vote, we might not be here. But that's not what happened. The only public aspect of Gorham's nomination and ultimate selection was the motion, the second, and the

vote. (Da231). Although Board President Skurbe referenced that “the Board had discussions on the direction that they were going take,” and that “they had ample time to review all the applications,” and that “it was decided” that the Board would not conduct any interviews, none of those deliberations or decisions occurred in open session. No reasons were given for their decisions. There was no discussion of the consideration of the one candidate. Indeed, no other candidate was even considered. And this all occurred in secret.

The Board argued below, and again argues here, that it complied with the law when it filled a vacancy on the Board by a majority vote of the remaining board members. But just because Defendant may have complied with N.J.S.A. 18A:12-15, that does not mean that that Defendant complied with the OPMA. While the Board moved for the nomination and voted in public, nothing else took place in open session. All of the deliberations regarding whether to interview candidates took place in private, and all the deliberations regarding the interview candidates also took place in private. The Board gave no insight into its decision not to interview any candidates. Thus, they violated the OPMA.

Defendant also argues that the personnel exemption covers appointments. But this contravenes Gannett, in which the Court held that the personnel exception “is not an excuse for excluding the public from the entire process.” 201 N.J. Super. at

69. Here, except for the vote, the public was excluded from the entire process, including the decision not to interview any of the candidates.

As Gannett held, when appointing a member of the Board, the Board is acting in lieu of an election. When they do so, they must meet a higher standard, which is there must be some level of deliberation. As we know, that deliberation occurred in private session, but the public is entitled to know more when the Board acts as the electorate.

In a representative republic, elections and jury service are those very rare times when citizens can make enforceable decisions that affect their rights. Elections almost always occur in the context of campaigning and votes that occur by secret ballot yet are in public to ensure integrity. The candidates are listed on ballots, and anyone can vote for anyone else. This is why on those rare occasions when the Board acts to fill a seat occupied by a person who normally is elected, the Board's obligation to act in a transparent manner is heightened. That is what Gannett stands for.

The Board would have the Court believe that the Trial Court's reliance on Gannett was misplaced, and that this Court should find that this case is governed by the Supreme Court's decision in Kean Federation of Teachers v. Morell, 233 N.J. 566 (2018). However, law does not exist in a vacuum. The Kean and Gannett cases

must be read together, and when that is done, they are consistent, and the Trial Court's reliance on Gannett was entirely appropriate.

In Gannett, the Court held that “[i]n the instant case, where a public body is appointing an individual to fill a position normally filled by an elected official, the reasons for allowing public scrutiny of the actions taken are even more compelling.” 201 N.J. Super. at 70. Kean addressed the treatment of employees, not elected public officials. What made Gannett special, and especially applicable to the present case, was that the board sat in place of the electorate (like the Board did here). In Kean, the governing body was addressing the hiring, retention, and termination of employees, which falls squarely within the definition of a personnel matter. Kean, 233 N.J. Super. at 577 (discussing how the issue at the meeting in Kean was a subcommittee report on faculty retention).

Because the results of this Gannett and the result in Kean can easily be reconciled based on the fact that Gannett addressed the fulfillment of an elected position and Kean addressed the retention of employees, the Trial Court's decision was reasonable and rational. And while Kean did not cite or discuss Gannett, this is probably because Kean did not involve an appointment of a person to an elected position, and as such Gannett was not on point for the case before that Court.

This case is also analogous to In re Consider Distribution of Casino Simulcasting Special Fund (Accumulated in 2005), 398 N.J. Super. 7 (App. Div. 2008). In Casino Simulcasting, the New Jersey Racing Commission held deliberations and made decisions regarding the distribution of \$1,820,669.42 in funds in private session but voted on the distribution in public session. The Court held that this procedure violated the OPMA because there was no “public discussion or deliberation.” Id. at 17. Thus, the Court voided the action and remanded the matter. This Court should do the same here.

The reconstructed minutes for the October 18, 2023 executive session meeting, which remain under seal from public disclosure and have been submitted here via Confidential Appendix for the eyes of the Court and attorneys only, show the deliberations that occurred in closed session and demonstrate exactly how the OPMA was violated in a manner which was explicitly and previously recognized in a published decision.

All of Defendant’s arguments rely on citations to arguments regarding employees, or are otherwise inapposite, and so must fail.

For instance, in the Matter of Board of Education of the City of Trenton, the issue before the Court was whether the State Board of Education had the constitutional authority to issue an administrative order which required the board to

implement a plan for corrective action to remedy educational deficiencies in the Trenton school system. 176 N.J. Super. 553 (App. Div. 1980), *aff'd* (1981).

In Visotcky v. Garfield, the Court considered the question of whether a teacher under contract with a school district could also serve as a member of that district's Board of Education. 113 N.J. Super. 263, 266 (App. Div. 1971).

In Houman v. Pompton Lakes, the Court considered whether the Borough of Pompton Lakes violated the OPMA when it decided and voted to hire outside counsel to handle certain tax appeals during closed session. 155 N.J. Super. 129, 142-43 (Law. Div. 1977). First, a borough attorney is not an elected position, such as a member of the board, so this case is not on point. Second, the court in Houman found that the board had in fact violated the OPMA by conducting certain activities during closed session, but that it had ratified the voidable action at a later meeting. Id. at 173-174.

Finally, the Board cites to the initial decision by an ALJ in Shaw v. Manchester Township Board of Education, 1989 S.L.D. 1550 (OAL Dkt. No. EDU 5147-88, Agency Dkt. No. 219-7/88 (Initial Decision Mar. 14, 1989), *aff'd*, (Comm'r, Apr. 26, 1989). In this case, the ALJ considered whether the board had violated the OPMA by conducting discussions in closed session about an appointment to fill a vacant seat. This case, far from being helpful to the Board here, and is in fact opposite to its position.

In Shaw, the board conducted interviews of nine candidates in closed session. (Da248). At a special meeting convened for the purpose of filling the seat, a resolution was introduced to appoint the board's choice. (Ibid.). When the petitioner objected to the fact that the interviews had been conducted in closed session, the board first held a "lengthy discussion" and then adjourned to closed session to discuss the issue with its attorney. (Da250). After returning to open session, the board held discussion on the qualifications of the selected candidate and then voted on the appointment. (Ibid.). After the vote, the board "opened the discussion for public participation," and fielded questions about the candidate's qualifications. (Ibid.).

In its decision, the ALJ recognized that Gannett allowed for discussion of candidates' qualifications in closed session (Da251) and also recognized that a board could ratify voidable actions at a later session held in compliance with the OPMA. (Ibid.). The ALJ held that the board had violated the OPMA by conducting interviews in closed session, had not violated the OPMA by discussion the candidates' qualifications in closed session, and had eventually ratified any voidable actions. (Da252-53). This situation is clearly opposition to the case at bar, where not only were there no interviews and no public discussion, but the voidable actions were never ratified by the Board.

The Board's reliance on N.J.S.A. 18A:12-15 misplaced because that statute only discusses the procedural mechanisms for filling Board vacancies. Nothing in N.J.S.A. 18A:12-15 relieves the Board of following the OPMA, nor do the cases cited by the Board discussing this statute, including Matter of Board of Education of the City of Trenton and Gannett.

Finally, the Board attempts to distinguish the two out of state cases which have cited and applied Gannett. But the Board's own explanations show exactly how on point these cases were in fact.

In Hinds County Board of Supervisors v. Common Cause of Mississippi, the Supreme Court of Mississippi cited Gannett in support of its holding that, in the context of Mississippi's Open Meetings law, "'personnel matters' are restricted to matters dealing with **employees hired and supervised by the board**, not those employees of some other county official, and not other county officials themselves. **Nor[] would a member of the board of supervisors be classified "personnel."** 551 So. 2d 107, 124 (Miss. 1989) (emphasis added). In spite of this clear language, the Board avers that this case did not address the same issues as the one before the Court. But then the Board goes on to acknowledge that the Hinds court "held that a county board of supervisors was not entitled to enter closed session under the personnel matters exemption to consider appointments to fill a vacancy[.]" (Db. at 20) (internal quotations omitted). This is exactly what happened here: the Board

considered and discussed the appointment to a vacancy during closed session and held no discussions during open session.

Likewise, in Lambert v. Belknap County Convention, a convention of the county's district's representatives had conducted interviews for candidates for the office of the county sheriff in non-public session, and upon selecting "two finalists for the vacancy," disclosed those two names but not those of the remaining five candidates not selected. 949 A.2d 709, 713 (N.H. 2008). The two finalists were interviewed in public session, but the ultimate selection was done by secret ballot. Ibid.

After the petitioner filed a declaratory action under that state's Right to Know Law, New Hampshire's Supreme Court cited Gannett for the proposition that

The public has a significant interest in knowing the candidates under consideration for [an elected] office. A successful candidate's continued retention in the office of sheriff . . . is dependent wholly upon the approval of the public, not upon the approval of the Convention or any other agency or department. Therefore, the members of the public should have the opportunity to evaluate the candidates and determine which candidate they believe is best qualified to perform the duties of the office.

Lambert, 949 A.2d at 718. The court also rejected the respondents' argument that the appointment should be considered a "hiring," so that it would fall under a personnel exception similar to New Jersey's N.J.S.A. 10:4-12(b)(8), and found that the New Hampshire legislature could have, but did not, include appointments in the

list of exemptions which could be done in closed session. Lambert, 949 A.2d at 715. In the end, the court found that the actions of the convention violated New Hampshire's analog to New Jersey's OPMA. Id. at 716.

The Board attempts to distinguish this by focusing on the fact that the New Hampshire court used the term "secret ballot," doubtless to highlight the fact that the vote here was conducted in open session. But the reconstructed minutes for the October 18, 2023 executive session meeting make it clear that the outcome for this vote had been largely predetermined based on secret discussions. As stated earlier, all the deliberations regarding whether to interview candidates took place in secret, and all of the deliberations regarding the candidates themselves also took place in secret. No reasons were given for their decisions, including the decision not to interview any candidates or the decision not to consider any other candidate. Nor was there any discussion of the consideration of the one candidate.

Here, the Board concedes in its brief that it discussed the qualifications of the candidates for the vacant position in closed session, and once returning to open session, "immediately proceeded with the nominations process and the vote[.]" (Db. at 22). However, since the appointment of an elected official is not a "personnel matter" under N.J.S.A. 10:4-12(b)(8) under precedential New Jersey case law, the Board's effective exclusion of the public from the process was violative of the OPMA.

Based on the foregoing, Ms. Arminio respectfully requests that the Court affirm the decision of the Trial Court which denied summary judgment to the Board and granted summary judgment to Ms. Arminio.

POINT II

APPELLANT’S ARGUMENT THAT THE TRIAL COURT ERRED BY REMEDYING THE BOARD’S VIOLATION OF THE OPEN PUBLIC MEETINGS ACT BY VOIDING THE APPOINTMENT AT ISSUE MUST BE REJECTED

(Raised Below at 1T11:18-17:4; Da211).

The Board argues that, even if the appointment of Mr. Gorham violated the OPMA, that it was an abuse of the Trial Court’s discretion to remedy that violation by voiding the appointment. In doing so, the Board misconstrues both the statute and the governing case law.

As discussed above, the appointment of Mr. Gorham to the Board was taken in violation of the OPMA. And Plaintiff acted appropriately and filed suit, hereby exercised a remedy explicitly recognized by the OPMA: “Any action taken by a public body at a meeting which does not conform with the provisions of this act **shall be voidable** in a proceeding in lieu of prerogative writ in the Superior Court[.]” N.J.S.A. 10:4-15(a) (emphasis added). This Court, in exercising its plenary review, should affirm this decision.

The Board argues that our case law does not require that an action taken in contravention of OPMA be voided. (Db. at 30). But N.J.S.A. 10:4-15(b) states

explicitly that “if the court shall find that was taken at a public meeting which does not conform to the provisions of this act, the court **shall declare such action void.**” (emphasis added). So, in fact, the Trial Court *was* required to void the appointment once it found a violation of the OPMA.

Furthermore, the case law cited by the Board is inapposite. The Board cites to La Fronz v. Weehawken Board of Education, for the proposition that the Trial Court was not required to void the illegal action taken at the October 18, 2023 meeting. 164 N.J. Super. 5 (App. Div. 1978). But this case does not stand for the proposition advanced by the Board. In La Fronz, the Court considered whether certain resolutions had been properly passed at a special meeting and then at a regular meeting in light of whether sufficient notice had been given to the public. The Court held that the resolutions were proper because

a public body is restricted to acting upon business set forth in its published agenda only "to the extent known" by it at the time of publication of the agenda. It is manifest from the record that the need for action on the matters in question was not known to the board until the date of the meeting.

Id. at 7 (internal citations omitted). The resolutions had been improperly passed at a closed meeting held three months earlier, and those resolutions had been invalidated as result of that illegal action. And the Court, in the very language cited by the Board here, simply confirmed the commonsense proposition that prior illegal action does not invalidate later legal action. Id. at 8. Indeed, it has been stated multiple times that

the Board could have ratified their illegal actions here by subsequent legal actions at a later public meeting, but did not do so.

The Board also argues that the remedy exercised by the Trial Court was inappropriate absent a showing of a “pattern of non-compliance.” (Db. at 29). However, this inquiry is only relevant when the Trial Court (or any reviewing Court) is considering whether or not to issue injunctive relief against future illegal actions.

For instance, in Burnett v. Gloucester County Board of Chosen Freeholders, the Court considered whether it was reversible error for the lower court to have rejected a petitioner’s request for “prospective injunctive relief, pursuant to N.J.S.A. 10:4-16” to “prevent future violations.” 409 N.J. Super. at 225.

Similarly, in McGovern v. Rutgers, the plaintiff sought “prospective injunctive relief, compelling defendants to conduct the [b]oard's future meetings in compliance with OPMA.” 211 N.J. at 103. The Court found that injunctive relief was inappropriate because the plaintiff had failed to establish a pattern of non-compliance. Id. at 112.

Ms. Arminio did not request prospective injunctive relief here, and as such it is irrelevant whether there was a pattern of non-compliance. (Da1-10).

This Court, in exercising its plenary review, should affirm the decision of the Trial Court to void the appointment of Mr. Gorham to remedy the Board’s violation of the OPMA.

POINT III

APPELLANT’S ARGUMENT THAT THE TRIAL COURT ERRED BY NOT MAKING THE VOIDED APPOINTMENT RETROACTIVE MUST BE BARRED BY JUDICIAL ESTOPPEL

(Raised Below at 2T20:16-25:17).

Incredibly, the Board argues that the Trial Court erred by failing to make the voided appointment retroactive, thereby voiding all votes and actions take by Mr. Gorham during his brief tenancy as a Board member. However, because it was in fact *the Board who requested that the order not be retroactive*, this argument should be barred by judicial estoppel.

The doctrine of judicial estoppel operates to "bar a party to a legal proceeding from arguing a position inconsistent with one previously asserted." Cummings v. Bahr, 295 N.J. Super. 374, 385 (App. Div. 1996). For the purposes of this doctrine, "a party makes intentionally inconsistent statements when he unequivocally asserts a position of law or fact in one proceeding and knowingly proceeds to assert a contrary position in a subsequent proceeding." Levin v. Robinson, Wayne & La Sala, 246 N.J. Super. 167, 187 (Super. Ct. 1990) "It is the integrity of the judicial process that is protected by the doctrine of judicial estoppel." Cummings, 295 N.J. Super. at 387. "A party will not be permitted to play fast and loose with the courts nor to assume a position in one court entirely different or inconsistent with that taken by him in another court or proceeding with reference to the same subject matter." Levin,

246 N.J. Super. at 180.

In the briefing for reconsideration, and during oral argument, the Board began the following colloquy with the Trial Court, raising what they deemed a public policy issue which would stem from the voided appointment:

MR. GEORGIU: For one thing, if we void Mr. Gorham's appointment, what happens to every single vote he partook in.

THE COURT: They . . . weren't look[ing] for retroactive application.

MR. GEORGIU: And was this made clear?

(2T20:16-21). The Trial Court then discussed the potential harm from the potential retroactive application of the voided appointment and noted that the Board hadn't provided any evidence of harm. (2T21:3-22:16). After noting that the appointment of the superintendent would be impacted by retroactive application, counsel for the Board stated explicitly that "I would request, and I hope the counsel doesn't oppose that in the order it's stated that explicitly." (2T23:1-3).

All in all, this issue was the subject of lengthy discussion with the Trial Court at oral argument, with the Board at all times arguing against retroactive application of any voided appointment. (2T20:16-25:17). And in the end, the Trial Court did not order that the voided appointment be retroactive, so the Board was successful in its campaign against retroactivity. Even though success on the position asserted is not required to assert the doctrine, see Levin, 246 N.J. Super. at 187-88, it is important

here, because the position the Board so strenuously advocated for is now something that they attempt to weaponize against the resulting order. This is a clear example of a situation where a litigant is attempting to play “fast and loose” and where judicial estoppel should apply to ensure fairness to all of the litigants and to maintain judicial integrity.²

As such, Ms. Arminio requests that this Court disregard this argument entirely.

POINT IV

THE TRIAL COURT CORRECTLY DENIED APPELLANT’S MOTION FOR RECONSIDERATION

(Raised Below at 2T30:17-36:23; Da238).

Though the Board included the August 16, 2024 Order of the Trial Court which denied its motion for reconsideration in its Notice of Appeal, its brief makes no arguments regarding that Order. (Da238). It is well established that an argument, if not briefed, is deemed abandoned. See, e.g., N.J. Dep't of Env'tl. Prot. v. Alloway Twp., 438 N.J. Super. 501, 505 n.2 (App. Div.), certif. denied, 222 N.J. 17 (2015); Midland Funding LLC v. Thiel, 446 N.J. Super. 537, 542 n.1 (App. Div. 2016);

² See Kira A. Davis, Judicial Estoppel and Inconsistent Positions of Law Applied to Fact and Pure Law, 89 CORNELL L. REV. 191, 215 (2003) Available at: scholarship.law.cornell.edu/clr/vol89/iss1/3 (arguing that the adoption of contradictory positions of law applied to fact threatens judicial integrity).

Pressler, Current N.J. Court Rules, cmt. 5 on Rule 2:6-2 (2025); Boritz v. N.J. Mfrs. Ins. Co., 406 N.J. Super. 640, 650 n.3 (App. Div. 2009).

Addressing this point on its merits, assuming *arguendo* that it is considered by the Court, because the Board did not present any new evidence to the Trial Court or point to anything that the Trial Court had overlooked, the Trial Court did not abuse its discretion in denying that motion, and the August 16 2024 Order should be affirmed.

It is axiomatic that the Appellate Division reviews “a trial court's denial of a motion for reconsideration under the abuse of discretion standard.” Branch v. Cream-O-Land Dairy, 244 N.J. 567, 582 (2021); Gold Tree Spa, Inc. v. PD Nail Corp., 475 N.J. Super. 240, 245 (App. Div. 2023). “An abuse of discretion arises when a decision is made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis.” Kornbleuth v. Westover, 241 N.J. 289, 302 (2020) (quoting Pitney Bowes Bank, Inc. v. ABC Caging Fulfillment, 440 N.J. Super. 378, 382 (App. Div. 2014)). Reconsideration “applies when the court’s decision represents a clear abuse of discretion based on plainly incorrect reasoning or failure to consider evidence or a good reason for the court to reconsider new information.” Pressler & Verniero, Current N.J. Court Rules, cmt. 2 on Rule 4:49-2 (2025). Reconsideration is not a “mechanism for “unhappy litigants

[to] attempt once more to air their positions and relitigate issues already decided.” Michel v. Michel, 210 N.J. Super. 218, 224 (Ch. Div. 1985).

The Board’s reconsideration motion (as a motion from a final judgment) was subject to what one case has colloquially called the “loud guffaw or involuntary gasp” standard: if a court can review the reasons for a decision without a loud guffaw or involuntary gasp, then that decision should not be disturbed on reconsideration. D’Atria v. D’Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990). While this is an “overstatement,” “it is not much of an overstatement.” Ibid.

Below, the Board raised nothing more than disagreement with the Trial Court’s decision. The Trial Court specifically relied on the published decision of the Court in Gannett Satellite Information Network, Inc. v. Board of Education, 201 N.J. Super. 65 (Law Div. 1984), which was exactly on point for the situation. Certainly, the Trial Court’s reliance on a published trial court decision from another county is reasonable, and was not “arbitrary, capricious or unreasonable.” D’Atria, 242 N.J. Super. at 401.

For the first time in support of its reconsideration argument before the Trial Court, the Board pointed to the case of Kean Federation of Teachers v. Morell, 233 N.J. Super. 566 (2018). This case is not applicable to the situation at bar, because, as discussed more fully above, Kean involved the university’s decision whether to reappoint **employees**, not an appointment to an **elected position**.

The Board's reconsideration motion was nothing more than an attempt to "relitigate" the issues or "get a second bite at the apple," and it was well within the discretion of the Trial Court to deny that application. Conforti v. Cty. of Ocean, 255 N.J. 142, 169 (2023); D'Atria, 242 N.J. Super. at 401.

Based on the foregoing, Plaintiff respectfully requests that the Court affirm the decision of the Trial Court which denied the Board's motion for reconsideration.

CONCLUSION

For the foregoing reasons, the Trial Court's judgments, dated July 26, 2024 and August 16, 2024, in favor of Ms. Arminio must be affirmed.

Respectfully submitted,

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Respondent, Michele Arminio*

/s/ Christina N. Stripp
Christina N. Stripp

Dated: April 2, 2025

IN THE SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

MICHELE ARMINIO,	:	Docket No.: A-000207-24
	:	
	:	Civil Action
PLAINTIFF	:	ON APPEAL FROM:
	:	
V.	:	SUPERIOR COURT OF NEW JERSEY
	:	LAW DIVISION, MIDDLESEX COUNTY
MONROE TOWNSHIP	:	DOCKET NO.: MID-L-6748-23
BOARD OF EDUCATION,	:	
	:	7/26/2024 ORDER DENYING SUMMARY
	:	JUDGMENT TO DEFENDANT/APPELLANT
DEFENDANT	:	AND GRANTING
	:	RESPONDENT/PLAINTIFF'S CROSS-
	:	MOTION FOR SUMMARY JUDGMENT
	:	
	:	8/16/2024 ORDER DENYING
	:	DEFENDANT/APPELLANT'S MOTION
	:	FOR RECONSIDERATION
	:	
	:	MOTION JUDGE:
	:	HON. BENJAMIN S. BUCCA, JR. J.S.C.

**REPLY BRIEF OF DEFENDANT/APPELLANT,
MONROE TWP. BD. OF ED.**

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Submitted: April 16, 2025

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Legal Argument

I. THE BOARD OF EDUCATION DID NOT VIOLATE THE OPEN PUBLIC MEETINGS ACT (“OPMA”).

A. The OPMA Permits Discussion of the Appointment of a Member of a Board of Education in Closed Session.

The Board’s challenged executive session discussion involved the appointment of a public officer, and thus squarely fell within the exemption of N.J.S.A. 10:4-12(b)(8). Consequently, the Board was permitted to hold its discussion in private, and did not violate the OPMA when it did so.

The plain language of N.J.S.A. 10:4-12(b)(8) specifically and explicitly permits a public body to exclude members of the public from the body’s discussions regarding the “appointment...of any specific prospective public officer...appointed by the public body.” Id. An interpretation of N.J.S.A. 10:4-12(b)(8) limiting its application to only employees, as was done by the Trial Court, ignores the plain terms of the statute, and therefore violates basic tenets of statutory interpretation. See, e.g., Kean Fed'n of Teachers v. Morell, 233 N.J. 566, 584-87 (2018) (N.J.S.A. 10:4-12(b) “uses plain language to express what a public body may do with respect to conducting closed sessions...‘It is not the function of this Court to rewrite a plainly-written enactment of the Legislature or presume that the Legislature intended something other than that expressed by

way of the plain language.” (quoting DiProspero v. Penn, 183 N.J. 477, 492 (2005))).

Plaintiff argues that “since the appointment of an elected official is not a ‘personnel matter’ under N.J.S.A. 10:4-12(b)(8)...the Board’s...exclusion of the public...was violative of the OPMA.” (Pb22). However, N.J.S.A. 10:4-12(b)(b) does not contain the word “personnel”, but instead applies to both employees hired by, and *public officers appointed by*, the Board. More specifically, an interpretation of the statute that only exempts discussions regarding the “employment”, “termination of employment”, “terms and conditions of employment”, “evaluation of the performance of”, “promotion”, or “disciplining of” “any specific prospective...employee or current...employee employed...by the public body”, makes superfluous the additional language employed by the Legislature, specifically the “appointment” of “any specific prospective public officer...or current public officer...appointed by the public body.” N.J.S.A. 10:4-12(b)(8). By its inclusion of the appointment of public officers as an exemption, the Legislature clearly intended not to limit the application of N.J.S.A. 10:4-12(b)(8) only to employees of public bodies. Thus, because all words used by the Legislature should be given meaning, Plaintiff’s narrow interpretation of N.J.S.A. 10:4-12(b)(8) which limits its applicability only to

discussions of employees of public bodies, and ignores the language addressing the appointment of public officers, should be rejected.

Furthermore, it is respectfully submitted that the reversal of the Trial Court's Judgment is mandated not only by the plain language of the OPMA, but also by existing caselaw. "N.J.S.A. 10:4–12(b) clearly permits the public body to determine to enter into closed session for any one of the identified circumstances approved by the Legislature." Kean Fed'n of Teachers v. Morell, 233 N.J. 566, 584 (2018) (emphasis added). The OPMA states "[a] public body may¹ exclude the public only from that portion of a meeting at which the public body discusses any' of the enumerated topics. N.J.S.A. 10:4–12(b)." Ibid., at 584. "The choice is that of the public body. It determines whether to have the private discussion of the listed topics." Id.

Furthermore, while Plaintiff and the Trial Court extensively cite to and rely upon Gannett Satellite Info. Network, Inc. v. Bd. of Educ. of Borough of Manville, 201 N.J. Super. 65 (Law. Div. 1984)², that case actually supports the

¹ Emphasis contained in Kean, *supra*.

² In fact, Plaintiff argues that the Law Division decision in Gannett, *supra*. (Law Div. 1976), and the Supreme Court decision in Kean Federation of Teachers v. Morell, 233 N.J. 566 (2018), "must be read together..." (Plaintiff's App. Br., p. 15-16). However, the Supreme Court's decision is precedential and binding, whereas the Gannett decision is persuasive, at best.

Board's interpretation of the OPMA. Gannett did not hold that a board of education is prohibited from *discussing* its prospective appointment of a board member during closed sessions, but merely held that a board could not *vote* on its appointment in a closed session. See, Gannett, *supra.* at 68-69 (distinguishing the matter from Jones v. East Windsor Bd. of Ed., 143 N.J. Super. 182 (Law Div. 1976), *app. dismiss. as moot*, 158 N.J. Super. 496, (App. Div. 1977), where the Court approved a board of education holding interviews of prospective members in a closed session, because there the closed session was followed by a public vote appointing one of the applicants). In Gannett, even *the Plaintiff* acknowledged "the exception was intended to cover discussions by the Board, out of the presence of the candidates, to evaluate them and make a selection." Ibid., at 68. And, the Court's conclusion was consistent, holding that "the Board could exclude the public from its deliberations of the various candidates." Ibid., at 69. Thus, because Gannett actually affirmed the Board's ability to discuss prospective candidates in closed session under the OPMA, and only prohibited the voting on the ultimate appointment during an unnoticed closed meeting, the decision actually supports the Board's position and, to the extent it is considered persuasive, supports the reversal of the Trial Court's decision.

Finally, while Plaintiff also cites to In re Consider Distribution of Casino Simulcasting Special Fund (Accumulated in 2005), 398 N.J. Super. 7 (App. Div.

2008), that case is inapplicable. The Court in In re Consider, supra., explicitly acknowledged that “the OPMA recognizes circumstances that authorize private deliberations to protect the public interest or personal rights, none of those circumstances were present [t]here.” Ibid., at 17. Thus, to the extent that case is not directly contradicted by Kean, 233 N.J. 566 (2018), it is only applicable to matters not permitted to be discussed in closed session, and therefore irrelevant to the issue in the instant Appeal.

Therefore, because the cases relied upon by the Plaintiff and the Trial Court in fact recognize that the OPMA permits public bodies to exclude the public from its discussion of prospective members, and because the plain language of the statute clearly permits such private discussion, the decision of the Trial Court should be reversed.

B. The OPMA Does Not Impose a Heightened Standard Regarding the Discussion of the Appointment of a Prospective Public Officer.

The Board did not violate the OPMA by having an ‘inadequate’ public discussion prior to its vote to appoint Mr. Gorham to fill a vacancy. Despite Plaintiff’s acknowledgment that the *only* reason the Trial Court concluded the Board’s public vote to appoint Mr. Gorham was invalid was because “there was substantive discussion of the applicants in private session” (Pb6, quoting the Trial Court’s Opinion, at 2T35:18-22), the Plaintiff attempts to argue now that

there exists some heightened standard that requires a certain amount or degree of public discussion, which should be imposed upon public entities that appoint an individual to serve in a role usually filled via election and popular vote. Not only does this argument lack support, but it was previously rejected by the Supreme Court in Kean Fed’n of Teachers v. Morell, 23 N.J. 566 (2018).

More specifically, the Plaintiff now argues that the Board’s appointment of Mr. Gorham to fill a vacancy on the Board violated the OPMA not only because there was a private discussion of the candidates, but also because, after the Board returned to the public session, there was *insufficient* public discussion prior to the Board’s vote to appoint Mr. Gorham. See, Pb7 (“...without holding any *real* public discussion or comments...” (emphasis added)), Pb10 (“...did not discuss the vacancy in open session *except to say...*” (emphasis added)), Pb11 (“...without *any deliberation...*” (emphasis added)), Pb12 (arguing there was not “*sufficient discussion* in open session” (emphasis added)), Pb13 (indicating no action would have been filed had the Board “proceeded to engage in a *full* discussion in open session before conducting their vote” (emphasis added)), Pb14 (“The Board gave no insight into its decision not to interview any candidates. Thus, they violated the OPMA.”).

The OPMA does not mandate *any* public discussion prior to a public entity taking action at a properly noticed meeting, much less does it impose a

heightened discussion requirement before a public entity can exercise its statutorily granted powers to appoint a qualified member of the public to fill a vacant seat on said body. Further, it is respectfully submitted that this Court should not now impose such a requirement, because “[t]o do so would result in adding to the OPMA requirements that the Legislature did not impose.” Kean Fed'n of Teachers v. Morell, 233 N.J. 566, 586 (2018). “Forcing public bodies to...robustly discuss...matters...would intrude on a public body’s prerogative as to how to conduct its meetings.” Ibid., at 587. “Moreover, it would risk throwing off the careful balance that the Legislature struck between a public body's need to control its own proceedings and at the same time determine when and how to protect confidential interests of the public body or others.” Ibid., at 586.

The Supreme Court has already clarified: “[t]he OPMA does not contain a requirement about the robustness of the discussion that must take place on a topic.” Ibid., at 58 (emphasis added). In fact, the Supreme Court recognized that New Jersey’s “public bodies routinely approve recommendations in public meetings without discussion.” Id.

“[T]he robustness of a debate on a particular item discussed in public session is not a topic addressed in the OPMA. It is beyond the existing requirements of the OPMA. If a discussion of a certain length or quality is to be mandated, the OPMA requires amendment by the Legislature, not by the courts.”

Kean Fed'n of Teachers v. Morell, 233 N.J. 566, 588 (2018).

The Board did, in fact, discuss its deliberative process in public before moving to appoint Mr. Gorham to fill the vacancy. The length, content or quality of that discussion could not have violated the OPMA, as the OPMA does not govern such issues. Thus, to the extent the Plaintiff argues the Trial Court's Judgment should be affirmed not because there was a private discussion prior to the public discussion and vote, but because the public discussion was somehow inadequate, such argument lacks merit or support. Instead, because the Board not only voted in public, but also discussed its process in public prior to said vote, the requirements of the OPMA were met and, in fact, surpassed. As such, no violation of the OPMA occurred and the Judgment of the Trial Court should be reversed.

II. THE BOARD OF EDUCATION'S PUBLIC VOTE APPOINTING MR. GORHAM WAS CORRECTIVE OF ANY PRIOR VIOLATION OF THE OPMA.

The Board's public discussion and vote met the requirements of OPMA and were, therefore, curative of any OPMA violation that occurred during the closed executive discussion. Only action taken by a public body at a meeting that did not meet the notice requirements of the OPMA can be voided. The Board's meeting at which it publicly voted to appoint Mr. Gorham to fill the

vacancy was properly noticed (and in fact attended by Plaintiff, who participated in the public comment portion). Therefore, even if the Board's prior executive discussion of the applicants for the vacant Board seat violated the OPMA, the Court's Judgment voiding the subsequent public vote appointing Mr. Gorham should still be reversed.

Plaintiff concedes that, even if the Board violated the OPMA by discussing the candidates in private, "the Board could have ratified their illegal actions here by subsequent legal actions..." (Pb25). Plaintiff, nonetheless, continues to argue the Judgment voiding the Board's public vote appointing Mr. Gorham was proper, seemingly alleging that the Board could only have permissibly acted to appoint a new Board Member at a separate, different, subsequent Board meeting. Plaintiff, though, provides no rationale for the apparent prohibition on ratifying a violation of the OPMA by proper public action taken at the same meeting that the alleged violation occurred.

The Board had properly noticed its October 18, 2023 meeting, when it provided more than forty-eight (48) hours' notice of such meeting to the public. Thus, by the plain language of N.J.S.A. 10:4-15(a), the Board's action during the public portion of the October 18, 2023 meeting "shall not be voidable". Further, even assuming *arguendo*, a violation of the OPMA occurred during the earlier closed session, the Board was expressly permitted by N.J.S.A. 10:4-15(a)

to “take corrective or remedial action by acting de novo at a public meeting”, which is exactly what the Board did when it voted to appoint Mr. Gorham during the public portion of the properly noticed October 18, 2023 meeting. There is no basis in the law or public policy to require a public body that has accidentally violated the OPMA from having to wait for what would amount to a penalty period prior to trying again. While a subsequent, properly noticed meeting, would of course be required to cure an OPMA violation caused by a lack of adequate notice, when the alleged violation involves an alleged improper private discussion, no waiting period is required prior to the time that the Board takes corrective action. Instead, the OPMA should be interpreted to require public corrective action without unnecessary delay.

Therefore, contrary to Plaintiff’s arguments, in view of the foregoing and based upon the applicable law, this Court should reverse and vacate the judgment of the Trial Court.

III. THE BOARD OF EDUCATION DID NOT REQUEST THE TRIAL COURT’S ORDER TO HAVE NO (RETROACTIVE) EFFECT.

In Point III of her brief, Plaintiff argues that, because “it was in fact *the Board who requested that the order not be retroactive,*” the principle of judicial estoppel should preclude the Board from arguing that the Trial Court erred by failing to make the voided appointment of Mr. Gorham retroactive, thereby voiding all of

his votes as a Board member. However, this argument should be rejected because a review of the transcript, upon which Plaintiff relies, readily reveals that Plaintiff's arguments are not factually correct. In fact, the transcript demonstrates that the Board never substantively requested or argued that the voided appointment of Mr. Gorham should have retroactive effect. Rather, the Board merely asked that the Trial Court specify, within the language of its then-anticipated Order, whether it would have retroactive effect, so that the Board could ensure a clear understanding and compliance with the Court. (2T20:13-2T30:15).

The transcript demonstrates that at oral argument on the Board's motion for reconsideration, held on August 16, 2024, counsel for the Board raised the question of whether Mr. Gorham's votes as a Board member should be voided based on the Trial Court's Order, and specifically stated as follows: "We have to follow the Supreme Court and what they said because just think of all the public policy issues, that's where I'm going, that lead to it. For one, if we void Mr. Gorham's appointment, what happens to every single vote he partook in." (2T20:13-18). The Trial Court indicated that Plaintiff had not sought any retroactive effect, and that Plaintiff was not "look[ing] for retroactive application," to which counsel for the Board queried, "[W]as this made clear?" and stated, "It wasn't . . . in the order, Your Honor. That's why I had a question." (2T20:13-21:2). The Trial Court replied, "[T]hat was one item reserved," and proceeded to question Board counsel regarding

how many members were on the Board and whether there were any 5-4 votes in which Mr. Gorham's vote could have changed the outcome. (2T21:3-10).

As the colloquy between the Trial Court and Board counsel continued, counsel merely asked that, to the extent that the Trial Court intended to deny the Board's motion for reconsideration, the Order specify whether the Trial Court's voiding of Mr. Gorham's appointment would have any retroactive effect on Mr. Gorham's previous votes as a Board member. Counsel specifically stated, "I would request, and I hope the counsel doesn't oppose that in the order it's stated that explicitly." (2T22:23-23:4). The Trial Court acknowledged Board counsel's request regarding the explicit wording of the Order. (2T23:4).

Accordingly, upon review of the relevant portions of the transcript upon which Plaintiff relies in raising a judicial estoppel argument, the transcript itself establishes that the Board, in fact, did not make any legal argument or request in the proceedings before the Trial Court that the voided appointment of Mr. Gorham should have retroactive effect. Rather, counsel for the Board merely asked the Trial Court to expressly indicate in its then-anticipated Order whether the voided appointment would have any retroactive effect, for purposes of clarity and ensuring the Board's proper compliance with the Order. Because Plaintiff's argument in Point III of her brief depends upon a mischaracterization of the transcript, it is respectfully submitted that this Court should reject the judicial estoppel argument. In addition, it

is further respectfully submitted that this Court should rule, as argued in the Board's initial brief in support of its appeal, that the Trial Court erred when it ruled that Mr. Gorham's votes must remain binding upon the Board, and the public, despite the Trial Court having voided Mr. Gorham's appointment to a vacancy on the Board.

IV. THE ORDERS GRANTING JUDGMENT TO PLAINTIFF AND DENYING THE BOARD'S MOTION FOR RECONSIDERATION SHOULD BE REVERSED.

Finally, in Point IV of her brief, Plaintiff asserts that the Board's brief did not address the Court's denial of the Board's motion for reconsideration. However, the Board has appealed both the Trial Court's Order granting Plaintiff's Motion for Summary Judgment and the Order denying reconsideration, which were based upon substantially the same legal rationale that was articulated by the Trial Court. The Board has demonstrated, by way of the arguments set forth in its brief in support of this appeal, that the Trial Court's decisions were based upon multiple errors that warrant an Order by this Court reversing and vacating both Orders by the Trial Court.

CONCLUSION

For the foregoing reasons, and for the reasons articulated in detail in the Board's initial brief in support of this appeal, the Board respectfully requests that the decision and Order of the Superior Court, Law Division, Middlesex County, be reversed.

We thank the Court for its consideration.

Respectfully submitted,

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