

SCHOOL ETHICS COMMISSION DKT. NO. C41-07
COMMISSIONER DKT. NO. 2-3/09A

JENNIFER DERICKS, MAUREEN SHARPE, :
DARYL SAVAGE, SHIRLEY BOUSHELL, :
ARMEN KOCHAGIAN, AND :
RONALD BASSANI, :
COMPLAINANTS-RESPONDENTS, : COMMISSIONER OF EDUCATION
V. : DECISION
MICHAEL SCHIAVONI, BOARD OF :
EDUCATION OF THE TOWNSHIP OF :
SPARTA, SUSSEX COUNTY, :
RESPONDENT-APPELLANT. :
_____ :

Decided by the School Ethics Commission, February 24, 2009

For Complainants-Respondents, Maureen Sharpe, *Pro Se*¹

For Respondent-Appellant, Howard B. Mankoff, Esq.
(Marshall, Dennehey, Warner, Coleman & Goggin, PC)

The above-captioned matter came before the Commissioner of Education by way of a March 19, 2009 appeal by Respondent-Appellant Michael Schiavoni (respondent) of the February 24, 2009 decision of the School Ethics Commission finding him in violation of *N.J.S.A.* 18A:12-24.1(e) of the Code of Ethics for School Board Members and recommending a penalty of censure. In its decision, the Commission specifically determined that respondent – at the time President of the Sparta Board of Education (Board) – took private action capable of compromising the Board by submitting a letter to the editor, dealing with Board matters, for

¹ Where a complaint is submitted by more than one person, the Commission may designate a lead complainant – in this case Ms. Sharpe – for purposes of communication. See Commission’s decision at 3, note 2.

publication in the *Sparta Independent* in response to an article appearing a few days earlier, without the prior review and consent of the Board.²

In appealing to the Commissioner, respondent argues that the Commission erred in finding him in violation of the Code of Ethics, contending that the Commission failed to accord appropriate weight to the undisputed fact that he conferred with Board counsel prior to sending the letter in question – which, according to respondent, distinguishes this matter from the cases cited by the Commission in support of its position. Respondent proffers that: 1) he reasonably assumed he was in compliance with the School Ethics Act, since he had counsel’s approval of a final letter which was fact-based rather than an expression of opinion; 2) counsel was clearly aware that the letter had not been formally approved by the Board; 3) there is no evidence that any member of the Board objected to the letter; 4) neither any individual Board member nor the Board as a whole, nor the Superintendent, subsequently wrote to the *Sparta Independent* to dispute the accuracy of the letter’s contents or respondent’s authority to write it; and 5) the Board was not scheduled to meet for several weeks “so any BOE response would [have been] untimely had [respondent] delayed for the next BOE meeting for Board member concurrence of the letter.” (Respondent’s Appeal Brief at 2-4, quotation at 4) Moreover, respondent continues, even if the Commissioner agrees that a violation occurred, the Commission’s recommended penalty is excessive because respondent’s action did not involve “personal gain, self dealing or conflict of interest,” and no member of the public was harmed; respondent opines that a reprimand is the appropriate penalty in this case, where “a lay person

² This matter was heard as part of a consolidated proceeding involving two additional complaints (C46-07 and C47-07) filed by the same complainants against respondent and other Sparta Board members. The complaints in those matters, as well as the additional allegations in the complaint herein, were dismissed by the Commission and are not before the Commissioner on appeal. *N.J.A.C.* 6A:4-1.3(c)1, referencing *N.J.S.A.* 18A:12-29(b) and *N.J.A.C.* 6A:28-11.1.

[made] an erroneous decision that the reliance on counsel was reasonable, and prudent.”
(*Id.* at 4-5)

In reply, complainants counter that: 1) the Commission did not find, contrary to respondent’s assertion, that the statements in respondent’s letter were factually accurate – indeed, complainants maintain they were not; 2) the review and opinion of an attorney, whatever it may be, does not override the responsibility of a board member to seek input from the full board before taking private action, nor does an attorney’s advice relieve board members from adhering to the School Ethics Act; 3) respondent could have waited a week to submit his letter, or communicated with Board members by email or called a special meeting – as he frequently did on other occasions – immediately upon reading the article to which he thought it so important to respond; and 4) the question of objections to respondent’s letter by individual Board members was not raised at hearing, otherwise complainants “would have been happy to provide written documentation of the objections of at least one [Board] member.” Complainants contend that the penalty of censure is entirely appropriate, especially given respondent’s own recognition – as evidenced by his emails subsequent to sending the letter³ – that he should have discussed the letter with the entire Board before submitting it for publication in the newspaper; they further contend that harm was, indeed, done by the letter, which gave the impression that the full Board shared respondent’s negative view of the statements and actions of the district’s superintendent. (Complainants’ Answer Brief at 1-3, quotation at 2)

Upon careful review and consideration, the Commissioner can find no basis on which to disturb the decision of the School Ethics Commission as to its determination of violation, since the Commission’s decision is supported by sufficient credible evidence in the

³ Exhibits C-3, C-5 and C-6.

record, and respondent has not demonstrated that such decision is arbitrary, capricious or contrary to law. *N.J.A.C. 6A:4-4.1(a)* Indeed, the Commissioner fully concurs with the Commission that:

***While Schiavoni, as the President, may have been the spokesman for the Board at the time, and while he was addressing Board issues in his letter, ***by rushing to submit the letter to the editor without first obtaining the consent of the Board, Schiavoni failed to recognize that the authority to address any perceived problems with the October 26th article rested with the Board. To the extent that Mr. Schiavoni maintained that the October 26th article required rebuttal, he should have brought the matter to the attention of the Board for review, even if that meant delaying the publishing of the article for another week. Having failed to do so, ***Mr. Schiavoni took “private action;” i.e., action taken by a member of a district board of education that is beyond the scope of the duties and responsibilities of the member. *N.J.A.C. 6A:28-7.1*.

*** Because the letter to the editor in C41-07 clearly addresses Board business and is plainly intended to speak *for* the Board of Education, *** there was a reasonable likelihood that the public would perceive this letter to be an official statement of the Board’s position. ***[Therefore,] Schiavoni’s private action could have compromised the Board if, indeed, the Board did not subscribe, as whole, to the statements made in the letter to the editor, particular[ly] since these statements concerned the administration of the schools. Accordingly, ***Mr. Schiavoni violated *N.J.S.A. 18A:12-24.1(e)*.

(Commission’s Decision at 13-14)

The Commissioner further finds the Commission’s analysis to hold true regardless of whether respondent’s letter was intended to be “fact-based” or an expression of opinion – and regardless of whether the statements within it were true or not – since the very act of deciding whether, when and how to reply to a published letter, and selecting the information with which to counter it, in itself constitutes the taking of an official board position. Nor is the Commissioner persuaded by respondent’s attempt to insulate himself from the consequences of his actions by pointing to the Board attorney’s review of the letter prior to its submission to the newspaper – particularly since the appropriateness of such review and the specific nature and scope of the

discussions on which respondent purportedly relied is not at all clear from the record.⁴ Finally, respondent's contention that there was no clearly or publicly stated after-the-fact objection to his action on the part of Board members is of no import, even accepting it as true,⁵ since the acquiescence of individual board members – or even the Board as a whole – to a violation by one of their number does not alter the fact that the violation occurred.

Similarly, the Commissioner deems entirely appropriate the Commission's recommended penalty of censure. Although recognizing that the board members in the matters cited (at 13-14)⁶ as precedent for the Commission's finding of violation received reprimands for their respective offenses – the penalty suggested by respondent in the event the Commissioner upholds the Commission's determination of violation – the Commissioner finds those matters distinguishable in that: 1) there is no indication on record that respondent herein was a new or inexperienced Board member; 2) the Board has clear policies (Exhibit C-4) addressing both the inability of individual members to speak on behalf of the full Board without authorization to do so⁷ and the duties of the President; 3) the School Ethics Commission had, by the time of respondent's actions, published at least two decisions establishing that *N.J.S.A.* 18A:12-24.1(e)

⁴ The record before the Commissioner suggests, if anything, that counsel's review may have been limited to a determination of whether the statements in respondent's letter were "factual" and "accurate." Nothing in this record supports respondent's claim on appeal that the Board attorney was "clearly aware" that the letter had not been approved by the Board, nor is there any indication that respondent sought advice regarding – or that he and counsel even discussed – the propriety of his actions under the School Ethics Act. In this latter regard, the Commissioner notes that respondent neither objected to the Commission's summation of testimony nor provided a transcript of proceedings to support proposed additional findings of fact. *In re Morrison*, 216 *N.J. Super.* 143, 158 (App. Div. 1987)

⁵ In actuality, the Board minutes of November 6, 2009 (Exhibit C-2) and emails from respondent to Board member Keith Smith (Exhibits C-5 and C-6) suggest that respondent's actions *did* cause concern, if not outright objection, on the part of at least one Board member.

⁶ *I/M/O Bruce Freilich, Washington Township Bd. of Education*, C18-04 & C19-04 Consolidated, (April 4, 2005), Commissioner Decision No. 156-05, decided May 2, 2005; *I/M/O Randie Zimmerman*, C49-02 (July 22, 2003), Commissioner Decision No. 497-03, decided August 21, 2003.

⁷ The Commissioner notes that Board Policy No. 9120, to which Policy 0146 makes reference, is not included in the record; however, respondent did not claim that he acted pursuant to such policy.

was violated by communications from individual board members purporting or appearing to represent the full board;⁸ 4) there is no evidence on record that respondent was advised by counsel that sending the letter in question would not be a violation of the School Ethics Act; and 5) respondent's actions had significant implications for both the Board and the public, in that he as an individual unilaterally usurped the full Board's sole authority to determine whether, when and how to officially respond to a newspaper article (Exhibit C-7) dealing with Board issues that were obviously sensitive, contentious, and of significant interest to township residents – thereby leading the public to believe his own reaction was, in fact, that of the Board.

Nor is the Commissioner persuaded by respondent's contention that he did not act in a manner that involved "personal gain, self dealing or conflict of interest." While the Commissioner recognizes that such was, in fact, the case in the matters cited by the Commission (at 25-26)⁹ in support of its recommended penalty, the Commissioner cannot permit personal benefit or inconsistent interest – whether actual or potential – to become necessary preconditions to imposing a penalty of censure for a single offense where, as here, the violation is sufficiently serious and respondent's conduct cannot be sufficiently excused by circumstances established in the record so as to warrant a lesser penalty.

Accordingly, for the reasons set forth therein and above, the Commissioner affirms the decision of the School Ethics Commission finding that respondent Michael Schiavoni

⁸ The aforementioned decisions are available online at <http://www.state.nj.us/education/legal/ethics/2005/c18-04c19-04v.pdf> and <http://www.state.nj.us/education/legal/ethics/00-03/c4902.pdf>, respectively.

⁹ *I/M/O Raymond Bonker, Lenape Valley Reg'l Bd. of Ed.*, C11-97 (March 30, 1998), Commissioner Decision No. 225-98, decided May 22, 1998; *I/M/O Lawrence James, Chesilhurst Bd. of Ed.* C10-98 (December 15, 1998), Commissioner Decision No. 30-99, decided February 9, 1999; *I/M/O Doris Graves, Pleasantville Bd. of Education*, C47-05 (May 27, 2008), Commissioner Decision No. 301-08, decided July 10, 2008.

violated *N.J.S.A.* 18A:12-24.1(e) of the Code of Ethics for School Board Members, and adopts the Commission's recommendation that Mr. Schiavoni be censured for such violation.

IT IS SO ORDERED.¹⁰

ACTING COMMISSIONER OF EDUCATION

Date of Decision: August 18, 2009

Date of Mailing: August 19, 2009

¹⁰ This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1).