

STATEMENT OF FACTS

The Commission was able to establish the following facts based on the pleadings, the documents submitted, its investigation and the testimony before it. James Famularo became a member of the Asbury Park Board of Education in April 1996. He is currently the President of the Asbury Park Board of Education. In December 1996, he became the Assistant City Manager for the City of Asbury Park and still holds this full-time position. The written job specification for the position of Assistant Municipal Manager sets forth in the definition that he:

Assists the Municipal Manager in the administration of municipal affairs and in integrating and coordinating activities of the various departments; does related work as required.

The examples of work set forth in the job specification are that he:

Assists the Municipal Manager in the preparation and review of the budget.

Assists the Municipal Manager in installing concerned methods and systems for all departments.

Acts for and in place of the Municipal Manager in his absence and to have such other functions, powers and duties as may be assigned by the Municipal Manager.

Assists the Municipal Manager in advising the local governing body on matters of policy.

Assists the Municipal Manager in editing and compiling public information releases.

Assists the Municipal Manager in advising the governing body on all problems of personnel and administration organization.

Prepares comprehensive reports.

Supervises the establishment and maintenance of suitable records and files.

However, Mr. Famularo's answer to the complaint and testimony as to the nature of his position were contrary to the above job description. In both, he stated that his responsibilities include special assignments and projects to find revenue sources. He looks for such revenue in tax liens and sales, assignments, bankruptcies and other creative areas to stimulate revenues. In addition, he has a project to reduce the negative perception of crime in Asbury Park. He also handles citizen complaints and monitors daily attendance

reports of employees. He denies that he has any responsibility regarding compiling and submitting an annual budget to City Council, negotiating contracts for the City or making recommendations concerning the nature and location of City improvements.

Ms. DeMarinis testified that she began her position as Chief Financial Officer for the City on March 2, 1998. Her first job was to construct the 1998 budget, so she had to get reports from the supervisors as to their expenditures. She testified that Mr. Famularo was not involved at all in this process. Further, she testified that he has no interaction with the Finance Department and her department has the sole responsibility for city finances. She testified, in addition, that when the Board's budget was defeated in April 1998, City Council met and she determined where cuts would be made. Mr. Famularo had no involvement in that process as an employee of the City or a Board member. Since Asbury Park is an *Abbott* district², there was a limit as to how much they could cut from the budget in any event.

The following are facts regarding the examples that complainant cites to show that respondent's two positions are in conflict.

On December 1, 1997, the Asbury Park Board of Education approved a lease-purchase agreement that included \$79,400 for a portable basketball floor that would be installed in Convention Hall, which is owned by the City of Asbury Park. A December 7, 1997 article in the *Asbury Park Press* attributed to Mr. Famularo statements that "The city has been negotiating with the United States Basketball League to get a team in Convention Hall," and "[t]he floor would help that cause, as well as provide a better place for the high school team to play." Mr. Famularo was not quoted in the article and he denies having made those statements. On Tuesday, January 6, 1998, the Board rescinded approval for the lease-purchase agreement. It is undisputed that the current high school gymnasium is antiquated and not in compliance with State standards.

Complainant's second example references Mr. Famularo's commitment of Board funds to develop a second community tot lot. The City Assistant Community Development Director, John Gurzo, drafted a letter on October 28, 1997 to Robert Mann, Superintendent of the Asbury Park Schools. Therein, he stated his pleasure with reports from Mr. Famularo that the Board will dedicate \$10,000 to add to the City's \$20,000 for the development of a tot lot on property owned by the Board. This matter appeared on the Board's November 10, 1997 agenda, but was tabled. The Board voted to approve this commitment at its November 17, 1997 meeting. Mr. Famularo voted in favor of the motion.

The third example complainant references is that Mr. Famularo served as treasurer for City Councilman Albert Reinoso's campaign culminating in his election in February 1996. Mr. Reinoso then voted as a Council member for Mr. Famularo to become the

² A reference to the Supreme Court case, *Abbott v. Burke*, 119 N.J. 287 (1990)(Abbott II), which established 56 urban school districts with the strongest characteristics of poverty and need as "special needs districts."

Assistant City Manager in December 1996, although the public had been informed that the Assistant City Manager position was unnecessary and would remain vacant. She notes that Mr. Reinoso and Mr. Famularo are both members of Asbury United, a political organization that won majority votes in both the Board of Education and the City Council in 1996.³ The Commission's investigation confirmed the above facts.

The Commission must now decide whether the above facts show an impermissible conflict of interest pursuant to the School Ethics Act such that Mr. Famularo cannot continue to serve as both Assistant City Manager and Board President or Board member.

ANALYSIS

Complainant argues that Mr. Famularo's position as Assistant City Manager conflicts with his duties as Board President and Board member in violation of N.J.S.A. 18A:12-24(d). This provision sets forth:

No school official shall undertake any employment or service, whether compensated or not, which might reasonably be expected to prejudice his independence of judgment in the exercise of his official duties.

Complainant bases her argument on the Commission's ruling in *I/M/O David Fuller*, C32-95, (November 25, 1997). In the *Fuller* case, the Commission ruled that a Board member in the Irvington School District violated N.J.S.A. 18A:12-24(d) of the School Ethics Act by serving as Business Administrator for Irvington Township. Complainant asserts that Mr. Famularo's position is so similar to Mr. Fuller's that the Commission should find Mr. Famularo in violation of the Act as well.

With regard to the nature of Mr. Famularo's job, the Commission accepts the testimony of Mr. Famularo and Ms. DeMarinis as to his actual job responsibilities, since the Commission was unable to verify that he performed the duties set forth in the job specification. Therefore, the Commission makes this analysis accepting as fact that Mr. Famularo has no responsibility for preparing the City budget and his responsibilities are limited to finding revenue for the City, handling citizen complaints, monitoring attendance of employees and engaging in special projects of a public relations nature. Having accepted these facts, the Commission finds that Mr. Famularo's duties and responsibilities are distinguishable from those of Mr. Fuller, who had responsibility for the township's budget. Mr. Famularo's actual responsibilities are not of the type that one might reasonably expect to prejudice a board member's independence of judgment in the exercise of his official duties. Rather, Mr. Famularo has an indirect financial involvement with the City that may create a conflict on certain issues on which the City and the Board

³ Complainant also references Mr. Famularo's vote to hire Mr. Reinoso as Principal for the Thurgood Marshall School, which the School Ethics Commission found to be in violation of N.J.S.A. 18A:12-24(c). However, since that matter has concluded with the issuance of the Commission's decision in *I/M/O James Famularo*, C23-96 (February 24, 1998), the Commission declines to reconsider it here.

may be adversarial or have competing or conflicting interests. This conflict may be cured by his abstention from such matters, such as the discussions with city council over the defeat of the Board's budget. When the Council discussed the defeated budget with members of the Board in 1998, Mr. Famularo appropriately abstained. Clearly, he should continue to do so. However, the Commission concludes the requirement that he abstain from such budget discussions does not create a situation in which his employment might reasonably be expected to prejudice his independence of judgment as a Board member with respect to all issues. Thus, he can serve in both capacities but he is restricted from participating in matters involving the city to the extent that the interests of the board and the city diverge. Therefore, the Commission finds no probable cause to credit the allegation that Mr. Famularo is in violation of N.J.S.A. 18A:12-24(d) by serving as Assistant City Manager and a Board member based on his job responsibilities.

In response to complainant's first example of how Mr. Famularo's positions conflict, Mr. Famularo testified that he and Rodney Bond made an issue of the antiquated gymnasium and the possible lease-purchase of a basketball floor as soon as they were elected in April 1996. He was not employed by the City at that time. Mr. Famularo said he was always acting as a Board member in the interest of the students of Asbury Park. He denies that he made the statements attributed to him in the Asbury Park Press and reiterates that he has no responsibility for negotiating on behalf of the City. Further, he states that the lease-purchase agreement would have been a great deal for the Board, as in return for the City's use of the floor, the City would have allowed the Asbury students to play in the City Hall building free of charge.

The Commission is satisfied that Mr. Famularo was not acting as an employee of the City when he voted in favor of the lease-purchase agreement for the basketball floor. The Board can be said to be responsible for the safety of its student athletic teams, and the safety of the basketball team falls under that umbrella. The Department of Education, however, advised the Board that it should first consider expenditures to advance the education of students in light of the district's level two status. The Commission finds that the Department and the Board successfully closed this issue. The Commission further finds no probable cause to believe that the circumstances presented support a finding that Mr. Famularo's positions are incompatible.

The complainant's second example dealt with Mr. Famularo's commitment of \$10,000 in Board funds for the tot lot. In response, Mr. Famularo stated that part of a two million-dollar referendum that passed was for the improvement of tot lots on Board property. He asserts that he was well within his authority as a Board member to try to achieve this benefit for the children of Asbury Park. He set forth that his responsibilities as Assistant City Manager have no connection with recreation or the development of tot lots. Further, he says he has no involvement with Mr. Gurzo's department and therefore, Mr. Gurzo approached him solely as a Board member and not as Assistant City Manager. He asserts that the \$10,000 figure came out of the Board's Buildings and Grounds Committee, of which he is a member. He indicated further that recreation monies are to come from a combination of funds from the City, the Board and the Housing Authority.

The Commission perceives that Ms. Mellina's complaint with respect to the tot lot is that Mr. Famularo committed Board funds before the Board voted on the matter. The fact that he apparently did so does not constitute a violation of section 24(d) of the School Ethics Act. Mr. Famularo should not speak or act without the authority of the full Board in recognition of the fact that one member or a committee of the Board cannot bind the Board. However, such conduct does not raise an issue under the School Ethics Act. Indeed, his conduct indicates that he was acting as a Board member in his advocacy of the development of the tot lot. Further, in reviewing his job specifications and his testimony as to the nature of his job, there is no part of his job that one can say he was performing when he committed the Board's funds to the tot lot project. The Commission's investigation also showed that the Board does have funds to devote to such projects. Therefore, the Commission finds no probable cause to credit the allegation that Mr. Famularo's stated commitment of funds to the tot lot showed that his employment violates N.J.S.A. 18A:12-24(d).

The third example that complainant sets forth is essentially that Mr. Famularo's political ties to council members, particularly Albert Reinoso, create or evidence a conflict of interest between his positions of Assistant City Manager and Board member. The Commission's previously ruled on Mr. Famularo's relationship with Mr. Reinoso. The Commission held that it was a violation of N.J.S.A. 18A:12-24(c) for Mr. Famularo to have voted on Mr. Reinoso's appointment as principal when he had just served as Mr. Reinoso's campaign treasurer in the council election preceding the Board vote. *I/M/O James Famularo, C23-96* (February 24, 1998). It is not a logical extension of this ruling that Mr. Famularo would be in violation of the Act by continuing to serve as a Board member after being hired by City Council as Assistant City Manager. The Commission concludes that any personal involvement that has been noted between Mr. Famularo and Mr. Reinoso can be cured by Mr. Famularo's continued abstention on matters pertaining to Mr. Reinoso specifically. This is based on the fact that he indirectly works for Mr. Reinoso, not the fact that he served as his campaign treasurer. The Commission finds no probable cause to believe that Mr. Famularo cannot exercise independent judgment in any Board matter because he is employed by the City.

At the Commission meeting on this matter, Ms. Mellina produced an additional example of how Mr. Famularo's positions as Board member and Assistant City Manager were in conflict. She produced legal bills of Mr. Fellenz that were presented to the Board for payment to support her allegation that he had actually charged the Board for his legal representation of Mr. Famularo in his capacity as Assistant City Manager. Mr. Fellenz allegedly billed the Board for research and action he took to quash warrants to seize records of the City. Ms. Mellina asserts that this also shows how Mr. Famularo's two jobs are causing an impermissible conflict of interest. Mr. Fellenz adamantly denies complainant's allegation and says that all the work billed was related to the search warrants served on the Board. Ms. Mellina contends that the search warrants on the Board were served on a date later than the dates on the bills. The Commission does not reach a conclusion as to whether the complainant's allegation is true because even if it is,

Mr. Fellenz's conduct cannot be attributed to Mr. Famularo. Therefore, it cannot be evidence of Mr. Famularo's conflict of interest. Further, Mr. Fellenz, as an attorney, is under the jurisdiction of the New Jersey Supreme Court. For this reason, the Commission is forwarding the issue and the documentation to the Office of Attorney Ethics for further inquiry. The Commission finds no probable cause to credit the allegation that Mr. Fellenz's legal bills support the allegation that Mr. Famularo is in violation of N.J.S.A. 18A:12-24(d).

DECISION

For the foregoing reasons, the Commission finds no probable cause to credit the allegations and dismisses the complaint against James Famularo. However, as set forth above, the Commission requires that Mr. Famularo refrain from participating in matters in which the city and the board have conflicting or competing interests. Such matters include budget appeals and matters in which the issue is whether the board or the city should pay for a certain service. Failure to adhere to this restriction may result in further proceedings consistent with this opinion.

This decision constitutes final agency action and thus may be appealed directly to the Appellate Division of the Superior Court.

Paul C. Garbarini
Chairperson

Resolution Adopting Decision – C04-98

Whereas, the School Ethics Commission has considered the pleadings, documents and testimony of the parties and their witnesses; and

Whereas, the Commission has reviewed all of the information and now concludes that there is no probable cause to credit the allegation that respondent violated N.J.S.A. 18A:12-24(d) of the School Ethics Act; and

Whereas, the Commission has reviewed the proposed decision of its staff setting forth the reasons for its conclusion and setting forth its admonition that respondent must refrain from participating in matters in which the city and the board have adversarial positions; and

Whereas, the Commission agrees with the proposed decision;

Now Therefore Be It Resolved that the Commission hereby finds no probable cause to credit the allegation that James Famularo violated N.J.S.A. 18A:12-24(d) of the School Ethics Act and dismisses the allegations against him; and

Be It Further Resolved that the Commission adopts the enclosed decision referenced as its decision in this matter.

Paul C. Garbarini, Chairperson

I hereby certify that the Resolution was duly adopted by the School Ethics Commission at its public meeting on September 22, 1998.

Lisa James-Beavers
Executive Director

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