
IN THE MATTER OF : **BEFORE THE SCHOOL**
PAUL J. BIRCH : **ETHICS COMMISSION**
PROSPECT PARK BOARD OF :
EDUCATION : **Docket No. C04-10**
PASSAIC COUNTY : **DECISION**
:

PROCEDURAL HISTORY

This matter arises from a complaint filed on February 19, 2010 alleging that Paul J. Birch, a member of the Prospect Park Board of Education (Board) violated the School Ethics Act (Act), N.J.S.A. 18A:12-21 et seq. On March 17, 2010, a Motion to Dismiss in Lieu of Answer and in Support of Claim that the Complaint is Frivolous was filed on behalf of the respondent. The complainant was accorded 20 days to respond to the motion and allegation of frivolousness. N.J.A.C. 6A:28-8.2(a). By letter dated April 12, 2010, for good cause shown, the Commission granted the complainant until April 16, 2010 to submit his responsive brief, and further advised the parties that this matter was scheduled for discussion by the Commission at its meeting on April 20, 2010 in order to make a determination regarding the respondent's Motion to Dismiss and allegation of frivolousness. N.J.A.C. 6A:28-8.3; N.J.A.C. 6A:28-10.4. The complainant submitted a reply brief on April 15, 2010.

At its meeting on April 20, 2010, the Commission voted to deny the respondent's Motion to Dismiss and further found that the complaint is not frivolous, in accordance with the standard set forth at N.J.A.C. 6A:28-1.2. That decision was issued to the parties on May 26, 2010. By letter dated June 17, 2010, the complainant submitted a request to withdraw the complaint. At its meeting on June 22, 2010, the Commission considered the complainant's request, but voted to deny the request, pursuant to its discretion under N.J.A.C. 6A:28-10.6(b).

On July 6, 2010, an answer to the complaint was filed on behalf of the respondent. The complainant and respondent were notified by letter dated July 6, 2010 that the Commission would review this matter at its meeting on July 27, 2010 in order to make a probable cause determination, in accordance with procedures set forth at N.J.A.C. 6A:28-10.7.

At its July 27th meeting, the Commission found probable cause to credit Counts 1 through 6 of the complaint. A probable cause notice was issued to the complainant and respondent on September 1, 2010. Pursuant to N.J.A.C. 6A:28-7.1(c)1, because the respondent admitted the material facts in this matter, he was accorded 20 days to submit a statement setting forth the reasons he should not be found in violation of the Act, after which time the Commission would make a determination of violation on a summary basis. After obtaining an extension for good cause shown, a responsive statement was filed on September 24, 2010. The respondent does not challenge the facts set forth in the Commission's probable cause notice. In his affidavit, the respondent affirms that he did not willfully or knowingly violate the Act. (Respondent's Affidavit at p. 1) Rather, he argues that N.J.S.A. 18A:12-24(c) should not be interpreted so as to find a violation in this matter. The respondent further asserts that the Commission's prior advisories regarding N.J.S.A. 18A:12-24(c) "were somewhat confusing." (Responsive Brief at

p. 4). Referencing Advisory Opinion A10-00, (June 27, 2000) and Advisory Opinion A07-06, (July 31 2006), the respondent argues that:

the purpose of the Commission's rulings and advisements with respect to recusal from certain employment issues and/or voting were based upon the premise that the public should not perceive that the board member's objectivity or independence of judgment was impaired due to the relationship between the administrator and the board member's employee spouse. Accordingly, the fact patterns of all of the opinions addressed substantive involvement on the part of the board member. *** However, the opinions do not advise those same board members to recuse themselves from participating in insignificant matters involving administrators, such as a vote to table a motion involving the administrator [sic] contract." (*Id.* at p. 6)

The respondent reasons that virtually every decision made by a member of the Board of Education will, in some way, affect its employees. Thus, unless the Commission proscribes the employment of any immediate family of any board member within the district, the respondent asserts that "only ethics violations which are clear, not speculative, and shown by a preponderance of the evidence to have impaired the objectivity of a member or clearly create some tangible to the school official [sic] or member of his immediate family should be found to be violations of the Ethics act. [sic]" (*Id.* at p. 7)

FINDINGS OF FACT

The following facts are deemed to be undisputed:

1. The respondent was at all relevant times a member of the Board.
2. Prospect Park is an elementary district which employs a Superintendent, Principal, Vice Principal and Business Administrator/Board Secretary as its sole administrators. http://www.prospectparknj.com/index.php?option=com_content&view=article&id=4&Itemid=14.
3. The respondent's wife is a Special Education classroom aide in the District. She has "extremely limited contact" with the Principal and Vice Principal and "virtually no contact" with the Superintendent. (Respondent's Affidavit, September 15, 2010 at p. 2.)
4. The respondent was a member of the Board's Negotiations Committee for the 2009-2010 school year. In July 2009, the Negotiations Committee met with the Superintendent to discuss 2009-2010 salaries for the non-affiliated staff, which includes the central office secretaries, the Business Administrator/Board Secretary, the Building Principal and the Vice Principal. The Committee determined to recommend a 3.5% salary increase across the board of all non-affiliated staff. At that meeting, there was also a recommendation to amend the Superintendent's employment contract for the 2009-2010 school year. (*Ibid.*)

5. The respondent attended the August 2009 meeting of the Negotiations Committee wherein he “listened [to] how the salary adjustment [for the Superintendent] was determined by coming to a desired annual salary and then determining the corresponding salary increase therefrom.” (Id. at p. 3)
6. The Negotiations Committee gave its recommendations for the non-affiliated staff to the Board for inclusion on the September 8, 2009 Board Meeting Agenda, along with its recommendation for the amendment to the Superintendent’s employment contract. (Certification of Respondent, March 16, 2010 at p. 2)
7. At the Board’s meeting on September 8, 2009, while discussing the amendment to the Superintendent’s contract, there were questions regarding the amendment. During the meeting, the respondent reminded the Board that the Superintendent’s 2009-2010 salary increase was established by selecting a desired number and then converting same into a percentage. (Respondent’s Affidavit, September 15, 2010 at pp. 3-4)
8. At the Board’s meeting on September 8, 2009, the respondent voted “no” against a motion to table the amendment to the Superintendent’s contract for further discussion. (Respondent’s Answering Certification, June 30, 2010, at Exhibit A: Board Minutes from the September 8, 2009 Meeting at p. 10; Answer at p. 4)
9. At the Board’s meeting on September 8, 2009, although the respondent abstained from the vote as to the Superintendent’s 2009-2010 contract amendment, the Principal’s 2009-2010 base annual salary and the Vice Principal’s 2009-2010 base annual salary, he made the motions to approve the amendment to the Superintendent’s contract, to approve the Principal’s 2009-2010 compensation and to approve the Vice Principal’s 2009-2010 compensation. (Respondent’s Answering Certification, June 30, 2010, at Exhibit A: Board Minutes from the September 8, 2009 Meeting at pp. 10-11)
10. At the Board’s meeting on November 17, 2009, the respondent voted “yes” to approve the revised amendment to the Superintendent’s contract. (Board Minutes from November 17, 2009 at p. 13)¹

ANALYSIS

The Commission previously found probable cause to credit the allegation that the respondent violated N.J.S.A. 18A:12-24(c) in connection with his actions, now set forth above in Factual Findings #4 through 10. N.J.S.A. 18A:12-24(c) provides:

No school official shall act in his official capacity in any matter where he, a member of his immediate family, or a business

¹ Although the respondent submitted a copy of the minutes from the Board’s November 17, 2009 meeting as Exhibit D to his answering certification, that copy was incomplete. A complete copy of the minutes is appended to the complaint.

organization in which he has 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;

In order to find a violation of N.J.S.A. 18A:12-24(c), the Commission must find that the respondent has either: 1) taken action in his official capacity in a matter where he, or a member of his immediate family had a direct or indirect financial involvement that might reasonably be expected to impair his objectivity or independence of judgment or 2) acted in his official capacity in a matter where he or a member of his immediate family had a personal involvement that is or creates some benefit to him or the member of his immediate family. The School Ethics Act at N.J.S.A. 18A:12-23 defines “member of the immediate family” as the spouse or dependent child of a school official residing in the same household. The Commission’s regulations at N.J.A.C. 6A:28-1.2 define “spouse” as “the person to whom the school official is legally married under New Jersey law and also includes a partner in a civil union couple as established in N.J.S.A. 37:1-33.” Thus, the respondent’s spouse is a member of his immediate family.

Participation on the Negotiations Committee for District Administrators;
Clarification Made at the September 8, 2009 Meeting; and
Voting on November 17, 2009

There is no dispute that the respondent was a member of the Board’s Negotiations Committee for the 2009-2010 school year which negotiated the amendment to the Superintendent’s contract, as well as the salaries for the Vice Principal and Principal. During the summer of 2009, the Negotiations Committee met with the Superintendent to discuss 2009-2010 salaries for the non-affiliated staff, which includes the central office secretaries, the Business Administrator/Board Secretary, the Building Principal and the Vice Principal. Thereafter, the Negotiations Committee gave its recommendations for salaries for the non-affiliated staff to the Board for inclusion in the September 8, 2009 Board Meeting Agenda, along with its recommendation for the amendment to the Superintendent’s employment contract. At the Board’s meeting on September 8, 2009, while discussing the amendment to the Superintendent’s contract, there were questions regarding the amendment. During the meeting, the respondent reminded the Board that the Superintendent’s 2009-2010 salary increase was established by selecting a desired number and then converting the same into a percentage; he abstained from voting on the amendment to the Superintendent’s contract, as well as the salaries for the Vice Principal and Principal.

Later, at the Board’s meeting on November 17, 2009, the respondent voted “yes” to approve the revised amendment to the Superintendent’s contract. As to this vote, the respondent states that he incorrectly believed that his prior abstention from voting on September 8, 2009, coupled with the approval granted by the Executive County Superintendent to the

Superintendent's contract rendered it "absolutely proper" that he participate in this vote. (Answer at p. 6).

Initially, the Commission reflects on the advisories referenced by the respondent in his responsive statement to the probable cause notice. In Advisory Opinion A10-00, (June 27, 2000), a board member's spouse was employed as a teacher in a K-8 district with 900 students; the Superintendent, Principal and Vice Principal were located in the same building as the board member's spouse. The question before the Commission was whether the board member may participate in discussions and votes involving the appointment of the Superintendent, Principal and Vice Principal or other employment issues regarding these positions. Although the Commission therein advised that, pursuant to N.J.S.A. 18A:12-24(c), the board member may participate in the *search* for a Superintendent, Assistant Principal and Principal, as well as *vote on the initial appointments*,² the Commission also advised that the board member "would violate N.J.S.A. 18A:12-24(c) of the Act if he were to participate in discussions and vote on employment issues concerning the administrators who supervise" his spouse after the administrators are appointed. A10-00 at p. 3.

In Advisory Opinion A07-06, (July 31 2006), a board member in a nine-school pre K-12 district had a spouse who worked as a teacher's assistant at the high school and was supervised by the Principal who was supervised by the Assistant Superintendent who was supervised by the Superintendent. Again, the questions before the Commission were whether the board member may participate in the hiring of the Superintendent and in any employment issues regarding the Superintendent. The Commission advised the board member that s/he would violate N.J.S.A. 18A:12-24(c) if s/he participated in the hiring of the Superintendent because the current Assistant Superintendent was a candidate to become Superintendent. Additionally, the Commission advised that the board member would violate the Act if s/he were "to participate in any employment issues regarding the Superintendent." A07-06 at page 3.

Thus, with respect to whether a board member with an immediate family member working in the District is permitted to participate in the *search, selection and vote to hire* the Superintendent (or other administrators), issues which are not specifically before the Commission in this matter, the Commission has considered whether the board member is familiar with any of the candidates for the position(s) to be filled. However, *once the administrators are hired*, the Commission has advised that the board member with an immediate family member employed in the District may not participate in any "employment issues" relative to the supervising administrators. Indeed, in Advisory Opinion A30-05 (March 10, 2006), the Commission advised that the board member identified as "B," whose spouse worked as a secretary in the High School nurse's office, must recuse himself "**from all discussions and votes**" with regard to the High School Principal and Superintendent. (A30-05 at p. 4; emphasis added) See also, Advisory Opinion A07-06 (July 31 2006) and Advisory Opinion A23-06 (November 15, 2006).

²The Commission reasoned that although these administrators could all be considered supervisors of the board member's spouse, it would not be reasonable for the public to expect that a board member, with a spouse who teaches in the district, would choose to appoint administrators who are most likely to be financially favorable to teaching staff, especially since teachers are employed pursuant to a collective bargaining agreement. The Commission specifically cautioned that "[t]his may change if the selection is for someone who already knows the board member's spouse." A10-00 at page 2.

With respect to the within matter, the Commission further notes that the respondent's participation as a member of the Board's Negotiations Committee for the 2009-2010 school year which negotiated the amendment to the Superintendent's contract, as well as the salaries for the Vice Principal and Principal could not plausibly be characterized as involvement in "insignificant matters involving administrators," as argued in his responsive brief. (Responsive Brief at p. 6) As such, the Commission finds that the respondent's participation on the Negotiations Committee, together with his participation in the September 8, 2009 discussions, was well within the clear proscriptions set forth in the above advisories. Similarly, the Commission finds that the respondent's vote on November 17, 2009 to approve the amendment to the Superintendent's contract was improper, in accordance with the Commission's above advisories and its recent decisions. See, I/M/O William Depsee, Woodland Park Board of Education, Passaic County, C30-09 (January 26, 2010), Commissioner of Education Decision No. 65-10SEC, decided March 11, 2010; I/M/O Charles Carey, Pennsauken Bd. of Ed., Camden County, C33-08 (March 23, 2010), Commissioner of Education Decision No. 168-10A, decided June 3, 2010; I/M/O Frank Minniti, Greenwich Twp Bd. of Ed., Gloucester County, C08-09 (May 25, 2010), Commissioner of Education Decision No. 208-10SEC, decided July 12, 2010; I/M/O Thomas Guarascio, Berkeley Township Bd. of Ed., Ocean County C40-08 (April 20, 2010), Commissioner of Ed. Decision No. 170-10SEC, decided June 4, 2010; and I/M/O Carey, Pennsauken Bd. of Ed., Camden County C27-09 (April 20, 2010), Commissioner of Education Decision No. 169-10SEC, decided June 4, 2010.

The Commission so finds, notwithstanding that the respondent's spouse has "extremely limited contact" with the Principal and Vice Principal and "virtually no contact" with the Superintendent. (Respondent's Affidavit, September 15, 2010 at p. 2.) As noted in I/M/O Charles Carey, Pennsauken Bd. of Ed., Camden County, C33-08 (March 23, 2010) Commissioner of Education Decision No. 168-10A, decided June 3, 2010, the Superintendent has general supervision over all aspects of the schools, N.J.S.A. 18A:17-20, which allows for a variety of managerial actions or decisions that could affect the employment of the respondent's spouse. See, Carey at p. 4.

Moreover, the decision to abstain from the votes pertaining to the Superintendent, Principal and Vice Principal does not necessarily shield the respondent where he had already, by his involvement on the Negotiations Committee, participated in discussions regarding the salaries of these administrators that were not open to the public. In I/M/O Richard Filipek, Saddle Brook Bd. of Ed., Bergen County, C18-07 (June 24, 2008) Commissioner of Education Decision No. 317-08SEC, decided July 23, 2008, the Commission found that the respondent Board member, whose spouse was employed in the District, violated N.J.S.A. 18A:12-24(c) by being present in his capacity as president of the Board and running two closed session meetings of the Board when the tenure appointment of the middle/high school principal, his wife's direct supervisor, was discussed, notwithstanding that he did not participate in the vote. The Commission found that the respondent had a direct financial involvement in the tenure appointment of the middle/high school principal that would reasonably be expected to impair his objectivity or independence of judgment.

Thus, the Commission finds that the respondent was acting in his official capacity in a matter where a member of his immediate family had an indirect financial involvement which a reasonable person could perceive to impair the respondent's objectivity or independence of judgment in violation of N.J.S.A. 18A:12-24(c) when he: (1) participated on the Board's Negotiations Committee for the 2009-2010 school year and negotiated the amendment to the Superintendent's contract, as well as the salaries for the Vice Principal and Principal; (2) made clarifying statements at the September 8, 2009 meeting as to the Superintendent's contract; and (3) voted to approve the revised amendment to the Superintendent's contract at the November 17, 2009 meeting.

Making Motions and Voting Against the Motion to Table

At the Board's meeting on September 8, 2009, the respondent voted "no" against a motion to table the amendment to the Superintendent's contract. Moreover, although he abstained from the vote as to the Superintendent's 2009-2010 contract amendment, the Principal's 2009-2010 base annual salary and the Vice Principal's 2009-2010 base annual salary, he made the motions to approve the amendment to the Superintendent's contract, to approve the Principal's 2009-2010 compensation and to approve the Vice Principal's 2009-2010 compensation.

The respondent argues that "[i]t would be an anomaly indeed for the [C]ommission to find that I was somehow currying favor with the [S]uperintendent for the benefit of my wife by substantially reducing his proposed stipend." (Answer at p. 4) The respondent further asserts that he was not advised to recuse himself from the motion to table the discussion of the contract (id.) and, in any event, characterizes his vote against tabling the motion on September 8, 2009 as an "insignificant matter" that could not be reasonably anticipated in the proscriptions set forth in the Commission's advisories. (Responsive Statement at p. 6)

In I/M/O Alexander Sipos, Garfield Bd. of Ed., Bergen County, C20-99 (May 23, 2000) Commissioner of Education Decision No. 221-00SEC, decided July 10, 2000, the Commission found that the respondent violated N.J.S.A. 18A:12-24(c) when he made motions to pass resolutions that resulted in the appointment of his wife to two positions with the Board. Although there was no information before the Commission to indicate that the respondent participated in the discussions or involved himself in the decision to hire his wife, and notwithstanding that the respondent argued he made the motion as the chairperson of the Personnel Committee, that the resolutions were en masse and he excused himself from the vote, the Commission nevertheless found that the respondent acted in his official capacity. The Commission explained,

Making a motion that places a matter before the board for its vote is the way board business is conducted. Without the initial motion, no business takes place. Therefore, Mr. Sipos' moving the resolutions to hire his spouse on two instances was clearly acting in his official capacity. Pursuant to the Act, it is of no moment that he moved all the personnel committee recommendations or that he

moved them en masse. The only question is whether Mr. Sipos acted in his official capacity, which he clearly did. Sipos at p. 3

The Commission finds that the respondent's actions, taken together, demonstrate that, after participating on the Negotiations Committee which negotiated the amendment to the Superintendent's contract, as well as the salaries for the Vice Principal and Principal, the respondent advanced these arrangements by making motions, or voting against a motion to table, so as to bring these compensation decisions to the Board. Thus, the Commission finds that the respondent was acting in his official capacity in a matter where a member of his immediate family had an indirect financial involvement which a reasonable person could perceive to impair the respondent's objectivity or independence of judgment in violation of N.J.S.A. 18A:12-24(c) when he: (1) voted "no" against a motion to table the amendment to the Superintendent's contract; and (2) made motions at the September 8, 2009 meeting to approve the Superintendent's 2009-2010 contract, the Principal's 2009-2010 compensation and the Vice Principal's 2009-2010 compensation.

DECISION

For the reasons set forth above, the Commission finds that Paul J. Birch violated N.J.S.A. 18A:12-24(c) when he: (1) participated on the Board's Negotiations Committee for the 2009-2010 school year and negotiated the amendment to the Superintendent's contract, as well as the salaries for the Vice Principal and Principal; (2) made clarifying statements at the September 8, 2009 meeting as to the Superintendent's contract; (3) voted to approve the revised amendment to the Superintendent's contract at the November 17, 2009 meeting; (4) voted "no" against a motion to table the amendment to the Superintendent's contract; and (5) made motions at the September 8, 2009 meeting to approve the Superintendent's 2009-2010 contract, the Principal's 2009-2010 compensation and the Vice Principal's 2009-2010 compensation.

PENALTY

The Commission recommends a penalty of censure. In weighing the appropriate penalty in this matter, the Commission has considered the respondent's statement in response to its probable cause notice as well as his repeated assertions in his answer that his actions were guided by counsel's advice.

In Guarascio, supra, the Commission recommended a penalty of censure for six violations of voting where the respondent was conflicted, notwithstanding that four of the violations occurred within minutes of the time that he was sworn in. The Commission therein noted that the fifth violation occurred during an Executive Session meeting when the respondent participated in a discussion concerning the automatic renewal of the Superintendent's contract, then when he voted in the affirmative in a 5-4 vote not to automatically renew the Superintendent's contract. Even after the Board member completed training in June 2008, there was a sixth violation on September 23, 2008 when he voted to reappoint his wife as club sponsor for the Scrapbook Club.

In Sipos, supra, the Commission found that the respondent violated N.J.S.A. 18A:12-24(c) when, after being elected to the Board in 1997, he made motions to pass resolutions in July

1998 and January 1999 that resulted in the appointment of his wife to two positions with the Board. The Commission recommended a penalty of censure and the Commissioner approved the penalty.

In Filipek, supra, the Commission recommended a penalty of censure for the Board member, notwithstanding that he did not participate in the vote and there was a single violation. The Commission therein cited to SEC v. Michael Kilmurray, Lacey Twp. Bd. of Ed., Ocean County, C12-94 (January 27, 1998), Commissioner of Education Decision No. 155-98 (April 15, 1998) where it found that “when a school official has a conflict of interest of which the public is aware, and that school official goes behind closed doors when that item is discussed, the situation creates a justifiable impression among the public that their trust is being violated.” (Kilmurray at p. 3) The Commission finds this case particularly applicable to the within matter, since the respondent engaged in negotiations and discussion regarding the compensation package for the Superintendent, Principal and Vice-Principal prior to these matters being brought before the full Board.

Pursuant to N.J.S.A. 18A:12-29(c), this decision shall be forwarded to the Commissioner of Education for review of the School Ethics Commission’s recommended sanction. Parties may either: 1) file exceptions to the recommended sanction; 2) file an appeal of the Commission’s finding of violation; or 3) file both exceptions to the recommended sanction together with an appeal of the finding of violation.

Parties taking exception to the recommended sanction of the Commission but *not disputing* the Commission’s finding of violation may file, within **13 days** from the date the Commission’s decision is forwarded to the Commissioner, written exceptions regarding the recommended penalty to the Commissioner. The forwarding date shall be the mailing date to the parties, indicated below. Such exceptions must be forwarded to: 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.

Parties seeking to appeal the Commission’s finding of violation *must* file an appeal pursuant to the standards set forth at N.J.A.C. 6A:4 within **30 days** of the filing date of the decision from which the appeal is taken. The filing date shall be three days after the date of mailing to the parties, as shown below. In such cases, the Commissioner’s review of the Commission’s recommended sanction will be deferred and incorporated into the Commissioner’s review of the finding of violation on appeal. Where a notice of appeal has been filed on or before the due date for exceptions to the Commission’s recommended sanction (13 days from the date the decision is mailed by the Commission), exceptions need not be filed by that date, but may be incorporated into the appellant’s briefs on appeal.

Robert W. Bender
Chairperson

Mailing Date: October 27, 2010

Resolution Adopting Decision – C04-10

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

Whereas, at its meeting on July 27, 2010, the Commission found probable cause to credit the allegations that the respondent violated N.J.S.A. 18A:12-24(c) of the School Ethics Act; and

Whereas, the respondent was so notified and accorded 20 days to submit a written statement setting forth the reasons why he should not be found in violation of the Act.

Whereas, the respondent submitted a written statement which was considered by the Commission;

Whereas, at its meeting on September 28, 2010, the Commission determined that the respondent violated N.J.S.A. 18A:12-24(c) of the School Ethics Act and recommended a penalty of censure; and

Whereas, at its meeting on October 26, 2010, the Commission agreed that the within decision accurately memorializes its findings and recommendations; and

Now Therefore Be It Resolved, that the Commission hereby adopts the within decision and directs it staff to notify all parties to this action of the decision.

Robert W. Bender, Chairperson

I hereby certify that the Resolution was duly adopted by the School Ethics Commission at its public meeting on October 26, 2010.

Joanne Boyle
Executive Director

