IN THE MATTER OF	:	**Before the School Ethics Commission**
RODNEY BOND	:	**Docket Nos. C21-96 and C24-96**
Asbury Park Board of Education	:	**(Consolidated)**
Monmouth County	:	

PROCEDURAL HISTORY

This matter arises from two complaints filed separately by Barbara Lesinski and James G. Olson. In both complaints, complainants named the Asbury Park Board of Education (Board) as the respondent even though the allegations were against only Board members Rodney Bond and James Famularo. As set forth in its March 7, 1997 determination on probable cause, with the consent of complainants, the School Ethics Commission (Commission) considered the complaint to be filed only against Mr. Bond and Mr. Famularo. Additionally, since both complaints involved the identical events and individuals and made basically the same allegations, the Commission consolidated the complaints.[1]

In her complaint filed with the Commission on July 12, 1996, Ms. Lesinski alleged that Board member Rodney violated the School Ethics Act (Act), N.J.S.A. 18A:12-21 et seq. when he voted in favor of allowing Solid gold Productions to use a school district facility to state a concert. Ms. Lesinski alleged that Mr. Bond resided in the same household with the concert promoter, Rayfield James, Jr., and that Mr. Bond would profit from the concert. Mr. Olson filed a similar complaint on July 30, 1996, alleging that Mr. Bond violated the Act because he had an interest in the concert and would profit from it. Mr. Olson likewise alleged that Mr. Bond and Mr. James resided at the same address. By Written Statement Under Oath filed on July 25, 1996, in answer to Ms. Lesinski's complaint, Mr. Bond admitted that he voted in favor of Solid Gold Productions' use of the facilities, but denied that this vote violated the Act. Relying on N.J.S.A. 18A:12-24(h), Mr. Bond answered that his vote did not violate the Act because he had no interest in Solid Gold Productions nor would he benefit in any way from the concert. Mr. Bond further stated that while Mr. James is a good friend of his, Mr. James in not an immediate family member within the definition of the Act and Mr. James, while he did not appear before the board in support of the application, likewise would receive no benefit from the concert. On August 22, 1996, Mr. Bond filed virtually the identical Written Statement Under Oath in answer to Mr. Olson's complaint.

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[1] In its March 7, 1997, determination on probable cause, the Commission dismissed the allegations against Mr. Famularo, finding that Mr. Famularo's vote did not violate the Act because he did not have a sufficient direct or indirect personal involvement with the concert promoter.

The Commission also dismissed the allegations concerning the Board attorney's, Kim Fellenz, Esq., failure to properly review the Board's facilities use policy when advising the Board on the Concert application. The Commission found that there was no probable cause to credit these allegations as they did not set forth any alleged violations under the act.

By letters dated December 27, 1996, the Commission advised Mr. Bond to appear before the Commission at its January 28, 1997, meeting. By letter dated January 14, 1997, Mr. Bond, through his attorney, advised the Commission that he would be unable to attend the Commission meeting due to a scheduling conflict. By letter dated January 16, 1997, the Commission rescheduled Mr. Bond's appearance for its February 25, 1997, meeting. On February 25, 1997, Mr. Bond had to leave before the Commission reached his case. Ultimately, the Commission determined that it was not necessary to its investigation to seek further information from Mr. Bond beyond that which was in his Written Statement Under Oath.

At its public meeting on February 25, 1997, the Commission orally found probable cause to credit the allegations in the complaints against Mr. Bond. The Commission memorialized this oral determination in a written finding dated March 7, 1997, and adopted the Resolution dated March 25, 1997. As set forth in its March 7, 1997, determination, the Commission concluded that the material facts were not in dispute and, therefore, advised Mr. Bond that he could submit, by April 7, 1997, a written statement to the Commission as to why his actions did not violate the Act and as to appropriate sanction should a violation be found. By letter dated March 21, 1997, and filed March 27, 1997, Mr. Bond submitted his arguments as well as supporting certifications. Mr. Bond also requested a copy of the record in the matter. By letter Dated May 5, 1997, the Commission provided Mr. Bond with the requested information and gave him additional time in which to submit a supplemental response should he so choose. Mr. Bond filed a supplemental response on May 19, 1997.

FACTS

The material facts in this matter, which are evident from the pleadings, testimony, and documents submitted, are undisputed. An Application for Permit to Use Public School Building dated March 12, 1996, (March 12 Application) was submitted to the Board. The March 12 Application lists Solid Gold Productions as the organization, with Charles Rouse and Rodney Bond as the contacts. The March 12 Application requests the use of the Asbury Park High School Football Stadium Field for a musical festival. The March 12 Application contains two signature lines at the bottom for sponsors and provides that "[t]he sponsors below agree to be responsible for any violation caused by non-compliance with the rules and regulations of the Board of Education." Each line provides space for "Name (Please Print)," "Signature," and "Address." Typed on the first line is "Solid Gold Productions" and the signature space next to it is signed by Charles Rouse who lists the address as 3701 Hwy. 33, Neptune, NJ 07753. The next line has printed "Rodney Bond" and is signed by Rodney Bond. The address space was left blank. Mr. Bond admits that he was a sponsor on the March 12 Application. He states that his intent was to assist his "good friend" with the planning and holding of the concert. As set forth in the Board's minutes for its March 18, 1996, meeting, Mr. Bond, Mr. Ray James, and Mr. Charles Rouse appeared before the Board on that date in support of the March 12 Application. Mr. Bond and Mr. James reside at the same address. The Application was carried over to another meeting.

In April 1996, Mr. Bond was elected to the Board and sworn in as a member. Subsequently, on May 13, 1996, a new application on behalf of Solid Gold Productions (May 13, 1996 Application) was submitted to the Board for a proposed concert. The application form for the May 13 Application was identical to the form used for the March 12 Application. This time, however, the sponsors were not the same. Solid Gold Productions, Inc. was listed as the organization, but Toney Slaughter was now listed as the contact. The May 13 Application this time was signed only by Charles Rouse as sponsor. Although the date of the event was different, it still was the same event that was being proposed. The Board's minutes for the May 13, 1996, meeting state that the Board approved a Motion to Approve Solid Gold Productions' use of the high school football field for a music festival at a date to be determined. Mr. Bond made the Motion to Approve. Mr. Bond submitted a certification from himself, the School Board Secretary/Business Administrator, Dora E. Mylchreest, and Board President, Shelia Solomon, which stated that prior to moving and voting on Solid Gold Productions' May 13, Application, Mr. Bond advised the Board the he had divested himself of all interests in Solid Gold Productions and the he sought the advice of Board counsel who, after asking questions, ultimately advised him that he could vote on the Application.

ANALYSIS

Mr. Bond raised two procedural arguments which the Commission will address initially. First, Mr. Bond argues that once the Commission found probable cause, it was required to refer this matter to the Office of Administrative Law (OAL) for hearing. According to Mr. Bond, N.J.S.A. 18A:12-29(b) and (c) require the Commission to refer all cases to the OAL upon a finding of probable cause, regardless of whether there are material facts in dispute. In support of this argument, Mr. Bond relies on N.J.A.C. 1:1-4.1 which defines a "contested case" and states that a hearing in a contested case should be designed to resolve "...disputed questions of fact, law or disposition relating to past, current, or proposed activities or interests." Mr. Bond reasons that N.J.A.C. 1:1-4.1 supports his position because it refers to resolving matters other than disputed questions of fact. The Commission disagrees. The Commission is not required to transmit a matter to the OAL for hearing if there are no disputed material facts.

N.J.S.A. 18A:12-29(b) provides in relevant 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 notify the complainant and each school official named in the complaint.

The language in N.J.S.A. 18A:12-29(c) specifically makes reference to the Administrative Procedure Act (APA). Accordingly, the relevant provisions of the APA must be considered when determining the Commission's obligation to refer complaints to

the OAL for hearing. Pursuant to the APA, an agency head [2]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). 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. New Jersey State Bd. of Medical Examiners, 205 N.J. Super. 398, 404 (App.Div. 1995). As the Supreme Court noted in In Re Uniform Adm'n Procedure Rules, the APA and the OAL's rules implementing the APA "...do not interfere with the agency procedures for resolving cases, or to hear and decide contested cases." Id. At 105.

Given the agency head's authority concerning cases before it, Courts have found that an agency head's discretion to determine how to handle a particular case is not circumscribed by the use of "shall" in a statutory provision relating to transfer of cases to the OAL. In Hills Development Co. v. Bernards Tp., 229 N.J. Super 318 (App. Div. 1988) and In Re Township of Warren, 247 N.J. Super 146, (App. Div.), certif. denied 127 N.J. 557 (1992), the Appellate Division concluded that the use of the word "shall" in the statutory provision relating to transfer of matters to the OAL did not require the Council on Affordable Housing (COAH) to automatically refer objections to a municipality's affordable housing plan to the OAL for hearing. The Fair Housing Act, N.J.S.A. 52:27D-301 et seq., allows parties to object to a municipality's plan to provide affordable housing and provides in the relevant part, "[i]f mediation efforts are unsuccessful, the matter shall be referred to the Office of Administrative Law as a contested case defined in the 'Administrative Procedure Act', [citations omitted]." (emphasis added), N.J.S.A. 52:27D-316(c). The Appellants in Hills and Warren argued that use of the word "shall" required COAH to transfer automatically, without discretion, any unresolved objections to the OAL for a hearing. The Appellate Division in both cases dismissed those arguments and found that the Fair Housing Act's reference to the APA incorporated the APA's provisions which allow the agency head to determine whether a case involved contested material issues of fact, thereby making it a contested case requiring an evidentiary hearing.

While the language of the Act and the Fair Housing Act are not identical, Hills and Warren are nonetheless instructive. These cases demonstrate that, despite the use of the word "shall," referral of a matter to the OAL is within the agency's discretion when the statutory provision in question makes specific reference to the APA. Under the APA, the agency head retains the right in the first instance to determine whether a case is contested and requires an evidentiary hearing. The use of the word "shall" does not abrogate this authority.

Indeed, this interpretation of the Act is consistent with the function served by the OAL. The OAL was created to provide an independent agency to promote fairness and consistency in the conduct of administrative hearings before State Agencies. In Re Uniform Adm'n Procedure Rules, supra, 90 N.J. at 90-91. The role of the OAL is to

[2] "Agency head" in the case of the Act refers to the Commission as a public body. N.J.S.A. 52:14B-2(d)

conduct administrative hearings when there are factual disputes. Public Advocate Dep't v. Public Utilities Bd., 189 N.J. Super. 491 (App. Div. 1983) It is well established that where no disputed issues of material facts exist, an administrative agency need not hold an evidentiary hearing in a contested case. Cunningham v. Dept. of Civil Service, 69 N.J. 13, 24-25 (1975); Bally Mfg. Corp. v. Casino Control Com'n, 85 N.J. 325, 334 (1981). In such a case where there are no material facts in dispute, a party's right to a hearing is satisfied by giving the party the opportunity to provide written submissions. In Re Solid Waste Util. Cust. Lists, 106 N.J. 508,521 (1987).

Mr. Bond's reliance on N.J.S.A. 18A:12-29(c) and N.J.A.C. 1:1-4.1 is misplaced. N.J.S.A. 18A:12-29(c) provides that "[u]pon completion of the hearing, the Commission, by majority vote, shall determine whether the conduct complained of constitutes a violation of this Act or whether the complaint should be dismissed." As discussed above, the right to a hearing is satisfied by providing the respondent with the opportunity to submit his position in writing to the Commission. When there are no facts in dispute and thus no need for an evidentiary hearing, it certainly makes sense for the Commission to exercise its discretion to consider the matter directly rather than send the matter to OAL. Likewise, N.J.A.C. 1:1-4.1 offers no support for Mr. Bond's arguments. This regulation simply sets forth what kind of matters are to be considered contested cases. The fact that a contested case includes matters that involve questions of law is not dispositive as to whether an agency must refer a case to the OAL. As discussed above, the APA does not divest a State agency of its inherent authority to consider a matter itself.

In his March 21, 1997, submission in response to the finding of probable cause, Mr. Bond requests that the Commission allow board President, Shelia Solomon, Board Secretary/Business Administrator, Dora E. Mylchreest, and Board Vice President, John Moor to address the Commission. Mr. Bond submitted certifications from Ms. Solomon and Ms. Mylchreest with his response. Both certifications state that prior to the May 13, 1996, vote on Solid Gold Productions' application, Mr. Bond advised the board that he had divested himself of all interests in Solid Gold Productions and that he would not profit in any way from the concert. The certifications further state that Mr. Bond sought the advise of Board counsel as to whether he had a conflict and that the Board attorney, after questioning, advised Mr. Bond that he could vote on the application. Mr. Bond also submitted his own certifications which states the same. It is the Commission's understanding the Mr. Moor would provide the same information if he appeared before the Commission. The Commission finds that there is no need for the appearances of the above individuals. The Commission has the certifications. Accordingly, the Commission accepts that prior to the May 13, 1996, vote, Mr. Bond advised the Board that he had no interest in Solid Gold Productions and that the Board attorney advised Mr. Bond that he did not have a conflict that would disqualify him from voting on the May 13 Application.

With these procedural matters resolved, the Commission will now determine whether Mr. Bond's vote on Solid Gold Productions' May 13 Application violated the Act. For the following reasons, the Commission finds that Mr. Bond violated N.J.S.A. 18A:12-24(c) when he voted on the May 13 Application. This provision states:

> 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.

This provision must be interpreted in accord with the legislative intent of the Act, which is to "ensure and preserve public confidence" in school officials. As the Legislature stated, "[t]hese board members and administrators must avoid conduct which is in violation of their public trust or which creates the justifiable impression among the public that such trust in being violated." In interpreting an identical provision of the Local Government Ethics Law, N.J.S.A. 40A:9-22.1 et seq., the New Jersey Supreme Court found that this provision requires a public official to discharge his duties with "undivided loyalty." MacDougall v. Weichert, 144 N.J. 380, 401 (1996).[3]

In this case, there certainly can be the justifiable public perception that Mr. Bond did not execute his duties with "undivided loyalty." Mr. Bond signed the March 12 Application as a sponsor. He appeared before the Board at a public meeting as an advocate for the Application on March 18, 1996. He has stated in his March 24, 1997, certification that one of the reasons he acted as a sponsor and advocate for the concert was to help his good friend Charles Rouse. Despite his involvement with the concert and the Application, On May 13, 1996, Mr. Bond voted in favor of the revised May 13 Application. This Application was for the same event except the revised May 13 Application had Mr. Bond's name removed as sponsor. In fact, Mr. Bond's name was not removed from the Application until May 13, the date he voted on it. Also, Mr. Bond had appeared before the Board on the original application less than two months before and it was only one month since he had been elected to the Board. Under these circumstances, there certainly is the justifiable impression that Mr. Bond's independence of judgement and objectivity were impaired and he should not have voted on the May 13 Application.

Mr. Bond's claims that he has no interest in Solid Gold Productions and that he would receive no benefit from the concert do not alleviate the problem. It certainly is reasonable for the public to perceive that Mr. Bond's independence of judgment or objectivity might be impaired when the application of his good friend, on which he initially was a sponsor and in support of which he appeared before the Board shortly before his election to the Board, comes before the Board for a vote. The Act does not require an actual conflict. Rather an apparent conflict is prohibited as well, as evidenced by the legislative intent, N.J.S.A. 18A:12-22. Likewise, the violation is not erased because Mr. Bond sought and received legal advice in which the Board attorney advised

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[3] The Local Government Ethics Law was enacted to ensure public confidence in local government officials by providing a comprehensive scheme of ethical standards for local government officials. N.J.S.A. 40A:9-22.2. N.J.S.A. 40A:9-22.5 provides the standards of conduct and N.J.S.A. 40A:9-22.5(d) is identical to N.J.S.A. 18A:12-24(c).

him that there was no conflict. While the Commission may consider the Board Attorney's advice in determining sanction, the violation still has occurred.

Mr. Bond also relies on Petrick v. Planning Board of the City of Jersey City, 287 N.J. Super. 325 (App. Div. 1996) and Monmouth Medical Center v. State Department of Health, 272 N.J. Super. 297 (App. Div. 1994) in support of his argument that no conflict existed when he voted on Solid Gold Productions' May 13 Application. Neither case supports Mr. Bond's position. Initially, it should be noted that neither case was decided under the Act. Rather, they involved an analysis of conflicts of interest under the common law principles. While cases such as these may offer some insight, they do not involve a comprehensive scheme to guide the ethical conduct of school officials.

In any event, neither case supports Mr. Bond's claim that his action did not violate the Act. As Mr. Bond points out, Petrick stands for the proposition that cases involving conflicts of interest must be evaluated on the particular facts of each case and the Courts should determine whether the circumstances could be interpreted to show that the public official could have been tempted to depart from his sworn duty. Relying on Petrick, Mr. Bond argues that his interest was sufficiently remote so as not to disqualify him from performing his duties as an elected official. As discussed above, in this case, the facts demonstrate that Mr. Bond's actions violated the Act. Mr. Bond voted on an application on which he initially had been a sponsor and on which he had appeared before the Board as an advocate, only one month before his election to the Board and only two months before he voted on it as a Board member. Furthermore, the application admittedly was an application of a close friend, which is one reason Mr. Bond initially became involved in the application. These facts certainly demonstrate a violation of N.J.S.A. 18A:12-24(c) and Petrick offers no support for concluding otherwise.

Likewise, Monmouth Medical offers no support for Mr. Bond's position. The relevant issue in Monmouth Medical was whether a member of the Health Care Administration Board who was also affiliated with a hospital seeking a certificate of need, should be disqualified from voting on regulations concerning cardiac care. As in Petrick, the Appellate Division noted that the circumstances of each case must be reviewed individually. In Monmouth Medical, the Court concluded that there was not conflict of interest because the member was not voting on a matter directly affecting her or the hospital with which she was affiliated. Rather, the Court noted that she was voting on general regulations. In this case, Mr. Bond voted on an application on which he initially had a direct involvement. His name was not removed from the May 13 Application until the day that he voted on the Application. Monmouth Medical does not support Mr. Bond's claim that his vote did not violate the Act.

In his Written Statement Under Oath, Mr. Bond also argued the N.J.S.A. 18A:12-24(h) applies to his vote and, therefore, he cannot be found in conflict. N.J.S.A. 18A:12-24(h) provides:

> No school official shall be deemed in conflict of 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.

Mr. Bond argues that this provision applies because he would receive no monetary gain from the concert. This provision does not absolve Mr. Bond from the violation. As discussed above, the violation in this case in based on Mr. Bond's involvement with the application in question. The fact the he would not have received any money is not determinative. Indeed, if Mr. Bond were correct, any school official could vote on a matter where he has a direct or indirect personal involvement so long as he did not receive any monetary benefit. This is contrary to N.J.S.A. 18A:12-24(c).

DECISION

For the foregoing reasons, the Commission finds that Mr. Bond violated N.J.S.A. 18A:12-24(c) when he voted on Solid Gold Productions' May 13 Application. The Commission now will address the isue of appropriate sanction. Mr. Bond argues that the appropriate sanction in this case is a reprimand. In support of this argument, Mr. Bond states that he became involved with the event partially in an effort to improve the cultural and social life of Asbury Park. Mr. Bond further points out that prior to his vote, he advised the entire Board that he had divested himself of any interest in Solid Gold Productions and he sought legal advice from the Board attorney on whether he could vote on the May 13 Application.

The Commission agrees that a reprimand is the appropriate sanction in this case. Prior to his vote, Mr. Bond did disclose to the full board that he no longer was involved with the concert or the Application. More importantly, he did seek legal advice from the Board attorney to determine whether he could vote on the matter. In recognition of the fact that the Board attorney advised Mr. Bond that he could vote on the matter, the Commission recommends to the Commissioner of Education that a reprimand be imposed.

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Paul C. Garbarini, Chairperson

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