
MARGARET CAPONE

V.

ERIC AIKEN
HAMILTON TOWNSHIP
BOARD OF EDUCATION,
ATLANTIC COUNTY

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**BEFORE THE SCHOOL
ETHICS COMMISSION**

Docket No. C28-15

**DECISION ON
PROBABLE CAUSE**

PROCEDURAL HISTORY

This matter arises from a Complaint filed on July 30, 2015, by Margaret Capone, a member of the public, alleging that Eric Aiken, President of the Hamilton Township Board of Education (Board) in Atlantic County, violated the School Ethics Act (Act), N.J.S.A. 18A:12-21 et seq. Specifically, the Complainant alleges that the Respondent violated N.J.S.A. 18A:12-24(b), (c), (f) and (h) of the Act.

By letter of August 6, 2015, the Complaint was sent to the Respondent, notifying him that charges against him were filed with the School Ethics Commission (Commission) and advising that he had 20 days to answer the Complaint. Counsel for the Respondent filed a Motion to Dismiss in Lieu of an Answer on August 27, 2015, which included a frivolous allegation, pursuant to N.J.S.A. 18A:12-29(e). The Complainant filed a reply to the Motion to Dismiss and to the frivolous allegation on September 18, 2015.

The parties were notified by letter dated September 30, 2015 that this matter would be placed on the Commission's agenda for its meeting on October 27, 2015, in order to make a determination regarding the Respondent's Motion to Dismiss the Complaint, as well as the allegation of frivolousness. At its October 27, 2015 meeting, the Commission determined the Complaint not frivolous, voted to deny the Motion to Dismiss as to Counts 1 and 2, granted the Motion to Dismiss Count 3, and directed the Respondent to file an Answer on allegations asserted in Counts 1 and 2 of the Complaint. On December 16, 2015, the Respondent filed his Answer as directed.

The Commission notified the parties by letter dated January 5, 2016, that this matter would be placed on the Commission's agenda for its meeting on January 26, 2016, in order to make a preliminary determination on probable cause in accordance with procedures set forth at N.J.A.C. 6A:28-10.9, deciding whether this matter should proceed to adjudication on the merits or whether further review is not warranted.

At its meeting on January 26, 2016, the Commission reviewed the matter and found no probable cause to credit the allegations that the Respondent may have violated N.J.S.A. 18A:12-24 (b), (c), (f), and (h) of the Act. Accordingly, the Commission voted to dismiss the Complaint in its entirety for failure to provide sufficient facts to support a finding of probable cause, pursuant to N.J.A.C. 6A:28-10.7(d).

SUMMARY OF THE PLEADINGS

Count 1

The Complainant alleges that Respondent/Board member is conflicted under the Act due to his sister's status as an on-call substitute teacher in the District. The Complainant maintains that on February 2, 2015, the Respondent voted to approve Board counsel's invoice, which included an item for legal advice he sought as Board President regarding the nature of his conflict and level of his permissible participation in Board activity in light of this conflict. The Complainant asserts that when asked, the Respondent did not disclose that he had sought this advice and that he failed to disclose that the bills were for legal advice requested by the Respondent, which required Board approval. The Complainant asserts that the Respondent violated the Act, specifically N.J.S.A. 18A:12-24(b), (c), (f), & (h).

Count 2

The Complainant alleges that on March 9, 2015, the Respondent voted again to approve legal fees for alleged personal services rendered regarding Respondent's conflict, without disclosing that he had sought the advice, and that he knowingly voted to approve his own legal expenses for the Board to pay. The Complainant asserts that Respondent violated N.J.S.A. 18A:12-24(b), (c), (f), & (h).

Count 3—Dismissed October 27, 2015

The Respondent argues that the Complaint must be dismissed because the Complainant has failed to meet her burden of proof to factually establish a violation of any of the subsections of the Act alleged to have been breached. He also maintains that the Complainant's claims are conclusory with no link between the facts and the law and further contends that these bald assertions are the result of Complainant's personal animus against the Respondent for having lost her bid for re-election to the Board.

ANALYSIS

This matter is 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 allegations 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 in Counts 1 and 2 that the Respondent violated N.J.S.A. 18A:12-24(b), (c), (f), & (h) when on February 15, 2015 and again on March 9, 2015, he voted to approve legal fees for what the Complainant characterizes as "personal" legal services rendered by Board counsel for advice as to whether the Respondent's ability to participate in Board activity is limited due to the alleged conflict regarding his sister's role as an on-call substitute teacher in the District. Thus, the question before the Commission is whether the Complainant alleged facts in these Counts, which, if true, could support a finding of probable cause to credit the allegations that the Respondent violated the Act.

Allegations of Prohibited Acts:

The Complainant has alleged in both surviving Counts of the Complaint that the Respondent violated N.J.S.A. 18A:12-24(b), (c), (f), & (h), which provide, respectively:

b. No school official shall use or attempt to use his official position to secure unwarranted privileges, advantages or employment for himself, members of his immediate family¹ or others;

c. 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;

f. No school official shall use, or allow to be used, his public office or employment, or any information, not generally available to the members of the public, which he receives or acquires in the course of and by reason of his office or employment, for the purpose of securing financial gain for himself, any member of his immediate family, or any business organization with which he is associated;

h. 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.

In order to establish a violation of Subsection (b) of prohibited acts, the Complainant must allege and ultimately prove that the Respondent used his official position to garner some unwarranted privilege or advantage for himself or another.

In order to credit the allegation that the Respondent violated N.J.S.A. 18A:12-24(c), the Complainant would have to provide evidence that the Respondent had either: 1) taken action in his official capacity in a matter where he, or a member of his immediate family, had a direct or indirect financial involvement that might reasonably be expected to impair his objectivity or independence of judgment; or, 2) acted in his official capacity in a matter where he or a member of his immediate family had a personal involvement that is or created some benefit to him or the member of his immediate family.

¹ 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. Thus, Respondent’s sister cannot be a member of the immediate family.

In order to credit the allegation that Respondent violated N.J.S.A. 18A:12-24(f), the Complainant would have to establish that Respondent used, or allow to be used, his public office, or any information, not generally available to the members of the public, which he receives or acquires in the course of and by reason of his office for the purpose of securing financial gain for himself, any member of his immediate family, or any business organization with which he is associated.

In order to credit the allegation that Respondent violated N.J.S.A. 18A:12-24(h), the Complainant would have to establish that Respondent, by reason of his participation in any matter required to be voted upon, received a material or monetary gain which accrues to him as a member of any business, profession, occupation or group, to a greater extent than any gain could reasonably be expected to accrue to any other member of that business, profession, occupation or group.

Fundamentally, the Commission must determine whether the Respondent acted in such a manner as to evoke these subsections and the violations they may occasion. First, the Complainant alleges the Respondent abused his power as the Board President by seeking “individualized legal services from the Board Attorney.” Second, she asserts that the Respondent failed to disclose to the Board that he sought counsel and failed to abstain from voting on the invoices to pay for those services from which he is alleged to have personally benefitted.

The Respondent states that he did not use or attempt to use his official position to secure unwarranted privileges for himself, or acted in a manner where he has an interest so as to impair his objectivity, allow his office to be used for financial gain or voted on any matter from which a gain accrued to him to any greater extent than to any other member of the Board similarly situated.

In its review of the pleadings and documents in support, the Commission concurs with the Respondent for the following reasons:

First, the Complainant admits in her Complaint that Board Policy mandates that only the Board President or the Superintendent can approve contact with Board counsel for legal advice. The Respondent as Board President did exactly what he was authorized to do under the circumstances. He sought legal counsel to clarify his ability to conduct Board business in light of the potential conflict posed by his sister’s position as an on-call substitute teacher in the District.

Second, the Respondent sought advice concerning Board business and was not seeking “individualized legal services” as the Complainant alleged. The Respondent did not seek counsel on a personal matter or a personal law suit, but rather on an ethical question that would impact the Board as a whole. Board counsel is available to the Board to provide legal advice and research for just such situations.

As the Respondent’s Board conduct was permissible, the Commission does not find that the Respondent acted inappropriately. Under these circumstances, the Commission finds no

probable cause to credit the allegations that the Respondent violated N.J.S.A. 18A:12-24(b), (c), (f), & (h) of the Act.

NOTICE

Pursuant to N.J.S.A. 18A:12-29(b), the Commission hereby notifies the Complainant and Respondent that it finds no probable cause to credit the allegations that the Respondent violated N.J.S.A. 18A:12-24(b), (c), (f), & (h) of the Act, 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: February 24, 2016

Resolution Adopting Decision – C28-15

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

Whereas, at its meetings on January 26, 2016, the Commission reviewed the matter and found no probable cause to credit the allegations that the Respondent violated N.J.S.A. 18A:12-24(b), (c), (f), & (h) of the Act; and

Whereas, at its meeting on January 26, 2016, the Commission voted to dismiss the complaint for failure to provide sufficient facts to support a finding of probable cause, as determined pursuant to N.J.A.C. 6A:28-10.7(d); and

Whereas, at its meeting on February 23, 2016, 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 the Resolution was duly adopted by the School Ethics Commission at its public meeting on February 23, 2016.

Joanne M. Restivo
Acting Executive Director
School Ethics Commission