

FACTS

The Commission was able to discern the following facts on the basis of the pleadings, documents submitted and the testimony.

At all times relevant to this complaint, Michael Cuneo was the Business Administrator for the Hammonton Board of Education. Robert Capoferri was at all times relevant to this complaint the president of the Board. Michael Kopakowski was at all times relevant to this complaint the Superintendent of the Hammonton School District, but at the time of the hearing, he was serving as superintendent of another school district.

On or about June 19, 1999, the Hammonton referendum approved over \$33 million for an early childhood project and construction of a high school by September 2001. On or about July 3, 2001, Mr. Cuneo entered into an agreement with Mr. Capoferri that provided that Mr. Cuneo would receive additional compensation in the amount of \$10,000.00 for the school year 2000-01 and \$10,000.00 for the school year 2001-02. Mr. Cuneo testified that he actually negotiated the agreement with Board Finance Committee Chairman James MacLane. Superintendent Kopakowski also executed an agreement for extra compensation. It was identical except for the number of days that the agreement was in effect. On or about July 10, 2001, Mr. MacLane executed an invoice entitled "capital improvement charges for the year ending: Jun-01." This invoice authorized an inter-fund transfer from the bond referendum fund to the general fund in the amount of \$21,530.00. This represented in part the additional salary to Mr. Cuneo, \$20,000.00 plus \$1,530.00 (FICA). Mr. Cuneo testified that he was paid in one lump sum for 2000-01 and paid by separate checks in addition to his salary for the year 2001-02. He further testified that these checks to him were on the bill list for Board approval.

On or about July 13, 2001, a line item register report sets forth the transfer of \$21,530.00 from the capital account to an account called "Hammonton BOE – Custodian Account." The register report showing the line item is signed by Michael Cuneo, R.S.B.O., School Business Administrator and Robert Capoferri, Board President. It is dated July 12, 2001. This register report was not given to all of the Board members. The register remained on file in the Business Administrator's office.

On or about December 3, 2001, five months after the transfer of monies, the Board voted unanimously to approve the \$21,530.00 line item, along with numerous other line items without discussion on said line item.

On or about July 9, 2002, the members of the Board voted seven to four to retroactively ratify the two agreements. Mr. Capoferri was one of the votes in favor.

Board member John Rodio testified that he had no knowledge of the contract until he received the Board's July 9, 2002 Board agenda. However, three-term Board member David

Rizzotte testified that he was aware that Mr. Capoferri wanted Mr. Cuneo to coordinate the project and be compensated for the extra work. He understood that Mr. Capoferri wanted Mr. Cuneo to be at the project site, he believes because Mr. Capoferri did not agree with the Clerk of the Works that the Board hired. He was also aware that Mr. Capoferri had discussed in his presence that the Board would save money by not hiring a construction manager. He testified that the amount of money that Mr. Cuneo was to be paid was never discussed.

On or about July 11, 2002, the Board retroactively ratified a total of \$1,389,773.89 in change orders resulting in an extra \$989,719.89 in additional charges to the Board. Mr. Cuneo had authorized all of the change orders without prior Board approval or vote. Some Board members were unaware of the change orders prior to their authorization and completion. Board members John Rodio and Joseph Giraldo testified that they did not have prior notice of the change orders.

ANALYSIS

Complainants allege that Michael Cuneo's conduct constitutes a violation of N.J.S.A. 18A:12-24(a) and (c) of the School Ethics Act. Complainants allege that Mr. Cuneo withheld information from some of the Board members of the agreements to pay him extra compensation and accepted compensation that he knew or should have known was not approved by the Board. Complainants further allege, with regard to the change orders, that Mr. Cuneo authorized the change orders and allowed them to be completed without prior Board approval, did not advise some of the Board members of the change orders and knew or should have known that the change orders needed Board approval.

N.J.S.A. 18A:12-24(a) provides:

No school official or member of his immediate family shall have an interest in a business organization or engage in any business, transaction, or professional activity, which is in substantial conflict with the proper discharge of his duties in the public interest.

Complainants urge the Commission to find that Mr. Cuneo's acceptance of \$20,000 in extra compensation without the knowledge of some of the Board members was a business transaction that was in substantial conflict with the proper discharge of Mr. Cuneo's duties in the public interest. In response, Mr. Cuneo states that he was unaware that the \$20,000.00 in extra compensation was never formally presented to the Board and submits an affidavit from Board President Capoferri stating that it was Mr. Capoferri's fault that the agreement was not presented to the Board for a formal vote in open session on the July 3, 2001 agreements, but he was satisfied that every member of the Board knew exactly what was occurring and no one objected.

No complaint was made against Mr. Capoferri in this matter, so the only question is whether the July 3, 2001 agreement was a transaction that was in substantial conflict with Mr. Cuneo's duties in the public interest. The Commission addressed a similar question in Reggio and McHugh v. Randazzo and Stead, C24-99 (May 23, 2000). There, the Commission determined that a superintendent and business administrator had not taken any affirmative steps to use their official positions to secure unwarranted privileges for themselves in violation of N.J.S.A. 18A:12-24(b) when they served as Clerks of the Works in the district. The Commission noted in that case that administrators have served in the capacity of Clerks and Project Coordinators in other districts and said that it could not find that the position of Clerk of the Works might reasonably be expected to prejudice the administrators' independence of judgment in the exercise of their official duties. The Commission concluded that the positions were not in conflict.

The Commission notes that the situation in the present case is different because the Board never formally voted to approve the agreement for Mr. Cuneo's additional compensation to serve as a project coordinator. Nevertheless, the Commission cannot find the agreement to be a transaction that is in substantial conflict with the proper discharge of Mr. Cuneo's duties in the public interest. It appears from Mr. Rizzotte's testimony that some Board members were aware that Mr. Cuneo was at least proposed to the Board as the coordinator of the project for which he would receive extra compensation. It is clear that the terms of the agreement were not formally discussed by the Board, but the intent to save money by using the Board's administrators to coordinate the project rather than a construction manager was at least communicated to some Board members. This transaction was handled in a sloppy and careless manner. Both Board President Capoferri and the superintendent admit to having made errors in the handling of this matter and in not ensuring that the contract was brought before the Board for a formal vote. Indeed, the Commission is surprised that the District's audit did not find a deficiency in the way the transaction was handled. Nevertheless, the Commission is satisfied that Mr. Cuneo performed duties in addition to his regular duties as business administrator in order to receive the extra compensation pursuant to the agreement. Therefore, the Commission cannot find on the basis of these facts that Mr. Cuneo's agreement was a transaction in substantial conflict with his duties in the public interest and finds no probable cause to credit the allegation that Mr. Cuneo violated N.J.S.A. 18A:12-24(a).

Complainants next urge the Commission to find that, having accepted a contract for extra compensation, Mr. Cuneo acted in a matter in which he had a personal or financial involvement in violation of N.J.S.A. 18A:12-24(c) when he approved change orders without Board approval. Subsection (c) provides:

No school official shall act in his official capacity in any matter in which he, a member of his immediate family, or a business organization in which he holds an interest, has a direct or indirect financial involvement that might reasonably be expected to impair his objectivity or independence of judgment. No school official shall act in his official capacity in any matter where he or a member of his

immediate family has a personal involvement that is or creates some benefit to the school official or member of his immediate family.

Mr. Capoferri testified that the projects were on a very tight schedule for completion and that when the need for changes arose, they had to act quickly to ensure that the projects were completed on time. Clearly, it was an error to have to retroactively approve a million dollars in change orders, but the Commission cannot conclude on the basis of the facts before it that Mr. Cuneo's authorizing such change orders constituted acting in his official capacity in a matter in which he had a financial or personal involvement as set forth above. The agreement for Mr. Cuneo's services had already been made and his compensation was not set on a "per hours worked" basis. If so, perhaps the change orders would have resulted in more work for Mr. Cuneo and thereby the approval of such may have constituted acting in his official capacity in a matter in which he had a financial or personal involvement in violation of the Act. However, in the present case, Mr. Cuneo had negotiated a fee of \$10,000.00 per year for two years, regardless of the full number of hours that he would have to spend on the project.

The New Jersey Supreme Court, interpreting a provision in the Municipal Land Use Law similar to N.J.S.A. 18A:12-24(c) stated:

A conflicting interest arises when the public official has an interest not shared in common with the other members of the public. Another way of analyzing the issue is to understand '[t]here cannot be a conflict of interest where there do not exist, realistically, contradictory desires tugging the official in the opposite direction.' Wyzkowski v. Rizas, 132 N.J. 509, 524 (1993)(citations omitted).

In the present case, the Commission does not discern the contradictory desires tugging Mr. Cuneo in a direction opposite from the interest of the members of the public. He and the public wanted the project completed properly, on time and for the least cost. In order to complete the task, Board President Capoferri ordered him to assume extra duties for which he would be compensated. The Commission does not dispute that one million dollars in change orders constitutes a lot of change orders, but the testimony was unrefuted that the amount was within the 20% allowable under the bidding laws. It is clear that the Board has to approve all change orders under the bidding laws; however, so the Commission is referring the issue of whether the retroactive approval was sufficient to the Department of Education's Office of Compliance Investigation for whatever investigation it may deem appropriate. This question of whether any laws were violated in the way that the Board approved the change orders is not within the jurisdiction of the Commission.

Based on the foregoing, the Commission finds no probable cause to credit the allegation that Mr. Cuneo violated N.J.S.A. 18A:12-24(c) in connection with his authorization of the change orders.

DECISION

For the foregoing reasons, the Commission finds no probable cause to credit the allegations that Michael Cuneo violated N.J.S.A. 18A:12-24(a) and (c) of the School Ethics Act in connection with his agreement for additional compensation and his authorization of the change orders and dismisses the complaint against him. The Commission finds it curious that a similar complaint was not filed against Superintendent Kopakowski since he entered into the same agreement as Mr. Cuneo and has even greater responsibility for the items that are placed on the Board agenda. It is also curious that no complaint was filed against Mr. Capoferri who was Board President and manager of the project. Because the Commission can only determine whether a violation existed in the complaint before it, it finds no probable cause to credit the allegations against Mr. Cuneo.

This decision is a final decision of an administrative agency. Therefore, it is appealable only to the Superior Court--Appellate Division.

Paul C. Garbarini
Chairperson

Resolution Adopting Decision – C47-02

Whereas, the School Ethics Commission has considered the pleadings, documents and the testimony presented; and

Whereas, the Commission has found no probable cause to credit the allegation that Mr. Cuneo violated N.J.S.A. 18A:12-24(a) or (c) and dismissed the complaint against him; and

Whereas the Commission has reviewed a draft decision; and

Whereas, the Commission agrees with the draft decision;

Now Therefore Be It Resolved that the Commission hereby adopts the decision and directs its staff to notify all parties to this action of the Commission's decision herein.

Paul C. Garbarini, Chairperson

I hereby certify that the School
Ethics Commission adopted
this decision at its public meeting
on June 24, 2003.

Lisa James-Beavers
Executive Director