

FACTS

On the basis of the pleadings, supporting documents and testimony, the Commission finds the following facts to be undisputed.

1. At its meeting of April 25, 1995, the Vernon Township Board of Education chose three board members to serve on the negotiation team. The three members of the negotiating team did not have conflicts of interest that would render them unable to participate in or vote on the collective bargaining agreement with the teachers' union.

2. The April 1995 election resulted in the Vernon Township Board of Education having five board members who either were teachers or had spouses affiliated with the Vernon Township Education Association (VTEA).

3. Two newly elected board members, Michael Kirchmer and Howard Whidden, Jr. have spouses who are members of the VTEA. Edward DeYoung's and John McGowan's spouses are a teacher's aides in Vernon Township. John Graf, Jr. is a teacher in another district and his spouse is a teacher in Vernon.

4. The Negotiation Committee of the board began bargaining with the Vernon Township Education Association (VTEA) in the Spring of 1995. The contract expired on June 30, 1995. The Negotiation Committee was at all times composed of board members who were not members and did not have immediate family members who belonged to the VTEA or the NJEA.

5. On December 21, 1995, the board voted to ratify a collective bargaining agreement with the VTEA.

6. The five aforementioned board members invoked the doctrine of necessity in order to allow the board to vote on the collective bargaining agreement. However, they did not state their intention clearly for the public at the time of the vote. Rather, during the public comment portion of the board meeting, Mr. McGowan explained that there was a rule that allowed conflicted board members to vote in response to a question by Mr. Murphy. According to witnesses to that conversation, Mr. McGowan explained the doctrine of necessity and indicated to Mr. Murphy that the doctrine allowed the respondents to vote despite conflicts of interest that would normally prohibit them from participating.

7. The collective bargaining agreement passed with a vote of eight in favor and one opposed. Respondent Howard Whidden, Jr. cast the dissenting vote.

8. There is no notation in the minutes that the board members invoked the Doctrine of Necessity in order to ratify the collective bargaining agreement.

ANALYSIS

Respondents recognize that Advisory Opinion A10-93(b) requires that board members with immediate family members in the local bargaining unit or the same statewide general union abstain from voting on the collective bargaining agreement. However, respondents argue that the board's circumstances required that they invoke the Doctrine of Necessity and vote on the contract. Thus, the issue is whether respondents violated the Act, despite the fact that their collective abstention from the vote would result in the board's being unable to have a quorum to vote on the agreement.

Complainant sets forth that respondent violated N.J.S.A. 18A:12-24(c) of the School Ethics Act.¹ 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 or personal involvement that might reasonably be expected to impair his objectivity or independence of judgment.

As set forth in Advisory Opinions A01-93, A10-93 and A10-93(b) and A07-94, a school official who has an immediate family member in the local bargaining unit or the same statewide general union will violate N.J.S.A. 18A:12-24(c) of the Act by participating in negotiations or voting on the collective bargaining agreement. The Commission reasoned that the public could reasonably perceive that a board member's vote for his spouse to receive a raise provides a financial benefit to him. Further, the Commission advised, "by voting to increase the pay rate for members of the same union to which a board member belongs, the board member could be influencing an increase in the rate of payment to all union members, thereby benefiting the union member and/or his spouse."

However, the School Ethics Commission envisioned that the aforementioned prohibition could create a situation in which so many board members have a conflict, that the board would be unable to take action on a contract. Therefore, the Commission set forth an exception in Advisory Opinion A10-93(b) and A07-94. It provided that where more than a quorum of the board members must abstain from voting on a contract, the board may invoke the "Rule [or Doctrine] of Necessity". (Citing U.S. v. Will, 449 U.S. 200 (1980)).

In 1989, Judge Serpentelli set forth the three prerequisites necessary for a public body to invoke the doctrine of necessity. Allen v. Toms River Regional Board of Education, 233 N.J. Super. 642, 651 (Law Div. 1989). First, the public body must be unable to act without the members in conflict taking part. Second, there must be a pressing need for action, i.e., the matter cannot be laid aside until another date. Third, there can be no alternative forum that can grant

¹ Complainant also alleges that consideration of teacher or personnel performance brought before the Board could appear to receive biased or prejudiced judgment in violation of N.J.S.A. 18A:12-22a. However, there are presently no facts before the Commission to indicate that such a violation has occurred. The Commission can decide a complaint based only on the facts before it, rather than events that may occur in the future.

the same relief. Also, from prior cases, the court set forth that the public welfare is an important consideration in determining whether the public body should invoke the doctrine of necessity. Id. at 649. The Vernon Township Board of Education met the requisite elements of the doctrine in the present case. With five members of the board in conflict on a board in which five members constitute a quorum, the board would have been unable to act on a contract without the conflicted members taking part. Also, there can be no dispute that the ratification of a contract constitutes a pressing need for action that the body cannot put off while waiting for new members who will not be in conflict. Regarding the third prerequisite, there is no alternative forum that could take responsibility for ratifying the teachers' contract. The inability to ratify the contract could lead to a walk-out or other action that could be detrimental to the students and thus, to the public welfare. Thus, the Commission finds that the prerequisites were met by the Vernon Township Board of Education. Having so concluded, the Commission cannot find probable cause that respondents violated the School Ethics Act, N.J.S.A. 18A:12-24(c) by voting on the ratification of the collective bargaining agreement.

In the Commission's prior advisory opinions, the Commission explained that invoking the Rule of Necessity requires a determination from the school board attorney that the school board must invoke the rule in order to vote on the collective bargaining agreement. At that time, the school board should publicly announce that it is invoking the rule because a majority of the school board members are in conflict with the School Ethics Act. The minutes should reflect that the board invoked the rule when it voted on the matter. The above procedures are a precautionary measure to inform the public of the reason for ostensibly acting in violation of the School Ethics Act. (See Advisory Opinion A10-93(b) and A07-94). The Commission reiterated the authority of school boards to invoke the Doctrine in Advisory Opinion A38-95.

Although the Commission finds no probable cause, it reiterates the need to state clearly in the public meeting that the board is invoking the Doctrine of Necessity and why it is doing so, specifying the members in conflict at the time of the vote. In the present case, the original minutes from meeting of August 15, 1995, do not reflect that the board, relying on the advice of counsel, invoked the Doctrine of Necessity to allow them to vote. The minutes set forth that the complainant, Mr. Murphy, brought the conflict to the attention of the board and informed them that certain members should not vote. The minutes do not reflect that the board responded to Mr. Murphy's concern. The minutes should clearly set forth the names of the conflicted board members and the fact that they invoked the doctrine in order to cast a vote. Had the respondents done so in this case, they may have avoided this complaint.

Nevertheless, although the board may not have followed the correct procedure, the board had five of nine board members with a conflict of interest such that they could not vote on the contract with the local bargaining unit. Consequently, there is no dispute that the board's circumstances required that the board invoke the doctrine of necessity in order to take any action on the contract. The respondents have amended the minutes as the Commission requested. They have set forth clearly the reasons that they invoked the doctrine of necessity when the board ratified the contract and the nature of their conflicts. By doing so, respondents have complied with the prior directive of the School Ethics Commission and provided additional support that they complied with the School Ethics Act when they voted on the contract.

DECISION

For the foregoing reasons, the School Ethics Commission does not find probable cause that respondents violated the School Ethics Act and therefore, dismisses the case against them.

This decision is a final administrative agency action that may be appealed directly to the Superior Court - Appellate Division.

Respectfully submitted,

Paul C. Garbarini
Chairman

Resolution Adopting Decision -- C07-96

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

Whereas, the Commission has reviewed the proposed decision of its staff; and

Whereas, the Commission agrees with the proposed decision;

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, Chairman

I hereby certify that the Resolution
was duly adopted by the School
Ethics Commission at its public meeting
on July 23, 1996

Lisa James-Beavers
Executive Director

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