

June 2, 2010, pursuant to N.J.A.C. 6A:28-9.1(b), which provides that subpoenas may be issued by attorneys or *pro se* parties in accordance with rules of the OAL.

Mr. Mellk presented arguments on behalf of the complainant, and asked that the Commission accept into evidence the exhibits that were appended to the complaint, as set forth below. He argued that the respondent's failure to obey a subpoena should result in the Commission drawing a negative inference as to the testimony that the respondent would have provided and should further serve to overcome the residuum rule.

Mr. Mellk drew the Commission's attention to Exhibit C-1, the text of the discussion on www.facebook.com, and specifically noted those areas where the respondent's son commented on a situation that took place in the District, asserting that these comments demonstrate that the respondent discussed a confidential Board matter with his son and that he blamed another teacher, Mr. Juzwiak, for the resignation of band teacher, Mr. Stein. Mr. Mellk further argued that the email sent to Mr. Juzwiak on June 6, 2009, Exhibit C-2, demonstrates that the respondent violated the Code of Ethics for School Board Members by taking private action that could have compromised the Board and by failing to support school personnel.

Thomas Juzwiak was called as a witness for the complainant. He has been employed by the District since 1993 both as a music teacher and band director. Mr. Juzwiak identified Exhibit C-2 as the email that he received from the respondent. He testified that he "was shocked" when he received the letter. He did not believe that the respondent had his facts straight. He believed that the respondent was blaming him for the resignation of Mr. Stein. Mr. Juzwiak further stated that he believed that he and the respondent had a cordial relationship. In response to a question from the Commission, Mr. Juzwiak stated that the email sent by the respondent on June 6th followed an email sent to the community by the Superintendent announcing that Mr. Stein had resigned.

Mr. Juzwiak identified Exhibit C-1 as the "facebook chattering" that took place involving students; he testified that one of the students alerted him about it. In response to a question from the Commission, he acknowledged that the discussion among the students referenced an email that he previously sent to the students. He admitted that he sent an email to students when he "had been in a bad mood." He testified that he did not agree with the direction the marching band program was being taken in; he admitted that he expressed this disappointment to selected students in an email. Mr. Juzwiak recalled that the date of the facebook discussion by the students at Exhibit C-1 occurred the same weekend that the Superintendent sent the email announcing the resignation of the Mr. Stein. Mr. Juzwiak recalled that the Superintendent sent the email announcement on a Friday in June 2009 and that the "chatter" started that weekend. He was able to further narrow the date to the first weekend in June, in that the following Monday was the start of a suspension for the remainder of the school year, which he estimated to be about three weeks.

The complainant, Ellen Ogintz, testified that, to her knowledge, as of the date of the facebook discussion, the situation which resulted in the resignation of Mr. Stein had not been discussed at a public Board meeting and she had no indication that it was discussed during Executive Session of a Board meeting.

Complainant's Exhibits

C-1	Exhibit A of the complaint: the text of the discussion which took place on www.facebook.com .
C-2	Exhibit B of the complaint: Respondent's email to Tom Juzwiak dated June 6, 2009

FINDINGS OF FACT

The facts set forth below are based on the testimony and documents on record, which are specifically Exhibits C-1 and C-2. The Commission recognizes that both exhibits are hearsay, which, although admissible pursuant to N.J.A.C. 1:1-15.5, is generally subject to the residuum rule.¹ However, the Commission acknowledges the argument advanced by complainant's counsel that due to the respondent's failure to obey the subpoena that Mr. Mellk issued to both the respondent and his son, counsel was unable to authenticate Exhibits C-1 and C-2 through the testimony of the respondent and/or his son. Consequently, counsel argued that these exhibits should not be subject to the residuum rule. Because the Commission acknowledges that a party who fails to obey a subpoena may suffer an inference that the documentary or physical evidence or testimony that the party fails to produce is unfavorable, N.J.A.C. 1:1-11.4, under the circumstances of this particular matter, it accepts Exhibits C-1 and C-2 as competent evidence, and makes the following findings:

1. At all times relevant to this complaint, the respondent was a member of the Board.
2. Mr. Juzwiak is a band teacher and colleague of Mr. Stein.
3. Mr. Stein resigned in June 2009. The Superintendent sent an email to the community on the first Friday in June 2009, announcing Mr. Stein's resignation.
4. The subject of Mr. Stein's resignation and the reasons for the resignation were not discussed by the Board before his resignation occurred.
5. After receiving the Superintendent's announcement, the respondent sent the following email to Tom Juzwiak on Saturday June 6, 2009 which states, in relevant part:

Tom,

I can't begin to describe how disappointed I am with the gross injustice that's unfolded over the past few weeks. [My son] and I were very excited over the potential of a really competitive marching band this fall. I had planned to be a chaperone for the sleep-away band camp in August. [My son] was eager to finally be able to join a band comprised of kids who really wanted to seek excellence in their marching band show.

¹ The "residuum rule" requires that findings of fact be supported by a residuum of competent evidence. Matter of Tenure Hearing of Cowan, 224 N.J.Super. 737 (App. Div. 1988).

That's all over now. And I have only you and the EWEA to blame.

I really tried to understand your position over the last few years. *** You were demanding and fair to both boys in their performance skills and you encouraged them to play up to their greatest potential. I know they appreciated your strictness and high standards.

I cannot ever forget, however, the damage you caused this week. From the moment Mr. Stein told students to drop off their marching band contracts in the front office instead of the band room, I knew something was amiss. I feel awful that I did not react immediately, both as a parent and a board member, to demand an explanation for that situation and an explanation for your reluctance to endorse Mr. Stein's plans.

Since then, and unfortunately, too late to act upon them, [I] have heard horrible stories about your actions and the complicity of your colleagues in EWEA. I heard that you and Mr. Berkuta advised hesitant students to not join in the new marching band program – that it might be too much work. I heard that you denied Mr. Stein the respect he deserved as a colleague and as a professional marching band instructor. Finally, I heard how certain members of your association began to attack his professional standing at the McKnight school [sic].

Your actions, and those of your colleagues, were motivated by selfishness, insecurity, and envy. You know it, and every one of your students knows it. Instead of encouraging your students to build a program of excellence, you've told them that they should only expect failure, or mediocrity at best. You have taught them a cruel lesson in life – that people can get crushed for trying too hard, for building too much, for moving too fast, for crossing the old vested interests.

It pains me to say this after the special relationship that you have had with [my children] and me, but you have failed your profession and have [abandoned] your passion for music. Having betrayed a former student as you have, how can you ever face your current students again and expect to have their respect or trust? Your word and your encouragement mean nothing now.

It's a very sad day.

Sincerely,

Bob Laverty

6. Over the course of the weekend, students engaged in an online discussion on www.facebook.com regarding the resignation of Mr. Stein and its effect on the marching band program. Among the students participating in the online discussion was the respondent's son.
7. Sometime prior to the students' discussion on www.facebook.com, Mr. Juzwiak sent an email to selected students, including the respondent's son, expressing his disappointment with the direction that the marching band program was taking. This email was referenced by the respondent's son in his online comments.

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:12-29b. Here, the complainant alleges that the respondent violated N.J.S.A. 18A:12-24.1(c), (e), (g), and (i). Each statutory provision is set forth below, together with the regulatory standard establishing the complainant's factual burden of proof.

Allegations Regarding www.facebook.com Discussions:

The complainant first alleges that in May 2009², the respondent discussed with his son "the volatile situation in the District" involving the marching band program and music/band teachers, Rob Stein and Tom Juzwiak, in which it was widely assumed, without evidence, that Mr. Juzwiak helped to orchestrate Mr. Stein's removal as marching band director, which led to Mr. Stein's resignation from the District. As a result, according to the complaint, the respondent's son posted reports on www.facebook.com discussing the respondent's placement of blame for the situation on Mr. Juzwiak. The complainant asserts the respondent's conduct violated N.J.S.A. 18A:12-24.1(g) and (i). (Complaint at pp. 1-2) N.J.S.A. 18A:12-24.1(g) provides:

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

The Commission regulations provide:

Factual evidence of a violation of the confidentiality provision of N.J.S.A. 18A:12-24.1(g) shall include evidence that the respondent(s) took action to make public, reveal or disclose

² At no time does the complainant offer evidence which dates to May 2009.

information that was not public under any laws, regulations or court orders of this State, or information that was otherwise confidential in accordance with board policies, procedures or practices. Factual evidence that the respondent violated the inaccurate information provision of N.J.S.A. 18A:12-24.1(g) shall include evidence that substantiates the inaccuracy of the information provided by the respondent(s) and evidence that establishes that the inaccuracy was other than reasonable mistake or personal opinion or was not attributable to developing circumstances. N.J.A.C. 6A:28-6.4(a)7.

The complainant contends that the postings by respondent's son on www.facebook.com demonstrate that the respondent failed to "hold confidential all matters pertaining to the schools which, if disclosed, would needlessly injure individuals or the schools, in violation of N.J.S.A. 18A:12-24.1(g).³ The complainant points to the following postings in Exhibit C-1 that were made by the respondent's son:⁴

[N.], there are points in your life when you will have to make decisions like that. They aren't always easy. Heck, Mr. Stein said how difficult it was to quit not only marching band director but his entire teaching job and that's a *** difficult thing to do. He figured by the example of Mr. J that our school wasn't ready for the change required to actually become a decent marching band. And obviously Mr. J had to do with it. You can take my dad's and my word for it. Mr. J wanted to keep his job so what he did was eliminate the competition. That's the only way I see it ...but there is little hope left for marching band or even band at all. Who knows how long Mr. J's going to stay after this?

That's the only explanation that can make sense to me at this point. My dad who's Vice President of the BOE blamed him and that's what I'm doing I guess. I know it may seem like an assumption but you gotta imagine how much hate mail he was receiving from fellow teachers who it was obvious from the start didn't want him there. I know Mr. J disagreed with Mr. Stein's plan completely; At some point, who knows if his medication wasn't working and he decided to write a nasty letter to his only competition for his job, Mr. Stein, and then forced him away from our school. I mean...It

³ The complainant does not allege that the respondent violated the "inaccurate information" portion of N.J.S.A. 18A:12-24.1(g); accordingly, that clause is not addressed.

⁴The text of the discussion on www.facebook.com at Exhibit C-1 includes no dates. The excerpts cited herein are not the complete restatement of the discussion, although they are shown in chronological order of posting. With the exception of the removal of students' names and inappropriate language, the excerpts appear as they do in Exhibit C-1 without edits or corrections.

takes a lot of anger to make someone resign from their teaching job and marching band job.

I'm sorry for pointing fingers at Mr. J, but my dad (Vice President of the Board) was the one who informed me that Mr. J was largely at fault for this. (Exhibit C-1)

It is clear from these postings that the respondent and his son discussed the resignation of Mr. Stein and it is logical to conclude that the respondent shared with his son that Mr. Juzwiak played a negative role in the resignation of Mr. Stein. However, it is not logical to conclude on this record that the source of information was the respondent. As noted in the Factual Findings, the Superintendent sent an email to the community announcing Mr. Stein's resignation on the first Friday in June, 2009, which appears to have been the impetus for the online discussion. Indeed, the respondent's son seems to be quoting from a letter written by Mr. Stein when he states:

[S.], there's a point where you don't even have that option and Mr. Stein got there. **"I have spent far more time in the phone and writing emails dealing with these people than I have actually planning out our season and making a solid educational foundation for our students."** And oppositions and setbacks like that DID make him quit. You can't just ignore calls and emails from concerned parents and teachers. Mr. Stein is a really good guy and it's totally unfair that he got so much negativity from the people he expected support from in the first place. It's completely ridiculous that these adults act like elementary school kids. Mr. Stein has just as much right to apply for band director as Mr. J especially if Mr. J didn't even apply yet. (Exhibit C-1, emphasis added)

Additionally, Mr. Juzwiak admitted during his testimony that *prior* to the online discussion, he emailed some students and expressed his disappointment with the direction that the marching band program was taking. Indeed, the respondent's son commented on this email in another posting:

Alright, then don't take them as fact. I am only running what is most likely at least some of the truth, you can't deny Mr. J had something to do with this. **As of last week and exclusive number of us received an email from Mr. J that had to do exactly with this.** (Exhibit C-1, emphasis added)

Thus, not only did the Superintendent's email make Mr. Stein's resignation a public matter, but Mr. Juzwiak's email provided first-hand information to students that he and Mr. Stein had conflicting views about the marching band program. This conflict was certainly known among the students, as relevant postings from Exhibit C-1 state:

(Posted by A.C.)

There are people to blame. There were a FEW parents who were very negative and knocked Mr. Stein down to complete desperation, like what [S.] said on the wall post. I didn't want to say this, but several students have already come to the conclusion, Mr. J. definitely has had a HUGE part in this. The fact that he hurt his former student and us by getting rid of a wonderful opportunity for us to GROW as a band is unacceptable as a teacher.

(Posted by T.L.)

And [J.], I do agree with you where he feels unwelcomed ...but if he's made it this far, he should not have resigned. I'll only say what I know. Maybe other teachers were discouraging him, but he encouraged US, the kids who wanted to be in marching band next year. We should have been his only priority.

(Posted by B.S.)

You see this is why I hate parents and teachers. We all saw how excited this guy was about all of this, but because of the lack of support and de-railings from fellow teachers and parents he wants to leave?

(Posted by J.H.)

We should start a petition to get everyone to sign to bring back Mr. Stein and get rid of Mr. J. once and for all. Thanks for screwing us out of something we love.

(Posted by A.H.)

Well I personally believe Mr. Stein left because he was experiencing personal instances with staff and administrators who were occupying his time or holding him up with his plans. I don't however believe Mr. J. or Mr. B. were the ones who were causing any issues, specially considering he never really mentioned who and when he was experiencing problems...This only leads me to conclude perhaps it wasn't any of our parents at all or for that matter the parents who had questions, i think Mr. Stein was kinda fed up with the lack of respect for his plan to be more committed so i don't think we can blame ourselves for anything and i hope we get this worked out well...

(Posted by S.C.)

Mr. J has admitted that he didnt want the band to progress to competing so quickly. Honestly – we are only this problem because parents of students WHO AREN'T EVEN GOING TO BE IN MARCHING BAND NEXT YEAR harassed Mr. Stein because of his plans for the direction of the band program.

(Posted by C. R.)

please just post if you have something constructive to say. no more blaming anyone for anything. no more speculation. unless you are rob stein, or directly quoting (with no editorializing) the letter, do not tell us why he resigned. (Exhibit C-1)

Moreover, the complainant acknowledged in her testimony that the subject of Mr. Stein's resignation was not, to her knowledge, discussed at a Board meeting, so as to render this potentially a "confidential matter pertaining to the school" so as to implicate N.J.S.A. 18A:12-24.1(g). It also appears from the online discussion that the respondent had a personal discussion with Mr. Stein, as the respondent's son states:

Apparently my dad tried to friend [Stein] on facebook and they had a discussion about it. Mr. Stein then 'un-friended' my dad. He doesn't want to have anything to do with this school district anymore. Hopefully, someone as talented as him will easily be able to find another job as a music teacher. (Exhibit C-1)

Thus, even granting that there were discussions between the respondent and his son about Mr. Stein's resignation, the Commission finds that the complainant failed to establish that the respondent violated N.J.S.A. 18A:12-24.1(g).

The complainant next contends that Exhibit C-1 demonstrates that the respondent violated N.J.S.A. 18A:12-24.1(i), which states:

I will support and protect school personnel in proper performance of their duties.

The Commission's regulations require that:

Factual evidence of a violation of N.J.S.A. 18A:12-24.1(i) shall include evidence that the respondent(s) took deliberate action which resulted in undermining, opposing, compromising or harming school personnel in the proper performance of their duties. N.J.A.C. 6A:28-6.4(a)9.

Although Exhibit C-1 may demonstrate that there was little support among the students for Mr. Juzwiak after the resignation of Mr. Stein, the Commission finds that the complainant failed to prove that *the respondent took deliberate action* which resulted in undermining, opposing, compromising or harming school personnel in the proper performance of their duties. Indeed, as set forth above, Exhibit C-1 merely shows that the respondent had discussions with his son about Mr. Stein's resignation and likely expressed his candid opinion to his son that Mr. Juzwiak was responsible for Mr. Stein's resignation. As such, the Commission finds that the complainant failed to establish that the respondent violated N.J.S.A. 18A:12-24.1(i) in connection with the first allegation the complaint.

Allegations Regarding Email to Mr. Juzwiak

The complainant asserts that on June 6, 2009, the respondent sent an email to Tom Juzwiak in which he expressed his profound disappointment with the “gross injustice that’s unfolded over the past few weeks,” namely Mr. Stein’s resignation. According to the complaint, the respondent stated to Mr. Juzwiak that he has “only you and the EWEA leadership to blame.” The complainant asserts the respondent’s conduct violated N.J.S.A. 18A:12-24.1(c), (e), (i). (Complaint at p. 2)

The Commission first considers the allegation that sending the email to Mr. Juzwiak was a violation of N.J.S.A. 18A:12-24.1(c), which states:

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

The Commission’s regulations require that:

Factual evidence of a violation of N.J.S.A. 18A:12-24.1(c) shall include evidence that the respondent(s) took board action to effectuate policies and plans without consulting those affected by such policies and plans, or took action that was unrelated to the respondent’s duty to:

- i. Develop the general rules and principles that guide the management of the school district or charter school;
- ii. Formulate the programs and methods to effectuate the goals of the school district or charter school; or
- iii. Ascertain the value or liability of a policy. N.J.A.C. 6A:28-6.4(a)3.

Here, there is no evidence on the record that the respondent took any “board action” whatsoever so as to implicate this provision of the Act. Accordingly, the Commission finds that the complainant has failed to establish that the respondent violated N.J.S.A. 18A:12-24.1(c).

Next, the Commission notes that N.J.S.A. 18A:12-24.1(e) 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.

The Commission initially notes that the respondent's email to Mr. Juzwiak at no time discusses Board matters or any potential Board action. Thus, there is no suggestion in this writing that the respondent failed to recognize that authority rests with the Board; there is also no personal promise made by the respondent. Rather, the Commission finds that the email is clearly an expression of the respondent's personal feelings toward Mr. Juzwiak. As such, even granting that the mere writing of the email was "private action," the Commission does not find that, by its nature, it had the potential to compromise the board. (Contrast, for instance, Dericks et. al v. Schiavoni, Sparta BOE, Sussex County C41-07 (February 24, 2009) *aff'd* Commissioner of Education Decision No. 260-09SEC, decided August 18, 2009, where a Board member sent a letter to the editor without the full knowledge and consent of the Board, in which he speaks on behalf of the Board and addresses Board matters; I/M/O Bruce Freilich, Washington Township Bd. of Ed., Burlington County C18-04 & C19-04 Consolidated, (April 4, 2005) Commissioner of Education Decision No. 156-05, decided May 2, 2005, where a board member sent a letter to a private donor giving the impression that the letter was written on behalf of the Board when, in fact, the Board had not authorized the respondent to send the letter; and I/M/O Randie Zimmerman, Rocky Hill Bd. of Ed., Somerset County (C49-02) (July 22, 2003), Commissioner of Education Decision No. 497-03SEC, decided August 21, 2003, where a Board member investigated a complaint and drafted a letter that appeared to have the endorsement of the Board. Accordingly, the Commission finds that the complainant has failed to establish that the respondent violated N.J.S.A. 18A:12-24.1(e).

Finally, the Commission considers the complainant's allegation that the respondent violated N.J.S.A. 18A:12-24.1(i), as set forth above, when he wrote the email to Mr. Juzwiak. In this connection, the Commission notes that it has found violations of N.J.S.A. 18A:12-24.1(i) where the comments made to or about the school employee were direct, confrontational and intimidating.

For instance, in I/M/O Charles Fischer, Eatontown Bd. of Ed., Monmouth County, C30-03 (February 24, 2004), Commissioner of Education Decision No. 157-04SEC, April 12, 2004, the Commission found that a Board member violated N.J.S.A. 18A:12-24.1(i) when he called an employee at home and became angry when she refused to provide him with the reports that he had requested. In I/M/O David Kanaby, Hillsborough Bd. of Ed., Somerset County, C53-05 (July 24, 2007), Commissioner of Education Decision No. 350-07SEC, September 10, 2007, the Commission found that the respondent Board member violated N.J.S.A. 18A:12-24.1(i) when he sent an email to the Superintendent which was both "threatening and intimidating" in that it asked the Superintendent for an accounting of her personal leave. The Board member sent the email to all Board members, as well as the Business Administrator, the Assistant Superintendent and his subordinate. The Commission found the respondent's email to be "a personal and highly critical expression of his anger towards the superintendent in the proper performance of her duties." (Kanaby at slip op. page 3)

In I/M/O Hollander, Springfield, Bd. of Ed., Union County C49-07 (February 24, 2009), *aff'd*, Commissioner of Education Decision No. 62-10ASEC, decided March 5, 2010, the

respondent Board member wrote a letter to the State complaining about his Superintendent. The Commission found that the letter was not a mere statement of disagreement or dissatisfaction with the Superintendent's handling of matters. The respondent accused the Superintendent of allowing his administrative staff to violate Board policy, then directed his recriminations to the attention of State officials. Finally, in Brown et al. v. David Matthews, City of Englewood Board of Education, Bergen County, C13-07 (October 27, 2008), *aff'd*, Commissioner of Education Decision No. 123-09A, April 14, 2009, the Commission found the respondent in violation of N.J.S.A. 18A:12-24.1(i) when he refused to cooperate with the District's affirmative action officer (AAO) and, in so doing, engaged in offensive comments so upsetting to the employee that she resigned as the District's AAO.

The Commission does not find that the respondent's email rises to the level of a violation of N.J.S.A. 18A:12-24.1(i) where the respondent's message was predominantly that of a parent expressing his disappointment directly to a teacher. However, having clearly gone on record voicing his dissatisfaction, the Commission now cautions the respondent about taking any official action as a Board member which would involve Mr. Juzwiak's employment. Accordingly, the Commission finds that the complainant has failed to establish that the respondent violated N.J.S.A. 18A:12-24.1(i).

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(c), (e), (g) and (i) of the Code of Ethics for School Board Members. Consequently, the complaint is dismissed. This decision is a final decision of an administrative agency and is appealable only to the Superior Court--Appellate Division. See, New Jersey Court Rule 2:2-3(a).

Robert W. Bender
Chairperson

Mailing Date: July 28, 2010

Resolution Adopting Decision – C29-09

Whereas, the School Ethics Commission has considered the documents on record and the testimony from its hearing on June 22, 2010; and

Whereas, at its meeting of June 22, 2010, the Commission found that the complainant failed to prove that the respondent violated N.J.S.A. 18A:12-24.1(c), (e), (g) and (i) of the Code of Ethics for School Board Members; and

Whereas, at its meeting on July 27, 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 this Resolution was duly adopted by the School Ethics Commission at its public meeting on July 27, 2010.

Joanne Boyle, Executive Director