

New Jersey Appellate Division Limits Duty of Boards of Education to Pay for Staff Member's Legal Costs

On December 21, 2023, a panel of the Appellate Court of New Jersey issued a decision clarifying that Boards of Education have no duty to reimburse school employees for counsel fees incurred in defending civil or administrative proceedings unless there is a timely request for reimbursement at the outset of the case, and the Board has input on the selection of counsel and fees to be charged. As a result, Boards of Education should feel free to deny claims for reimbursement where, as in this case, no request was made until years after the litigation commenced.

Boards of Education are, generally, required to defend and indemnify their staff and officers “[w]henver any civil or administrative action or other legal proceeding has been or shall be brought against” the staff-member for acts or omissions arising out of that staff-member’s job performance and duties. N.J.S.A. 18A:16-6. Often, and especially where an action is brought against an employee related to alleged misconduct, staff-members have retained their own counsel through their union. Once the matter has concluded, the staff-selected ‘union’ counsel often seeks payment of their fees earned during their representation of the staff-member directly from the board of education.

The Appellate Division, in Azzaro v. Board of Education of the City of Trenton, Mercer County, _ N.J. Super. _ (App. Div. 2023), held that Boards of Education need not reimburse counsel selected unilaterally by staff-members under N.J.S.A. 18A:16-6, without a prior opportunity for the Board to assign counsel of its choosing to defend the matter. In Azzaro, the Department of Education brought an action against a school staff-member seeking to revoke the staff-member’s teaching certificate. The matter was litigated for twelve (12) years, during most of which the staff-member was retired and no longer employed by the Board of Education. The staff-member was represented by counsel retained by her through her union. While it was undisputed the Board of Education had been aware of the action since it was instituted, it was also undisputed that the staff-member did not request that the Board of Education defend her or pay for her counsel fees until after the matter was finally resolved.

The Appellate Division held that, while Boards of Education must still provide a defense and indemnification for pending civil or administrative actions when staff members request the same for a matter that is pending or about to be instituted, there is no duty to reimburse staff-members who wait until after an action is adjudicated and seek reimbursement for counsel the staff-member unilaterally retained without prior Board approval:

“This appeal raises a novel issue of whether N.J.S.A. 18A:16-6 allows school board employees to wait until the final disposition of a civil or administrative action filed against them before seeking defense costs and indemnification

from a school board. We conclude an employee cannot wait until the action is completed and must provide the school board with reasonable notice after the initiation of the proceeding...”

Azzaro, supra. (App. Div. 2023).

In reaching this conclusion, the Appellate Division contrasted the language of N.J.S.A. 18A:16-6, applicable to civil, administrative or other legal proceedings, with the language of N.J.S.A. 18A:16-6.1, applicable to “criminal or quasi-criminal action” brought against a staff-member. The Court reasoned that N.J.S.A. 18A:16-6 obliges a staff-member seeking the defrayment of defense costs for a civil or administrative action to seek the defense from the Board prior to the conclusion of the matter, in part because the reimbursement obligation under that statute is not contingent on the outcome of the case. N.J.S.A. 18A:16-6.1, on the other hand, only entitles an employee to indemnification at the conclusion of a criminal proceeding, and even then only if the employee prevails.

Importantly, the Appellate Division indicated that its prior analysis of a similar statute requiring employers to provide defense and indemnification of police officers “can be applied to the legislative scheme under N.J.S.A. 18A:16-6 and N.J.S.A. 18A:16-6.1, which is analogous to N.J.S.A. 40A:14-155.” Ibid., citing Edison v. Mezzacca, 147 N.J. Super 9, 14 (App. Div. 1977). As a result, the Board of Education “must provide competent counsel, its own or outside counsel, or it may approve counsel requested by the [staff-member], but the employee does not have the absolute right to counsel of their own choosing at [Board of Education] expense.” Ibid., citing Edison, supra. at 14-15. As a result, a board of education’s “obligation under [N.J.S.A. 18A:16-6] does not require it to pay counsel chosen by a [staff-member] without the prior agreement of the [board of education] to do so.” Id.

Finally, the Appellate Division also significantly clarified that the nature of the staff-member’s alleged conduct does not matter. More specifically, a staff-member has no greater right to choose their own counsel where there is no criminal or quasi-criminal matter pending, even when the civil or administrative action alleges conduct that could serve as the basis for later criminal or quasi-criminal charges. Ibid. (Denying that the staff-member is entitled to reimbursement under N.J.S.A. 18A:16-6.1 simply because of “the serious nature of the charges set forth in the [administrative action, which], if proven,...would possibly constitute a criminal offense”).

As a result, staff-members have “an obligation to advise the Board they [seek] defense costs within a reasonable period of time after the [civil or administrative action is] filed.” Ibid. Furthermore, when a Board is obligated to provide a defense to a staff-member pursuant to N.J.S.A. 18A:16-6, the Board may meet that obligation by assigning the staff member counsel of the Board’s own choosing. Ibid. Where a staff-member obtains their own counsel (whether through their union or independently) to defend a civil or administrative



action instead or requesting a defense from the Board, the Board has no obligation to reimburse the staff-member or pay their chosen counsel's legal fees under N.J.S.A. 18A:16-6.

Although this case addressed the indemnification rights of employees, the court's rationale also has implications for N.J.S.A. 18A:12-20, the related statute addressing reimbursement of defense costs incurred by Board members in civil, administrative and criminal proceedings as well.

Should you have any questions or concerns, including how to best incorporate this new ruling at your schools, the attorneys at The Busch Law Group are available to provide assistance and counsel.

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