

FACTS

The parties are in agreement that the following facts are undisputed. James Russo and Thomas Scarano are at all relevant times members of the Woodbridge Township Board of Education. The current board president appointed them to serve on the negotiating committee effective April 21, 1997. They engaged in collective bargaining with the WTEA as the only two members of the negotiating team. Respondent Russo has a sister who works as a secretarial clerk in the district. She is represented by the WTEA. Respondent Scarano has a brother and a fiancée, now wife, who work as teachers in the district and who are both represented by the WTEA. Mr. Scarano married his fiancée in November 1997.

At the first public meeting following the respondents' appointment to the negotiations committee, complainant Arthur Delaney, Jr., called attention to what he perceived to be conflicts of interest. He specifically referenced School Ethics Commission Advisory Opinion A23-94. He requested an opinion on whether the respondents had a conflict of interest from the board attorney. The board attorney advised that there was no conflict. The respondents did not seek an advisory opinion from the School Ethics Commission and the board attorney did not advise that they do so. The complainant then requested that the board president, Robert Mantz, reconsider his selection of members to serve on the negotiations committee. He refused, although there were three board members who do not have any relatives in the WTEA.

Respondents met with the WTEA representatives and a mediator on April 30, 1997 and May 12, 1997. After they completed negotiations, and the WTEA ratified the contract, the Woodbridge board voted on it. Four board members, including Mr. Delaney, abstained from the vote because they or their family members were members of the WTEA or the NJEA. The remaining five, including Mr. Russo and Mr. Scarano, voted to ratify the contract.

Mr. Scarano also desires that the Commission consider other facts that he believes are material to determining whether he violated the Act. Specifically, the Woodbridge Township school district has over twelve thousand students in twenty-four school buildings and eighteen hundred employees. The collective bargaining agreement was of significant concern to the public before the April 1997 elections because the district was without a collective bargaining agreement from June 30, 1996. In that election, Mr. Scarano ran against incumbent members of the board who were members of the negotiating team at the time. The board and the WTEA filed for an impasse, which resulted in the appointment of State Mediator James Mastriani.

When he ran for election, he disclosed that his brother and fiancée were employed as teachers in the district and represented by the WTEA. These facts became the subject of public debate during the campaign and he had to address the issue in public forums. Despite the disclosure of his relationship to WTEA members, he was elected with over 4300 votes. This compares with less than 1000 votes for the former negotiation's chair

and Janice Zaneski, the other incumbent who received approximately 1100 votes. Mr. Scarano also wants the Commission to note that his brother is twelve years younger than he is and was employed in the district before he became a board member. Also, he was not on the board when the board appointed his fiancée to a teaching position.

When Mr. Scarano and Mr. Russo began negotiations, he states that the negotiations were not full and free and open. The mediator required that both the board and the WTEA define and limit the issues to be addressed in mediation. The mediator required that they reduce the number of issues down to 15, which would be the only issues the sides would negotiate. He would allow no other matters on the negotiating table. Thus, Mr. Scarano and Mr. Russo did not have an unlimited right to negotiate all items in the contract, but were limited by parameters set by the mediator appointed by the predecessor board. The board's chief negotiator was the board attorney and he conducted all negotiations on behalf of the district. There was no exchange of dialogue and no independent meetings between Mr. Scarano and Mr. Russo and members of the WTEA or their negotiating team. Finally, he notes that although they participated in and approved the final agreement that was submitted to the final board members for approval, they did so with significant limitation.

The Commission's investigation has not uncovered any information to contradict the foregoing facts and therefore, finds them also to be undisputed. However, the Commission does not find these facts to be material to the dispute. Thus, there being no material factual disputes, there is no need to forward the matter to the Office of Administrative Law for a hearing. Rather, the Commission will address each of the respondents' arguments regarding why the Commission should not find them to have violated the Act.

ANALYSIS

I. The Commission Must Refer This Matter to the OAL for a Hearing

Respondent's first argument is procedural, rather than substantive. At the conclusion of the Commission's probable cause letter, the Commission advised respondents that the Commission would not refer this matter to the OAL since the material facts were undisputed. Rather, it invited respondents to provide a written statement setting forth why the Commission should not find them in violation of N.J.S.A. 18A:12-24(c) of the School Ethics Act for negotiating and voting on the contract with the WTEA. The respondents disagree with the Commission's procedure. They argue that N.J.S.A. 18A:12-29(b) of the School Ethics Act requires the Commission to refer the matter to the OAL, whether or not the parties agree that there are material facts in dispute. N.J.S.A. 18A:12-29(b) provides, in pertinent part:

If the Commission determines that probable cause exists, it shall refer the matter to the Office of Administrative Law for a hearing to be conducted in accordance with the “Administrative Procedure Act,” P.L.1968, c.410 (C.52:14B-1 et seq.), and shall so notify the complainant and each school official named in the complaint.

The Commission has addressed this argument in a prior case, but will reiterate it here. In In the Matter of Rodney Bond, C21/C24-96, the respondent also argued that the Commission is required to refer a matter in which it finds probable cause to the OAL pursuant to the language in N.J.S.A. 18A:12-29(b). There, the Commission noted that because the statute refers to the Administrative Procedure Act (APA), it must consider the APA when determining this issue. Pursuant to the APA, an agency head, here, the Commission, retains full authority to determine whether a case is contested and to make final decisions in contested cases. N.J.S.A. 52:14F-7; In Re Uniform Adm’n Procedure Rules, 90 N.J. 85 (1982). In the 1982 case, the New Jersey Supreme Court noted that the APA and the OAL’s rules for implementing the APA “...do not interfere with the agency procedures for resolving cases, or to hear and decide contested cases.” Id. at 105. The APA simply provides a mechanism for providing a hearing once the agency head has determined that a matter is contested and requires an evidentiary hearing. Valdez v. N.J. State Bd. of Medical Examiners, 205 N.J. Super. 398, 404 (App. Div. 1995).

Considering the agency head’s authority under the APA, New Jersey courts have found that an agency head’s discretion to determine how to handle a particular case is not circumscribed by the use of the word “shall” in a statutory provision relating to transfer of cases to the OAL. In Hills Development Co. v. Bernards Twp., 229 N.J. Super. 318 (App. Div. 1988) and In re Township of Warren, 247 N.J. Super. 146 (App. Div. 1991), certif. denied 127 N.J. 557 (1992), the Appellate Division concluded that the use of the word “shall” in a statutory provision did not require the Council on Affordable Housing (COAH) to automatically refer objections to a municipality’s affordable housing plan to the OAL for a hearing. The Court dismissed the appellants’ arguments for an OAL hearing and concluded that the Fair Housing Act’s reference to the APA allowed the agency head to determine whether a case involved disputed material issues of fact requiring an evidentiary hearing. Although the language of the Fair Housing Act is not identical to that in the School Ethics Act, these cases demonstrate that the word “shall” does not abrogate the agency head’s discretion to decline referral of a case to the OAL when the statutory provision references the APA. Thus, the School Ethics Commission appropriately declined to refer the present matter to the OAL where there were no material facts in dispute requiring an evidentiary hearing.

II. N.J.S.A. 18A:12-24(c) Prohibits a Board Member from Negotiating Only When His Immediate Family Member is a Member of the Local Union.

Respondent next argues that the language of N.J.S.A. 18A:12-24(c) of the School Ethics Act only prohibits board members from negotiating only if their “immediate family member” is a member of the local bargaining unit. Subsection c sets forth:

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.

N.J.S.A. 18A:12-23 defines immediate family member as the “spouse or dependent child of a school official residing in the same household.” Respondent Scarano argues that if the Legislature had intended for the Commission to prohibit a board member from negotiating when he has a sibling in the local union, it would have used the term “relative” in place of “member of his immediate family” in the above statute. N.J.S.A. 18A:12-23 defines “relative” as the “spouse, natural or adopted child, parent or sibling of a school official.” He states that the Commission apparently gave no weight to the distinction. Further, he argues that the Legislature did not intend that a board member be prohibited from negotiating when his fiancée is a member of the union. If it had, it would have added “fiancée” to the definition of immediate family member or defined the term “spouse” more broadly than “the person to whom a school official is legally married under New Jersey law.”

The Commission finds these arguments to be without merit. As the Commission stated in Advisory Opinion A23-94, the Commission is not constrained to recognize conflicts of interest only when a matter affects a board member's immediate family member. Rather, the Commission looks to the whole statute, which provides that a school official cannot act in a matter in which he has an indirect personal or financial involvement that might reasonably be expected to impair his objectivity. The Commission finds that a board member who has a sibling in the local bargaining unit might reasonably be expected to be lacking objectivity when negotiating that sibling's contract. Thus, Mr. Scarano and Mr. Russo had an indirect personal involvement with the salary and benefits their siblings that prohibited them from negotiating without violating the Act.

The Commission finds Mr. Scarano’s fiancée issue even more troubling. Clearly, the reasoning for the prohibition against a board member negotiating when his spouse is a member of the collective bargaining unit is that the benefits from that contract will directly enrich that board member’s household. When a board member negotiates a fiancée’s contract and the term of the contract goes beyond the date of marriage as it does here, the benefits of the contract still enrich the board member. Thus, since Mr. Scarano married his fiancée prior to the expiration of the contract, the Commission concludes that he had a financial involvement in the outcome of negotiations that might reasonably be expected to

impair his objectivity. Therefore, he was in violation of the N.J.S.A. 18A:12-24(c) when he negotiated and voted in favor of the contract.

III. Respondents Acted on the Advice of the Board Attorney

Respondents argue that they proceeded to negotiate on the basis of an opinion by the board attorney who said there was no conflict. They further argue that since the attorney's interpretation of N.J.S.A. 18A:12-24(c) was a reasonable one, which they believe is consistent with the language of the statute, the Commission should not find them in violation of the Act for following it. The Commission stated in In the Matter of Rodney Bond, *supra*, that it will consider the fact that an attorney advised that there was no conflict in determining sanction, but not in determining whether a violation occurred. The Commission is the sole arbiter of what constitutes an ethics act violation. If the Commission concludes that a type of conduct violated the Act, it cannot then say that there is no violation because an attorney advised that there was no violation. Rather, the Commission considers the advice a mitigating circumstance in determining what the penalty should be.

This interpretation is particularly appropriate where, as here, the Commission had issued a public advisory opinion indicating that it interpreted the Act differently than the board attorney. In Advisory Opinion A23-94, the Commission said that the issue is whether the board member has a personal involvement that might reasonably be expected to impair his objectivity when determining whether to prohibit the board member from negotiating pursuant to N.J.S.A. 18A:12-24(c). In A23-94, the Commission advised that a board member with an emancipated son or daughter-in-law in the local bargaining unit was prohibited from negotiating. Consequently, the Commission had already advised that N.J.S.A. 18A:12-24(c) prohibited board members from negotiating when a relative other than an immediate family member was a member of the local bargaining unit. Mr. Delaney brought the Commission's advice in Advisory Opinion A23-94 to the respondents' attention at the time the board president was choosing the negotiating committee. Thus, the Commission's decision in the present case is completely consistent with A23-94 and the Commission is not compelled to rule otherwise because an attorney advised respondents that they would not violate the Act if they negotiated the collective bargaining agreement.

IV. Respondents Were Not Advised of Their Right to Have an Attorney When They Appeared Before the School Ethics Commission

Respondent Mr. Scarano argues that while complainant Arthur Delaney had a lawyer present his arguments, he did not have counsel nor was he told that he could be represented by counsel. This argument is completely baseless as the respondent in every case before the Commission is notified of his right to have counsel when the Commission advises him that his case is going to be discussed at an upcoming meeting. Mr. Scarano and Mr. Russo were notified of their right to bring counsel and present witnesses by letter

dated November 6, 1997, attached hereto as Attachment A. They were also copied on Mr. Delaney's letter from the Commission of the same date stating that he could also bring counsel. A copy of this letter is attached as Attachment B.

Having so notified the respondents of their right to bring counsel, the Commission could discern no need to reiterate at its meeting that the respondents had a right to bring counsel. Indeed, for it to do so would have been unfair to Mr. Delaney who had retained counsel and ostensibly paid for him to travel from Neptune to appear before the Commission in Trenton and represent him. Respondents voiced no objection to Mr. Delaney's counsel nor did they inquire at the meeting as to whether they had a right to counsel. Considering the notification that the Commission provided respondents, the Commission properly assumed that respondents made a conscious, informed choice to come to its meeting without counsel.

Furthermore, in their subsequent submission to the Commission, respondents set forth the facts that they say that they would have presented had they had counsel present. The Commission does not dispute those facts and includes them as part of the factual record before it. The weight to be accorded those facts would be within the purview of the Commission whether counsel were present or not. Therefore, the respondents were not in any way prejudiced by not having counsel present.

V. The Commission Should Consider the Nature of the Siblings' Relationship

James Russo, in a separate submission to the Commission, sets forth that the Commission should consider the type of relationship that a board member has with a sibling before deciding that the board member is disqualified from negotiating. The Commission does not dispute that some siblings may be closer than others. It is precisely for this reason that Mr. Russo's suggestion is impracticable and not mandated by the law. It is important to note that the Legislature drafted N.J.S.A. 18A:12-24(c) in subjective rather than objective terms. The test is whether the school official's involvement might reasonably be expected to impair his objectivity, not whether he feels his objectivity is impaired. A board member's closeness to his sibling is of no relevance to the objective issue before the Commission. Thus, the Commission rejects the argument that it should consider the nature of a board member's relationship with his sibling before determining whether he has a conflict of interest that prohibits him from participating in negotiations.

The Commission now finds that respondents acted in their official capacity in a matter in which they had a direct or indirect personal involvement that might reasonably be expected to impair their independence of judgment in violation of N.J.S.A. 18A:12-24(c) of the School Ethics Act by serving on the negotiations committee and voting on the collective bargaining agreement with the Woodbridge Township Education Association (WTEA).

CONCLUSION

For all the foregoing reasons, the Commission concludes that James Russo and Thomas Scarano violated N.J.S.A. 18A:12-24(c) of the School Ethics Act when they negotiated the collective bargaining agreement with the teachers' union and voted in favor of it. The Commission recommends that the Commissioner of Education impose the sanction of censure on Mr. Russo and Mr. Scarano. In making the recommendation, the Commission has considered as a mitigating factor the fact that Mr. Russo and Mr. Scarano sought legal advice from the board attorney who advised that they could serve as the negotiating committee. However, the Commission finds it to be a serious violation that these two board members served as the only two members of the negotiating team. Thus, it finds it necessary to make a more public statement than a reprimand that negotiating a contract when the terms of that contract will benefit one's sibling and/or fiancée and ultimately, spouse, is a violation of the School Ethics Act.

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 only, 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, 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.

Paul C. Garbarini
Chairperson

Resolution Adopting Decision -- C12-97

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

Whereas, the Commission found probable cause to credit the allegations in the complaint and invited respondents to file a written statement in response; and

Whereas, the Commission has reviewed respondents' 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 James Russo and Thomas Scarano violated the School Ethics Act and recommends that the Commissioner impose a sanction of censure against respondents Russo and Scarano; 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 January 27, 1998.

Lisa James-Beavers
Executive Director

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