

Howard Schwartz, Esq. advised the Commission that he would be representing the respondents in this matter. He was advised that his time to file an answer would not begin to run until such time as he had received the more specific complaints the Commission had requested. Mr. Schwartz filed answers to the complaints on August 5, 2004 arguing that the appointment was ethical and legal. They urged the Commission to sanction the complainants for filing frivolous complaints.

The parties were invited to attend the Commission's meeting on October 26, 2004. Complainants Judith Amorosa and Karen Loessel testified on October 26, 2004 along with witness Roxanne Ciampi. Respondent Anthony Manochio appeared to testify with counsel, Howard Schwartz, Esq. The Commission also requested that Board Secretary John Damato, Esq. be present to testify. The Commission did not have sufficient members to constitute a quorum to render a decision at its November 23, 2004 meeting. At its public meeting of December 21, 2004, the Commission voted to find no probable cause to credit the allegations in the complaint. The Commission found that the complaints were not frivolous. The Commission adopted this decision at its meeting of February 7, 2005 after the January 25, 2005 meeting was canceled due to a snow storm.

FACTS

The Commission was able to discern the following facts based on the pleadings, documents submitted, testimony and its investigation.

At all times relevant to this complaint, the respondents were members of the Union Township Board of Education (Board). On May 19, 2004, Dominik Fargnoli resigned from the Board. After Mr. Fargnoli's resignation, Board Secretary John Damato called Board President Ronald Manzella who asked him to contact the Personnel Committee and have the members of that Committee conduct interviews to fill the vacancy. Mr. Damato contacted the Committee members and had the notice of vacancy posted on the Board website. According to the affidavit of the Information Technology Manager, she posted a notice on the Board web site on May 20, 2004 indicating that applications would be accepted from individuals who wish to fill the vacancy. The closing date for applications was May 26, 2004. The Personnel Committee of the Board assigned by Board President Ronald Manzella consisted of respondent Judith Axelrod, Board Vice President, as Chair, and respondents Steven Helmstetter and Anthony Manochio. On May 25, 2004, the Board posted a second notice on the web site indicating again that applications would be accepted and that a special meeting would be held to determine who would fill the vacancy on June 1, 2004. The notice said that applications had to be submitted on or before May 26, 2004. A notice was also posted on the township cable TV channel. Although testimony indicated past practice to the contrary, the notice was not posted in the local newspaper. Mr. Damato did not recall whether he had asked his secretary to post it in the local newspapers, but he denied that anyone asked him to refrain from posting it in that fashion. The Personnel Committee conducted interviews on May 27, 2004. Two people applied for the vacant seat, a former Union Township principal/educator and a former Board member who lost the April 2004 election, Francis (Ray) Perkins.

On Tuesday, June 1, 2004, the Board held a special meeting and the Committee announced the nomination of Mr. Perkins. At the June 1, 2004 meeting, Ms. Alexrod moved and Mr. Abraham seconded the motion to appoint Mr. Perkins to the Board to fill Mr. Fagnoli's seat. Board Member Mrs. Gaglione stated at the meeting that she found out that the Board was seeking a replacement for Mr. Fagnoli by reading an article in the *Union Leader* newspaper rather than from her fellow board members. She abstained from the vote on that basis. Two other members of the Board who said that they also were not consulted about the process, Ms. Lewis and Ms. Middlebrooks, chose not to cast a vote. Therefore, the motion passed with five ayes and one abstention. Mr. Perkins then joined the Board meeting.

In prior years, according to complainants and other Board members, when a vacancy occurred on the Board, the Board interviewed candidates at a public meeting and all members would participate. However, Mr. Manochio testified that, although the entire Board sat in on such interviews in 2003, in 2002, a committee interviewed the candidates and reported back to the Board. In filling the present vacancy, only three Board members participated in the interview process and made the recommendation. The interviews occurred out of the hearing of the public.

ANALYSIS

First, as a procedural matter, respondents contend that these three complaints should be dismissed as not being under oath as required by the Act. The Commission requires the initial complaint to be under oath when it is filed pursuant to N.J.S.A. 18A:12-29(a). Thereafter, if the complainants clarify the specific provisions of the Act that they are alleging to have been violated by the respondents or add new provisions, such amendments are not required to be placed under oath. Because the purpose of the amendments was to clarify the legal basis of their complaints and not add new factual allegations, the Commission did not require the complainants to notarize their amendments. The Commission has always taken the position that only factual allegations have to be under oath. Therefore, the Commission declines to dismiss the complaints on this basis.

The second procedural matter being raised by the respondents is that the time to decide these matters has exceeded the 90-day limitation for decisions on complaints alleging violations of the Code of Ethics set forth at N.J.S.A. 18A:12-29(b) of the Act as amended in 2002. Because each of the complaints was initially filed alleging violations of N.J.S.A. 18A:12-21 and 22 and violations of the Code of Ethics were alleged through amendments, the Commission determined that this matter was not subject to the 90-day limitation for decisions on cases filed solely under the Code of Ethics for School Board Members. Ms. Loessel also alleged a violation of N.J.S.A. 18A:12-24(b) of the conflicts of interest portion of the Act. The different treatment of complaints alleging only the Code of Ethics versus complaints alleging both Code of Ethics and other School Ethics Act violations is set forth in N.J.A.C. 6A:28-6.4 through 6.8. Therefore, the Commission declines to dismiss the complaints on this basis as well.

Regarding the substance of the complaints, complainants first allege that the respondents, by their conduct in connection with the appointment of Mr. Perkins to the vacancy, violated N.J.S.A. 18A:12-22(a), which sets forth:

In our representative form of government it is essential that the conduct of members of local boards of education and local school administrators hold the respect and confidence of the people. These board members and administrators must avoid conduct which is in violation of their public trust or which creates a justifiable impression among the public that such trust is being violated.

Complainants believe that the respondents acted deceitfully and thereby created a justifiable impression that the public trust is being violated. The School Ethics Commission has previously ruled that it cannot find a violation of the School Ethics Act based solely upon N.J.S.A. 18A:12-22. Nancy LoPresti v. Marlene Lindhardt-Mazer, SEC Docket #C08-01, (June 26, 2001). N.J.S.A. 18A:12-22 sets forth the Legislature's findings and declarations. The Commission frequently cites the section as guidance in interpreting the School Ethics Act. However, in so doing, the Commission has noted that the section does not set forth conduct that is prohibited under the Act. Such provisions are found in the Prohibited Acts section, N.J.S.A. 18A:12-24, and the Code of Ethics for School Board Members, N.J.S.A. 18A:12-24.1. The justifiable impression standard would not be sufficient notice to school officials as to what conduct violates the Act so the Commission has declined to base a violation on such a vague standard. The Commission sees no reason to alter this position. Therefore, the Commission finds no probable cause to credit the allegation that violated N.J.S.A. 18A:12-22(a).

Complainant Amorosa next alleges that the respondents violated N.J.S.A. 18A:12-24.1(a), which provides:

I will uphold and enforce all laws, rules and regulations of the State Board of Education and court orders pertaining to schools. Desired changes shall be brought about only through legal and ethical procedures.

Complainant Amorosa contends that, although the Board may have followed legal procedures, its procedures were not ethical because they did not advertise the vacancy in the two newspapers that are the legal papers and thereby did not allow other equally or more qualified citizens to apply nor did they include other Board members in the interview process. Complainant's argument is an attempt to expand the School Ethics Act to encompass conduct that is not a violation of a prohibited act under N.J.S.A. 18A:12-24 nor a violation of the Code of Ethics for School Board Members under N.J.S.A. 18A:12-24.1, but conduct that is unethical in the sense that it is improper or unscrupulous. The Commission cannot adopt this reasoning. While the Commission may agree that the Board's failure to follow procedures it had used in the past made it appear that the respondents were trying to do a favor for a former member of the Board,

there is no law or regulation that requires a Board to advertise a vacancy in the local newspapers or hold interviews in public. Therefore, the Commission cannot find that N.J.S.A. 18A:12-24.1(a) has been violated and the Commission finds no probable cause to credit the allegation that respondents violated N.J.S.A. 18A:12-24.1(a).

Complainants Amorosa and Fisher next allege that respondent violated N.J.S.A. 18A:12-24.1(c), which sets forth:

I will confine my board action to policy making, planning and appraisal, and I will help to frame policies and plans only after the board has consulted those who will be affected by them.

Complainants argue that the respondents did not consult with other Board members who were excluded from the interview process. They contend that respondents' conduct will affect the way the Board does business in the future and the way that the public deals with the Board. The Commission does not have information to indicate that respondents failed to confine their board action to policy making, planning and appraisal. There is no evidence that the respondents were acting outside of their designated authority. Rather, complainant is focusing on the second part of this provision arguing that the respondents failed to frame policies and plans only after the board has consulted with those who will be affected by them. Respondents were not in the process of framing policies and plans in the present case. They were choosing someone to appoint to a board vacancy when there are no laws or rules that govern precisely how to do so. The president chose to have a committee conduct the interviews. The vacancy was advertised and a former board member was chosen. The Commission cannot require that the entire Board participate in interviews to fill the vacancy when there is no legal requirement that they do so. Past practice does not necessarily create a legally binding obligation. Based on these facts, the Commission cannot find probable cause to credit the allegation that respondents' conduct violated N.J.S.A. 18A:12-24.1(c).

Further, Complainant Amorosa, along with Complainant Loessel, alleges that respondents conduct was in violation of N.J.S.A. 18A:12-24.1(e), which provides:

I will recognize that authority rests with the board of education and will make no personal promises nor take any private action that may compromise the board.

The respondents met as a committee and made a recommendation to the full Board. Thus, it appears that in making the recommendation for action by the Board, they recognized that authority rests with the Board. The complainants have not demonstrated that respondents made any personal promises in connection with the appointment of Mr. Perkins. Thus, the complainants are alleging that respondents took private action that may compromise the Board in not including the other board members in the interview process. Respondents were meeting as a Committee of the Board when they interviewed candidates to fill the vacancy. They were not taking private action, but acting as Board members. The action is not private merely because respondents did not hold the meeting

in public. Therefore, the Commission finds no probable cause to credit the allegation that respondents violated N.J.S.A. 18A:12-24.1(e).

Complainant Loessel additionally argues that respondents violated N.J.S.A. 18A:12-24(b), which prohibits a board member from using or attempting to use his official position to secure unwarranted privileges, advantages or employment for himself, members of his immediate family, or others. The complainant alleges that respondents used their positions to secure an unwarranted privilege or advantage for others, specifically Mr. Perkins. The Commission believes that the information before it shows that the respondents would not have been able to appoint Mr. Perkins had it not been for their positions on the Board. Therefore, the main question is whether Mr. Perkins obtained an “unwarranted privilege or advantage” from the respondents. The Commission notes that it was clear that Mr. Perkins was willing to serve on the Board since he had served on the Board in the past. He was also knowledgeable about the Board because he had served as a Board member in the past. The Commission cannot find on these facts, that Mr. Perkins was the recipient of an unwarranted privilege or advantage. The Commission therefore finds no probable cause to credit the allegations that respondents violated N.J.S.A. 18A:12-24(b).

Next, Ms. Loessel argues that respondents violated N.J.S.A. 18A:12-24.1(g), which sets forth:

I will hold confidential all matters pertaining to the schools which, if disclosed, would needlessly injure individuals or the schools. In all other matters, I will provide accurate information and, in concert with my fellow board members, interpret to the staff the aspirations of the community for its school.

Ms. Loessel argues that respondents did not act in concert with their fellow board members and convened the ad hoc committee to render a decision without knowledge of the full board. She continues that they tabled the vote when advised that one Board member did not even know that the process was taking place. The Commission understands the frustration of the complainant, but does not believe that this provision applies to these circumstances. There is no allegation that the respondents failed to hold a matter confidential or failed to provide accurate information. Rather, the complainant takes one small phrase of this provision, “in concert with my fellow board members” out of context to establish a violation. The Commission believes that the provision should be read as a whole and therefore it must find that the respondents did not act in concert with their fellow board members to interpret to the staff the aspirations of the community for its school. When read together, the Commission does not believe that this provision applies to the present circumstances. The Commission therefore finds no probable cause to credit the allegations that respondents violated N.J.S.A. 18A:12-24.1(g).

Complainant Diane Fisher additionally urges the Commission to find that respondents violated N.J.S.A. 18A:12-24.1(f) by surrendering their independent judgment to allow the manipulation of the system to engineer the return of Mr. Perkins to

the Board after he had been soundly defeated at the polls in April 2004. N.J.S.A. 18A:12-24.1(f) sets forth:

I will refuse to surrender my independent judgment to special interest or partisan political groups or to use the schools for personal gain or the gain of friends.

Because no special interest or partisan political group has been alleged to be involved in the process of filling the vacancy, Ms. Fisher appears to contend that the respondents used the schools for the gain of friends. She argues that respondents' actions are evidence of behind the scenes plotting and planning to create a replacement "process" that could only end with this pre-determined outcome. She adds that the haste with which the search was conducted, when the State allows 65 days to name a replacement, is particularly suspect.

While the Commission may agree that the process used to fill the vacancy on the Board is "suspect," there is insufficient information on which to base a finding that the respondents used this particular process to aid a former Board member. As noted by Ms. Fisher, the only law governing this matter is that the Board has 65 days to choose a replacement. The law is silent as to how to go about filling the vacancy. Thus, the Commission is reluctant to say that because respondents did not follow past practice, they violated the Code of Ethics for School Board Members. For the foregoing reasons, the Commission finds no probable cause to credit the allegations that respondents violated N.J.S.A. 18A:12-24.1(f).

DECISION

For the foregoing reasons, the School Ethics Commission finds no probable cause and dismisses the complaint against the respondents

Respondents have asked that the Commission find that the complaint was frivolous and impose sanctions pursuant to N.J.S.A. 18A:12-29(e). The Act sets forth the same standard as in civil complaints set forth at N.J.S.A. 2A:15-59.1, which is:

In order to find that a complaint, counterclaim, cross-claim or defense of the nonprevailing party was frivolous, the judge shall find on the basis of the pleadings, discovery, or the evidence presented that either:

- 1) The complaint...was commenced, used or continued in bad faith, solely for the purpose of harassment, delay or malicious injury; or
- 2) The nonprevailing party knew, or should have known, that the complaint...was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law.

Respondents have not demonstrated that these complaints were filed in bad faith. Nor has it been shown that the complaints were filed for the purpose of harassment, delay or malicious injury. Regarding the second standard, the Commission cannot say that the complainants knew or should have known that their complaints were without any reasonable basis in law and could not be supported by a good faith argument for an extension, modification or reversal of existing law. The Commission believes that the speed with which the Board acted, coupled with the decision to appoint a former Board member who had just been defeated in the April 2004 election to the vacancy, were valid reasons to question the process. However, as previously set forth, the Commission cannot base a finding of a violation on the standard that a justifiable impression was created that the public trust had been violated. Complainants knew that the process followed to appoint the former board member to fill a vacancy was not the procedure used in prior years and it appeared to them that the respondents changed the procedure in order to give their former colleague another chance to serve on the Board after he lost the election. It was not unreasonable to believe that such conduct was in violation of the School Ethics Act, although the Commission had to ultimately conclude that it was not.

For the foregoing reasons, the Commission does not find the complaint to be frivolous and declines to impose sanctions.

This decision constitutes final agency action and thus is directly appealable to the Appellate Division of the Superior Court pursuant to New Jersey Court Rule 2:2-3(a).

Paul C. Garbarini
Chairperson

Resolution Adopting Decision – C40/C41/C42-04

Whereas, the School Ethics Commission has considered the pleadings filed by the parties and the documents submitted in support thereof; and

Whereas, at its meeting of December 21, 2004, the Commission found no probable cause to credit the allegations that Respondents violated the School Ethics Act, N.J.S.A. 18A:12-21 et seq. and therefore dismissed the charges against them; and

Whereas, the Commission requested that its staff prepare a decision consistent with the aforementioned conclusion; and

Whereas, the Commission has reviewed the decision and agrees with the decision;

Now Therefore Be It Resolved that the Commission hereby adopts the proposed decision referenced as its decision in this matter on February 7, 2005 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 this decision was adopted by the School Ethics Commission at its public meeting on February 7, 2005.

Lisa James-Beavers
Executive Director