

The following material facts are undisputed. In November 1994, respondent was a member of the Brick Township Board of Education. He was elected to his third consecutive term in April 1996. Respondent is a teacher in East Orange and was so in November 1994. As such, he was and is a member of the NJEA. The BTEA is a local bargaining unit of the NJEA. When the collective bargaining agreement with the BTEA was brought before the Brick Township board for a vote, respondent voted on the contract.

On May 26, 1994, the Commission issued Advisory Opinion A10-93. In that opinion, the Commission set forth that a school board member would violate the Act if he participated in negotiations on a collective bargaining agreement with the local bargaining unit of a statewide union in which the board member or a member of his immediate family member was a member. On June 23, 1994, the Commission issued A10-93(b) and A07-94. In this opinion, the Commission set forth that the Act prohibits a school board member from voting on a collective bargaining agreement for a local bargaining unit of a statewide union when the school board member or his immediate family member belongs to the statewide union. The Commission released the opinions to the public on those dates. The Commission, noting that its opinions were a first interpretation of a new law and would change past practices, stated that the opinions should apply prospectively.

By letter dated August 16, 1994, the Brick Township board received advice from its attorney setting forth the Commission's opinions in A10-93, A10-93(b) and A07-94. The board attorney advised the board as follows:

Our reading of the aforesaid statute and advisory opinions is that a Board member, who is a member of the same State wide union as the union in which the Board is involved with in labor negotiations, cannot vote after the date of the advisory opinion of June 23, 1994, irrespective of whether the labor negotiations began before the June date and continued thereafter.

However, the board attorney went on to note that that the opinions of the Commission are "purely advisory in nature, and as such are not binding upon any Board member or the Board itself." He went on to give his own opinion that the Advisory Opinion was "overreaching" and the findings "excessively broad". Last, the attorney sets forth:

Please be advised that if an individual Board member notwithstanding our opinion herein, decides to vote on the teachers' labor contract, there are no known sanctions that can be applied to the contract, there are no known sanctions that can be applied to the Board member if it is his opinion to vote based upon his and his union's interpretation of the advisory opinions. Further, we know of no known mechanism whereby a member's vote is not to be recorded.

Respondent testified that he relied on the board attorney's analysis of the Advisory Opinions and sought additional clarification as to whether he should vote or

abstain on November 3, 1994. He testified that he received no clear answer leaving him with the impression that he could do what he felt was correct. Respondent testified that he chose to cast his vote, which he felt he was required to do as a board member. However, respondent did not testify that the board attorney ever advised respondent to vote on the collective bargaining agreement.

ANALYSIS

Respondent sets forth several reasons that the School Ethics Commission should not find that he violated the Act and should not have found probable cause. The issues that he raised will be addressed in turn.

I. The Commission Considered All Material Facts

First the respondent argues that the Commission did not consider all of the material facts in the case, specifically those facts that indicate that respondent relied on the competent advice of counsel. Respondent sets forth that one acting in the position of a fiduciary can rely upon advice of a competent counsel citing Van der Veer v. Ames, 6 N.J. Super. 143 (App. Div. 1950). He further argues that respondent's actions were within the scope of his authority, in good faith and within the purview of an ordinary prudent man taking the advice of competent counsel.

The Commission has reviewed the full opinion of counsel and finds it significant for what it does and does not say. First, the opinion says in no uncertain terms that counsel's reading of the opinion is that **“a board member, who is a member of the same State wide union as the union in which the Board is involved with in labor negotiations, cannot vote after the date of the advisory opinion of June 23, 1994, irrespective of whether the labor negotiations began before the June date and continued after.”** The attorney goes on to express his disagreement with the Commission's opinion and his belief that it is not binding on board members. Then he ultimately leaves it to the board member and his union to decide whether to vote. However, there is no ambiguity in the meaning of the Commission's opinion. Because this is the only portion of the attorney's opinion that is not ambiguous, the Commission concludes that respondent was aware of the Commission decision that he would be in violation of the School Ethics Act if he voted on the collective bargaining agreement.

The counsel to the board goes on to indicate that there are “no known sanctions” that can be applied to a board member who decides to vote on the labor contract “notwithstanding our opinion herein”. This sentence indicates that counsel's opinion is that the board member should not vote, but if he does vote, despite the opinion, no sanctions will result. Thus, the Commission concludes that the board member did not rely on the advice of counsel when he decided to vote for the Act. The board attorney ultimately left the decision to respondent's judgment and that of his union. Respondent chose to vote despite the Commission's opinion that doing so would violate the Act. Respondent's reliance on the attorney's advice that no sanctions could be applied to

board member who votes on the contract is very different from reliance on advice telling him that it is permissible to vote. At no time did the attorney advise that it is permissible for respondent to vote. Respondent only testified that he was confused and left to his own devices. Given the clear wording of the attorney's reading of the advisory opinion, and respondent's testimony that indicated that the attorney would not advise him that he could vote, the most prudent course of action would have been to abstain from voting. Respondent chose not to do so.

II. The Commission's Advisory Opinions Do Not Extend the Statutory Prohibition Set Forth in N.J.S.A. 18A:6-8.4.

Respondent next argues that the Commission has no power to extend statutory prohibitions. His argument is that since N.J.S.A. 18A:6-8.4 allows a person employed by a board of education to serve as a board member in a district other than that which employs him, the Commission's Advisory Opinion A10-93(b) and A07-94 effectively sets a statutory prohibition on conduct the legislature did not intend to prohibit. The Commission finds this argument to be without merit.

The Commission's advisory opinions do not impede upon the statutory right of school board employees to serve as board members in other districts. Clearly, respondent has served in both capacities for three consecutive terms and nothing that the Commission does will render him disqualified from serving. Further, he is not being charged with having such a substantial conflict that he cannot continue to serve in both. Rather, the Commission is stating, as it has in other situations, that where respondent has a conflict of interest, he cannot vote on a matter. The Legislature empowered the Commission to enforce the standards of conduct and guide members as to the standards that the legislature set forth in the School Ethics Act. Thus, respondent's argument that a prohibition such as that set forth in Advisory Opinion A10-93(b) and A07-94 would have been included in N.J.S.A. 18A:6-8.4 is illogical. The School Ethics Act sets forth prohibited conduct by school board members and administrators. The advisory opinion is the Commission's interpretation of certain provisions of the Act. It would be inappropriate for the legislature to limit the voting of board members in a section of Title 18A entitled "Employees; Qualifications; Discrimination; Prohibitions; Leave to Serve in Legislature." Again, the Commission's decision does not disqualify a teacher from becoming a board member, nor does it prevent a board member from becoming a teacher.

III. The Commission's Interpretation of N.J.S.A. 18A:12-24(c) and (f) is Neither Arbitrary Nor Capricious.

Next, respondent argues that the Commission's interpretation of N.J.S.A. 18A:12-24(c) and (f) is arbitrary and capricious. He sets forth that the Commission interprets those subsections based on speculation, rather than facts and empirical data. The Commission disagrees that a finding of a violation of subsection (c) must be based on an actual finding that the board member's salary will be increased by his vote. The law requires no such proof. However, the Commission agrees that a finding of a violation of subsection (f) should be based on evidence that the member used his public office or

information that he acquired from that office to secure financial gain for himself. The distinction is clear from the wording of the two provisions.

Subsection (c) sets forth that:

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. (Emphasis added).

Subsection (f), on the other hand, sets forth that:

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 or 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.

Thus, subsection (f) does not have wording that indicates as in (c) that the board member might reasonably be expected to use his office or information to secure financial gain. Rather, the school official must have actually used his office or information derived from it to secure financial gain. To find a violation of (c), the Commission need only show that one would reasonably expect that an indirect personal or financial involvement would impair his objectivity or independence of judgment. Furthermore, one must read all subsections of section 24 in conjunction with the legislature's findings and declarations. The declarations provide that board members and administrators must avoid conduct which is in violation of the public trust or "which creates a justifiable impression among the public that such trust is being violated." N.J.S.A. 18A:12-22(b).

In the present case, the Commission finds that there is insufficient evidence to show that respondent used his public office or any information derived from it to secure financial gain for himself in violation of subsection (f). Therefore, it now dismisses that charge. The Commission previously ruled that there was no probable cause to credit the allegations that respondent sat in on closed session discussions or participated in negotiations where he could have access to such information. However, the Commission finds that respondent had an indirect financial involvement in the outcome of collective bargaining between the local bargaining unit and the board. The Commission reasons that respondent's statewide general union looks to salary and benefits statewide to determine what salary to seek for its members. The comparison of salaries creates the justifiable impression among the public that the public trust is being violated when respondent votes on the collective bargaining agreement when he is a member of the same statewide general union as the local bargaining unit.

IV. The Commission's Decision Does Not Infringe Upon Respondent's First Amendment Rights.

Respondent further argues that the Commission's decision raises serious first amendment issues as to his freedom of association. The Commission finds this argument to be baseless. The Commission does not ever require the respondent or others similarly situated to choose being a teacher over being a board member. The respondent is free to associate with both groups within the standards set forth in the School Ethics Act as interpreted by the Commission.

V. Respondent Has Not Proved the Affirmative Defense that the Complaint is Untimely or Barred by Laches.

Respondent next sets forth his belief that the complaint is untimely and barred by laches. The Commission finds that there is no statutory time limitation set forth in the School Ethics Act or the Commission's regulations. Further, respondent has failed to cite facts and supporting cases to prove the affirmative defense of laches.

First, the School Ethics Act does not set a statute of limitations for filing ethics complaints. The Legislature could have set the same 90-day limit for ethics complaints as it did for petitions before the Commissioner, but it chose not to do so. In ethics matters, it often takes time to flesh out relationships to determine whether a conflict exists. Setting a 90-day time limit would only increase frivolous complaints by forcing potential claimants to file before they had all of the facts in order to avoid being time-barred. A time bar does not serve the legislative purpose to ensure that members of the public have faith in their elected officials. Thus, the Commission finds that there is no time bar on filing an ethics complaint, except that it must be a reasonable amount of time that does not result in prejudice to respondent.

In the present case, the respondent has not been prejudiced by the filing of the complaint well over a year after the vote occurred. There were no witnesses that the respondent was unable to call due to the length of time that had passed. There were no documents that he could not retrieve because they had been purged or otherwise destroyed. Furthermore, the respondent has testified that he does not believe that he did anything wrong and thus he is very likely to vote on a collective bargaining agreement again. The issue raised in the complaint is one that needs to be resolved and is likely to arise again. Thus, the Commission does not find that the within complaint is barred by untimeliness.

The affirmative defense of laches is based on the length of delay in bringing a claim, the reasons for delay, and the changing conditions of either or both parties during the delay. Lavin v. Hackensack Board of Education, 90 N.J. 145, 152 (1982). The length of the delay alone or in conjunction with the other elements may result in laches. Id. Whether or not it is inequitable to allow a claim to be enforced will generally turn on whether an adverse party has been harmed by the delay. Id. at 153; N.J. Dept. of

Environmental Protection and Energy v. Dopp, 268 N.J. Super. 165, 176 (App. Div. 1993).

In the present case, Mr. Sangiovanni testified that he did not become aware that Mr. Pannucci improperly voted on the collective bargaining agreement until February 1995 although the vote occurred in November 1994. At that time, he began his candidacy for a seat on the Brick board of education for the first time. His knowledge was acquired through Mr. Mueller who was then seeking to have the contract nullified. Mr. Mueller did not prosecute his petition in the Office of Administrative Law and it was subsequently dismissed. Mr. Sangiovanni filed the within complaint on April 4, 1996.

The Commission finds that the length of time it took Mr. Sangiovanni to file the within complaint did not result in laches. The filing of the complaint was less than a year and a half after the conduct occurred and a year and two months after the complainant states that he became aware of the possible violation of the Act. The Commission finds that it was reasonable for Mr. Sangiovanni not to have filed sooner in light of his knowledge that someone was already challenging the contract at issue in the present case, although the petition was not before the School Ethics Commission. More importantly, the Commission finds that the delay did not harm Mr. Pannucci in any way by denying him access to any evidence that he could have used to defend himself against Mr. Sangiovanni's allegations. For the foregoing reasons, the Commission finds that respondent has failed to prove that he can invoke the affirmative defense of laches to bar the present complaint.

VI. The Commission's Interpretation of the School Ethics Act Does Not Attempt to Supersede the Will of the Electorate.

As set forth in "II" above, the School Ethics Act as interpreted by the Commission does not in any way prevent teachers or any other members of a national school union from serving on a school board. It only sets a limit on their ability to vote on matters that the Commission has deemed them to have a conflict. The decision has not prevented and will never prevent the continuing participation of members of national school union members to participate on school boards. Thus, the Commission finds this argument to be meritless.

CONCLUSION

For all the foregoing reasons, the Commission finds that respondent violated N.J.S.A. 18A:12-24(c) of the School Ethics Act. Because respondent received inadequate advice from counsel as to whether he should vote and the Commission had only recently issued the advisory opinion setting forth that his voting on the contract would violate the Act, the Commission recommends a lower penalty than it normally would for the violation. It recommends a penalty of censure because a censure does not force respondent to miss any board meetings, but yet it is a public disciplinary action so that other board members and the public are notified of the violation. For the foregoing reasons, the Commission recommends that the Commissioner impose a penalty of censure.

Upon adoption of this decision by a formal resolution of the School Ethics Commission, the matter shall be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed to the parties, any party may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, CN 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.

Paul C. Garbarini
Chairperson

Resolution Adopting Decision -- C08-96

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

Whereas, the Commission found probable cause to credit the allegations in the complaint, found that there are no material facts in dispute, and therefore invited respondent's written statement in response; and

Whereas, the Commission has reviewed respondent's written statement and now concludes that respondent violated N.J.S.A. 18A:12-24(c) 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

Whereas, the Commission agrees with the proposed decision;

Now Therefore Be It Resolved that the Commission hereby finds that Frank Pannucci has violated N.J.S.A. 18A:12-24(c) of the School Ethics Act and recommends that the Commissioner impose a penalty of censure and adopts the proposed decision referenced as its decision in this matter.

Paul C. Garbarini, Chairman

I hereby certify that the Resolution
was duly adopted by the School
Ethics Commission at its public meeting
on November 26, 1996

Lisa James-Beavers
Executive Director

[c0896/c:lisa/decisions]