

OAL # EEC 01110-06
SEC # C32-05 and C24-05
C # 424-07SEC
SB # 33-07

IN THE MATTER OF THE SUSPENSION OF :
DR. JOSEPH ATALLO PURSUANT TO : STATE BOARD OF EDUCATION
N.J.S.A. 18A:12-29(c), STATE OPERATED : DECISION
SCHOOL DISTRICT OF THE CITY :
OF PATERSON, PASSAIC COUNTY. :

Decided by the School Ethics Commission, July 24, 2007

Decided by the Commissioner of Education, October 25, 2007

For the Respondent-Appellant, Joel Miklacki, Esq.

For the Petitioner-Respondent School Ethics Commission,
Cynthia Raymond Rimol, Deputy Attorney General (Anne Milgram,
Attorney General of New Jersey)

This matter arose with the filing of two complaints with the School Ethics Commission (hereinafter "Commission"). The first complaint was filed by the Director of the Office of Compliance Investigation in the New Jersey Department of Education and alleged, among other contentions, that respondent-appellant, Doctor Joseph Atallo (hereinafter "appellant"), a member of the Paterson School District Board of Education, violated N.J.S.A. 18A:12-24.1(e)¹ by threatening Dr. Dennis Clancy, the Interim School District Superintendent in Paterson, using profanity at the April 5, 2005 meeting of the

¹ N.J.S.A. 18A:12-24.1(e) prohibits school board members from making personal promises, or taking private any action that may compromise the board.

Paterson Board of Education. The second, filed by Frederick Mutooni, alleged that appellant threatened him using profanity at a meeting of the Paterson Board of Education on April 27, 2005.

By letter dated December 2, 2005, the Commission notified appellant that it had determined that there was probable cause to credit certain of the allegations against him. Specifically, the Commission determined that probable cause existed that appellant violated N.J.S.A. 18A:12-24.1(e) by threatening the Interim School District Superintendent and a member of the public at separate meetings of the Paterson Board of Education. Respondent denied the allegations and the matters were consolidated and transmitted to the Office of Administrative Law for a hearing.

The hearing was held on October 16, and 18, 2006. At the hearing, documentary evidence was admitted into the record and testimony was provided by ten witnesses. In her decision, the Administrative Law Judge (ALJ) provided an extensive summary of the testimony and evidence and, noting that the Commission had the burden to prove that appellant violated the School Ethics Act, determined that there was not sufficient credible evidence introduced into the record to establish either allegation by a preponderance of the credible evidence.

As to the first allegation, the ALJ assessed the credibility of the witnesses and concluded that the testimony of the members of the public that no such threat was made was more credible than that of Dr. Clancy that the threat was made by appellant. Therefore, the ALJ recommended that this allegation be dismissed. ALJ's Decision, slip op. at 19.

With respect to the second allegation, the ALJ reviewed the extensive testimony presented by the Commission and appellant's witnesses, as well as the documentary evidence introduced, and concluded that "[a] preponderance of the credible evidence falls short of establishing any specific statements that may have been made by either Dr. Atallo or Mr. Mutooni ... [and there] is also insufficient evidence establishing, by a preponderance of the credible evidence, that Dr. Atallo threatened Mr. Mutooni by words or actions on April 27, 2005." ALJ's Decision, slip op. at 23. Based on her assessment of the totality of the evidence presented, the ALJ concluded that the Commission failed to prove its assertions by a preponderance of the credible evidence, and recommended that this allegation also be dismissed. Id. at 24.

On July 24, 2007, after reviewing the ALJ's decision, the record created in the Office of Administrative Law, and the exceptions filed by the parties, the Commission issued its decision with respect to the consolidated actions. In its decision, the Commission recognized that determinations of credibility by the Administrative Law Judge must be given deference because she has the greatest opportunity to observe the demeanor of the witnesses, and agreed with and adopted the determination of the ALJ that the charge that appellant threatened the Interim School District Superintendent using profanity was not proven by a preponderance of the credible evidence. The Commission explained:

The DAG also argues that the ALJ erred in concluding that the Commission failed to prove by a preponderance of the credible evidence that Dr. Atallo violated N.J.S.A. 18A:12-24.1(e) when he threatened the interim superintendent, Dr. Clancy, with profanity. The Commission must give deference to the ALJ's credibility determinations. "The reason for this rule is that the administrative law judge, as a finder of fact, has the greatest opportunity to observe the

demeanor of the involved witnesses, and, consequently, is better qualified to judge their credibility.” In the Matter of the Tenure Hearing of Tyler, 236 N.J. Super. 478, 485 (App. Div.), certif. denied, 121 N.J. 615(1989).” The ALJ found that Dr. Clancy’s testimony was significantly impaired by his failure to report or take any action regarding the alleged incident. Upon review of the record, the Commission hereby concludes that the ALJ’s credibility determinations regarding the April 5, 2005 public forum must be given deference and her findings based on those determinations cannot be overturned.

School Ethics Commission’s Decision, slip op. at 2.

As to the charge that appellant violated N.J.S.A. 18A:12-24.1(e) by threatening Frederick Mutooni after he called for appellant’s resignation from the Paterson Board of Education at its April 27, 2005 meeting, the Commission rejected the conclusion of the ALJ that the charge was not proven by a preponderance of the credible evidence. The Commission reasoned:

While the Commission gives deference to the credibility determinations of the ALJ, it agrees with the DAG that the testimony and evidence establishes that Dr. Atallo threatened Mr. Mutooni. Upon a review of the record before it, the Commission concludes that the ALJ erred when she placed limited weight upon Mr. Mutooni’s account of what happened on April 27, 2005, due to inconsistencies in the testimony of the various witnesses when such inconsistencies were not regarding a material fact.

. . . .

The Commission finds that the ALJ’s error in placing limited weight on Mr. Mutooni’s testimony based on immaterial inconsistencies, and the error in placing greater weight on the respondent’s witnesses because of a presumption that they had no vested interest in the outcome of the proceedings, slightly tip the balance of the evidence so that it no longer provides equal support to two inconsistent inferences. These errors, coupled with the fact that there was testimony that Dr. Atallo made threatening statements to Mr. Mutooni also shift that balance of evidence even

more. Both Dr. Clancy and Mr. Vancheri testified that Dr. Atallo made threatening statements to Mr. Mutooni.

. . . .

The Commission finds and concludes that the preponderance of the credible evidence establishes that Dr. Atallo threatened Mr. Mutooni by words on April 27, 2007.

School Ethics Commission's Decision, slip op. at 2-3.

The School Ethics Commission assessed the nature of the established violation of the School Ethics Act and recommended to the Commissioner² that, because a threat to a member of the public is one of the most egregious violations of the public trust that a board member can commit, appellant should be suspended from the Paterson Board of Education for one year. *Id.* at 4. On October 25, 2007, the Commissioner of Education issued her decision with respect to penalty.³ Emphasizing that a determination by the Ethics Commission as to violation of the School Ethics Act was not reviewable by her, and that her jurisdiction was limited to reviewing the sanction to be imposed following a finding of a violation by the Commission, the Commissioner rejected the Commission's recommended sanction.

The Commissioner concluded that the recommended penalty was both excessive and insufficiently supported. While agreeing that the conduct that appellant was determined to have engaged in was reprehensible and cannot be countenanced by a public school district board of education member under any circumstances, the

² In accordance with N.J.S.A. 18A:12-29(c), the School Ethics Commission recommends a sanction based on established violations of the Act, and the Commissioner renders the final decision with respect to the penalty to be imposed.

³ Pursuant to N.J.S.A. 18A:12-29(d), determinations of the School Ethics Commission that the Act was violated may be appealed to the State Board of Education. The Commissioner of Education may only review and determine the appropriate penalty to be imposed when the Commission determines that the Act has been violated.

Commissioner concluded that the Commission failed to substantiate why its recommended penalty was so much more severe than that imposed in In the Matter of John Tally and Sharon Knight, Brick Township Board of Education, Ocean County, decided by the School Ethics Commission January 24, 2006 and by the Commissioner of Education March 1, 2006, affirmed by the State Board of Education November 1, 2006. The Commissioner instead imposed a three month penalty based on the conduct determined by the Commission. In addition, the Commissioner stayed implementation of the penalty pending a timely appeal by appellant to the State Board.

The appellant filed the instant appeal to the State Board, contending that the Commission lacked jurisdiction to overturn the decision of the ALJ, that he engaged in no action in violation of the School Ethics Act and that, in the event it is determined a violation of the School Ethics Act occurred, the three month penalty is excessive.

Appellant argues that the Commission did not provide a legally appropriate basis for rejecting the ALJ's decision with respect to the allegation that he threatened a member of the public at a meeting of the board of education because the Commission failed to demonstrate in its decision that the ALJ's credibility determinations were arbitrary, capricious or unreasonable. Thus, appellant argues that the decision of the Commission must be reversed and that of the ALJ adopted as the final decision of this matter. In addition, appellant contends that the Commission improperly extended the time to issue its final decision in this matter without a showing of extraordinary circumstances pursuant to N.J.A.C. 1:1-18.8(f), and, because of this, the decision of the ALJ became the final decision by operation of law. Appellant also argues that the evidence and testimony presented below do not support the Commission's

determination that he threatened a member of the public at a meeting of the Paterson Board of Education, and that the Commission's decision, as well as the excessive penalty imposed by the Commissioner, must be reversed by the State Board.

In response to these contentions, the Deputy Attorney General representing the Commission argues that, contrary to appellant's assertion, the Commission did not reject or modify findings of fact by the ALJ as to issues of credibility, but rather, determined that the weight of the testimony and evidence established that appellant threatened a member of the public with profanity at the April 27, 2005 meeting of the Paterson Board of Education. The DAG argues that, while the Commission relied upon the ALJ's findings of fact, it had a different opinion of the weight to be accorded the testimony based on immaterial inconsistencies in testimony of witnesses, and disagreed with conclusions of the ALJ with respect to whether particular witnesses had an interest in the outcome of the proceedings. These differences with respect to the weight to be accorded testimony, it is asserted, do not constitute an impermissible rejection of the ALJ's credibility determinations, but rather, reflect an appropriate assessment of the record and conclusions as to whether the established facts demonstrate by a preponderance of the credible evidence that appellant violated the School Ethics Act.

With respect to the assertion that the time to issue the Commission's decision was not properly extended, and that the ALJ's decision should be deemed the final decision in this matter, the DAG argues that both requests for an extension of time were properly submitted, and that the Chief Administrative Law Judge assessed and rejected appellant's arguments as to why the extensions should not be granted. The DAG also argues that the Chief ALJ's determination to reject appellant's arguments is not

reviewable by the State Board and must be upheld. Based on the foregoing, the DAG argues that appellant's request that the ALJ's decision be deemed the final decision in this matter must be rejected, and that the decision of the Commission should be affirmed by the State Board. Finally, the DAG argues that the penalty imposed by the Commissioner is appropriate given the established conduct of appellant and should be upheld by the State Board.

After a thorough review of the record on appeal, we affirm the decision of the School Ethics Commission that appellant violated N.J.S.A. 18A:12-24.1(e) by threatening a member of the public at a meeting of the Paterson Board of Education, but reject the determination of the Commissioner with respect to the appropriate penalty to be imposed.

Initially, we reject appellant's contention that the Commission failed to obtain appropriate extensions of time for issuing its decision. We have reviewed the arguments of the parties and conclude that Chief Administrative Law Judge Laura Sanders properly rejected appellant's arguments against granting the requested extensions of time in her July 12, 2007 letter in response to those contentions.

With respect to the Commission's determination that appellant violated the School Ethics Act by threatening a member of the public at a meeting of the Paterson Board of Education, we have thoroughly reviewed the arguments of the parties and the record on appeal, and affirm the determination of the Commission for the reasons set forth therein. In so holding, the State Board agrees that the Commission properly exercised its discretion when it reached a different conclusion than the ALJ with respect to the weight to be accorded testimony of the witnesses. The Commission's

determination was based on its assessment of the weight to be accorded to inconsistencies in witnesses' testimony, as well as its disagreement that certain witnesses had a vested interest in the outcome of the proceedings while others did not, and was properly within its authority under the Administrative Procedures Act.⁴

With respect to the appropriate penalty to be imposed based on the above finding of a violation of N.J.S.A. 18A:12-24.1(e), we reject the decision of the Commissioner and instead impose a penalty of a one year suspension of appellant from the Paterson Board of Education, effective immediately. In this regard, we agree with the Commission's conclusion that appellant's conduct is of such a serious and egregious nature as to justify imposition of a one year suspension.

The School Ethics Act was enacted to ensure that the conduct of members of local boards of education earns the respect and confidence of the people. N.J.A.C. 18A:12-22(a). The ability of members of the public to observe and appropriately participate when school district boards of education conduct business is essential to ensure such respect and confidence. School board members cannot be permitted to undertake personal actions that serve to dissuade the public from exercising its right to attend and participate in local board of education meetings meetings. In this case, appellant threatened a member of the public at a meeting of the Paterson Board of Education after he called for appellant's resignation from the board during the public portion of the meeting. ALJ's Decision, slip op. at 4. This action clearly had the

⁴ In reviewing this appeal, the State Board did not to consider appellant's assertion that the Chairperson of the School Ethics Commission has a personal vendetta against him. Appellant failed to seek to supplement the record on appeal with facts to support this alleged personal connection and vendetta pursuant to N.J.A.C. 6A:4-1.9(b), and thus there is no basis in the record on appeal to consider this contention when assessing the decisions below.

potential to compromise the public's respect and confidence in the Paterson Board of Education, and we conclude that a one year suspension is the appropriate penalty for such conduct.⁵

In sum, we affirm the decision of the School Ethics Commission that appellant violated the School Ethics Act, but reject the decision of the Commissioner with respect to the appropriate penalty, instead imposing a penalty of a one year suspension of appellant from the Paterson School District Board of Education.

Kathleen Dietz opposed.

March 19, 2008

Date of mailing _____

⁵ We note that, while the Commissioner imposed a two month suspension in this case in recognition of the penalty imposed in Tally and Knight supra, which involved a finding that the appellants engaged in conduct similar to that which occurred in this case, we do not consider this past precedent binding on all future determinations of penalty and have determined that the established conduct in this proceeding warrants a one year suspension of appellant from the Paterson Board of Education.