
CAROL MARTINEZ

**BEFORE THE SCHOOL
ETHICS COMMISSION**

v.

**FRANCIS ALBOLINO and
MARK STEIN,
HACKENSACK BOARD OF
EDUCATION
BERGEN COUNTY**

**Docket No. C45-11
PROBABLE CAUSE NOTICE**

PROCEDURAL HISTORY

This matter arises from a complaint filed on October 26, 2011 by Carol Martinez alleging that Francis Albolino, Mark Stein and Philip Carroll, members of the Hackensack Board of Education (“Board”), violated the School Ethics Act (“Act”), N.J.S.A. 18A:12-21 et seq.

After being granted an extension for good cause shown, a Motion to Dismiss in Lieu of Answer was filed on behalf of the respondents. The respondents therein alleged that the complaint was frivolous. Pursuant to N.J.A.C. 6A:28-8.2(a), the complainant was accorded an opportunity to respond to the motion. A reply was filed on her behalf on January 13, 2012. The parties were advised that this matter was scheduled for discussion by the Commission at its meeting on January 24, 2012 in order to make a determination regarding the respondents’ Motion to Dismiss. At its meeting on January 24, 2012, the Commission granted the Motion to Dismiss the allegation that Respondent Carroll violated N.J.S.A. 18A:12-24(c) and dismissed him as a respondent in this complaint. The Commission denied the Motion to Dismiss the allegations that Respondents Albolino and Stein violated N.J.S.A. 18A:12-24(c) and found that the complaint was not frivolous in accordance with the standard set forth at N.J.A.C. 6A:28-1.2. Respondents Albolino and Stein were directed to file an answer to the complaint.

After being granted an extension for good cause shown, an Answer was filed on behalf of the respondents on April 19, 2012. By letter dated April 26, 2012, the parties were advised that the Commission would review this matter at its meeting on May 29, 2012. At that meeting, the Commission voted to find no probable cause to credit the allegation that the respondent violated the Act.

SUMMARY OF PLEADINGS, DOCUMENTS AND INVESTIGATION

The complainant asserts that Respondent Albolino’s spouse is a tenured teaching staff member and Respondent Stein’s daughter is a tenured teaching staff member. According to the complainant, the Board commenced a search for a new Superintendent on or about May 10, 2011. The job was posted in June 2011; the Board amended its criteria in July 2011 and re-posted the position. The complainant alleges that Raymond Gonzalez, Acting Superintendent and former Assistant Superintendent responded to the second posting and applied for the

position. The complainant further alleges that Dr. Gonzalez directly supervised the building principals who directly supervised Respondent Albolino's spouse and Respondent Stein's daughter.

According to the complainant, Dr. Gonzalez was selected and became a candidate as of September 13, 2011. On September 13, 2011, the respondents attended a closed session meeting to discuss the pool of candidates, which included Dr. Gonzalez. They decided on dates for the interviews and they finalized the first interview questions. On September 21, 2011, October 4, 2011, October 6, 2011 and October 17, 2011, respondents attended and participated in interviews of certain candidates, including the interview for Gonzalez on September 21, 2011. According to the complainant, on or about October 5, 2011, Gonzalez withdrew from the pool of candidates. The complainant asserts that the respondents violated N.J.S.A. 18A:12-24(c) by participating in the Superintendent Search meeting on September 13, 2011 and the Candidate interviews.

While the respondents do not dispute that Respondent Albolino's spouse is a tenured teaching staff member and Respondent Stein's daughter a tenured teaching staff member, and that, in the summer of 2011, the Board commenced a search for a new Superintendent, the respondents specifically deny that Dr. Gonzalez directly supervised the building principals who directly supervised Respondent Albolino's spouse and Respondent Stein's daughter. Respondents offer the following affidavits:

Respondent Albolino attests that his wife has been employed by the District for 25 years. She teaches kindergarten at the Fairmount School and is a member of the Hackensack Education Association. Because the Board did not have the expertise to coordinate its search for a new Superintendent, it relied upon Susan McCusker of the New Jersey School Boards Association (NJSBA). Thus, Albolino avers that he never had any personal contact with the candidates relating to their applications, except in the context of a Board meeting. (Albolino Affidavit at pp. 1-2)

The Board did not have direct involvement in the receipt and screening of the applications as they were sent directly to Ms. McCusker. There was an initial posting of the Superintendent's position; based on the limited responses to a July 1, 2011 submission date, Ms. McCusker recommended that the Board expand its criteria to include Central Office and/or Principal experience, instead of only experience as a Superintendent/Assistant Superintendent. The Board agreed and a new application deadline was established for August 12, 2011. Respondent Albolino attests that Ms. McCusker maintained physical custody of the application materials until September; he did not immediately know the names of the applicants or see their applications. (Id. at pp. 3-5)

At the August 10, 2011 meeting, Ms. McCusker disclosed that Interim Superintendent Gonzalez had applied for the position. The respondents then asked Board counsel for advice as to whether they were permitted to participate in the search. On August 12, 2011, Board counsel issued a memorandum to Respondent Stein. Citing to the Commission's Advisory Opinion A10-00 (June 27, 2000), counsel advised that the presence of in-house candidates was *not* sufficient to require respondents' recusal. Counsel advised that because their relatives were tenured faculty

members subject to a collective bargaining agreement in a district with 750 employees, no possible benefit could accrue to the relatives by virtue of the respondents' participation in the evaluation of an in-house candidate. Respondent Albolino relied upon counsel's advice. (Id. at pp. 6-7)

After the search closed, the Board met with Ms. McCusker in closed session on September 13, 2011. Ms. McCusker had screened the applicants and placed them in categories according to whether they met the criteria and credentials. Based on her analysis, the Board ultimately selected eight of the candidates, including Dr. Gonzalez, for first interviews. Albolino notes in this regard that the Board informally decided that if three members were interested in interviewing a candidate, that candidate would be invited for a first interview. Six of the 10 Board members favored inviting Dr. Gonzalez for an interview. Thus, Respondent Albolino reasons that "even if Mr. Stein and I had recused ourselves, Interim Superintendent Gonzalez would still have been invited for an interview." The first interviews took place in closed session on September 21, October 4, 6 and 17, 2011. Dr. Gonzalez was interviewed on September 21 and he withdrew his candidacy on October 5, 2011 and resigned employment with the District before the Board completed the remaining interviews. Eventually, the Board was unable to achieve a consensus on a candidate; the search was abandoned without extending a formal offer to any candidate. On November 21, 2011, the Board voted to appoint an Interim Superintendent. (Id. at pp. 7-9)

Respondent Stein affirms that his daughter is a tenured teacher, having been employed in the District for eight years. She presently teaches at the High School and is a member of the Hackensack Education Association. Respondent Stein agrees with the statements made by Respondent Albolino. (Stein Affidavit at pp. 1-2)

Board attorney Richard E. Salkin, Esq., attests that the respondents approached him after the August 10, 2011 meeting and inquired whether the emergence of an internal candidate would affect their ability to continue participating in the selection of a new Superintendent. In this regard, counsel avers that he has known both respondents "to be cautious and conservative public officials who have routinely recused themselves whenever there is even a potential for a question to be raised." Recognizing that the selection of a new Superintendent is one of the most important functions of a Board member, counsel asked the respondents to frame their question in writing; counsel thereafter reviewed the relevant law and the Commission's advisory opinions. He advised the respondents that:

N.J.S.A. 18A:12-24(c) requires a board member's recusal when any matter is presented in which the member, or a member of his or her immediate family, has a direct or indirect financial interest that might reasonably be expected to impair his or her objectivity or independence of judgment. I am of the opinion, consistent with Advisory Opinion A10-00, that no disqualifying financial interest is presented when a teacher that is related to the Board member receives fixed compensation under a collective bargaining agreement.

I also found that having a spouse or relative employed by the district would not create a per se personal interest conflict for a Board member that seeks to review an employment application from an in-house candidate. In so finding, I considered that the Board members' relatives were both tenured faculty and members of a collective bargaining unit that did not currently have a contract up for renewal. I also considered the size of the district, with approximately 750 employees, and the attenuated nature of any potential working relationship between the relatives and the in-house candidate. (Salkin Affidavit at pp. 1-3)

Counsel avers that he reiterated this advice at the Board's meeting of September 21, 2011 when the complainant objected to the participation of the respondents during the first-round interviews. Upon the complainant's continued objection thereafter, counsel affirms that he reviewed the Commission's relevant advisory opinions and advised the Board and the complainant that his advice had not changed. In particular, counsel distinguishes the facts herein from those presented in Advisory Opinion A07-06, on which the complainant relied. Counsel further understands the Commission's advisories as follows: "there is no blanket rule against participation and the Board member would only be required to recuse if there is a pre-existing relationship between the relative and the candidate." Counsel stands by his opinion that the respondents were not required to recuse themselves from the selection process of Dr. Gonzalez, although the ultimate supervisor, since he was presented with no facts supporting the existence of a relationship between Dr. Gonzalez and the Board members' relatives. Dr. Gonzalez acted as their supervisor in the most attenuated way in a district with 750 employees and the responsibility to educate 5,200 students. (Id. at pp. 4-6)

Dr. Raymond Gonzalez states that he was hired as the Assistant Superintendent for the district on July 1, 2010 and he was appointed Interim Superintendent on July 1, 2011. He voluntarily resigned his position effective December 7, 2011 to take a position as the Superintendent in another district. He was one of two Assistant Superintendents in the central office; the building principals reported to him and he reported to the Superintendent. It was his first position in the Hackensack School District. (Gonzalez Affidavit at p. 1)

Dr. Gonzalez submitted an application for the position of Superintendent with a deadline date of July 1, 2011. He subsequently learned that the position was re-advertised with an August 12, 2011 closing date. Around September 2011, he was invited to be interviewed by the Board in a closed session meeting on September 21, 2011. Concurrently, he was invited to be interviewed by the Wayne Board of Education in its search for a Superintendent. He interviewed with the Wayne Board on September 22, 2011 and September 28, 2011, was offered the position and, having not heard back from the Hackensack Board, Dr. Gonzalez accepted the position in Wayne. He advised the Hackensack Board on October 5, 2011 that he was withdrawing his application for Superintendent and tendering his resignation with 90 days' notice. Dr. Gonzalez underscores that his withdrawal from consideration for the Superintendent's position in Hackensack was not related to the complainant's allegations herein. (Id. at pp. 2-4)

As to his alleged professional relationship with the respondents' relatives, Dr. Gonzalez affirms that although he knew Respondent Albolino's spouse and Respondent Stein's daughter "in the most generic sense of the term," he did not know them personally. Noting that the district has 725-800 employees and 5,200 students in six buildings, Dr. Gonzalez avers that, in his short time in the district, "it was simply not possible for me to become personally acquainted with each and every employee." Noting that he was quickly elevated to the position of Interim Superintendent, Dr. Gonzalez affirms that he was essentially performing two jobs since his former position as Assistant Superintendent was not filled. Moreover, the other Assistant Superintendent was also planning to retire at the end of that school year and the district, according to Dr. Gonzalez, was "in a state of rapid transformation." His job "was more in the nature of triage than having the opportunity to meet individually with each and every staff member." Thus, while he was generally aware that the respondents had relatives employed in the district, he affirms that "he did not inquire further and did not want there to be even an appearance of impropriety." (*Id.* at pp. 4-5)

Dr. Gonzalez affirms that it was his custom and practice to try to walk through every classroom at every school at least once per year, and to greet every teacher. However, he did not formally observe or sit in on any lesson plans. He held an annual meeting at the start of each school each with all 800 district employees in the gymnasium. After the formal part of the meeting, he would circulate and greet staff; Dr. Gonzalez avers that he does "not have any specific recollection of interaction with Mrs. Albolino or Ms. Stein." To the extent he reviewed the principals' evaluations of their teachers, although such evaluations would have crossed his desk, given the number of evaluations and reports that he received on a daily basis, he would not have conducted more than a cursory review. Rather, Dr. Gonzalez affirms that he took a more substantive role in the evaluations of new teachers that were being considered for tenure or where there was a specific performance or disciplinary issue. Dr. Gonzalez does not recall any such issues involving Mrs. Albolino or Ms. Stein. He adds that he "would have difficulty identifying photographs of either Mrs. Albolino or Ms. Stein." He has no personal relationship with these teachers and was never asked, nor would he acquiesce to provide, any special consideration to them. (*Id.* at pp. 5-7)

Judy Albolino and Michelle Stein provide affidavits, as well. Mrs. Albolino is the spouse of Respondent Albolino; she has been employed in the district for 25 years. She currently teaches Kindergarten at the Fairmount School. Michelle Stein is the daughter of Respondent Stein. Ms. Stein attests that she has been employed in the district for eight years. She currently teaches at the high school. Both state that they are members of the Hackensack Education Association and the terms of their employment are governed by a collective bargaining agreement. Mrs. Albolino and Ms. Stein affirm that they did not know Dr. Gonzalez before he came to the district in July 2010. As classroom teachers, they report directly to an Assistant Principal and Principal who, in turn, report to Central Office. They attest that they had no ongoing material interaction with Central Office, no personal relationship with Dr. Gonzalez and they did not have any material interactions with him during the two-year period he worked for the district. They further affirm that their classroom observations are performed by building supervisors and their annual salary increments are determined by contract. They have never had an increment withheld or been subject to disciplinary action so as to be called to the attention of the Central Office. They never received any comments or feedback regarding their evaluations

from Dr. Gonzalez. Although they met Dr. Gonzalez on a few occasions, their interactions were brief and professional. (Judy Albolino Certification; Michelle Stein Certification)

FINDINGS OF PROBABLE CAUSE

This matter was before the Commission for a determination of probable cause pursuant to N.J.A.C. 6A:28-10.7. That is, the Commission must determine, based on the evidence before it, whether probable cause exists to credit the allegation in the complaint. A finding of probable cause is not an adjudication on the merits, but, rather, an initial review whereupon the Commission makes a preliminary determination whether the matter should proceed to an adjudication on the merits, or whether further review is not warranted.

The complainant alleges that the respondent violated N.J.S.A. 18A:12-24(c) of the School Ethics Act.

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

The Commission notes that the material facts in this matter are not in dispute. The respondents acknowledge that Respondent Albolino's spouse is a tenured kindergarten teacher in the District and that Respondent Stein's daughter is a tenured math teacher in the District. On or about May 10, 2011, the Board initiated a search for a new Superintendent and solicited applications on June 5, 2011 and June 10, 2011. A revised solicitation was posted on July 31, 2011. After the prior Superintendent retired at the end of the 2010-2011 school year, the District was temporarily operated by an acting Superintendent, Raymond Gonzalez. Respondent Stein sought a legal opinion from the Board's counsel as to whether, and to what extent, he and Respondent Albolino would be permitted to participate in the selection of the new Superintendent in light of their relatives' employment in the District. On August 12, 2011, Counsel issued a legal opinion, finding that the situation was essentially analogous to the facts in the Commission's Advisory Opinion A10-00 and concluding that the respondents could participate in the search and selection of a new Superintendent. The Board received a number of applications which were discussed and reviewed in closed session on September 13, 2011. On September 21, 2011, October 4, 2011, October 6, 2011 and October 17, 2011, the Board met to consider applications and interview the various candidates for the position. Although then-Acting Superintendent Raymond Gonzalez was initially an applicant for the permanent position and was interviewed by the Board in the first closed session meeting on September 21, 2011, Gonzalez withdrew his candidacy on October 5, 2011 after he decided to take a position in another District.

Respondent Albolino's spouse is a tenured teaching staff member. 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. In Advisory Opinion A10-00, (June 27, 2000), the Commission advised a board member whose spouse was a teacher in the District that s/he may participate in the search for the administrators and vote on the appointments. However, the Commission noted that this advice may change if the selection was for someone who already knows the board member's spouse. Thus, the Commission made an exception for administrators who have some familiarity with a board member's spouse.

Later, in Advisory Opinion A07-06, (July 31 2006), the Commission advised that a Board member whose spouse worked as a teacher's assistant at the high school would violate N.J.S.A. 18A:12-24(c) if s/he were to participate in discussions regarding the hiring of the Superintendent and in the vote to hire the Superintendent. There, the Commission found that because the current Assistant Superintendent was a candidate to become Superintendent and the Assistant Superintendent supervised the Principal who supervised the Board member's spouse, the public could reasonably expect that the Board member's objectivity and independence of judgment may be impaired if s/he were to participate in discussions regarding the hiring of the Superintendent and in the vote to hire the Superintendent.

Respondent Stein's daughter is a tenured teaching staff member. As noted above, the Act defines "member of the immediate family" as the spouse or dependent child of a school official residing in the same household. Therefore, the respondent's daughter is not a member of the immediate family, but rather a "relative," defined by the Act as a spouse, natural or adopted child, parent or sibling of a school official. In Advisory Opinion A23-06, (November 15, 2006), the Commission advised a Board member (identified as "B") whose mother and brother (both "relatives") were employed in the district as a full time aide and the Media Services Coordinator, respectively, that s/he may participate in the search for the new Superintendent, the interview process for the potential candidates and the hiring of the new Superintendent *unless* the Board member's mother or brother had some familiarity with a potential candidate because such candidate worked in the district.

The Commission acknowledges that these respondents acted reasonably under the circumstances to obtain advice from Board counsel as to whether and to what extent, they would be permitted to participate in the selection of the new Superintendent in light of the family members' employment in the District. Counsel issued a legal opinion examining the Commission's past advisories and concluding that the respondents could participate in the search and selection of a new Superintendent. The Commission further acknowledges respondents' contention that the Commission's advisories do not establish a bright line prohibition "against Board member participation in the Superintendent hiring process literally any time there is an in-house candidate and the Board member has a relative employed in within the district." Respondents continue:

If such a rule existed, then the Commission's advisory opinions would have stated it directly and unequivocally, but in establishing a rather fluid concept of "some familiarity" between the potential candidate and the relative, it is evident that, like any ethics

problem, the ultimate answer must be found in a nuanced analysis of the facts and the specific nature of any relationship with an in-house candidate. (Ibid.)

Thus, under these circumstances, the Commission declines to find probable cause to credit the allegation that the respondents violated N.J.S.A. 18A:12-24(c). In so doing, the Commission acknowledges that its past advisories offering advice with respect to the search for, and hiring of, a Superintendent included language of “familiarity” when discussing in-house candidates for the position. The Commission further recognizes that the lack of a “bright line rule” has caused confusion which, in this case, resulted in litigation and perhaps the unnecessary expenditure of Board resources.

Yet, where the Board member has an immediate family member or relative employed in the District, the Commission has taken a clear position in its advisories prohibiting that Board member’s subsequent involvement in the Superintendent’s employment issues *once the Superintendent is hired*, irrespective of whether the new Superintendent was once an employee of the District. In this regard, the Commission has stated that the Board member and his/her immediate family member or relative will have at least a personal involvement creating a benefit, and may also have a financial involvement that might reasonably be expected to impair his or her objectivity, such that involvement in the administrator’s post-employment issues (*i.e.*, evaluations, contract discussions, etc.) is prohibited. See, Advisory Opinion A10-00 (June 27, 2000), Advisory Opinion A23-06, (November 15, 2006).

The Commission recognizes that the Legislature has made it clear that Board members “... must avoid conduct which is in violation of their public trust or which creates a justifiable impression among the public that such trust is being violated.” N.J.S.A. 18A:12-22. As such, it now finds that the same concerns which give rise to a post-employment conflict of interest also have the potential to taint the Superintendent’s pre-employment/selection and hiring process where the Board member has an immediate family member or relative employed in the District. Recognizing that 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 a Board member’s immediate family member or relative, the Commission determines that such Board members would have a direct or indirect financial involvement that might reasonably be expected to impair their objectivity or independence of judgment. Accordingly, henceforth, a Board member who has an immediate family member (as defined in N.J.S.A. 18A:12-23) or a relative (as defined in N.J.S.A. 18A:12-23) employed in the district may not participate in the search, selection and/or vote for a new Superintendent,¹ *irrespective of whether there is an in-house candidate being considered for the position* because the Commission maintains that the Board member’s involvement in the search, discussion and/or vote for a new Superintendent under such circumstances would constitute a violation of N.J.S.A. 18A:12-24(c). To the extent the Commission’s past advisories dealing with the search for, and selection of, a new Superintendent are inconsistent with this determination, those advisories are no longer considered valid guidance.

¹ The Commission underscores that its determination herein applies *only* to the hiring of Superintendents and Chief School Administrators.

NOTICE

Pursuant to N.J.S.A. 18A:12-29(b), the Commission hereby notifies the complainant and respondents that it finds no probable cause to credit the allegation that the respondents violated N.J.S.A. 18A:12-24(c) and the complaint is, therefore, dismissed. This decision is a final decision of an administrative agency and, 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 – C45-11

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 May 29, 2012, the Commission found no probable cause to credit the allegations that the respondents violated N.J.S.A. 18A:12-24(c) of the School Ethics Act and dismissed the complaint; and

Whereas, at its meeting on June 26, 2012, the Commission agreed that the within probable cause notice accurately memorializes its findings;

Now Therefore Be It Resolved, that the Commission hereby adopts the proposed probable cause notice in this matter and directs its staff to notify all parties to this action of said notice.

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