

2009 meeting, the Commission reconsidered its previous decision and voted to find that the respondent did not violate N.J.S.A. 18A:12-24.1(e) and (i) as alleged in count one. The Commission also voted to find that the respondent violated N.J.S.A. 18A:12-24.1(i) as alleged in counts three and four, to recommend to the Commissioner of Education that the respondent be censured and to adopt this decision.

FINDINGS OF FACT

The following facts were deemed admitted by the parties:

1. The respondent became a member of the Board in April 2006. (Answer, at page 1)
2. The complainant served in the capacity as superintendent since April 2004. (Complaint, at count 1, paragraph 1, page 1)

Count One

1. In March 2007, the respondent attended multiple public presentations regarding the District's budget. (Answer, at count 1, paragraph 3, page 2)
2. At the March 13, 2007 budget presentation, during a PTA meeting, the respondent asked the complainant to tell the public which elective programs would be cut under the proposed budget. (Id., at count 1, paragraph 5, page 3)
3. The complainant had shared this information with Board members during the March 1, 2007 meeting of the Budget and Finance Committee of which the respondent was a member. (Id., at count 1, paragraph 5, page 3)
4. At the March 13th meeting, the respondent publicly urged full disclosure of all relevant information and open communication with all members of the Board and the public. (Id., at count 1, paragraph 7, pages 4 to 5)
5. The complainant thought that it would be inappropriate to release information about which elective programs would be cut because, by extension, this would identify teachers who might lose their jobs. (Davino Certification at paragraph 11, page 6)
6. The complainant shared his concerns about the inappropriate release of information about which elective programs would possibly be cut with the respondent. (Id., at paragraph 11, page 6; Complaint at Exhibit B, Davino email, March 9, 2007)
7. At the March 17, 2007 budget presentation, during a PTA meeting, the respondent publicly asked the complainant for information regarding the Advanced Placement courses. (Answer, at count 1, paragraph 9, page 5)
8. The respondent also publicly stated that the complainant had failed and refused to provide him with additional data that he requested regarding the Advanced Placement courses. (Id., at count one, paragraph nine, page five)

Counts Three and Four¹

1. When he became a Board member in April 2006, the respondent was instructed to communicate with the complainant via email; he never had telephone conversations with the complainant. (Id., at count 3, paragraph 4, page 13)
2. The respondent sent approximately 19 email communications to the complainant between November 2006 and June 2007. (Id., at count 3, paragraph 4, page 13)
3. The respondent sent the following letter (Complaint at Exhibit F) dated May 31, 2007 to the complainant and copied then State Board President, Dr. Arnold Hyndman, Union Executive County Superintendent, Dr. Carmen Centuolo and, then Board President, Judy Millman:

Dear Mr. Davino:

As the chief school administrator of the Springfield New Jersey school district, one of your charges, I believe is to be responsible for implementing all district policies. Unfortunately, I have been informed by the board secretary, in writing and verbally, that both you and the president of the board of education, Ms. Millman, have instructed the board secretary, Mr. Matthew Clarke, to violate, policy 9132. According to bylaw, the chairman of a committee shall call a meeting by making arrangements through the office of the secretary. You and/or the board president have instructed him to ignore the request and to refuse to obey the policy.

If this violation was an isolated incident, perhaps it could be dealt with in a simple manner. However, the instructions by the board president, of which I have been told you, are aware of, and the apparent allowance of your administrative staff to refuse to follow board of education policy, is just one more example of a district that is headed for disaster.

We as a board of education are quickly losing the trust and support of our community. The relationship between the whole board and the chief school administrator is critical. Your refusal to sit down and talk, and work out our differences is no longer tolerable. Your decision to allow an administrator to violate board policy because you do not like the chairperson, without speaking to the BOE member himself, is, in my belief, a further recipe for disaster for our school and our kids. I have tried to stay focused on the issues. I believe you and the board president have made this personal. Members of the BOE should be allowed to dissent. Violation of this policy and other policies should be unacceptable, no matter how you feel personally.

¹ The Commission will not address the allegations in count three related to the respondent's communications with the district's Director of Human Resources in June 2006, as the underlying claim is time-barred and was dismissed in the Commission's October 24, 2008 probable cause decision. The Commission also notes that, in its probable cause decision, it dismissed the allegations in count three that the respondent violated N.J.S.A. 18A:12-24(e) and (f) in relation to the respondent's conduct involving a Comcast email survey and respondent's communications about the use and maintenance of the district's athletic fields, and it will not address these allegations in this final decision.

The public should feel welcome at our meetings. Conduct that says “Listen to me, but I won’t listen to you” will not engender support. That is where our school district is. Stonewalling me, and/or the public is a defensive scar that is difficult to heal.

I hope you will implement all the policies equally and fairly. There is a process to change them. There should be a penalty for those who refuse to follow them or enforce them.

Sincerely,
David Hollander M.D.

Count Six²

1. At the September 10, 2007 Board meeting, the respondent voted to approve the payment of registration fees for himself to attend a seminar on October 2, 2007 and October 23-26, 2007. (*Id.*, at count 6, paragraphs 2 through 5, page 28)
2. At the October 22, 2007 Board meeting, the respondent voted to approve the payment of registration fees for himself to attend training in February 2008. (*Id.*, at count 6, paragraphs 2 through 5, page 28)

ANALYSIS

As a preliminary matter, the Commission will first address two of the respondent’s requests made in his reply to the Commission’s probable cause decision. The respondent’s first request is for the Commission to consider that the “complainant be barred from pursuing charges inconsistent with representations in his certification submitted in support of the Springfield Board of Education’s NJQSAC district performance review, stating that no board members (including Dr. Hollander) had engaged in an [sic] violation of the School Ethics Act.” (Respondent’s reply to the Commission’s probable cause decision, at page two) The respondent argues that “the Commission should rule that the complainant is barred, on the basis of judicial estoppel, from pursuing the charges in this matter.” (*Id.*, at footnote one on page two) Under the doctrine of judicial estoppel, a party who, by his pleadings, statements or contentions, under oath, has assumed a particular position in a judicial proceeding is estopped to assume an inconsistent position in a subsequent action. (See, State, Dept. of Law v. Gonzales, 142 N.J. 618, 632 (1995) Here, the doctrine of judicial estoppel does not apply, because the New Jersey Quality Single Accountability Continuum (NJQSAC) district performance review is not a judicial proceeding; rather, it is part of a comprehensive monitoring system for public schools established at N.J.S.A. 18A:7A-3 et seq. Accordingly, the Commission finds no cause to credit the respondent’s argument in this regard.

² The respondent has requested that the Commission, in making its final determination on count six, consider copies of the minutes from 39 meetings of the Board conducted between April 24, 2006 and December 3, 2007, which were offered into evidence for the purpose of showing the Board’s practice with respect to motions to approve payment of Board members’ travel expenses. The Commission advises that it was not necessary to reach to this evidence in order to make a final determination as to count six; thus, it did not consider that evidence.

The respondent also requests, for a second time, that the Commission dismiss this matter as frivolous. However, that request was considered at the probable cause stage of the proceedings, as set forth in the Commission's probable cause decision. The Commission has already denied the respondent's request to find that the complaint was frivolous; it will not reconsider this decision.

COUNT ONE

The Commission found probable cause to credit the allegations in count one that the respondent violated N.J.S.A. 18A:12-24.1(e), (g) and (i) in relation to his conduct at the March 2007 public presentations of the District's budget.

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.

In making a determination as to a violation of N.J.S.A. 18A:12-24.1(e), the Commission must first ascertain if the respondent's conduct at the March 2007 public presentations of the District's budget was private action. The term "private action" is defined at N.J.A.C. 6A:28-7.1 to mean, in part, "action taken by a member of a district board of education...that is beyond the scope of the duties and responsibilities of a member of a district board of education..." In his response to the Commission's probable cause determination, the respondent argued that "the challenged statements were made by the respondent in the course of his performance of his duties as a board member. They were made at a board budget presentation, during a public discussion sponsored and conducted by the board, on a matter of essential board business, the district budget." (Respondent's reply to the Commission's probable cause decision, at page five)

The evidence before the Commission shows that the budget presentations that the respondent attended were Board presentations conducted to provide information to the public. The Commission notes that the respondent attended those presentations in his role as a member of the Board. The evidence shows that, at the March 13, 2007 budget presentation to the PTA, the respondent asked the complainant to tell the public which elective programs would be cut, and, at the March 17, 2007 budget presentation to the PTA, the respondent challenged the complainant regarding information the respondent had been provided for the Advanced Placement courses. The Commission finds that these actions taken by the respondent were Board actions within the scope of the duties and responsibilities of the respondent as a member of the board, and were, therefore, not private actions. Accordingly, the Commission finds that the respondent did not violate N.J.S.A. 18A:12-24.1(e).

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.

In order to find a violation of N.J.S.A. 18A:12-24.1(g), the Commission must determine whether the respondent failed to hold confidential all matters pertaining to the schools which, if disclosed, would needlessly injure individuals or the schools. The respondent argues that, even assuming that the information regarding the budget cuts was confidential, his attempt to discuss this confidential information is not alone sufficient to establish a violation. (Respondent's reply to the Commission's probable cause decision, at page 6) The Commission agrees. Here, the evidence shows that nothing confidential was disclosed by the respondent. While the respondent attempted to pressure the complainant into releasing information regarding the budget cuts at an inappropriate time prior to finalization of the budget, such information was not confidential and, in any event, was never released. Because nothing confidential was disclosed by the respondent, the Commission finds that the respondent did not violate N.J.S.A. 18A:12-24.1(g).

N.J.S.A. 18A:12-24.1(i) provides:

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

In order to find a violation of N.J.S.A. 18A:12-24.1(i), the Commission must determine whether the respondent failed to support the complainant in the proper performance of his duties as superintendent during the March 2007 budget presentations. The respondent argued that his conduct did not rise to the level of a violation of N.J.S.A. 18A:12-24.1(i) because there is no evidence to show that the complainant felt threatened or bullied, or that the respondent's comments were disrespectful, rude, insensitive or derogatory. (Id., at page eight) The respondent conceded that his comments may have been focused and challenging, but noting that, absent evidence that they were inappropriate or were made for any purpose other than to gather information that he considered relevant, the respondent concluded that there was no factual or legal basis for finding a violation. (Id., at page 8) To support his argument, the respondent relied upon Annie D. Jackson v. Reginald Davis, C09-07 (April 1, 2008) where the Commission found that a board member did not violate N.J.S.A. 18A:12-24.1(i) when he questioned a principal in a demanding way that was not extreme or disrespectful for the purpose of gathering information.

Previously, in I/M/O Charles Fischer, C30-03 (February 24, 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. Also, in I/M/O Karen Jackson, C08-05 (December 20, 2005), the Commission found a board member violated N.J.S.A. 18A:12-24.1(i) when she made a

derogatory statement regarding a teacher's lesson on the Holocaust at a public meeting of the board. While the respondent's questions and statements at the March 2007 public presentations of the budget may have been challenging, they did not approach the severity of the conduct of the board members in I/M/O Fisher and I/M/O Jackson. Furthermore, this matter is similar to Jackson v. Davis, as the evidence does not show that the respondent's requests and statements at the March 2007 budget presentations were made for any purpose other than to gather information and provide the public with as much information as possible regarding the Board's budget. Based on the foregoing, the Commission finds that the respondent did not violate N.J.S.A. 18A:12-24.1(i) as alleged in count one.

COUNTS THREE AND FOUR

The Commission found probable cause to credit the allegations in count three that the respondent violated N.J.S.A. 18A:12-24.1(d), which provides:

I will carry out my responsibility, not to administer the schools, but, together with my fellow board members, to see that they are well run.

To prove a violation of N.J.S.A. 18A:12-24.1(d), the complainant maintains that the respondent administered the schools when he sent 19 email communications to the complainant between November 2006 and 2007. The respondent argued that there was no evidence to support a finding that the respondent administered the schools as that term is defined at N.J.A.C. 6A:28-7.1. (Respondent's reply to the Commission's probable cause decision, at page 10) N.J.A.C. 6A:28-7.1 provides:

“Administer the schools” means that a member of the district board of education or a member of a charter school board of trustees has become directly involved in activities or functions that are the responsibility of school personnel or the day to day administration of the school district or charter school or has given a direct order to school personnel.

The Commission agrees with the respondent that there is no evidence to show that the respondent became directly involved in activities or functions that are the responsibility of school personnel or the day-to-day administration of the District, or that the respondent gave a direct order to school personnel. Therefore, the Commission finds that the respondent did not violate N.J.S.A. 18A:12-24.1(d).

The Commission also found probable cause to credit the allegations in counts three and four that the respondent violated N.J.S.A. 18A:12-24.1(i) when he sent the May 31, 2007 letter to the complainant and copied then State Board President, Dr. Arnold Hyndman, Union Executive County Superintendent, Dr. Carmen Centuolo and, then Board President, Judy Millman. The respondent maintained that the May 31 letter did not contain confidential personnel information and claimed that it only expressed his dissatisfaction with the complainant's handling of certain matters. (Id., at page 12) The respondent also noted that the letter was not written in the course of a performance evaluation. (Id., at page 12)

Initially, the Commission notes that N.J.S.A. 18A:12-24.1(i) does not require the respondent to release confidential information in order to have violated N.J.S.A. 18A:12-24.1(i); neither has the Commission so held in its prior decisions. Further, the Commission finds that the letter was not a mere statement of disagreement or dissatisfaction with the complainant's handling of matters. It went further; the respondent accused the complainant of allowing his administrative staff to violate Board policy, then directed his recriminations to the attention of State officials. Indeed, in the third paragraph, the respondent states, "Your refusal to sit down and talk, and work out our differences is no longer tolerable. Your decision to allow an administrator to violate board policy because you do not like the chairperson, without speaking to the BOE member himself, is, in my belief, a further recipe for disaster for our school and our kids." The Commission notes that there is no evidence on this record that the complainant was acting outside of Board policy. Assuming, however, that there was a valid disagreement between them, the respondent could fairly have sent this letter to the complainant without copying State officials. In the alternative, he could have stated his disagreement publicly, in a less antagonistic manner. The Commission therefore, finds that the respondent's letter rises to a violation of N.J.S.A. 18A:12-24.1(i).

COUNT SIX

The Commission found probable cause to credit the allegation in count six that the respondent violated N.J.S.A. 18A:12-24(c) when he voted with the majority of the Board on September 10, 2007 and October 2, 2007 to approve payment of expenses for him to attend board member training and seminars. 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 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 his response to the Commission's probable cause decision, the respondent clarified that the payment was for registration fees only and that he paid the related travel expenses himself. (Id., at page 13) The respondent also noted that the training was a requirement of his membership on the Board and that he received no financial benefit as a result of his vote. (Id., at page 13) The Commission notes that the registration fee for the training is a minimal amount. Furthermore, the Commission finds that N.J.S.A. 18A:12-24(h) provides an exception such that the respondent's vote to approve payment of expenses for him to attend required board member training does not constitute a violation of N.J.S.A. 18A:12-24(c). N.J.S.A. 18A:12-24(h) provides:

No school official shall be deemed in conflict with these provisions if, by reason of his participation in any matter required to be voted upon, no material or monetary gain accrues to him as a member of

any business, profession, occupation, or group, to any greater extent than any gain could reasonably be expected to accrue to any other member of that business, profession, occupation or group;

Previously, in I/M/O Bruce Freilich, C18-04 & C19-04 (April 4, 2005), the Commission found that the exception in N.J.S.A. 18A:12-24(h) applied to a board member who voted to approve payment to himself for aid in lieu of transportation. The Commission reasoned that the board member was a member of a group created by N.J.S.A. 18A:39-1 et seq., to receive aid in lieu of transportation and that the board member's vote did not benefit him or his child to any greater extent than the other parents or children receiving aid in lieu of transportation. (Id., at page seven) This matter is similar as the respondent is a member of a group, created by N.J.S.A. 18A:12-33, that is required to attend board member training. The respondent's vote to approve payment of the registration fees for the required training did not benefit him to any greater extent than the other board members who are required to attend board member training. Therefore, the Commission finds that the respondent did not violate N.J.S.A. 18A:12-24(c).

DECISION

For the reasons expressed above, the Commission finds that David Hollander violated N.J.S.A. 18A:12-24.1(i) of the Code of Ethics for School Board Members and the Commission dismisses the remaining allegations against him.

PENALTY

The Commission recommends that the Commissioner of Education impose the penalty of a censure. In so doing, the Commission notes that board members have been censured for single findings of violations of the Act. (*See, I/M/O Raymond Bonker, Lenape Valley Reg'l Bd. of Ed.*, C11-97 (March 30, 1998), approved by Commissioner, May 22, 2008, where a board member was censured for violating N.J.S.A. 18A:12-24(b) when he released staff email addresses in his campaign literature before the board had discussed and approved releasing them in public; I/M/O Lawrence James, Chesilhurst Bd. of Ed. C10-98 (December 15, 1998), approved by Commissioner February 2, 1999, where a board member was censured for violating N.J.S.A. 18A:12-24(b) when he asked the Business Administrator to intercede on his behalf in order to acquire an unsecured loan from the bank that held the Board's accounts). The Commission also notes that board members have been censured for single violations of the Code of Ethics for School Board Members. (*See, I/M/O Doris Graves, Pleasantville Bd. of Education*, C47-05 (May 27, 2008); approved by Commissioner, July 10, 2008, wherein a board member was found to have violated 18A:12-24.1(d) when she spoke with the district's facilities coordinator and later appeared at a board personnel meeting regarding a personnel action affecting her cousin by marriage)

This decision has been adopted by a formal resolution of the School Ethics Commission. 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.

Paul C. Garbarini
Chairperson

Resolution Adopting Decision – C49-07

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

Whereas, at its meeting of December 16, 2008, the Commission found that David Hollander violated N.J.S.A. 18A:12-24.1(e) and (i), and recommended to the Commissioner of Education that he be suspended from the Springfield Board of Education for 30 days; and

Whereas, at its meeting of February 24, 2009 the Commission reconsidered its prior decision and found that David Hollander violated N.J.S.A. 18A:12-24.1(i), and recommended to the Commissioner of Education that he be censured; and

Whereas, the Commission directed its staff to prepare a decision, which the Commission has reviewed and approved; and

Now Therefore Be It Resolved that the Commission hereby adopts the proposed decision referenced as its decision in this matter and directs its staff to notify all parties to this action of the Commission's decision herein.

Paul C. Garbarini, Chairperson

I hereby certify that the Resolution was duly adopted by the School Ethics Commission at its public meeting on February 24, 2009.

Joanne Boyle
Executive Director

PCG/JB/MET/ethics/decisions/C49-07