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JEFFREY HEWITSON	:	BEFORE THE SCHOOL
	:	ETHICS COMMISSION
	:	
v.	:	
	:	
PATRICIA DELGIUDICE	:	Docket No. C28-11
HAMILTON TOWNSHIP BOARD OF	:	DECISION
EDUCATION,	:	
MERCER COUNTY	:	
	:	

PROCEDURAL HISTORY

This matter arises from a complaint filed on June 8, 2011 by Jeffrey Hewitson alleging that Patricia DelGiudice, a member of the Hamilton Township Board of Education (“Board”), violated the School Ethics Act (“Act”), N.J.S.A. 18A:12-21 et seq. Specifically, the complainant alleged that the respondent violated N.J.S.A. 18A:12-24(c) as well as N.J.S.A. 18A:12-24.1(e) of the Code of Ethics for School Board Members. After being granted an extension for good cause shown, an answer was filed on behalf of the respondent on August 24, 2011, although a complete answer to the complaint was not filed until September 13, 2011. Therein, the respondent alleged that the complaint was frivolous. The complainant was accorded an opportunity to respond to the allegation of frivolousness; his response was filed on October 5, 2011.

By letter dated October 13, 2011, the complainant and respondent were notified that the Commission would review this matter at its meeting on November 22, 2011 in order to make a probable cause determination, in accordance with procedures set forth at N.J.A.C. 6A:28-10.9, as well as to make a determination on the allegation of frivolousness. At its November 22, 2011 meeting, the Commission found that the complaint was not frivolous in accordance with the standard set forth at N.J.A.C. 6A:28-1.2, and also found no probable cause to credit the allegation that the respondent violated N.J.S.A. 18A:12-24(c) as alleged in Count 2 of the complaint. Consequently, Count 2 was dismissed. The Commission then voted to retain this matter for hearing where the complainant would carry the burden to factually prove that the respondent violated the Code of Ethics for School Board Members, as alleged in Counts 1 and 3 of the complaint.

By letter dated December 22, 2011, the parties were notified that this matter would be scheduled for hearing at the Commission’s meeting on February 28, 2012. On February 27, 2012, the Commission received a request for adjournment filed by respondent’s counsel, due to illness. Counsel for the complainant consented to the request for adjournment; consequently, the Commission adjourned the hearing scheduled for February, 28, 2012 and rescheduled the hearing for May 22, 2012. Thereafter, the Commission notified the parties that its May meeting was rescheduled for May 29, 2012.

The complainant appeared with his attorney, Robert B. Rottkamp, Esq. and the respondent appeared with her attorney, Adam S. Weiss, Esq. Prior to the start of the hearing,

counsel for the complainant informed the Commission that the complainant was withdrawing Count 1. Accordingly, the Commission heard testimony as to Count 3 of the complaint. After hearing all testimony, as summarized below, the Commission voted during the public portion of its meeting to find no violation of the School Ethics Act and to dismiss the complaint.

SUMMARY OF THE RECORD

Former Board member Dr. Elric A. Cicchetti testified that in June of 2011, the Board was in the process of selecting a new Superintendent. Dates were set in early June 2011 to interview the final candidates. The Board interviewed about 14 candidates, then got the number down to two finalists. Both finalists were interviewed at the June 1, 2011 meeting with the expectation that if the Board reached a consensus about moving one candidate forward, they could make the appointment at the June 9, 2011 meeting. Dr. Cicchetti explained that there were seven members participating in the discussion. Although it is a nine-person Board, two members could not participate in that they had familial conflicts. According to Dr. Cicchetti, the Board was advised by Jane Kershner of the New Jersey School Boards Association (NJSBA) that five votes would be required to actually appoint the candidate; therefore, in order to avoid a potentially embarrassing situation, the Board should not move any name forward until it had those five votes.

At the executive session of the June 1 meeting, pursuant to straw votes taken, Dr. Cicchetti testified that there were two votes for the internal candidate, Dr. Barbara Frascella, and four votes for an outside candidate, Louis Goldstein. One Board member, Stephanie Pratico, was indecisive; she left the meeting. The Board adjourned around 11:00 p.m. According to Dr. Cicchetti, there was no consensus for one candidate. At the June 9th meeting, Dr. Cicchetti explained that “things failed dramatically in executive session.” The Board did not have enough votes for a single candidate and, subsequently, Mr. Goldstein withdrew his name from consideration. On cross-examination, Dr. Cicchetti acknowledged that he spoke with Dr. Frascella on or about June 3 by phone, prior to the Board’s formal vote.

Dr. Barbara Frascella testified that she has worked in the Hamilton School District for many years as a school psychologist and Director of Special Services. She was the internal candidate for the position of Superintendent and one of the finalists. She was interviewed on the evening of June 1, 2011. Dr. Frascella testified that the next morning, she received a call from Jane Kershner telling her that the Board made a decision to go with the other candidate. Dr. Frascella thanked Ms. Kershner and that was the extent of the call. Dr. Frascella stated that Ms. Kershner was at the June 1 meeting when she was interviewed.

Jeffrey Hewitson is the complainant in this matter. He testified that he filed the within complaint because he believed that the respondent went beyond her authority as Board President by taking private actions to contact Ms. Kershner and inform her that there was a Board decision when there was no vote; Mr. Hewitson affirms that the respondent misrepresented what happened on June 1, 2011.

As to the June 1, 2011 meeting, Mr. Hewitson testified that the Board had a long discussion about the qualifications of both finalists and they took an informal vote to determine

if there were enough members to move forward with one candidate. There were two votes for Dr. Frascella and four votes for Mr. Goldstein. According to Mr. Hewitson, Ms. Kershner advised the Board not to embarrass themselves by “going out there with less than five votes.” He understood this to mean that if the Board did not have five votes for a single candidate, they should not move forward. Mr. Hewitson stated that there was never a consensus to place anyone’s name on the June 9th agenda. Thus, there is nothing in the minutes of the June 1, 2011 meeting that reflects an item to be placed on the June 9, 2011 agenda. Mr. Hewitson never expected Mr. Goldstein’s name to be placed on the June 9th agenda. He identified C-1, a certification from the Business Administrator attaching a copy of an email sent to the complainant on January 23, 2012 with copies of Board minutes.¹ He stated that the Board did not direct or provide the respondent with a motion to contact Jane Kershner after the June 1 meeting.

On cross-examination, Mr. Hewitson stated that he did not recall whether the Board actually voted any time Ms. Kershner was to be contacted. He acknowledged that as they went through the hiring process, Ms. Kershner would contact candidates each time someone was released. Mr. Hewitson also acknowledged that he spoke with Dr. Frascella by phone, prior to the Board’s formal vote. He maintained the position that the respondent took private action, although he admitted that he had no personal knowledge of the same. In response to questioning from the Commission, the complainant conceded that four votes might be sufficient to move someone’s name to the June 9th agenda, although ultimately it would take five votes to appoint someone. He further acknowledged that a motion by one Board member which was seconded by another member could move someone’s name to the agenda. Mr. Hewitson explained that although Mr. Goldstein’s name was brought to the June 9th meeting for vote, there were insufficient votes to support an appointment.

At the close of the complainant’s testimony, counsel requested that the affidavits of Board members Joseph Malagrino and Stephanie Pratico be entered into evidence, in that neither person could attend the hearing. After hearing objections from respondent’s counsel, the Commission accepted the documents as Exhibits C-2 and C-3, respectively. The Commission cautioned that, inasmuch as these Board members were not available for cross-examination, it would weigh their statements accordingly. Mr. Malagrino certified that when a straw vote was taken on June 1, 2011, “neither candidate garnered the requisite five votes.” (Exhibit C-2) Ms. Pratico certified that she left the June 1 meeting at approximately 11:00 p.m. and “[a]t that time no consensus was reached through a consensus vote.” Exhibit C-3. Ms. Pratico further affirmed that at the June meeting, the Board did not conduct a vote to notify either candidate of the outcome of the meeting or authorize the Board President, *i.e.*, the respondent, or anyone else to notify either candidate of the outcome of the meeting. Ms. Pratico further attests that the Board did not vote to place either name on the agenda for the June 9th meeting for confirmation of appointment. Exhibit C-3.

Pursuant to N.J.A.C. 6A:28-8.3(d), upon completion of complainant’s case, the respondent’s counsel moved to dismiss the complaint. After hearing arguments from the parties, the Commission asked the parties to leave the room so that it could deliberate. The Commission denied the Motion to Dismiss. Upon resumption of the hearing, the respondent’s counsel called his witnesses, as summarized below.

¹ Neither party introduced Board minutes into evidence in this proceeding.

William Burns, Esq. is the Board's counsel. He testified that the Board hired the NJSBA to manage the recruiting and selection of the Superintendent. It was his opinion that the Board adhered to the relevant statutes and the NJSBA's guidance.

Board member William Harvey testified that at the June 1 meeting, there were two votes for Dr. Frascella and, he believed, five votes for Mr. Goldstein. That is, there were four "solid" affirmative votes for Mr. Goldstein and Ms. Pratico said that she was willing to do what she had to do. According to Mr. Harvey, when candidates were released from consideration, Ms. Kershner would notify them, although the Board did not formally vote to notify Ms. Kershner. Mr. Harvey stated that this was the same process that was followed on June 1, 2011. It was his understanding that when Ms. Pratico left the meeting on June 1, there were sufficient votes because she indicated that she would vote with the majority. Thus, Ms. Pratico would have been the fifth vote for Mr. Goldstein. According to Mr. Harvey, Ms. Kershner instructed that while five votes are needed to appoint someone, they only needed a majority of people present to move forward to place a name on the next agenda. Mr. Harvey reasoned that they had the majority at the June 1 meeting. After that, when the five votes were needed, "things fell apart."

Board member Eric Hamilton testified that he did not participate in the selection of the Superintendent due to a familial conflict, but affirmed that he was not aware of any private actions taken by the respondent.

Board member Richard Kanka participated in the June 1, 2011 meeting and testified that after the straw vote, there were four votes for one candidate and two for another. He stated that one of the members left the meeting, but, as she was leaving, she stated that she would vote with the majority. Mr. Kanka stated that Ms. Kershner advised that there had to be a majority to move forward with a candidate. He believed that if four people were in favor of a candidate that would be a majority of the participating Board. He is not aware that the respondent took any private action in this process.

Jane Kershner is the Director of Field Services for the NJSBA and she assists districts with searches for Superintendents. She affirmed that she communicated with the respondent "every step of the way" in the search for a Superintendent. Ms. Kershner was of the opinion that the respondent's conduct of the Superintendent's search was "completely above board."

Ms. Kershner testified that the initial pool of candidates was brought to the Board and the Board determined which candidates they wanted to interview. Those candidates who were not selected for an interview were sent a letter, signed by Ms. Kershner. If the candidate got a first interview but was not invited for a second interview, the candidate was sent a letter, signed by Ms. Kershner.

Ms. Kershner acknowledged that two members of the Board were conflicted from the search and selection process. Since only seven members could participate, Ms. Kershner advised the Board that a consensus of four members would be sufficient to get a name onto the agenda for the next meeting. Ms. Kershner attended the June 1, 2011 meeting until about 9:30 p.m. or 10:00 p.m. At the time she left, there was no formal consensus. The next morning, the

respondent called her and stated that there were four members who agreed to move forward Mr. Goldstein and have his name on the agenda for the next meeting. According to Ms. Kershner, the respondent also told her that there was a fifth member who left the meeting, but stated that she would vote with the majority. Nevertheless, the respondent told Ms. Kershner that she would “go with the four members.” Ms. Kershner testified that it was her job to call and tell the non-selected person that her name was not being moved to appointment. Ms. Kershner stated that the respondent did not direct her to make the call.

On cross-examination, Ms. Kershner stated that she may have said that five members were required to make the appointment. However, she does not believe that she advised the Board not to move forward unless they were sure they had five people. They knew they needed five Board members at a formal meeting to appoint. Ms. Kershner underscored that with only seven members participating in the search and selection, a majority of four could get the name onto the agenda. She confirmed that she was told that one Board member left the meeting, but that the Board member stated she would vote with the majority; however the respondent did not want to count on that. Ms. Kershner did not know whether she had cautioned the Board not to act in a manner that would embarrass them. She did affirm that it was a confidential process and they needed to respect the candidates’ time and, in the end, only one person can be selected.

Ms. Kershner testified that she did not know if there would be five votes to appoint anyone on June 9th; she only knew that having four votes was sufficient to place it on the agenda. She telephoned Dr. Frascella immediately because she wanted to notify her in a professional manner. She felt it was the right thing to tell her that her name was not going onto the agenda; rather, the consensus was to put Mr. Goldstein’s name on the agenda. Ms. Kershner stated that she was aware there was not a vote to place the name on the June 9th agenda because all discussions had taken place during executive session on June 1 and, therefore, there could not have been a public vote. In response to questioning from the Commission, Ms. Kershner reiterated it was her decision to make the call to Dr. Frascella.

Complainant’s Exhibits²

C-1	Certification from Board Secretary as to emails on January 23, 2012 providing copies of Board minutes.
C-2	Certification of Joseph Malagrino
C-3	Certification of Stephanie Pratico

FINDINGS OF FACT

As the trier of fact in this matter, the Commission had the opportunity to observe the demeanor of the witnesses and to judge their credibility. As such, the Commission found that Ms. Kershner, who provided the most crucial testimony, was a credible and convincing witness. Thus, the Commission makes the following factual findings:

1. The Hamilton Board of Education is a nine member Board. During the 2010-2011 school year, the Board was in the process of searching for a new Superintendent. When an

² The respondent did not enter any documents into evidence.

internal candidate applied for the position, two of the Board members were conflicted out of the search and selection process.

2. At all times relevant to this complaint, the respondent was a member of the Board. During the period at issue herein, June 2011, she was the Board President and she was leading the process for the Board to select a new Superintendent.
3. At the Board's meeting on June 1, 2011, two finalists were interviewed: an internal candidate, Dr. Barbara Frascella and an external candidate, Mr. Louis Goldstein.
4. During the executive session on June 1, 2011, after taking a straw vote, Dr. Frascella had the votes of two members and Mr. Goldstein had the votes of four members.
5. Board member Stephanie Pratico did not take an affirmative position in support of one candidate; she left the meeting before it concluded.
6. Jane Kershner, Director of Field Services for the NJSBA, was assisting the Board with its Superintendent search.
7. On the morning of June 2, 2011, the respondent contacted Ms. Kershner and told her that, pursuant to the straw vote on June 1, 2011, Mr. Goldstein had four votes. The respondent also indicated that there may be a fifth vote, but that she could not count on the vote of Stephanie Pratico.
8. Per the NJSBA's guidance, because only seven Board members were participating in the Superintendent search and selection, a majority of four votes was sufficient to bring the name of a candidate to the Board for appointment.
9. Based on the information provided by the respondent, Ms. Kershner made the decision to contact Dr. Frascella and inform her that the consensus was to move Mr. Goldstein's name forward and to place it on the June 9, 2011 agenda for appointment.
10. At its meeting on June 9, 2011, the Board did not appoint Mr. Goldstein to the position of Superintendent in that it did not have sufficient votes to do so.

ANALYSIS

The complainant bears the burden of factually proving any violations of the Code of Ethics for School Board Members in accordance with the standards set forth at N.J.A.C. 6A:28-6.4(a). See also, N.J.S.A. 18A:12-29(b). Here, in Count 3 of the complaint, the complainant asserts that the respondent's actions violated N.J.S.A. 18A:12-24.1(e) of the Code of Ethics for School Board Members, 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 Commission's regulations require that:

Factual evidence of a violation of N.J.S.A. 18A:12-24.1(e) shall include evidence that the respondent made personal promises or took action beyond the scope of his or her duties such that, by its nature, had the potential to compromise the board. N.J.A.C. 6A:28-6.4(a)5.

In Count 3 of the complaint, the complainant asserts that the respondent notified staff from the NJSBA that a Board decision was made by formal vote; she instructed the NJSBA staff person to contact candidates and inform them that a decision was made. However, the complainant claims that no formal vote had been taken, due to a lack of consensus. The complainant further alleges that the "[r]espondent indicated to another Board member that Board member Pratico (who left the meeting) was cornered in the parking lot and committed her vote for the 'winning' candidate and therefore the five votes needed were secured by 'private action.'" The complainant contends that the respondent took private action "to secure votes outside the formal hearing, and unauthorized administrative actions to instruct the NJ School Boards Association staff to contact the candidates [and notify them] of a decision without Board authority." (Complaint at paragraph 3)

In order to find that the respondent violated N.J.S.A. 18A:12-24.1(e), as set forth above, the Commission would have to find evidence that the respondent made personal promises or took action beyond the scope of her duties such that, by its nature, had the potential to compromise the board. N.J.A.C. 6A:28-6.4(a)5. Here, there is no allegation that the respondent made any personal promises.

Further, there is no evidence that the respondent took action beyond the scope of her duties as the Board President and leader of the search for a new Superintendent. See, James A. Kuchta et al. v. Dr. Philip Casale, Nutley Bd. of Ed. Essex County, C02-09, C04-09, C05-09 and C06-09 (Consolidated), March 23, 2010. As such, there is no reason to reach the question of whether the action was of such a nature that it had the potential to compromise the Board. Rather, in accordance with the facts set forth above, the respondent contacted Ms. Kershner on June 2nd and informed her that, pursuant to the straw vote at the June 1, 2011 meeting, Mr. Goldstein had four votes. It was the respondent's practice to stay in constant communication with Ms. Kershner during this selection process.

Moreover, the complainant did not establish that the respondent notified Ms. Kershner that a Board decision "was made by formal vote." As Ms. Kershner stated, because all discussions took place during executive session, she was never under the impression that there was a formal vote taken on June 1. Neither did the complainant establish that the respondent instructed Ms. Kershner to contact any candidate and inform him/her that a decision was made. It was Ms. Kershner's decision to contact Dr. Frascella; the respondent did not direct her to do so. Accordingly, the complainant failed to establish that the respondent violated N.J.S.A. 18A:12-24.1(e).

DECISION

Based on the testimonial and documentary evidence, the Commission finds that the complainant failed to factually establish that the respondent violated N.J.S.A. 18A:12-24.1(e) of the Code of Ethics for School Board Members. Consequently, the complaint is dismissed. This decision is a final decision of an administrative agency. Therefore, it is appealable only to the Superior Court--Appellate Division. See, New Jersey Court Rule 2:2-3(a).

Robert W. Bender
Chairperson

Mailing Date: June 27, 2012

Resolution Adopting Decision – C28-11

Whereas, at its meeting on November 22, 2011, the Commission found no probable cause to credit the allegation that the respondent violated N.J.S.A. 18A:12-24(c) as set forth in Count 2 and it, therefore, dismissed that Count; and

Whereas, the Commission voted to retain this complaint for hearing on the allegations that the respondent violated N.J.S.A. 18A:12-24.1(e); and

Whereas, the Commission has considered the pleadings filed by the parties, the documents submitted in support thereof, and the testimony of the parties from its hearing on May 29, 2012; and

Whereas, at its meeting on May 29, 2012, the Commission found that the complainant had not established that the respondent violated N.J.S.A. 18A:12-24.1(e) of the Code of Ethics for School Board Members; and

Whereas, the Commission, therefore, dismissed the complaint; and

Whereas, at its meeting on June 26, 2012, 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 this Resolution was duly adopted by the School Ethics Commission at its public meeting on June 26, 2012.

Joanne Boyle, Executive Director
School Ethics Commission