SCAN

**SHORT FORM ORDER**

**SUPREME COURT - STATE OF NEW YORK**

**Present:**

**HON. F. DANA WINSLOW,**

**Justice**
**TRIAL/IAS, PART 11**
**NASSAU COUNTY**

---

**In the Matter of the Application of**
**MICHAEL F. BARKAN,**
**Petitioner,**

**RETURN DATE: 3/31/06**

**For Judgment under Article 78 of the Civil Practice Law and Rules,**

**SEQUENCE NO.: 001**

**- against -**

**INDEX NO.: 014281/05**

**ROSLYN UNION FREE SCHOOL DISTRICT AND THE BOARD OF EDUCATION OF THE ROSLYN UNION FREE SCHOOL DISTRICT,**

**Respondents.**

---

**The following papers read on this petition (numbered 1-3)**

**Notice of Amended Petition..... 1**
**Verified Amended Answer.....2**
**Affidavit.....3**
**Memorandum of Law.....A**
**Supplemental Memorandum of Law.....B**
**Petitioner's Reply Memorandum of Law.....C**

In this petition pursuant to **Article 78** of the **Civil Practice Law and Rules**, MICHAEL BARKAN ("BARKAN") seeks a judgment (i) annulling the determinations of respondents ROSLYN UNION FREE SCHOOL DISTRICT (the "DISTRICT") and THE BOARD OF EDUCATION OF THE ROSLYN UNION FREE SCHOOL DISTRICT ("the BOARD"), dated August 23, 2005 and September 8, 2005, which denied BARKAN's request for a defense and indemnification in connection with litigation commenced in the Supreme Court, Nassau County, under the Index. No. 5946/05, entitled *Roslyn Union Free School District v. Michael Barkan et al.* (the "Underlying Action"); (ii) enjoining respondents to provide BARKAN with a defense and indemnification in the Underlying Action; and (iii) awarding monetary damages for the costs and expenses incurred by BARKAN in connection with the Underlying Action.

The Court notes that two related proceedings were commenced in this Court by other defendants in the Underlying Action. The proceeding entitled *Carol Margaritis v. Roslyn Union Free School District et al.*, Index No. 4296/06, was originally filed on April 17, 2006, and the proceeding entitled *Ronna Niederman v. Roslyn Union Free School District et al.*, Index No. 6874/06, was filed on May 24, 2006. The Court had intended to determine the three related proceedings concurrently, in the interests of full edification and consistency, and, to that end, had awaited complete submission of the related proceedings. It has come to the Court's attention, however, that the two related matters were adjourned on consent, and have not been fully submitted to date. The Court finds that the interests of justice will not be served by further delay, and accordingly, proceeds to determine the instant matter.

Facts and Procedural History

BARKAN served on the BOARD from in or about July, 1985 until in or about June 2004. On or about April 15, 2005, the Underlying Action was commenced against BARKAN and other former and current members of the BOARD, based upon allegations that BARKAN and other BOARD members abdicated their oversight roles and failed to monitor the DISTRICT's assets, finances and investments, nor the activities of key DISTRICT employees. The Complaint alleges that the BOARD members' failure to implement and oversee adequate internal control policies and procedures resulted in the misuse and misappropriation of DISTRICT funds. Based upon these allegations, the Complaint asserts causes of action for breach of fiduciary duty, negligence, declaratory judgment, accounting, unjust enrichment and constructive trust.

On April 25, 2005, BARKAN sent Notice of the Summons and Verified Complaint to the Interim Superintendent of Schools for the DISTRICT for purposes of requesting a defense and indemnification in the Underlying Action pursuant to **Public Officers Law §18** and the by-laws of the BOARD. By letter dated August 23, 2005, special counsel to the DISTRICT advised BARKAN's counsel that "defense and indemnification is not available to your client due to the fact the Board has commenced an action against him as a Board member." The BOARD passed a Resolution at its meeting dated September 8, 2005, stating that it "hereby denies Mr. Barkan's request for a defense pursuant to Public Officer's Law §18, based upon the plain language of Public officers [sic] Law §18(3)."

BARKAN brought the instant proceeding to challenge the above determinations as unlawful and arbitrary pursuant to **CPLR §7803**. He argues, essentially, that the language cited for denying his request does not apply because the Underlying Action was brought against him by the DISTRICT and not by the BOARD. Several procedural

defenses were asserted by respondents, which appear to have been abandoned or effectively refuted by petitioner. The Court thus turns to the merits of petitioner's challenge.

The Court notes, at the outset, that the positions of both parties, as set forth in their written submissions and oral argument, reflect an assumption that the duty of the BOARD to provide a defense and indemnification is co-extensive; that is, that the BOARD has to both defend and indemnify, or it has to do neither. Upon examination of the **Public Officers Law** and the BOARD's by-laws, however, the Court finds that the duties are governed by different provisions, which appear to operate distinctly and independently. Accordingly, the Court will address separately the issues of defense and indemnification.

Duty to Defend

**Public Officers Law §18(3)(a)** provides as follows:

> [T]he public entity shall provide for the defense of the employee in any civil action or proceeding, state or federal, arising out of any alleged act or omission which occurred or allegedly occurred while the employee was acting within the scope of his public employment or duties. This duty to provide for a defense shall not arise where such civil action or proceeding is brought by or at the behest of the public entity employing such employee.

A public entity is bound by this provision only if it has agreed, by resolution, by-law or otherwise, to confer such benefits upon its employees and to be liable for the cost. **Public Officers Law §18(2).** On or about August 7, 1986, the BOARD adopted **Public Officers Law §18** into its by-laws, with certain changes in the statutory language. This act was reaffirmed by the BOARD on July 6, 2004 and July 7, 2005. The only significant change in the language of this section, as adopted by the BOARD, was that the term "public entity" was replaced with the "Board," and "at the behest of" was replaced with "on behalf of." Further, a subsection was added which defined certain terms, including "Board," "Employee," and "District," for purposes of the by-law.

As a former BOARD member, BARKAN falls within the definition of "Employee." **Public Officers Law §18(1)(b).** His right to a defense under **Public Officers Law §18(3)(a)**, as adopted by the BOARD, does not arise if either of the following applies: (i) the acts or omissions complained of were outside the scope of his employment or duties; or (ii) the Underlying Action was brought by or on behalf of the BOARD.

The Court rejects respondents' argument that BARKAN was acting outside the scope of his employment when he committed the acts or omissions complained of in the Underlying Action. The crux of the action against BARKAN is the alleged abdication of responsibility. As stated in the complaint, his alleged omissions reflect an inadequate performance of his duties, not a departure from them. The general allegations of stealing or misappropriation by "Board Members" contained in the Fourth Fifth and Sixth causes of action are insufficient, absent factual detail or evidentiary support relating specifically to BARKAN, to establish that BARKAN was acting outside of the scope of his employment.

The dispositive issue is whether the Underlying Action was brought by or on behalf of the BOARD. In the by-law mirroring **Public Officers' Law §18**, the DISTRICT is defined as "Roslyn Union Free School District" and the BOARD is defined as "Board of Education of Roslyn Union Free School District." BARKAN argues that this distinction reflects the BOARD's intent to describe two separate entities for purposes of the by-law. In this case, says BARKAN, where the action is brought in the name of the DISTRICT, to recover funds allegedly diverted from the DISTRICT, the action is not an action brought "by or on behalf of" the BOARD. The exclusion contained in the by-law does not apply, and BARKAN remains entitled to a defense. BARKAN also argues that the re-adoption of this by-law in its original form, after the onset of events leading to the Underlying Action, reflects the BOARD's conscious intent to preserve the benefits of **Public Officers Law §18** for its members in circumstances such as the instant ones, where the BOARD member has been sued by the DISTRICT, and not by the BOARD.

Respondents contend that the BOARD and the DISTRICT are legally indistinguishable in this matter. A school district is a municipal corporation. **Gen. Const. Law §66(1)(2)**. A Board of Education is the governing "body corporate" that is "charged with the general control, management and responsibility of the schools of a union free school district" **Education Law §2(14).** Respondents argue that where, as here, the interests of a board of education and a school district are identical, there is no legal distinction between the two entities. **Board of Ed. Of Union-Endicott Central School District v. NYS PERB,** 250 AD2d 82, *lv. app. den.* 93, NY2d 805. Further, the DISTRICT could not have brought this action independently of the BOARD. A lawsuit may be commenced on behalf of a school district only upon approval by the board of education. **Gerson v. Mills,** 290 AD2d 839, 841; **N.Y. Educ. Law §1709(33).** In this case, the BOARD authorized its attorney to commence the Underlying Action by resolution dated March 31, 2005.

Judicial review of the BOARD's determinations denying a defense to BARKAN is limited in scope. The Court may only inquire as to whether the determinations were

affected by an error of law, arbitrary and capricious, or an abuse of discretion. **CPLR §7803**. *See also* **Pell v. Board of Ed. of Union Free School Dist. No. 1**, 34 N.Y.2d 222. The Court finds no basis to disturb the BOARD's determinations. The BOARD's interpretation and application of its own by-law is a rational one. Its view of the DISTRICT and the BOARD as a unified entity for purposes of this matter is consistent with case law cited above. It is also consistent with **Public Officers Law §18**, where a "public entity," may be defined as a "combination or association of governmental entities operating a public school." **Public Officers Law §18(1)(a)**. By that definition, the BOARD and DISTRICT together constitute the "public entity." It is mere speculation that the BOARD intended to broaden the benefit under **Public Officers Law §18(3)** when it distinguished between "Board" and "District," and substituted the word "Board" for "public entity" in the corresponding by-law. The use of the word "Board" more likely represents the fact that the BOARD is the governing body which has the power to take legal action.

The Court rejects the fiction of separateness proffered by petitioners. As described by counsel (and consistent with Education Law), the activities of the BOARD and the DISTRICT are intertwined. The entities work as two facets of a single whole, each performing different functions in the service of an indivisible purpose; namely, the operation of the schools within their governance. Rather than discrete bodies, they are more like an undifferentiated cell of a single organism. The BOARD's finding that the Underlying Action is an action brought by or on behalf of the BOARD is rational, notwithstanding that the action was nominally brought by the DISTRICT. The BOARD and the DISTRICT, for purposes relevant here, are reasonably viewed as united in interest and function. It follows that the BOARD's determination that it has no obligation to defend BARKAN is supported by a fair interpretation of **Public Officers Law §18(3)** as incorporated into the by-laws.

That does not, however, end the inquiry. The Court has noted above that the duty to defend and the duty to indemnify do not necessarily coincide. Accordingly, the Court must address the latter, and the interplay, if any, between the two.

Duty to Indemnify

**Public Officers Law §18(4)** provides as follows:

> 4. (a) The public entity shall indemnify and save harmless its employees in the amount of any judgment obtained against such employees in a state or federal court, or in the amount of any settlement of a claim, provided that the act or omission from which such judgment or claim arose occurred while the employee

> was acting within the scope of his public employment or duties; provided further that in the case of a settlement the duty to indemnify and save harmless shall be conditioned upon the approval of the amount of settlement by the governing body of the public entity.
>
> (b) Except as otherwise provided by law, the duty to indemnify and save harmless prescribed by this subdivision shall not arise where the injury or damage resulted from intentional wrongdoing or recklessness on the part of the employee.

As adopted by the BOARD, the language differs. The Court notes with interest that this section does not bar indemnification where the action has been brought by the public entity itself. The only exclusion (other than for acts outside the scope of employment) is for losses resulting from the intentional wrongdoing or recklessness of the employee. This section would seem to render futile any negligent action by the BOARD against its members, as it requires the BOARD or DISTRICT to compensate itself for its own injury; i.e., to assume the risk of the employee's negligence. As illogical as it may sound, however, such indemnification is arguably consistent with public policy, insofar as it encourages and facilitates voluntary public service.

As the duty to indemnify does not arise until a judgment is obtained against the employee (or an approved settlement is reached), application of this section requires a post-judgment examination of the facts proved regarding the employee's culpability or state of mind. The BOARD could not rationally determine that no indemnification was available to BARKAN at the time of its August 23, 2005 letter, unless the acts or omissions complained of were outside the scope of employment, which proposition is unsupported by the record to date. Thus, the Court concludes that any determination to deny indemnification is premature and unsupported by substantial evidence in the record. The Court notes, however, that the Resolution of September 8, 2005 does not purport to deny BARKAN's request for indemnification; it denies the request for a defense. Accordingly, it shall not be disturbed on that basis.

Conclusions – the Defense and Indemnification Scheme

The Court believes that, although governed by separate subsections of **Public Officers Law §18**, the issues of defense and indemnification cannot be considered solely in isolation. The Court must consider the implications of its opposite conclusions with respect to defense and indemnification. .

In this case, the scheme would operate as follows in the Underlying Action: BARKAN would have no right to a defense paid for by the BOARD/DISTRICT. With respect to indemnification, there are three possible scenarios: (1) If BARKAN is ultimately adjudged to be liable on the basis of intentional wrongdoing or recklessness,

then BARKAN would not be entitled to indemnification by the BOARD. (2) If BARKAN is ultimately adjudged to be liable on the basis of negligence, then BARKAN would be entitled to indemnification in the amount of the judgment. (3) If BARKAN is not liable, then, obviously, no indemnification is necessary.

The first scenario yields a logical outcome: no defense, no indemnification. BARKAN is entirely responsible, legally and financially, for his own culpable conduct. The second scenario yields an anomalous result. BARKAN pays for his own defense, but is indemnified in the amount of the judgment. This flips a fundamental legal principal on its head; namely, that the duty to defend is broader than the duty to indemnify. In this scenario, the duty to indemnify is broader than the duty to defend. This potential result suggests that a defendant charged only with negligence may be better off defaulting than defending. Further, the BOARD would be better off discontinuing where intentional wrongdoing or recklessness cannot be proved. The defendant employee would have to defend sustainable allegations of intentional or reckless conduct, but if ultimately only negligence is proved, the defendant's financial exposure would be limited to the costs of the defense. The potential results offends accepted notions of logic, equity and justice. Arguably the Petitioner must borrow or more drastically sell his home only to find that he fell into category 2 or 3 and thus unable to receive his defense costs. This offense may be inequitable, in the abstract, and the Court is highly tempted to change the result respecting the duty to defend but the determination has withstood the rationality test.

Accordingly, it is

ORDERED, that petitioner's application for relief is **granted in part and denied in part** as follows:

(1) Insofar as the letter of August 23, 2005 purports to deny BARKAN's request for **indemnification** in the Underlying Action, it is **vacated and annulled**. BARKAN may re-apply to the BOARD for indemnification, if appropriate, after entry of judgment in the Underlying Action (or prior to execution of a stipulation of settlement), which application shall be determined by the BOARD, subject to judicial review.

(2) Insofar as the letter of August 23, 2005 and the Resolution of September 8, 2005 purport to deny BARKAN's request for a **defense** in the Underlying Action, they are **upheld *pendente lite***. BARKAN may re-apply to the BOARD for reimbursement of his legal costs and expenses, if appropriate, after entry of judgment in the Underlying Action (or prior to execution of a stipulation of settlement), which application also shall be determined by the BOARD, subject to judicial review in accordance with the principles articulated above.

This constitutes the decision and Order of the Court.

Counsel shall appear for a conference 2 weeks after service of this order after entry.

ENTER:

Dated: September 20, 2006

J.S.C.