

IN THE MATTER	:	BEFORE THE SCHOOL
	:	ETHICS COMMISSION
OF	:	
	:	Docket No.: C45-06
MARLENE POLINIK,	:	
WAYNE TWP. BOARD OF EDUCATION :	:	FINAL DECISION
PASSAIC COUNTY	:	
	:	

PROCEDURAL HISTORY

This matter arises from a complaint filed on August 18, 2006 by Theresa Curreri, Anthony D’Appolito, Dawn Makowski and Donald Pavlak, all members of the Wayne Board of Education (Board), alleging that Ms. Polinik, also a member of the Board, violated the School Ethics Act (Act), N.J.S.A. 18A:12-21 et seq. as follows:

1. Complainants allege that the respondent violated N.J.S.A. 18A:12-24(c) when she participated in discussions and negotiations of contracts and salary guides that are governed by the New Jersey Education Association (NJEA) when her husband was a member of the NJEA.
2. Complainants allege that the respondent violated N.J.S.A. 18A:12-24.1(a), (c), (d), (g), (i) and (j) when, at the January 19, 2006 public meeting of the Board, she:
 - a. Falsely accused the administration and other Board members of covering up information regarding a staff member transfer;
 - b. Made a motion to have a student’s grade changed from a B to an A;
 - c. Released executive session discussions related to the grade change;
 - d. Accused Board members of not taking their job seriously; and
 - e. Left an executive session screaming and opening the door, which allowed the public and the press to hear the commotion.
3. Complainants allege that the respondent violated N.J.S.A. 18A:12-24.1(c), (d), (e), (g), (i) and (j) when, at a meeting of the Board, during a budget presentation by the school nurse, she stated that there were four students who had positive steroid test results, two of whom were wrestlers and two who were football players.
4. Complainants allege that the respondent violated N.J.S.A. 18A:12-24(c), and N.J.S.A. 18A:12-24.1(c), (d) and (e) when, at the December 6, 2005 School Resource Committee (SRC) meeting, she asked the teachers if they believed that if the Board were to offer full family health benefits to prospective employees it would help in that it would be beneficial in the hiring procedures.
5. Complainants allege that the respondent violated N.J.S.A. 18A:12-24.1(e) and (g) when, at the March 31, 2006 executive session of the Board, she stormed out of the meeting and disclosed executive session discussions to a member of the press.
6. Complainants allege that the respondent violated N.J.S.A. 18A:12-24.1(a), (b), (c) and (e) when, in relation to the February 2006 Board retreat, she told the Board that she did not believe that the New Jersey School Board (NJSBA) representative

who had conducted most of the Board retreats was reliable or trustworthy, and requested that an additional NJSBA representative attend the retreat.

7. Complainants allege that the respondent violated N.J.S.A. 18A:12-24.1(c), (d), (e), (i) and (j) when she did her own investigation with the soil conservation committee.
8. Complainants allege that the respondent violated N.J.S.A. 18A:12-24.1(c), (d), (e), (h) and (i) in relation to her review of resumes on July 28, 2006.

After the Commission, for good cause shown, granted an extension of the time to file a response, the respondent submitted a Motion to Dismiss by way of counsel, Marc H. Zitomer, Esq. The Commission considered the Motion to Dismiss at its December 19, 2006 meeting and voted to deny the Motion to Dismiss. The Commission reasoned that N.J.A.C. 6A:28-6.5(e) allows a respondent to file a Motion to Dismiss in lieu of an answer, but only when the complaint alleges solely a violation of N.J.S.A. 18A:12-24.1, the Code of Ethics for School Board Members. This complaint alleges violations of both N.J.S.A. 18A:12-24, Prohibited Acts and N.J.S.A. 18A:12-24.1, the Code of Ethics for School Board Members. Complaints alleging a violation of both Prohibited Acts and the Code of Ethics for School Board Members are governed by N.J.A.C. 6A:28-6.4, which does not allow for the filing of a Motion to Dismiss in lieu of an answer. Therefore, the Commission denied the Motion to Dismiss.

Through her counsel, and after the granting of an extension, for good cause shown, of the time to file, the respondent filed an answer wherein she denied that she violated the Act and responded as follows:

1. The respondent admitted that she participated in executive session discussions regarding the local education association contract in or about November, 2005, which was approximately four months after the Memorandum of Agreement (MOA) had been signed. She maintains that this allegation fails to state a violation of the Act.
2. The respondent denied that she violated the Act in relation to the January 19, 2006 public meeting of the Board and:
 - a. She admitted that she stated that the staff transfer process was flawed.
 - b. She admitted that she made a motion to have a student's grade changed from a B to an A because the administration and the Board disregarded its own policy on grade changing.
 - c. She noted that she did not attend the executive session in question and, therefore, could not have released executive session information.
 - d. She denied that she accused the Board of not taking their jobs seriously; rather she stated that the Board "rubber stamps" administrative decisions.
 - e. She admitted that she left an executive session and noted that she left because complainant, Anthony D'Appolito, was screaming at her and she was frightened.
3. The respondent certified that she was at a high school presentation when an administrator informed her that there were four positive steroid drug tests.

She admitted that, in the context of budget discussions, during a Board meeting the following month, she asked the school nurse if it was true that there were four positive drug steroid tests, two coming from students who were wrestlers and two who were football players.

4. The respondent admitted that at a December 6, 2005 meeting of the SRC, she asked two high school principals if they believed that offering full family health benefits to new hires would be beneficial in hiring procedures. She maintained that this was an ongoing concern of the Board for many years.
5. The respondent admitted that she left the March 21, 2006 executive session because she was frightened for her own safety. She maintained that complainant, D'Appolito, was so loud that reporters, who were waiting outside, heard him yelling. She denied that she divulged any executive session discussions to the reporters. She certified that the article that was subsequently written accurately quoted her regarding her opinion on the budget.
6. The respondent admitted that she stated that the NJSBA representative was partial to the administration. She maintained that another Board member suggested that the Board have an additional NJSBA representative at the retreat.
7. The respondent denied that she conducted her own investigation with the soil conservation committee. She admitted that the director of the soil conservation committee provided her with information regarding an ongoing environmental problem.
8. The respondent admitted that she went to the Board office on July 28, 2006 to review the resumes of the candidates who applied for a vacant position. She noted that none of the complainants was present at the Board office on the day in question.

The respondent also asserted that the complaint failed to state a claim upon which relief may be granted. She also maintained that counts three, six and seven failed to state the date when the alleged violations took place and that those counts should be dismissed as time-barred. She asked the Commission to find that the complaint was frivolous and to sanction the complainants pursuant to N.J.S.A. 18A:12-29(e).

At its February 27, 2007 meeting, the Commission took testimony from complainants Theresa Curreri and Anthony D'Appolito, represented by Toni Damiano, Esq., and their witnesses, who were subpoenaed, Stephen Fogarty, Esq., Maria Nuccetelli, and Karinne Herschaft. The Commission also took testimony from the respondent, represented by Marc Zitomer, Esq., and Nathanya Simon, Esq., and respondent's witnesses Jane Hutchison and Cynthia Radina. After the testimony, the Commission notified both parties that they should submit simultaneous closing statements. At its meeting of April 24, 2007, after reviewing the parties closing statements, the School Ethics Commission found probable cause to credit the allegations in count seven that the respondent violated N.J.S.A. 18A:12-24.1(c), (d), (e) and (j) of the Code of Ethics for School Board Members subject to receipt of documentation establishing the exact date(s) upon which the allegation is based. The Commission also

voted to find probable cause to credit the allegations of count eight that the respondent violated N.J.S.A. 18A:12-24.1(c), (d), (e) and (i) of the Code of Ethics for School Board Members in relation to her review of resumes on July 28, 2006. The Commission further voted to find no probable cause to credit the allegations of counts one through six.

On April 26, 2007, through correspondence to the complainant, the Commission requested verification of the date(s) of the occurrence(s) upon which the allegations in count seven are based as required pursuant to N.J.A.C. 6A:28-6.3. On May 3, 2007, the Commission received documentation from the complainants which consisted of minutes from the Board's September 28, 2005 special meeting.

At its May 22, 2007 meeting, the Commission considered the complainants' documentation and took note that the minutes did not provide any documentation regarding a date as to when the respondent conducted her alleged investigation with the soil conservation committee. Furthermore, the Commission noted that the Board attorney testified that he believed that the incident took place in the summer of 2005, which, if true, would render count seven time-barred. Upon a thorough review of the September 28, 2005 minutes, the Commission determined that this documentation provided by the complainants failed to provide verification of the date(s) of the occurrence(s) upon which the allegations in count seven are based. Therefore, at its May 22, 2007 meeting, the Commission voted to dismiss allegation seven for failure to comply with N.J.A.C. 6A:28-6.3.

Also, at its May 22, 2007 meeting, the Commission voted to adopt its probable cause decision. In its decision, the Commission found that the material facts were not in dispute with respect to the issue upon which it found probable cause and, therefore, the Commission advised the respondent that it would decide the matter on the basis of a written submission. The Commission invited the respondent to provide a written submission within 30 days of the date of the probable cause decision and set forth why Marlene Polinik should not be found in violation of N.J.S.A. 18A:12-24.1(c), (d), (e) and (i) when she attempted to review resumes in the Board office on July 28, 2006 as set forth in count eight. The respondent was also told that her written submission should include her position on an appropriate sanction should the Commission determine that the Act was violated. Through her attorney, the respondent filed a timely response arguing that count eight of the complaint should be dismissed in its entirety, with prejudice.

At its September 25, 2007 meeting, the Commission considered the respondent's submission in reply to its probable cause determination and voted to find that the respondent violated N.J.S.A. 18A:12-24.1(c), (d), (e) and (i) and to recommend a penalty of censure to the Commissioner of Education. At its December 18, 2007 meeting the Commission reconsidered its prior determination made at its September meeting. Upon reconsideration, the Commission found that the respondent violated N.J.S.A. 18A:12-24.1(c) and dismissed the allegations that the respondent violated N.J.S.A. 18A:12-24.1(d), (e) and (i). In light of this finding, the Commission tabled the matter at its December 18, 2007 meeting in order to review its penalty determination. At its January 22, 2008 meeting, the Commission voted to recommend to the Commissioner of

Education a penalty of censure. The Commission also adopted this decision at January 22, 2008 meeting.

FACTUAL FINDINGS

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

1. At all times relevant to this complaint, the complainants and the respondent were members of the Board.
2. On July 28, 2006, the respondent and fellow Board member, Jane Hutchison, went to the Board office, without prior notification to the administration, for the purpose of reviewing the resumes of candidates that had applied for an open position.
3. Prior to July 28, 2006, the superintendent had not made any recommendations to the Board regarding a final candidate. The superintendent provided the Board with a memorandum on July 21, 2006 wherein she indicated that a preliminary review of the candidates had been completed, she would probably recommend a candidate at the August 24, 2006 Board meeting and that the interview would take place on August 17, 2006.
3. The respondent believed on July 28, 2006 that the superintendent had finalized her recommendation for the Board's vote because one final candidate would be presented to the Board for a "meet and greet" on August 17, 2006.
4. While there was inconsistent testimony regarding whether there was an established process for the Board's review of candidate's resumes, the Commission notes that the August 17, 2006 Board agenda contained an agenda item for the development of a process to review the resumes of candidates. Therefore, the Commission concludes that there was no established process for the Boards' review of resumes as of July 28, 2006 when the respondent went to the Board office to review the resumes.
5. The Superintendent, the Director of the Human Resource Department and the Assistant Superintendent for Administration and Supervision were not in the office on July 28, 2006. The respondent was not aware that those administrators were out of the office at that time when she went to the Board office. The respondent went directly to the office of Cindy Radina, the Assistant Superintendent for Curriculum and Instruction while Ms. Hutchison waited for her in the Personnel Office. Ms. Radina said that she would call the superintendent and asked them to meet her in the Personnel Office.
6. The respondent went to the Personnel Office and told the secretary in the Personnel Office that she and Ms. Hutchison were there to review resumes and the personnel secretary gave her some resumes to review. Ms. Radina then joined the respondent and Ms. Hutchison.

7. The respondent asked the personnel secretary where the rest of the candidates' resumes were, and the secretary informed the respondent that they were in the locked office of the Assistant Superintendent for Administration and Supervision who was not in the office at the time.
8. The respondent asked the secretary if the secretary had a key. The secretary said she did not have a key, but that a custodian might have a key.
9. The respondent found the custodians eating lunch and they informed her that they had a key. The respondent then went to Ms. Radina to inform her that the custodians had a key to the office. Ms. Radina told the respondent that she was not comfortable going into a locked office.
10. The personnel secretary felt pressured by the demands made by the respondent and Ms. Hutchinson and was grateful that Ms. Randina came into the office to intervene and handle their demands. The personnel secretary was very upset because the other secretaries were out and the personnel secretary was multi-tasking.
11. Board President, Karinne Herschaft was in the Board office at the time, and the respondent, Ms. Hutchinson and Ms. Herschaft went into a conference room to speak. The heated argument which ensued between Ms. Herschaft, Ms. Hutchinson and the respondent created a tense and disturbing environment in the office.
12. Ms. Herschaft, the respondent and Ms. Radina all spoke with the superintendent on the phone. The superintendent suggested that they speak with the Board attorney. The respondent, Ms. Hutchinson and Ms. Herschaft spoke with the Board attorney who informed them that they could not go into a locked office and that in the future they should give 24 hours notice prior to reviewing candidates' resumes.

ANALYSIS

The Commission found probable cause to credit the allegation that the respondent violated N.J.S.A. 18A:12-24.1(c) in relation to her review of resumes on July 28, 2006. In finding probable cause that the respondent failed to confine her board action to policy making, planning and appraisal, the Commission reasoned that the respondent went to the Board office without prior notification to the administration and persisted in her attempt to review all of the resumes even though she had found out that most of the administrators were not in the office. (Commission's probable cause decision at page 17) In the respondent's submission, she argues that her "actions were directly related to "appraising" the candidates who applied for the position..." (Respondent's submission at page 5) The respondent further argues that it was clear that there was no process in place for Board members to review the resumes; that Ms. Hutchison testified that, on a prior occasion, she went to the Board office without an appointment to review resumes; the respondent testified that she had previously gone to the Board office to review resumes only to find that the resumes were shredded; and the Board attorney had informed them that it was their right as board members to review candidates' resumes. Thus, based on

the foregoing, the respondent urges the Commission to find that she did not violate N.J.S.A. 18A:12-24.1(c).

The question before the Commission is whether the respondent failed to confine her board action to policy making, planning and appraisal. The Commission must first determine if the respondent's action in attempting to review the resumes was "board action." The Commission notes that when the respondent went to the Board office she was accompanied by another Board member and she went as a Board member to review resumes of candidates that had applied for an open position. The respondent did not go to the Board office as a community member or a parent; she went as a Board member on Board business related to the hiring of personnel. Therefore, the Commission finds that the respondent took "board action" when she went to the Board office to review resumes.

The Commission must next determine if the respondent's board action went beyond policy making, planning and appraisal. The Commission agrees with the respondent, that the purpose of her being there was to appraise the resumes of the candidates who had applied for the open position. However, the respondent went beyond appraisal of the candidate's resumes when, after reviewing the resumes that were given to her by the personnel secretary she took several steps to locate the resumes. First she asked the secretary where the other resumes were. Then, upon finding that the resumes were in a locked office, she asked the secretary if the secretary had a key. The secretary informed her that a custodian had a key. Then the respondent searched for the custodians and found them eating lunch. Then she located a custodian who had the key. While ultimately, the locked door was not opened because of the reluctance of Ms. Randina to open the locked office, the respondent's actions in attempting to locate a key to open a locked office were not confined to the appraisal of the resumes. Thus, even accepting the respondent's argument that there was no process in place for the Board's review of resumes, the Commission finds that the respondent's actions, as noted, went beyond her Board duty to appraise or review the resumes in violation of N.J.S.A. 18A:12-24.1(c).

The Commission also found probable cause to credit the allegation that the respondent violated N.J.S.A. 18A:12-24.1(d) in relation to her review of resumes on July 28, 2007. The Commission reasoned that the respondent administered the schools when she questioned the secretary regarding the whereabouts of the additional resumes and when she attempted to locate a key to open the locked office. (Commission's probable cause decision at page 17) In her submission, the respondent argues that she did not make any demands on the secretary as to the additional locked resumes, that she did not direct any custodian to unlock the door for her and she worked through Ms. Radina to obtain the resumes and review them. (Respondent's submission at pages 7-9) In her submission, the respondent cites I/M/O Fisher, C30-03 (February 24, 2004) to argue that her "conduct pales in comparison to the conduct of Mr. Fisher..." (Respondent's submission page 8) In Fisher, the Commission found that a board member did not violate N.J.S.A. 18A:12-24.1(d) when he asked a district employee to obtain reports regarding the 2003-04 budget and, when the employee did not send him the reports, he spoke with her at home and engaged in a heated conversation with the employee. The respondent also cites I/M/O Paul Schaefer, C03/C04/C06/C07/C12-03 (September 23, 2003) (Board

member administered the schools when he terminated the school's Chief Academic Officer.) and I/M/O William Lahn, C25-05 (December 20, 2005) (Board member administered the schools when he insisted upon receiving SAT reports from the guidance secretary resulting in a reprimand of the secretary and when he instructed district employees to provide more supervision in the boys locker room) to support the contention that her conduct did not rise to the level of administering the schools. The respondent urges the Commission to find that she did not violate N.J.S.A. 18A:12-24.1(d).

The question before the Commission is whether the respondent's conduct rose to the level of administering the schools in violation of N.J.S.A. 18A:12-24.1(d). The facts establish that, in the respondent's interaction with the personnel secretary, she did not instruct the secretary regarding her job duties. Instead, she told the secretary that she wanted to review the resumes. The facts also establish that, in the respondent's interaction with the custodians, she did not instruct them regarding their job duties. Instead she found out whether or not they had a key. Finally, the facts establish that the respondent went through Ms. Randina in her attempts to review the resumes. The complainant has provided no evidence to establish that the respondent put herself in the place of an administrator and instructed district employees regarding their job duties as did the board members in Schader and Lahn. Therefore, the Commission finds that the respondent did not violate N.J.S.A. 18A:12-24.1(d) and dismisses that allegation.

The Commission also found probable cause to credit the allegation that the respondent violated N.J.S.A. 18A:12-24.1(e) in her relation to the review of resumes. In its probable cause determination, the Commission reasoned that when the respondent attempted to have the locked office door opened, she took private action that went beyond the scope of Board action. (Commission's probable cause decision at pages 17-19) In her submission, the respondent denies that she attempted to open a locked office. (Respondent's submission page 9) The respondent argues that she did not take private action, but "...went to the Board office in good faith with the sole purpose of reviewing resumes for a soon to be filled administrative position." (Respondent's submission page 10) She also maintains that there was no evidence to show that her conduct compromised the Board. (Respondent's submission page 10)

In determining whether the respondent violated N.J.S.A. 18A:12-24.1(e), the Commission must first determine if the respondent took private action when she went to the Board office to review the resumes. As noted above, the Commission found that the respondent went beyond her Board member duties of appraisal and review of resumes. At that point, her action became private action because it was action that went beyond the scope of the duties and responsibilities of a board member. The Commission must next determine if the respondent's action could in any way compromise the Board. The Commission agrees with the respondent that the complainants provided no evidence to show how the respondent's private action may have compromised the Board. Absent such evidence, the Commission cannot find that the respondent violated N.J.S.A. 18A:12-24.1(e). Therefore, the Commission finds that the respondent did not violate N.J.S.A. 18A:12-24.1(e) and dismisses the allegation.

Finally, the Commission found probable cause to credit the allegation that the respondent violated N.J.S.A. 18A:12-24.1(i) because both the personnel secretary and the superintendent's secretary became stressed on the day that the respondent reviewed the resumes. (Commission's probable cause decision at page 18) The respondent argues that there is nothing in the record to demonstrate that she was the cause of the secretaries' stress. (Respondent's submission at page 10) The Commission agrees that the record is devoid of any evidence to show how the respondent failed to support and protect school personnel in the proper performance of their duties. The Commission also finds credible Ms. Hutchinson's testimony that the personnel secretary was multi-tasking because the other secretaries were out of the office and that this was the cause of the personnel secretary's stress. The complainants have failed to sustain their burden of proof because there is no evidence to show that the respondent failed to support and protect school personnel in proper performance of their duties. Therefore, the Commission finds that the respondent did not violate N.J.S.A. 18A:12-24.1(i) and dismisses this allegation.

DECISION

Based on the foregoing, the Commission finds that Marlene Polinik violated N.J.S.A. 18A:12-24.1(c) of the Code of Ethics for School Board Members when she went beyond appraisal of the candidate's resumes and: 1) asked the secretary where the other resumes were; 2) upon finding that the resumes were in a locked office, asked the secretary if the secretary had a key; and 3) located a custodian who had the key after the secretary informed her that a custodian had a key.

REQUEST FOR SANCTIONS

At its January 22, 2008 meeting, the Commission considered the respondent's request that the Commission find that the complaint was frivolous and impose sanctions pursuant to N.J.S.A. 18A:12-29(e). The Commission notes that it can find no evidence which might show that the complainants filed the complaint in bad faith solely for the purpose of harassment, delay or malicious injury. The Commission also has no information to suggest that the complainants should have known that the complaint was without any reasonable basis in law or equity or that it could not be supported by a good faith argument for an extension, modification or reversal of existing law. The Commission's finding of a violation shows that the complaint was reasonably based in law. For the foregoing reasons, the Commission finds that the complaint is not frivolous and denies the respondent's request for sanctions against the complainant.

PENALTY

The Commission recommends that the Commissioner of Education impose a penalty of censure. The Commission notes that the respondent's conduct is somewhat similar to the board member's conduct in Lahn, where that board member was ultimately censured. In Lahn, the board member requested information from a guidance secretary. In this case, the respondent repeatedly requested information from a district secretary. While the respondent's conduct did not result in disciplinary action against the secretary, as occurred in Lahn, the respondent took it upon herself to locate the information, as noted below. In Lahn, the board member was also found to have violated the Act on more than one occasion.

While here, the respondent did not violate the Act on more than one occasion, as the board member in Lahn, the respondent's conduct also warrants a censure for several reasons. First, when Ms. Randina told the respondent she would meet her in the Personnel Office after calling the superintendent, the respondent did not wait for Ms. Randina to review the resumes. Rather, the respondent spoke with the secretary and began to review the resumes before Ms. Randina joined the respondent in the Personnel Office. At some point Ms. Randina left the Personnel Office. Next, the respondent independently took several steps to locate the rest of the resumes. First, the respondent asked the personnel secretary where the rest of the candidates' resumes were. The secretary informed the respondent that the resumes were in the locked office of an Assistant Superintendent who was not in the office at the time. Second, the respondent asked the secretary if the secretary had a key to the locked office. The secretary said she did not have a key, but that a custodian might have a key. Third, the respondent searched through the school to locate the custodians to find a key to the office. Ms. Randina finally had to intervene and tell the respondent that she was not comfortable going into a locked office, which the respondent ultimately accepted. The Commission questions why the respondent did not wait for another day to review the resumes after the secretary told her that the resumes were in a locked office of an Assistant Commissioner who was not present in the office. Based on the foregoing, the Commission recommends to the Commissioner of Education the imposition of a penalty of censure.

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 13 days from the date on which the Commission's decision was mailed to the parties, Ms. Polinik 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.

Paul C. Garbarini, Chairperson
School Ethics Commission

Resolution Adopting Decision – C45-06

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 January 22, 2008, the Commission found that Marlene Polinik violated N.J.S.A. 18A:12-24.1(c) of the Code of Ethics for School Board Members in the Act and recommended that the Commissioner of Education impose a sanction of censure; and

Whereas, the Commission reviewed a draft decision prepared by its staff 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 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 Resolution
was duly adopted by the School
Ethics Commission at its public meeting
on January 22, 2008.

Joanne Boyle
Executive Director