



## DECISION ON MOTION TO DISMISS

Respondents' attorneys argue that the Commission should dismiss the complaint on its face because the complainant has failed to state a cognizable claim under the School Ethics Act, N.J.S.A. 18A:12-21 et seq. The Commission reserved decision until now.

The School Ethics Commission does not have rules regarding motion practice. The New Jersey Administrative Code sets forth rules for motion practice; however, it sets forth no standards for a motion to dismiss. Therefore, the Commission must turn to the New Jersey Court Rules to determine the standard it should apply to respondents' request. The Court Rules set forth the standard for a motion to dismiss for failure to state a claim at N.J. Court R. 4:6-2(e). Cases interpreting the rule have held that the test for determining the adequacy of a pleading is whether a cause of action is "suggested" by the facts. Printing Mart v. Sharp Electronics, 116 N.J. 739, 746 (1989). The New Jersey Supreme Court further stated:

In reviewing a complaint dismissed under R. 4:6-2(e), our inquiry is limited to examining the legal sufficiency of the facts alleged on the face of the complaint. However, a reviewing court 'searches the complaint in depth and with liberality to ascertain whether the fundament of a cause of action may be gleaned from an obscure statement of claim, opportunity being given to amend if necessary'...For purposes of analysis plaintiffs are entitled to every reasonable inference of fact. [Id. (citations omitted).]

Applying this standard to the complaint at issue, the Commission must now search the complaint. Mr. K. Karl Kovach's complaint sets forth:

18A:12-24 Para. b have (sic) been violated. All relatives below were hired while the board members were in office:

Gwynne Kesselman's sister-in-law, Brenda, hired 9-1-93

Philip Labasi's wife, Beverly, hired 9-1-95

Joseph LaCorte's wife, Judy, hired 8-21-95

Respondents argue that the complainant alleges no specific facts that Mr. Labasi or Mr. LaCorte did anything or attempted to do anything to secure employment for their spouses. They state that barring such facts, Mr. Kovach has failed to state a claim. Commission finds that the citation of paragraph b in the complaint states a cognizable claim under the School Ethics Act. It sets forth:

No school official shall use or attempt to use his official position to secure unwarranted privileges, advantages or employment for himself, members of his immediate family or others.

The Commission agrees with respondents that there is no law saying that a board cannot hire spouses of board members during a board member's term. However, the complainant alleged that the respondents violated N.J.S.A. 18A:12-24(b) in connection with the hiring. Thus, the Commission had an obligation to investigate the charges to determine if the respondents used their official positions to secure unwarranted employment for their relatives and spouses as alleged in the complaint. While the complaint is not expertly drafted, it is not worded so poorly as to prevent the respondents from responding adequately. Indeed, the respondents answered the complaint fully without ever raising the defense that the complainant did not set forth facts to support a violation of the School Ethics Act.

Although Mr. Kovach failed to lay the factual foundation for his charge, the Commission recognizes the general principle frequently stated in administrative agency proceedings. When a pro se litigant files a complaint, the agency should accommodate the litigant's lack of a legal background and allow him or her some latitude in complying with filing requirements. As set forth above, plaintiffs are entitled to every reasonable inference of fact. Id. Again, the Commission may give complainants latitude so as long as it does not result in unfairness to the responding litigants.

In the present case, the respondents clearly understood that Mr. Kovach was charging them with having used their positions to secure unwarranted employment for their spouses and relatives. The facts Mr. Kovach presented set forth the coincidence that the three respondents had their spouses or relatives appointed to board positions during their terms on the board. He did so by providing the dates of the appointment. The Commission concludes that the complainant set forth a sufficient claim to allow the Commission to go forward and conduct its investigation. Thus, the motion to dismiss as a matter of law is denied.

## **FACTS**

On the basis of the pleadings, documents and testimony presented, the following facts appear to be undisputed.

1. Gwynne Kesselman is currently the President of the Edison Board of Education. She became a board member in February 1993. Her current term on the board expires in April 1998.

2. Joseph LaCorte became a member of the Edison school board in April 1993. He is no longer a member of the board of education. His term expired in 1996.

3. Philip Labasi has been a member of the Edison Board of Education since April 1994. His term expires in April 1997.

4. On October 11, 1993, Brenda Kesselman, the wife of Gwynne Kesselman's brother-in-law, was appointed as a grade 5 teacher at James Madison Intermediate School in the Edison Township school district for a one-year term.

5. Gwynne Kesselman voted against the appointments of all personnel including Brenda Kesselman's.

6. The Superintendent recommended Brenda Kesselman's reappointment, after she was initially nonrenewed following her one-year appointment. The board decided the reappointment of all previously laid-off non-tenured staff members on June 13, 1994. Gwynne Kesselman voted in favor of the reappointments along with the other seven board members present.

7. Brenda Kesselman was again non-renewed in the Spring of 1995 due to budget uncertainty. After the board resolved the budget, the non-renewed employees were reappointed at the board's June 22, 1995, meeting. Once again, Gwynne Kesselman voted in favor of the reappointments. The vote was unanimous.

8. In June 1995, the Superintendent recommended that Joseph LaCorte's wife, Judith LaCorte, be appointed as a secretarial substitute in the Edison school district. On June 22, 1995, the board voted on the resolution to reappoint her. Mr. LaCorte first voted in favor of the resolution to appoint his wife contained in the motion to approve the whole personnel report. The board then unanimously approved to revote on Item N (the substitute list) separately. On the revote, Mr. LaCorte abstained.

9. In June 1995, Mrs. LaCorte applied for a position as a full-time secretary. At a special meeting of the board on July 20, 1995, a quorum of the board passed a resolution appointing Judith LaCorte as a full time secretary III in the Edison High School, effective August 21, 1995. Mr. LaCorte abstained. The resolution accepting the appointment passed 5-2.

10. From October 1992 until June 1994, Philip Labasi's wife, Beverly Labasi, was employed by the Edison school district as a lunch aide.

11. The board appointed Mrs. Labasi as a secretarial substitute effective September 1994. The Superintendent recommended the reappointment of Mrs. Labasi as a secretarial substitute for the Edison Township school district in June 1995. At the public meeting on June 22, 1995, a quorum of the board passed the resolution to rehire her as a secretarial substitute. Mr. Labasi abstained from voting.

12. In June 1995, Mrs. Labasi interviewed for the position of full-time secretary III. After the interviews, the superintendent recommended Mrs. Labasi's appointment to the position of full-time secretary III. At a special public meeting of the board on July 20, 1995, a quorum of the board appointed Mrs. Labasi as a full-time secretary IIIB at John P. Stevens High School effective September 1, 1995. She was placed at Step 1 on the guide. Mr. Labasi was not present at that meeting.

13. Superintendent Persi initiated a three-step process for hiring personnel. It included an initial screening by the Screening Committee, an interview by the Screening Committee, and an interview with the principals of the school in which the person will work.

The committee narrows the list at each level and the scores for each interview are independent of each other. The final recommendation came from Superintendent Persi.

14. Superintendent Persi did not have any conversations with respondents about the hiring of the spouses, except for a conversation with Mr. Labasi stating that he hoped his wife would be able to get fair treatment. This occurred after the superintendent had presented Mrs. Labasi's name as a recommended candidate.

15. Neither Carol Toth, Principal Riccio, Principal Cangelosi, nor Mr. Weislo had any conversations with Mr. Labasi nor Mr. LaCorte concerning the hiring of their wives.

## **ANALYSIS**

Complainant sets forth that respondents violated N.J.S.A. 18A:12-24(b) of the School Ethics Act. N.J.S.A. 18A:12-24(b) provides:

No school official shall use or attempt to use his official position to secure unwarranted privileges, advantages or employment for himself, members of his immediate family, or others.

The Commission will address the charges against each respondent separately.

### *GWYNNE KESSELMAN*

In the present case, Gwynne Kesselman voted for the reappointment of Brenda Kesselman to the position of grade 5 teacher after she had previously been nonrenewed. In her answer, Ms. Kesselman swore under oath that the board attorney advised her that she could vote in light of the fact that Brenda Kesselman was neither an immediate family member nor a relative under the School Ethics Act. Her attorney also argues in a brief to the Commission that a newly enacted statute provides that the board must support the hiring recommendations of the superintendent unless the members have good cause not to do so.

Under subsection (b) of section 24 of the School Ethics Act, the person who receives the privilege or employment need not be an immediate family member to find that a school official committed a violation. Rather, there must be some showing that the school official used her position to gain some benefit for that person to which he or she would otherwise not be entitled. In some circumstances, the casting of a vote can constitute a use of one's official position to secure a benefit for someone else.

The appointment of Brenda Kesselman as a teacher just months after Gwynne Kesselman's election to the board could cause the public to raise questions. However, the Commission finds that there is no evidence that Ms. Kesselman used her official position to influence the hiring of one who was otherwise unqualified for the position. Further, there is no evidence that raises a question as to Brenda Kesselman's qualifications for the appointment such that the Commission could find her appointment unwarranted under the Act.

The fact that Ms. Kesselman received advice from an attorney that she could vote is not persuasive. If she voted and influenced others to vote despite a conflict of interest, then the Commission would have to find that she violated the Act. The advice of an attorney could mitigate against the penalty, however. Similarly, the Commission is not influenced by the so-called “Rotondo bill” argument. The Commission recognizes that the law sets forth that a board shall not withhold its approval of a superintendent’s recommendation for arbitrary and capricious reasons. However, a board member with a conflict of interest clearly has a good reason for not voting. Thus, if the board could not get a majority vote for the superintendent’s recommendation without her vote, it would not have failed for arbitrary and capricious reasons.

For the reasons set forth above, the Commission does not find probable cause to credit the allegation that Gwynne Kesselman violated the Act.

*JOSEPH LaCORTE*

Regarding the hiring of Mrs. LaCorte, the question complainant implies is whether the interviewers, who are all board employees, were influenced by the fact that their employer’s wife was seeking a position. Each of the interviewers testified to seeking only the most qualified person and being uninfluenced by her status as a board member’s spouse. The Commission questioned Mr. LaCorte and the members of the selection committee extensively about his wife’s promotion from secretarial substitute to full-time secretary during Mr. LaCorte’s term. The fact that board employees have to decide whether to choose a board member’s wife over another candidate when that board member has the power to negatively influence his employment can be problematic. Nevertheless, there is no law against the hiring of board members’ spouses who meet the qualifications to fill vacant positions. Indeed, if the Commission found a basis for a violation of the School Ethics Act on that basis alone, then it would preclude board members’ immediate family members from being hired while they served on the board. Thus, the Commission needs more evidence to find that respondent used his official position to secure an unwarranted privilege for his spouse.

The records submitted by the respondents do not show that Ms. LaCorte received the highest scores over the other applicants.<sup>1</sup> Nevertheless, she scored highly enough at each stage to make it to the final interview where she was ultimately chosen. The Commission is satisfied that the board’s procedures for hiring were followed. The interviewers testified that they chose her on the basis of her ability, having been familiar with her work. Clearly, Mr. LaCorte should have abstained initially on the resolution to approve the personnel report. However, he cured the error with the revote abstaining on his wife’s appointment.

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<sup>1</sup> During the course of the Commission’s investigation, the Edison Board of Education and respondents provided the Commission with personnel documents, some of which contain confidential information. All personnel documents submitted that contain confidential information are hereby sealed to ensure that the confidentiality is preserved.

Without additional information linking Mrs. LaCorte's appointment with Mr. LaCorte's office as a board member, there is no evidence of a violation of the School Ethics Act.

### *PHILIP LABASI*

Philip Labasi submits that he in no way used his position to influence the hiring of his wife. Complainant takes the position that the fact that the appointment was made during the board member's term is evidence of influence, presumably because those responsible for hiring serve at the will of the board. The Commission disagrees with the complainant and holds that there must be other evidence of influence other than the timing of the appointment to prove a violation of N.J.S.A. 18A:12-24(b). Thus, it is necessary to analyze all of the facts.

Mrs. Labasi had previous experience in the district. She began working as a lunch aide in October 1992. Mr. Labasi became a board member in April 1994. Mrs. Labasi was appointed as a substitute secretary in September 1994. She was reappointed as a substitute secretary in June 1995 and was appointed a full time secretary in July 1995. In addition, Mrs. Labasi testified that she received another promotion and pay raise in November 1995 when the principal recommended that she become a Secretary III at John Adams Middle School. She testified that she had applied for the position of full-time secretary in December 1994, but was denied. Because Mr. Labasi became a board member in April 1994, it may appear that Mrs. Labasi was quickly promoted during his first term as a board member from lunch aide to substitute secretary to full time secretary. However, the evidence did not show that Mr. Labasi took any action to influence the process or encourage her promotions.

The Commission questioned the superintendent extensively on Mrs. Labasi's appointment to the full-time secretary position and how she became a Secretary IIIB when the only apparent vacancy was for a Secretary III. However, he was able to explain that the employee hired for the second Secretary III vacancy had currently been serving as a Secretary IIIB so her promotion created a new vacancy. Superintendent Persi stated that there was no need to conduct a new round of interviews. Thus, the superintendent chose the board member's spouse among those who had already interviewed for the Secretary III position, and who had made it through the initial screening process. The Search Committee did not conduct new interviews.

The Commission also questioned Mr. Wcislo, the Chair of the Search Committee, extensively on his written summary of the process. Therein, he indicated that the initial screening committee screened 18 candidates and chose the top eight. Mrs. Labasi was number nine in the scores. When questioned on the rating sheets that indicated that the spouses were not the highest ranked candidates, Mr. Riccio testified that the two higher scoring persons were "unavailable". While the Superintendent and Mr. Riccio seemed to disagree on what the term "unavailable" meant, the resolution of the issue was not necessary to determine whether Mr. Labasi used his position to secure his wife's employment. Despite the questions the evidence raised about the process, there was never any indication that Mr. Labasi had a hand in the three levels of screening that took place.

The evidence also showed that Mr. Labasi initially voted in favor of his wife's appointment to the substitute list contained in the personnel report. However, he abstained on the revote, thus curing the initial error. Again, the Commission must find that Mr. Labasi used his position to secure unwarranted privileges for Mrs. Labasi in order find that he violated N.J.S.A. 18A:12-24(b). There is no evidence to show Mr. Labasi tried to influence the Screening Committee, the principals or the Superintendent to secure employment for his wife. Thus, the Commission finds no probable cause to credit the allegations that Mr. Labasi violated the School Ethics Act, N.J.S.A. 18A:12-24(b).

### **DECISION ON THE MERITS**

For the foregoing reasons, the School Ethics Commission does not find probable cause to credit the allegations that Gwynne Kesselman, Joseph LaCorte or Philip Labasi violated the School Ethics Act and therefore, dismisses the complaint against them.

### **DECISION ON MOTION FOR SANCTIONS**

The attorneys for Mr. LaCorte and Mr. Labasi have jointly requested that the Commission sanction the complaint for filing a frivolous complaint. The School Ethics Act sets forth a provision for sanctions that reads:

If prior to the hearing the commission determines, by majority vote, that the complaint is frivolous, the commission may impose on the complainant a fine not to exceed \$500.00. The standard for determining whether a complaint is frivolous shall be the same as that provided in [N.J.S.A. 2A:15-59.1].

N.J.S.A. 2A:15-59.1(b) provides:

In order to find that a complaint, counterclaim, cross-claim or defense of the nonprevailing party was frivolous, the judge shall find on the basis of the pleadings, discovery, or the evidence presented that either:

- 1) The complaint...was commenced, used or continued in bad faith, solely for the purpose of harassment, delay or malicious injury; or
- 2) The nonprevailing party knew, or should have known, that the complaint...was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law.

The New Jersey Supreme Court has held that the term “frivolous” should be given restrictive interpretation, in light of the premise that in a democratic society, citizens should have ready access to all branches of government. McKeown-Brand v. Trump Castle Hotel & Casino, 132 N.J. 546 (1993). In the present case, the complainant set forth the only facts of which he had knowledge and set forth his belief that respondents violated a section of the School Ethics Act based on those facts. Thus, the Commission finds no evidence that complainant filed the complaint in bad faith to harass, delay or injure. Further, as set forth above, the complainant is not an attorney and is not expected to know exactly what facts constitute a violation. A Commission investigation was necessary to determine all of the facts to clarify whether the promotions of board members’ spouses were more than a coincidence. Thus, the Commission cannot find that the complainant should have known that the complaint was without any reasonable basis in law or equity and could not be supported by a good faith argument for a reversal of existing law.

For the foregoing reasons, the Commission denies respondents’ motion for sanctions.

This decision constitutes final administrative agency action. Thus, it may be appealed only to the Superior Court - Appellate Division.

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Paul C. Garbarini  
Chairman

### **Resolution Adopting Decision -- C38-95**

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

Whereas, the Commission has found no evidence upon which to find probable cause to credit the allegations; and

Whereas, the Commission has reviewed a draft decision by its staff dismissing the complaint; and

Whereas, the Commission agrees with the decision;

Now Therefore Be It Resolved that the Commission hereby adopts the draft decision dismissing the complaint and directs its staff to notify all parties to this action of the Commission's decision herein.<sup>2</sup>

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Paul C. Garbarini, Chairman

I hereby certify that the Resolution was duly adopted by the School Ethics Commission at its public meeting on October 22, 1996.

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Lisa James-Beavers  
Executive Director

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<sup>2</sup> School Ethics Commission member Katherine Jani recused herself from the hearing, discussion and decision in this matter because the attorney for Mr. LaCorte is the attorney for the school board on which she sits.