

SUPREME COURT OF THE STATE OF NEW YORK
WESTCHESTER COUNTY

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SAMUEL DAVIS AND DAWN POWELL,

Petitioners,

for a judgment pursuant to CPLR Article 78 against

THE TOWN OF PUTNAM VALLEY
TOWN BOARD and BOARD OF ETHICS,

Respondents.
-----X

Index No. 06-23102

AFFIDAVIT
IN
OPPOSITION

SAMUEL DAVIS and DAWN POWELL, being duly sworn state:

1. We are the petitioners herein. We submit this affidavit in opposition to respondents' motion to dismiss. We first address certain misstatements of fact contained in the motion papers. Thereafter, we address each of the purported Objections in Point of Law (Points I through XVIII below). We also note that, for the most part, the "motion to dismiss" simply disputes the allegations of the Petition, and therefore asks the Petition be dismissed. Apparently, though not stated in respondents' papers, they claim that our Petition fails to state a cause of action. We are informed by counsel that the fact they contradict our claims, does not establish that the causes of action are not properly pleaded.

***Misstatements of Fact:
That Davis and Powell Were Financially Interdependent***

2. The motion papers are riddled with material misstatements of fact, unsupported in the record. The central misstatement is that we somehow "admitted" to the Ethics Board that

we were financially interdependent on each other. This misstatement is found at numerous locations throughout the motion papers.¹

3. Mr. Bondi² falsely states that we admitted this to him in some unspecified meeting with himself and one other Ethics Board member. Apparently there is no record of such meeting – and Mr. Bondi’s recollection is squarely contradicted by (a) my written submission, and (b) the Ethics Board’s decision.

4. In my written submission to the Ethics Board, dated April 18, 2006,³ we thought Supervisor Davis had denied financial interdependence and any claim of domestic partnership:

“Dr. Powell is her own independent person in every way and by any measure, be it her legal status or any other.”

5. The Ethics Board agreed that there was no proof of any financial interdependency, stating:

Here, at the time she was hired to serve in the position as Secretary to Supervisor, the Domestic Partner was a licensed professional actively engaged in the private practice of her profession. The Board of Ethics separately interviewed the Supervisor and the Domestic Partner. **They reported that the Domestic Partner was not dependent on the Supervisor for her support.** The Board is mindful that modern households commonly include more than one bread winner; and that the members of a modern household may organize their personal relationships and financial affairs in a variety of ways, and with varying degrees of interdependency. In the absence of evidence that the Domestic Partner was dependent on the Supervisor for her support, and in the absence of evidence that the Domestic Partner was dependent on the Supervisor for her support, and in the absence of a presumption that domestic partners share a mutual interest in their respective

¹ See Memo of Law at pp. 1, 2, 10, 21; Bondi Affidavit at p. 1.

² Bondi is described as “Bishop Bondi,” because he conducts a church from his home, in the Eastern Orthodox denomination. The Court should not confuse his title with the “bishop” title used in the Roman Catholic church.

³ A copy of my written submission is provided as Respondents’ Exhibit F.

employment contracts, **the Board of Ethics is unable to conclude that the Supervisor derived a ‘material or pecuniary benefit’ from the Domestic Partner’s employment agreement with the Town.** (emphasis added)

6. However, in the papers in this proceeding, respondents now state:

“Neither Supervisor Davis nor Ms. Powell denied that they were domestic partners. Rather, they admitted that they were financially interdependent.” (Memo of Law at p. 1)

This misstatement – repeated numerous times throughout the motion papers – is, as we’ve shown, demonstrably false.⁴

I Ethics Opinions Are Reviewable in an Article 78 Proceeding

7. Respondents’ first contention is that ethics committee advisory opinions are not reviewable in an Article 78, because they are merely advisory. We are informed by our counsel that Respondents are in error. Kelly v. NYS Ethics Comm., 161 Misc.2d 706, 614 N.Y.S.2d 996 (Sup. Ct. Albany Co. 1994)(allowing Article 78 proceeding to challenge Advisory Opinion of State Ethics Commission); Speers v. NYS Ethics Commission, 209 A.D.2d 919, 619 N.Y.S.2d 201 (3d Dept. 1994)(same); Matter of Petition of N and Charleston Land Cor. v. NYC Board of Ethics, 139 Misc.2d 634, 638, 528 N.Y.S.2d 794, 797 (Sup. Ct. N.Y. Co. 1987)(“advisory” ethics opinion is “final determination” where it “named names, and the [agency] may well have used the opinion” to take action against the target.)

8. Although the respondents cite several cases in support of the opposite

⁴ Bondi makes the same misstatement, albeit under oath, in his affidavit.

conclusion, in those cases it appears the ethics opinion was not a final determination.⁵ In Neale v. Cohen, 281 A.D.2d 421, 721 N.Y.S.2d 110 (2d Dept. 2001), the Court explained why it was proper to have dismissed the petition challenging an ethics decision:

The Supreme Court properly dismissed the instant petition on the grounds that the matter was not ripe for judicial review and it was academic. The Ethics Board did not make a final determination against the petitioner, but rather, issued an advisory opinion without mentioning the petitioner's name.

9. Here, by contrast, the Town Board took action publicly to censure the petitioner, and the Ethics decision not only named the petitioner, but the "confidential" decision was repeatedly published on page one of the local newspaper for several weeks.⁶ Had the decision been generic, and had it been kept confidential, and had no further proceedings been taken on the decision, the respondents might be correct. But on the reality of our facts, the ethics decision, and the town board's actions thereon, were clearly a "final determination" subject to review by this Court.

10. It seems laughable to suggest that there is no final determination, or that the matter is not "ripe" for review. We have been subjected to every manner of public humiliation, a

⁵ In *Scarpati-Reilly v. Town of Huntington Board of Ethics*, 300 A.D.2d 404, 751 N.Y.S.2d 753 (2d Dept. 2002), the case was dismissed because (1) the petitioner failed to join the Town as a party, and (2) no further proceedings had been taken on the nonfinal advisory opinion. In *Hammer v. Veteran*, 86 Misc.2d 1056, 386 N.Y.S.2d 170 (Sup. Ct. Westch. Co. 1975), the court said Article 78 "may not be used to review ... administrative functions." Our attorney advises us that this is in fact the CENTRAL purpose of Article 78. Thus, based on this incorrect statement of law, it is no surprise the court in that case reached the wrong result. The court in that case also suggested that no public officer can ever have standing to complain, since his public office is "created for the benefit of the general public and not for the benefit of the individual." The court also noted there had been no notice or hearing in that case, suggesting a different result might obtain if there had been such proceedings.

⁶ Copies of selected articles are attached as Exhibit 1.

censure by the Town Board and petitioner Dawn Powell’s compensation has been reduced from \$46,000 to \$36,000 effective January 1, 2007. (Every other Town employee received at least a 4% increase.)

II

State Law Was Not Irrelevant

11. In Point II, respondents urge this Court that “State law is irrelevant.” Their argument is premised on the false implication that the Board of Ethics considered the Comptroller’s opinion.⁷ Respondent’s Memo of Law at pp. 4-5. In fact, as is apparent from the Ethics Opinion (Exhibit 3 to our Petition), the ethics board never considered the on-point State ethics opinion.⁸

12. Based on this false premise, respondents argue that “the Board noted that the Town Code of Ethics was more restrictive than the state law.” Memo of Law p. 6. In fact, as we pointed out in the Petition, the Putnam Valley Code of Ethics, in force at the time⁹ specifically recited that in the event of any inconsistency with the state law, *the state provisions would control*.¹⁰ See Petition Para. 17.

⁷ If it’s irrelevant, as counsel now argues, why would the ethics board have considered it?

⁸ We concede that we were unaware of that decision, since at the time, we were not represented by counsel. It’s strange, to say the least, that the ethics committee – and its attorney Steven Leventhal, Esq. – didn’t stumble across a decision of the State’s highest ethics official which was right on point.

⁹ The Town Board adopted the new ethics law in October 2006.

¹⁰ Ethics Code Section 17-13 provides:

§ 17-13. Conflict with General Municipal Law.

In the event that any provision of this chapter shall conflict with the provisions of

13. Counsel concedes that there was an inconsistency between the state law and the local code,¹¹ but argues that the Town ethics board had the right to resolve that inconsistency in favor of the Town’s version. Counsel ignores the language in the Town’s Code – which, at the time specifically resolved inconsistencies *in favor of the state law*.

14. The ethics board concluded that “the Supervisor’s participation in the decision to employ his domestic partner violated the spirit and intent of the then current Town Code of Ethics.” Resp. Memo of Law at p. 6. In other words, the Town ethics board – which had just said there was nothing in the town’s code concerning “domestic partners” and had just found there was NO financial interdependence, now found that the Supervisor’s doing what was permitted by the State ethics code, somehow violated the local code.

15. The Court should recognize that the Supervisor did not, and does not, set the salary of the Confidential Secretary. That is set by the Town Board,¹² a fact unknown to the Ethics Board.¹³ Nor is there any evidence that the Town Board gave the Supervisor the right to set Dr. Powell’s compensation.¹⁴ In fact, the ethics board agreed this issue did not even raise an

Article 18 of the General Municipal Law of the State of New York, then in that event the provisions of said Article 18 shall prevail.

¹¹ Albeit with pejorative language: “Unlike the state law which permits nepotism in employment contracts, the Town Code of Ethics did not exclude contracts of employment” Memo of Law p. 6.

¹² Town Law Section 29(15). This was pointed out by Supervisor Davis in his written statement to the Ethics Board.

¹³ The ethics board expressed its concern that “the Supervisor ... approve[d] her salary....” Ethics Decision p. 8.

¹⁴ In fact, effective January 1, 2007, the Town Board reduced her salary to \$36,000. This, despite the fact her predecessor earned \$42,000 and was demonstrably less qualified. Upon

“appearance of impropriety”:

The Board finds that the Domestic Partner was not compensated at a rate so unreasonably high as to violate the spirit and intent of the State or Town ethics laws. Accordingly, no prohibited appearance of impropriety existed by virtue of the rate of compensation paid to the Domestic Partner for her services as Secretary to the Supervisor. Ethics Decision at p. 9.

16. Directly expressed, the question to the Court is as follows:

Where the State has explicitly approved a Town Supervisor’s hiring of his own spouse as Confidential Secretary, how can such conduct give rise to an “appearance of impropriety”?

17. To this question, the respondents offer no answer. Instead, they repeatedly urge that the Supervisor’s “participation” in the hiring, and his “supervision” of his own secretary’s work, somehow poses an appearance of impropriety. Yet, he has the ethical right to hire her, and the very nature of the job is that she reports to him.

18. The opinion of the ethics board is entitled to no deference. They held no hearing. They ignored the one controlling authority on point. They misstated the law in several respects. Their ultimate conclusion, that permissible conduct gave an appearance of impropriety, was not based on anything.

III

Widespread Practice Is Not Irrelevant

19. In their Point III, respondents argue that evidence of practices throughout the state is irrelevant, because the ethics board here applied “the more restrictive” local code.

Respondents’ Memo of Law at 7.

information and belief, the rationale of the Town Board was that she should earn the STARTING salary of her predecessor. None of the Town Board has offered to reduce their own salaries to equal the STARTING salaries of THEIR predecessors.

20. We agree that the ethics board ignored such evidence. We agree that the board regarded this as irrelevant. The same way they ignored the one opinion directly on point.

21. The fact is, when we asked the New York State Association of Towns for some guidance on the point, they sent us the Comptroller's Opinion, and explained that many towns throughout the state (especially smaller towns like Putnam Valley) see the Supervisor select his spouse as Confidential Secretary.

22. Therefore, when the Putnam Valley Ethics Code was adopted in June 1999 (See Petition Exhibit 1), the Town Board was charged with knowledge that the State had interpreted its ethics law specifically to allow a Supervisor hiring a spouse as Confidential Secretary. It could easily have changed the language of the ethics code to prohibit such conduct (as the Town Board apparently decided to do in late 2006). The fact that the Town Board chose to DEFER to the state law, establishes that the Town's ethics code approved the hiring of a spouse.¹⁵

IV

The Interpretation of the Local Code Was in Conflict With the State Code

23. In their Point IV, respondents devote all of two sentences to the argument that a local code may be more restrictive than the state code. As discussed, however, here the local code specifically deferred to state code in the event of any differences, and did not purport specifically to change the rule allowing employment of spouses.

¹⁵ Once again, this was not the hiring of a spouse, nor was there any evidence that Dr. Powell was a "domestic partner," however that term be defined. Nor was there any proof of financial interdependence, as the Ethics Board found such evidence entirely lacking.

V

Dr. Powell Has Standing

24. In their Point V, respondents argue that Dr. Powell has no standing. Since she is directly affected by the outcome, arguably she is not merely a permissible party, but arguably a necessary party.

25. On November 15, 2006, the Town Board approved a Censure resolution, and requested that Dr. Powell be removed from her position. Respondents' Exhibit J.

26. Dr. Powell has had her name and face on page one of the local newspapers for several months, and has been accused of engaging in unethical behavior, being incompetent and similar stigmatizing allegations.

27. As such, Dr. Powell has standing.

VI.

Supervisor Davis Has the Right to Pursue this Proceeding

28. In their Point VI, respondents argue that Supervisor Davis has no right to file this Article 78, for reasons that are incomprehensible. We dispute the argument, whatever it is.

VII.

Substantial Evidence

29. In their Point VII, respondents argue that the substantial evidence rule does not apply where, as here, no hearing was held.

30. Petitioner added, in an abundance of caution, the allegation that the challenged determinations were not supported by substantial evidence. In the event the Court finds that the procedure employed by the Ethics Board constituted a hearing to which the substantial evidence

rule applies, petitioners preserve their assertion.

31. This allegation is based on all the arguments set forth herein, which need not be repeated. However, respondents point to one specific factual issue: that we petitioners supposedly admitted (by silence) that we are “domestic partners.” Memo of Law p. 10 (b). They argue that because Mr. Tendy included a reference to “domestic partners” in his “kitchen sink” complaint, the petitioners should have denied it, and by not denying it, they are deemed to have admitted it. *Id.* at 10-11.¹⁶

32. In fact, the ethics board did not say how it concluded that Dr. Powell was Supervisor Davis’ “domestic partner.” It appears that the term was merely used to label Dr. Powell, not as a factual conclusion. The ethics board gave no definition of the term, and cited no evidence to support such a finding.¹⁷ The absence of any such finding by the ethics board defeats the respondents’ contention that the finding should be given deference.¹⁸

VIII

The Censure Was Unwarranted

33. In their Point VIII, respondents argue that the Town Board acted properly in censuring Davis and/or Powell.

¹⁶ There were no pleadings nor any formalized procedure before the ethics board.

¹⁷ The uncontradicted evidence before the ethics board was Dr. Powell’s statement that “I do not understand what allegations you wish me to address,” Respondent’s Exhibit E, and Supervisor Davis’ unequivocal “Dr. Powell is her own independent person in every way and by any measure, be it her legal status or any other.” Respondents’ Exhibit F.

¹⁸ Nor would they be “estopped,” as respondents urge at page 11 of their Memo of Law. Judicial estoppel can only arise where a party has taken a position in a litigated matter, and obtained some benefit from taking that position. It can hardly be said that petitioners received any “benefit” from Dr. Powell being labelled “the Domestic Partner.”

34. First, a town board has no power to make up laws as they go. By their silence, respondents concede there is no provision of law creating a power to “accept” the ethics board recommendation, nor to “censure” anyone based upon such a decision.

35. Second, even if they had the power to make up laws to suit their political whim, the Town Board had no basis to impose a censure, for all the reasons we have challenged the ethics decision. If the ethics decision is vacated, so too should the Town Board’s censure based on that decision.

IX

Is the New Law Retroactive?

36. In their Point IX, respondents argue that the new ethics code does not apply retroactively, because it “did not change the standard of conduct applicable....” Respondents’ Memorandum of Law at 13-14.

37. Of course, this ignores the question we pose in our petition. When the new code suggests that mere inaction may be the basis for huge fines, we are entitled to have an answer to the relatively clear question set forth in our Petition at Paragraphs 29-30:

[I]n Section 17-03, the law makes it a violation not only to take action that is proscribed, but also to “fail to take any official action” which will result in a benefit to a domestic partner, cohabitant or others. Does this mean that Davis is required to take action to remove Powell, even though her appointment was lawful and ethical when made, because now the law has changed? One is left to wonder.

30. Given that the law imposes draconian penalties, without any procedure for notice and an opportunity to be heard before the Town Board acts,¹⁹ these vague

¹⁹ The only reference to any form of hearing is before the Ethics Board. Section 17-05 “D.” However, the Ethics Board is a volunteer Board, which operates in secret. It is the Town Board which has the power to take the subject’s property, and it is the Town Board which should be required to comply with due process.

statements should render the law void. A person can be deprived of their property without notice that their conduct is within the law, or even whether they themselves are covered by the law.

38. Petitioners reiterate their request that the respondents answer the question.

X

The Constitutional Issue is Ripe

39. In their Point X, respondents argue that the constitutional challenge is unripe because no action has been taken against the Petitioners under the new ethics law. We disagree.

XI

Municipal Home Rule Law Compliance

40 In their Point XI, respondents argue that in enacting the new ethics code, they complied with Municipal Home Rule Law provisions requiring that superseded provisions of the state law be stated with specificity.

41. We rely on the discussion contained in our Petition at Paragraphs 22-23. In the context of a motion to dismiss, we believe we have adequately pleaded non-compliance with the legal requirements.

XII

New Ethics Code Does Not Satisfy Due Process

42. In their Point XII, respondents argue that the new ethics law provides adequate due process. The respondents do not point to anything in the new law that provides for notice and an opportunity to be heard before the Town Board imposes huge penalties. Instead, respondents point to the Ethics Board procedures to the effect that, prior to issuing their “recommendations,”

the Ethics Board is required to give notice and allow a hearing. But they aren't the ones who make the decision to impose the fines. That power is vested in the Town Board – and that is where Due Process protection is needed.

43. Particularly in this politically motivated²⁰ and frivolous ethics witch hunt, the need for some minimal Due Process protections should be apparent. By their silence, respondents concede it is lacking here.

XIII

No Standing, Again

44. In their Point XIII, respondents argue, again, that there is no standing. This time, they say that petitioners lack standing to challenge the new law's application to "domestic partners," because petitioners claim not to be "domestic partners."

45. This misses the point. Petitioners claim they are not, but point out the law is so vague that they cannot know for sure if they are or if we are not. If one could not plead non-applicability, how could the courts ever entertain void-for-vagueness challenges?

XIV

What is a "Domestic Partner"? I can't define it, but I know it when I see it.....²¹

46. In their Point XIV, respondents ask the Court to decide, on their motion to dismiss, that the otherwise undefined terms "domestic partner" and "cohabitant" are not too vague. They "establish" their point by quoting definitions from Black's Law Dictionary. There is

²⁰ The proceeding was instigated by Supervisor Davis unsuccessful opponent in the last election.

²¹ *Jacobellis v. Ohio*, 378 U.S. 184 (1964)(Stewart, J.).

nothing cited to suggest the Town Board intended to use that definition, and we can provide ten different definitions in common use today. See Exhibit 2 hereto.

47. Throughout his papers, Mr. Leventhal²² equates the term “domestic partner” with being “financially interdependent.” (hereinafter “Leventhal Definition No. 1”) Thus, he writes:

“Neither Supervisor Davis nor Ms. Powell denied that they were domestic partners. Rather, they admitted that they were financially interdependent.” (Memo of Law at p. 1)

48. In other words, because we supposedly admitted we were financially interdependent, this makes us domestic partners. Again, this equation comes from the very pen of the person who wrote the law.²³ Mr. Leventhal offers a completely different definition at page 18 of his Memorandum of Law:

“A nonmarital relationship between two persons of the same or opposite sex who live together as a couple for a significant period of time.” (hereinafter “Leventhal Definition No. 2”)

49. Leventhal’s Definition No. 2 doesn’t mention the financial interdependence which was the essence of Leventhal’s Definition No. 1. His Definition No. 1 doesn’t mention that you have to live together, nor for any particular period of time. And what constitutes a “significant” period of time? Perhaps Mr. Leventhal will give us a third and fourth definition in future papers. Or maybe we will learn the definition when the political opponents on the Town

²² Mr. Levanthal is the attorney who wrote the ethics law. As the litigation lawyer for the Town, he is himself in a conflict, since he is signing legal papers attesting that various things are “facts,” when, as we have shown, they are not factual at all.

²³ As we showed above, the record is uncontradicted (except for Mr. Bondi’s demonstrably false affidavit) that we were NOT financially interdependent, and the Ethics Board so found. This then means, in Leventhal’s definition, we are also NOT domestic partners.

Board levy thousands of dollars in fines against us for being “domestic partners.”

50. The fact is, the law does not provide fair notice to persons whose conduct is proscribed by the law – and who may be subject to enormous fines. As such, the law is void for vagueness.²⁴ Compare some of the definitions used in statutes such as the Insurance Law²⁵ or the Rent Stabilization regulations.²⁶ His Black’s Law Dictionary definition of “cohabitation” is also at variance with definitions used by the courts – which appear to equate it with something more than living together.²⁷

XV

Estoppel, Again

51. In their Point XV, respondents again argue that the petitioners are barred by estoppel from having their day in court. This time, they claim that Supervisor Davis enjoyed

²⁴ In the area of zoning law, we and many other municipalities have found it difficult to define terms such as “family,” sufficiently to satisfy the courts.

²⁵ “[B]oth partners are: 18 years of age or older; unmarried and not related by marriage or blood in a way that would bar marriage; residing together: involved in a committed (lifetime) rather than casual relationship, and mutually interdependent financially. The partners must be each other's sole domestic partner and must have been involved in the domestic partnership for a period of not less than six (6) months.” *Funderburke v. Uniondale Union Free School District*, 251 A.D.2d 622, 676 N.Y.S.2d 199 (2d Dept. 1998).

²⁶ “The determination ... should be based upon an objective examination of the relationship of the parties. In making this assessment, the lower courts of this State have looked to a number of factors, including the exclusivity and longevity of the relationship, the level of emotional and financial commitment, the manner in which the parties have conducted their everyday lives and held themselves out to society, and the reliance placed upon one another for daily family services.” *Braschi v. Stahl Associates Co.*, 74 N.Y.2d 201, 544 N.Y.S.2d 784 (1989).

²⁷ See *Brown v. Brown*, 122 A.D.2d 762, 505 N.Y.S.2d 648 (2d Dept. 1986), requiring a showing that (1) the parties “shared household expenses or a bedroom,” or (2) “that they functioned as an economic unit.”

benefits under the new ethics law, requesting advisory opinions about various apparent town conflicts.

52. Aside from their improper disclosure of a confidential communication, respondents offer no support for this novel theory, and we dispute it.

XVI

Appearance of Impropriety

53. In their Point XVI, respondents argue that the new law’s use of the “appearance of impropriety” standard is not unreasonably vague, since it has been used in other ethics codes. However, as we pointed out in the Petition, this is not your father’s ethics law. Going far beyond mere advisory opinions, this law provides for the imposition – without any notice or hearing by the town board – of unlimited financial penalties, loss of employment and generally draconian penalties not found in even the most serious criminal laws.

54. In the Petition, we alleged at Paragraph 25:

The law purports to make “appearance of impropriety” a violation. New Code Section 17-03. While this standard may be permissible for advisory ethics opinions, it has no place in a statute creating quasi-criminal penalties.²⁸ A person exercising reasonable judgment cannot know if he is covered by this law, let alone whether his conduct is proscribed.

55. Once again, in the context of a political witch hunt, such a bludgeon will present an unfair chill on public participation in government, and allow the ethics board to do to us (or to others) what they did to us in this case.

²⁸ In the penalties section, Section 17-07, the Code creates a host of severe penalties, including removal from office, \$1,000 fines and disgorgement of unlimited sums of money. If this Code is intended to apply retroactively to Powell’s appointment, the Petitioners are thus exposed to loss of their positions and tens of thousands in fines. (Footnote in original quote)

XVII

Terrorizing Volunteers

56. In their Point VII, respondents argue that the law's potentially draconian and ex parte penalties, should be applied to even the lowliest volunteer advisory board member. In so doing, they urge, they are being consistent with the state law definition.

57. The point we made was not that the definition is somehow odd or unusual. Rather, the concern expressed in the Petition is that the law provides staggering penalties imposed with no notice by the town board.

XVIII

Not Arbitrary

58. In their Point XVIII, respondents argue that their conduct was not arbitrary, capricious, unreasonable or an abuse of discretion. For all the reasons set forth herein, we disagree.

WHEREFORE, petitioners request the motion to dismiss be denied.

SAMUEL DAVIS

DAWN POWELL

Sworn to before me on
February 2, 2007

Notary Public