

To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

FILED
AND
ENTERED
ON April 5th 2007
WESTCHESTER
COUNTY CLERK

-----X
SAMUEL DAVIS and DAWN POWELL,

Petitioners,

For a Judgment pursuant to Article 78 of the CPLR

- against -

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

Respondents,
-----X

LIPPMAN, J.,

DECISION/
ORDER/
JUDGMENT

Index No. 23102/06

FILED

APR - 5 2007

TIMOTHY O. EDGNI
COUNTY CLERK
COUNTY OF WESTCHESTER

The following papers were considered on this petition, brought pursuant to CPLR Article 78, by Samuel Davis and Dawn Powell, and the motion, by The Town of Putnam Valley Town Board and the Board of Ethics, to dismiss the petition pursuant to CPLR 404:

<u>PAPERS</u>	<u>NUMBERED</u>
Notice of Petition, Verified Petition, Exhibits 1-6	1-8
Notice of Motion to Dismiss, Affirmation in Support of Respondents' Motion to Dismiss, Exhibits A-L	9-22
Affidavit in Opposition, Exhibits 1-2	23-25
Memorandum of Law in Support of Respondents' Motion to Dismiss	26
Affidavit in Support of Respondents' Motion to Dismiss	27
Reply Affidavit in Support of Respondents' Motion to Dismiss	28

INTRODUCTION

Petitioners are the Town Supervisor of the Town of Putnam Valley and his Confidential Secretary, an appointed, salaried position under Town Law § 29(15). The claims that give rise to this proceeding derive from the fact that petitioners maintain a residence together, which prompted a Putnam Valley Town Board member to file a formal complaint with the local Ethics Board alleging that the Town Supervisor's appointment of the Confidential Secretary cast a cloud of impropriety over the town government. This complaint resulted *inter alia* in the Putnam Valley Town Board censure of "the appearance of impropriety in the Supervisor's hiring of a confidential secretary." For the reasons that follow, this court concludes that the petition fails to state any legally cognizable claims under Article 78. Notwithstanding this, the court declares that the appointment of petitioner Dawn Powell ("Ms. Powell") to the position of Confidential Secretary was not unethical as of January 1, 2006.

FACTUAL AND PROCEDURAL BACKGROUND

On January 1, 2006, Samuel Davis ("Mr. Davis") began his two year term as Town Supervisor, an elected post. On that date, Mr. Davis appointed Ms. Powell to serve as his Confidential Secretary. By complaint filed in March 2006 before the Putnam Valley Ethics Board ("Ethics Board"), Putnam Valley Town Board member, Robert Tandy ("Mr. Tandy"), objected *inter alia* to Ms. Powell's appointment. The appointment, according to Mr. Tandy, raised the questions whether Ms. Powell possessed the requisite secretarial skills for the Confidential Secretary position, why she was starting at the \$46,000 salary level that the prior secretary commanded after six years on the job, and whether her hiring was a "business deal" that would ultimately benefit Mr. Davis where he was in a "position to influence it to his financial

advantage" (Verified Petition, Exhibit 2). In his complaint, Mr. Tandy characterized Ms. Powell as Mr. Davis's domestic partner (*see id.*). Petitioners dispute this characterization (*see* Verified Petition at ¶ 8).

By Advisory Opinion No. 101-06, the Ethics Board opined *inter alia* that a "prohibited appearance of impropriety existed by virtue of [Mr. Davis's] approval of an agreement of employment between the Town and his domestic partner" but the Ethics Board did not find that the rate of Ms. Powell's compensation created an appearance of impropriety (Verified Petition, Exhibit 3).

On August 16, 2006, the Putnam Valley Town Board ("Town Board") accepted the findings of the Ethics Board by voting for Resolution R 06-312 (*see* Verified Petition, Exhibit 4). On November 15, 2006, the Town Board issued a formal Resolution "censur[ing] the appearance of impropriety in [Mr. Davis's] hiring of a confidential assistant and requests that [he] replace Ms. Powell as his personal assistant with a candidate in whom the community will have trust and confidence" (Affirmation in Support of Respondents' Motion to Dismiss, Exhibit I).

During this period, the Town Board also adopted Local Law 5, revising the town's ethics code to, according to petitioners, effectively render Ms. Powell's appointment illegal and impose fines on petitioners. Petitioners additionally claim the new law attempts to operate retroactively, does not provide for notice nor specify what conduct is improper, and purports to supersede provisions of state law, rendering it facially invalid and void.

In sum, petitioners allege that respondents actions are illegal, arbitrary, capricious, unreasonable, an abuse of discretion and contrary to law. Mr. Davis and Ms. Powell commenced this Article 78 proceeding to (1) reverse and annul the July 24, 2006 decision of the Ethics Board,

(2) reverse and annul the August 16, 2006 Town Board Resolution R 06-312 that adopted the Ethics Board decision, (3) reverse and annul the November 15, 2006 Town Board Resolution that censured Mr. Davis, (4) annul Local Law 5, the "Revision of Code of Ethics" adopted by the Town Board on October 18, 2006; and (5) for a judgment declaring (a) Ms. Powell's appointment as Confidential Secretary was not unethical and (b) Local Law 5 invalid.

Respondents move to dismiss the proceeding pursuant to CPLR 404(a) on the grounds that (1) the Ethics Board decision is non-final and therefore unreviewable in this proceeding; (2) Ms. Powell does not have standing to challenge the Ethics Board opinion or the Town Board Resolutions; (3) the November 15, 2006 Town Board Resolution is rational, legal and proper; and (4) the newly revised ethics code is inapplicable to this action and is not subject to retroactive enforcement.

DISCUSSION

The preliminary inquiry has two prongs: (1) whether the determinations of the Ethics Board and Town Board are final, subject to independent administrative review and (2) whether Ms. Powell has standing to challenge respondents' actions.

By its very nature, the opinion rendered by the Ethics Board is considered non-final for administrative purposes as pointedly evinced by its subsequent ratification and incorporation in the administrative opinion of the Town Board (see *Matter of Best Payphones, Inc. v Department of Info. Tech. & Telecom. of City of N.Y.*, 5 NY3d 30 [2005]; *Stop-The-Barge v Cahill*, 1 NY3d 218 [2003]). In this regard, that branch of the motion to dismiss the claims against the Ethics Board seeking annulment of the July 24, 2006 opinion is granted and the Ethics Board itself is dismissed as a party to the proceeding.

The Resolution identifies the core of the matter as Mr. Davis's "hiring [of] the woman he lives with, Dawn Powell, ... as his confidential secretary" (Affirmation in Support of Respondents' Motion to Dismiss, Exhibit J). The Resolution recites that there was an appearance of impropriety in this employment relationship given "the potential ... pecuniary benefit [Mr. Davis derived] from [Ms.] Powell's salary" (*id.*). The Town Board found that the "appearance of improper self-dealing and related controversy impacts this Board's ability to carry out public business...and adversely impacts the perception of the Town government by its [staff] and other public officials" (*id.*). The Town Board concluded by censuring this "appearance of impropriety" (*id.*).

Whether Ms. Powell has standing to challenge the November 15, 2006 Town Board Resolution turns on whether there is a final and discernable claim subject to legal redress (*see Matter of Gordon v Rush*, 100 NY2d 236, 242-243 [2003]; *see generally Community Bd. 7 of Borough of Manhattan v Schaffer*, 84 NY2d 148, 154-155 [1994]; *cf. Matter of Town of Riverhead v New York State Bd. of Real Prop. Servs.*, 5 NY3d 36, 41-42 [2005]). Undoubtedly, the language of the Town Board Resolution caused personal discomfort to petitioners; however, the Town Board's censure did not require nor result in an actual change in the employment relationship, nor did it impose any directive, mandatory or otherwise, requiring change. The language is merely suggestive, not obligatory. Therefore, there is no final determination as contemplated by CPLR 7803(3) to give rise to an Article 78 petition (*see Dozier v New York City*, 130 AD2d 128, 133-135 [1987]; *Matter of Ward v Bennett*, 79 NY2d 394, 400-410 [1992] *compare Matter of Gordon v Rush, supra*, 100 NY2d at 242). The question of Ms. Powell's standing is thereby rendered moot (*see Community Bd. 7 of Borough of Manhattan v Schaffer*,

supra, 84 NY2d at 155 [citations omitted]).

The Resolution challenges Mr. Davis's employment decision, yet it does not impose any affirmative duty on him (much less Ms. Powell) that can serve as the basis of an Article 78 proceeding. Cast in these terms, in the posture of the motion to dismiss, the question then becomes one of ripeness for judicial review. This calls for a pragmatic evaluation of the facts to ascertain whether the administrative "decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury" (*Church of St. Paul & St. Andrew v Barwick*, 67 NY2d 510, 519 [1986] *cert. denied* 479 US 985 [1986]). "[U]nless and until [the administrative determination] impose[s] an obligation, den[ies] a right or fix[es] some legal relationship as a consummation of the administrative process" it is not final (*Matter of Essex County v Zagata*, 91 NY2d 447, 453 [1998] *citing Chicago & S. Air Lines v Waterman S.S. Corp.*, 333 US 103, 113 [1948]). A "challenged determination is final and binding when it 'has its impact' upon the petitioner who is thereby aggrieved" (*Matter of Edmead v McGuire*, 67 NY2d 714, 716 [1986] [citations omitted]).

Although petitioners strenuously object to respondent's claim that the proceeding is subject to dismissal, Mr. Davis is unable to demonstrate any injury in fact actionable at law (see *Matter of Clark v Town Bd. of Town of Clarkson*, 28 AD3d 553, 553-554 [2006]). Ms. Powell continues to serve as his Confidential Secretary. Mr. Davis was not subject to any penalty based on his hiring choice. The Town Board's disfavor with Mr. Davis's hiring decision did not culminate in any factual finding of impropriety or of an ethical violation. Indeed, the Resolution plainly adopts the findings of the Ethics Board that the "Supervisor did not violate state ethics code..." (Affirmation in Support of Respondents' Motion to Dismiss, Exhibit J).

The Town Board's bald assertion that a cloud of impropriety hangs over town government does not elevate this "censure" to an actionable claim when the employment relationship remains intact. Absent any actual injury to Mr. Davis or cognizable claim of law underpinning the petition, there is no final administrative action by the Town Board subject to Article 78 review. In accord with the finding in the November 15, 2006 Town Board Resolution that the hiring of Ms. Powell did not offend state ethics law governing such employment relationship as of January 1, 2006, it is hereby declared that Mr. Davis's hiring of Ms. Powell was not unethical as of January 1, 2006.

The final portion of the petition seeking to annul the "Revision of Ethics Code" adopted by the Town Board on October 18, 2006 is likewise not legally actionable. Since the November 15, 2006 Resolution squarely addresses Mr. Davis's employment of Ms. Powell commencing January 1, 2006 it cannot be premised on Local Law 5, which, by its express terms, governs conduct on or subsequent to the law's filing with the Secretary of State (*see* Verified Petition, Exhibit 5). It is the January 1, 2006 appointment of Ms. Powell that is the genesis of instant controversy. Thus, the claims alleged in the petition seeking to imply retroactive effect to Local Law 5 and apply those terms to the employment relationship are misplaced and therefore dismissed.

To the extent petitioners seek to foreclose future due process violations and otherwise prospectively challenge the application of the procedural ramifications of Local Law 5, such claims are not properly the subject of an Article 78 proceeding until there has been distinct and final administrative determination under these provisions (*see Matter of Bell v Levitt*, 44 AD2d 742 [1974] *app. denied* 34 NY2d 518 [1974]). Therefore, the allegations of the petition

regarding Local Law 5 are dismissed and it is declared that such claims are premature.

Accordingly, it is hereby

ORDERED that petition is denied.

ORDERED that it is declared that pursuant to the terms of the November 15, 2006 Town Board Resolution the appointment of Dawn Powell to the position of Confidential Secretary was not unethical as of January 1, 2006, and that the claims raised under Local Law 5 are not ripe for review in the context of this proceeding.

ORDERED that the proceeding is otherwise dismissed.

The foregoing constitutes the Decision, Order and Judgment of the Court.

Dated: White Plains, New York
April 4, 2007


HON. JONATHAN LIPPMAN, J.S.C.