

Commission did not find any evidence that respondent exerted any pressure on any administrator in connection with the hiring of his brother or the subsequent request to have his vote changed to an abstention.

The Commission found that the material facts were not in dispute regarding the conduct on which it found probable cause and therefore, invited respondent to provide a written submission within 30 days from receipt of the decision setting forth why Mr. Garcia should not be found in violation of N.J.S.A. 18A:12-24(c) of the Act. The decision was sent on July 17, 2006.

Respondent submitted a timely response through his attorney, David Rubin, on August 10, 2006. Therein, he argues that there should be no distinction drawn between a board member changing a vote publicly during a meeting and waiting until after the meeting and leaving a note to that effect. In addition, Respondent argues that the meeting had not yet concluded when he left the note because the Board was still in closed session deliberating over a controversial appointment. Therefore, he argues that it is unreasonable to conclude on these facts that respondent acted unethically in connection with the vote on his brother. With regard to the Fitz Media contract, respondent argues that he is not employed by Freeholder Fitzgibbons, but by the county, which assigned him to work with the Freeholder closest to his residence. Therefore, he argues this charge should either be dismissed or, if the Commission's finding is based on a direct employment relationship, he should be entitled to a plenary hearing on the issue of whether such a relationship exists. Further, he argues that a material issue of fact exists regarding his contention that he received legal advice that he could vote on the Fitz Media contract.

FACTS

The Commission was able to discern the following facts based on the pleadings and documents submitted. The Commission found these facts to be undisputed.

At all times relevant to this complaint, respondent has served on the Board. Also, at all times relevant to this complaint, respondent has been employed by Hudson County. He is assigned as an aide to Freeholder Maurice Fitzgibbons, for which he receives a stipend.

On August 30, 2005, Mr. Garcia voted to appoint his brother to a paid position with the Board. His brother had been employed as a custodian in the Hoboken Public Schools. He applied for a position posted in the maintenance department. The Director of Facilities, Tim Calligy, interviewed him and recommended to the superintendent that he be transferred to the position of maintenance employee. The superintendent made the recommendation to the Board.

The hiring of Mr. Garcia's brother was one item in a 55-item consent agenda on which he voted. He set forth that he did not realize at the time of voting that his brother's appointment was in the agenda. Later, however, when he realized that his brother's appointment had been on the agenda, before leaving the meeting, he left a written request for the Acting Board Secretary to change his vote to show an abstention. The meeting had not yet concluded when he did so. Rather, the Board was still in Executive Session. Mr. Calligy researched the subject of changing

a vote and determined that it had to be done in a public meeting. The matter was addressed at the next public meeting and Mr. Garcia was allowed to change his vote.

Also, on August 30, 2005, Mr. Garcia voted in favor of a contract with Fitz Media, Inc. which is local public relations firm owned by Maurice Fitzgibbons. Mr. Fitzgibbons is an elected Freeholder in Hudson County. Mr. Garcia has been an employee of the County of Hudson since before he joined the Board in 2002. More particularly, he has served as an Aide to Freeholder Fitzgibbons since 1998, having been assigned to him based on his residence. He also serves as Director of Health and Human Services for the City of Hoboken.

ANALYSIS

The Commission found probable cause to credit the allegation that Mr. Garcia's conduct violated N.J.S.A. 18A:12-24(c), which sets forth:

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.

The Commission set forth in its probable cause finding that, although Mr. Garcia's brother is not a member of his immediate family pursuant to N.J.S.A. 18A:12-23, he is a "relative" under this provision, the definition of which includes siblings. The Commission has previously held that a board member has a personal involvement in a matter concerning his relative such that his or her objectivity might reasonably be expected to impair his or her objectivity or independence of judgment. See In the Matter of Russo and Scarano, C12-97, (January 27, 1998); Commissioner Decision #22-1/98, (April 16, 1998). N.J.S.A. 18A:12-24(c) requires a showing of "some benefit to the school official." The Commission finds that there is an intrinsic benefit to a school official whose brother is appointed to a position within the district such that he should recuse himself from voting.

Respondent argues in his submission in response to the probable cause finding that, since the Commission accepted that he inadvertently voted for his brother's appointment, there should be no distinction between whether he corrected his vote during the public meeting or left a note asking for his vote to be changed. He refers to it as "a distinction without difference." The Commission disagrees. As the Commission set forth in the probable cause decision, regardless of respondent's claim that there were distractions at the meeting that led to his inadvertently voting for his brother's employment, it was his duty as a board member to know the items on the agenda and recuse himself from voting on an issue in which he has a conflict at the time of the vote, or to immediately correct the mistake during the open public meeting. The difference is that if the vote is corrected immediately, the public is made aware of the conflict and the change in the vote, which the Open Public Meetings Act requires for accurate minutes. See N.J.S.A. 10:4-14. Therefore, a vote occurring during a public meeting cannot be changed outside of a

public meeting. Mr. Calligy correctly guided respondent in the correct protocol for changing his vote in the next public meeting. The fact that the meeting had not yet concluded does not change the fact that the vote was not changed during the public session at which it was made. Therefore, the Commission concludes that respondent acted in his official capacity in a matter in which he had a personal involvement in violation of N.J.S.A. 18A:12-24(c).

Last, the Commission found probable cause to credit the allegation that respondent violated N.J.S.A. 18A:12-24(c), when he voted in favor of the Board's contract with Fitz Media, Inc. a corporation owned by Freeholder Fitzgibbons. In his response, respondent answered that Board Counsel told him "his status as a County employee does not preclude him from voting on a Board contract with a company owned by an elected County Freeholder, since the respondent is not employed by that Freeholder or his company." However, a Personnel Officer at the County of Hudson provided a written verification that Respondent has been employed with the County of Hudson, Department of Freeholders as an Aide to Freeholder Maurice Fitzgibbons from November 9, 1998 to the present. Further, Board Counsel Matthew Giacobbe certified that respondent never sought any type of legal guidance from him regarding this matter. Mr. Giacobbe admits that it is possible that Respondent sought advice from one of the other Special Counsels for the Board; albeit Respondent referenced Board Counsel, not Special Counsel. Respondent argues that this discrepancy creates a genuine issue of material fact that should require a hearing before the Office of Administrative Law. The Commission disagrees because, even if it was unrefuted that Respondent received such advice, it would only mitigate against the penalty, but not negate the fact that the violation occurred.

The Commission concludes that, although Respondent was at all times an employee of Hudson County and not a direct employee of Freeholder Fitzgibbons, respondent nonetheless had an indirect financial involvement with Freeholder Fitzgibbons, having worked as his aide since 1998. That involvement might reasonably be expected to impair his objectivity when voting for the Board to contract with the Freeholder's company. Therefore, the Commission finds that respondent violated N.J.S.A. 18A:12-24(c) when he voted in favor of the contract with Fitz Media, Inc.

For the foregoing reasons, the Commission finds that Mr. Garcia violated N.J.S.A. 18A:12-24(c) when he voted for his brother's appointment and voted for Fitz Media, Inc. to receive a contract with the Board.

PENALTY

The Commission notes that there are two separate violations of N.J.S.A. 18A:12-24(c) in the present case. Clearly, by itself, the vote on respondent's brother would warrant nothing more than a reprimand. See I/M/O Dino Pettinelli, Commissioner's Decision, Agency Docket No. 266-7/04 (September 8, 2004). However, when coupled with the vote on the Fitz Media contract, the Commission believes that a censure would be more appropriate. Two factors mitigate against such a penalty, though. First, is the fact that the votes occurred at the same time leaving no additional time for reflection or consideration of whether one or both may have been in error before the next. Second, is that the Commission could not determine as fact that respondent did not receive legal advice that he could vote on the Fitz Media contract. The Commission would have to transmit this matter to the Office of Administrative Law for such a determination and it declines to use the OAL for such a limited purpose. Therefore, the Commission recommends that the Commissioner of Education impose a sanction of reprimand.

This decision has been adopted by a formal resolution of the School Ethics Commission. This matter shall now be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction only, pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed to the parties, any party may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission and all other parties.

Robert Bender
Acting Chairperson

Resolution Adopting Decision – C41-05

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

Whereas, prior to its meeting of October 24, 2006, the Commission read the written submission of the respondent and reviewed its probable cause decision; and

Whereas, at its meeting of October 24, 2006, the Commission found that Carmelo Garcia violated N.J.S.A. 18A:12-24(c) of the School Ethics Act and recommended that the Commissioner of Education impose a sanction of reprimand*; and

Whereas, the Commission reviewed the draft decision recommending a reprimand against Mr. Garcia and agrees with the decision;

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

Robert W. Bender, Acting Chairperson

I hereby certify that this Resolution
was duly adopted by the School
Ethics Commission at its public meeting
on October 24, 2006.

Lisa James-Beavers
Executive Director

* Chairperson Paul Garbarini and Commissioner Robert Copeland abstained from this decision.