

SCHOOL ETHICS COMMISSION DKT. NO. C34-08
COMMISSIONER DKT. NO. 7-11/09A

TONY JOHN, MARTIN NOCK,	:	
CHRISTOPHER WALKER AND EFE OSAGIE,	:	
	:	
COMPLAINANTS-RESPONDENTS,	:	COMMISSIONER OF EDUCATION
	:	
V.	:	DECISION
	:	
KEN GORDON, BOARD OF	:	
EDUCATION OF THE TOWNSHIP OF	:	
WILLINGBORO, BURLINGTON COUNTY,	:	
	:	
RESPONDENT-APPELLANT.	:	
_____	:	

Decided by the School Ethics Commission, October 27, 2009

For Complainants-Respondents, Tony John, *Pro Se*¹

For Respondent-Appellant, Thomas A. Abbate, Esq.
(DeCotiis, Fitzpatrick, Cole & Wisler, LLP)

The above-captioned matter came before the Commissioner of Education by way of a November 2, 2009 appeal by Respondent-Appellant Ken Gordon (respondent) of the October 27, 2009 decision of the School Ethics Commission finding him in violation of *N.J.S.A.* 18A:12-24.1(d), (e) and (i) of the Code of Ethics for School Board Members and recommending a penalty of reprimand. In its decision, the Commission determined that respondent – at the time a member of the Willingboro Board of Education (Board) – administered the schools contrary to his duty as a Board member, took private action capable of compromising the Board, and failed to support and protect school personnel in the proper performance of their duties by inserting himself into the controversy surrounding the interim

¹ Where a complaint is submitted by more than one person, a lead complainant – in this case, Mr. John – may be designated by the Commission. *N.J.A.C.* 6A:28-6.6; Transcript of Proceedings Before the School Ethics Commission at 4-5 (Appendix to Respondent’s Brief at 53-54a).

superintendent's cancellation of a previously scheduled mock student election and asking the high school principal – also the head of the district administrators' association (WEAA) – to inform her colleagues that they should not stand in the way of such election, which was a parent-teachers (PTA/PTO) event that – contrary to apparent widespread belief – had *not* been cancelled by the Board.²

On appeal before the Commissioner, respondent characterizes the Commission's decision as arbitrary, irrational, and permeated by procedural and substantive errors.

Procedurally, respondent contends that, contrary to *N.J.S.A. 18A:12-29(b)*, the Commission failed to transmit the matter to the Office of Administrative Law (OAL) upon its finding of probable cause and to render its decision within 90 days. According to respondent, the statute is unequivocal in its requirements, and the Commission's "attempt to circumvent [these requirements] through the promulgation of regulations" that permit it to hear matters directly and deem its initial screening of a complaint as satisfying the 90-day requirement is of no moment, since the rule in question – *N.J.A.C. 6A:28-10.8* – is an *ultra vires* enactment that clearly contravenes the underlying statute. (Respondent's Brief at 21-23)

Respondent further contends that the Commission violated his due process rights by improperly admitting privileged evidence and erroneously crediting the testimony of complainants' principal witness. In respondent's view, the Commission should not have permitted the unredacted confidential investigative report with attachments prepared by Board counsel with reference to the incident underlying this matter (Exhibits C-2 through C-8) to be entered as evidence over respondent's repeated objections, since the report was rendered as "confidential," clearly subject to attorney-client privilege, and *not* released publicly – apart from

² Additional allegations were made in the complaint against respondent; these, however, were dismissed by the Commission and are not before the Commissioner on appeal.

a “heavily redacted excerpt” – as untruthfully stated by complainants and testified by complainants’ witness Sarah Holley.³ Had this report been suppressed as it should have been, respondent asserts, witnesses would not have been asked to admit on record to the substance of their statements to Board counsel; the email on which the Commission relied in deciding against respondent would have been precluded from consideration because complainants had no evidentiary foundation for its possession apart from their access as Board members to the confidential report to which it was appended; respondent would not have been compelled to testify at hearing; and the complainants’ case would have rested almost entirely on the testimony of a witness (Theresa Lucas) who should not have been deemed credible because, as respondent repeatedly advised the Commission, she had a clear motive to slant her testimony against respondent – specifically, a forthcoming civil suit against the district and several individuals including respondent, actually served the day after the Commission’s hearing and claiming harassment and retaliation as a result of her complaints of Board member interference, that would unquestionably be bolstered by a finding that respondent had violated the School Ethics Act. (Respondent’s Brief at 12-14, 17-21)

Substantively, respondent first argues that his actions did not constitute “administering” the schools or failing to support school personnel in their duties, as erroneously found by the Commission. According to respondent, his interaction with the head of the WEAA⁴ “represented a measured approach to what he reasonably perceived to be either a

³ Respondent opines that “the complainants do not seem to appreciate the irony of breaching the confidences and secrets of the Board in furtherance of a matter in which *they* allege that [respondent] compromised the Board.” (Respondent’s Brief at 2)

⁴ Respondent states that he “did not insist that Ms. Lucas contact the WEAA in his presence, nor did he ever order her to contact her membership. He did not directly order Ms. Lucas to tell her membership to permit the student election to proceed, nor did he ever expressly contradict any directive of Interim Superintendent Kern...or intend for the WEAA to take any action contrary to the [superintendent’s] directive.” He further states that his email to Interim Superintendent Kern – accepting “an inordinate share of the responsibility for the situation” in an effort to

potential lawsuit against the district, or alternatively irreparable harm to the Board's relationship with the WEAA," undertaken in view of his official position as Chair of the Negotiating Committee at a time when Board negotiations with the WEAA were pending and the parties were attempting to overcome their history of negative labor-management relations. Respondent asserts that "the misperception by the WEAA that the Board had cancelled the student election at the last minute, outside of a public session, would leave the membership of the WEAA as the target of convenience to bear the brunt of parental criticism for the decision" and that it "cannot be gainsaid that the WEAA's belief that it had been 'sold out' by the Board, even if mistaken, had the potential to irreparably harm relations between the parties." Respondent further contends that the Commission applied a vague notion of the term "administer," ignoring the fact that complainants – who bear the burden of proof in this matter – never established the delineation between the Interim Superintendent's actual administrative functions and respondent's authority as a liaison to the WEAA so as to demonstrate that respondent's actions were within the scope of the former rather than the latter. (Respondent's Brief at 25-28) Moreover, respondent continues, even if his actions could (erroneously) be construed as violating the Ethics Act, the Commission should not have overlooked the fact that he made every effort to follow the chain of command before concluding he had no choice but to speak to Ms. Lucas, and even then did not instruct her to ignore the Interim Superintendent's instructions, but merely advised her that her membership should not "stand in the way" of the mock election and should let the PTA/PTO deal directly with the higher-level administration – thus supporting building administrators in the proper performance of their duties, in a situation where the chief school

dissuade Kern from taking disciplinary action against Lucas – intentionally "overstated the scope of his advice to Lucas." (Respondent's Brief at 9)

administrator was acting in a manner respondent reasonably believed to be illegal and improper so as not to warrant similar support.⁵ (*Id.* at 28-31, 33-34)

Respondent also argues that it makes no sense to hold that his actions compromised the Board, since – as correctly found by the Commission – the PTA-sponsored student election was never the subject of official action by the Board, nor did the Board vote to prohibit the event. Respondent further contends that the potential for the annual school election to have been tainted under the facts of this matter are so “attenuated and remote that the [Commission’s decision] is stretched to the point of absurdity,” noting that no school held a student election as a consequence of respondent’s actions, no party or law enforcement or other regulatory authority challenged the results or legitimacy of the Board election, and the County Board of Elections had advised that a student election was permissible so long as incentives were not offered – a restriction made clear to the PTA prior to the election. Thus, according to respondent, petitioner’s actions “had no bearing on the Board election, and posed no reasonable likelihood of tainting the election” – which, in fact, “was not, and never has been, tainted.” (Respondent’s Brief at 31-33)

According to respondent, the Commission’s “most fundamental error was that it failed to recognize the distinction between a genuinely and materially unethical act...and the ordinary incidents of a citizen’s right to participate in the affairs of his government without fear of liability,” and that it consequently interpreted the School Ethics Act in “absolutist terms that elevate form over substance.” Respondent contends that he is a “public service minded person” seeking to be a “positive force for change” in a troubled district, but was made the subject of ethics charges by self-interested “holdovers from the time of [the district’s] fiscal

⁵ Respondent states that the Ethics Act cannot be read to require deference to the chief school administrator in all instances or support of all personnel at all times, since situations will arise where supporting one group necessarily excludes supporting another.

mismanagement” who sought to discredit him for their own purposes; he asserts that he did nothing more than attempt to bring the parties to the election controversy together in good faith, yet has now received a decision which will “permanently and irrevocably tarnish [his] integrity” because the Commission “[failed] to recognize that his *de minimis* contact with the head of the WEAA was both unavoidable in these circumstances and not unduly intrusive of the Interim Superintendent’s prerogative to administer the district.” (Respondent’s Brief at 1, 3, 23-24) Respondent opines that the Commission’s decision effectively means that “in order to avoid a charge of interference under the Code of Ethics, a board member has a mandatory and unconditional obligation to look the other way if an administrator is discovered to be engaging in conduct that is reasonably believed to be unlawful, or which might cause irreparable harm” – a holding that is “particularly fallacious in the context of a district that is now under the monitorship of the Department of Education because a complacent board allowed a previous superintendent to run up a \$10 million deficit.” Respondent states that he ran for a seat on the Board precisely because “too many people looked the other way,” and that the Commission’s implication that the School Ethics Act *requires* board member acquiescence “no matter how much confusion and potential for irreparable harm [exist]” is a result that the Commissioner must reverse. (Respondent’s brief at 2, 14)⁶

The complainants did not reply to respondent’s brief.

Upon careful review and consideration, the Commissioner is unpersuaded by respondent’s arguments on appeal and finds no basis on which to disturb the decision of the School Ethics Commission.

⁶ Within his papers on appeal, respondent additionally sought indemnification for counsel fees and expenses. That claim, however, is proceeding separately, as a petition (*Ken J. Gordon, Jr. v. Board of Education of the Township of Willingboro, Burlington County*, Agency Dkt. No. 347-11/09) before the Commissioner pursuant to *N.J.A.C. 6A:3*.

Initially, the Commissioner can find no fault in the Commission's having conducted proceedings in this matter in accordance with regulations duly adopted by the State Board of Education. Respondent's contention that the Commission violated its authorizing statute by so doing effectively challenges the facial validity of the implementing regulations – a challenge which lies within the sole purview of the Appellate Division of the Supreme Court and is not properly raised before the Commissioner. R. 2:2-3(a); *see also, Pascucci v. Vagott*, 71 N.J. 40, 51-52 (1976); *Wendling v. N.J. Racing Com'n*, 279 N.J. Super. 477, 485 (App. Div. 1995).

Moreover, the Commissioner cannot agree that respondent's due process rights were violated by the Commission's acceptance into evidence of Board counsel's confidential report on the mock election. Respondent's own submission shows that the report and all attachments on which the Commission materially relied, including respondent's email (Exhibit C-6), were released as public documents on July 14, 2008 – over three months prior to the filing of the October 21, 2008 complaint in this matter – in response to an Open Public Records Act (OPRA) request, and that the documents so released were redacted only as to the names of certain district staff members – readily identifiable in the context of complainants' allegations and likely recognizable to anyone even slightly acquainted with the underlying events – and personal address, phone and medical information not pertinent to the issues before the Commission.⁷ (Appendix to Respondent's Brief at 300a-324a⁸)

Nor can the Commissioner agree that the Commission placed undue weight on the hearing testimony of Mrs. Lucas; to the contrary, the Commission's findings of fact on the issues

⁷ Exhibits C-3 and C-4 do not appear to have been so released, but – even granting respondent's contention, *arguendo* – these were not material to the Commission's determination.

⁸ It is noted that the 23-page “public records” package provided to respondent's counsel by the Board contains only 14 pages of actual text, which agrees with the number of pages released in response to the OPRA request.

central to its determination of violation (findings 20 through 23) are entirely consistent with respondent's own testimony as set forth below:

Q: Okay. Why did you go to the high school that day?

A: I was scheduled – as a Willingboro graduate, I was scheduled to speak at career day, and I went there to speak for career day.

Q: You were invited to speak there?

A: Yes, I was invited.

Q: Was the primary purpose in your going there to speak at the career day event?

A: That was my only purpose.

Q: Okay. When you went to the building what did you do when you got there?

A: When I went to the building I signed in, and I went to the main office to make the building principal aware that I was there [consistent with Board practice]. They did that. They called her wherever she was and she came to the main office.

Q: Was your primary purpose in asking to speak to Mrs. Lucas to talk to her about the mock election?

A: No. It was just to inform her I was in the building.

Q: How long did you see Mrs. Lucas during that encounter?

A: About five or ten minutes.

Q: So what happened during – what transpired during your encounter with Mrs. Lucas?

A: When I saw Mrs. Lucas, I asked her – she asked me why I was there, I told her about the career day, and I asked her was she aware of all the confusion surrounding the mock election, and she indicated that she had heard about it, she was aware of it. I indicated to her that two of her principals had approached me and had expressed quite a bit of concern. I expressed to her that I was very concerned because we were in the midst of negotiations, and the relations were

going very good, which was not common in the past...I told her I did not want this to affect what was going on in the labor and collective bargaining we had. I told her I was very concerned because it had been communicated that the board of education had cancelled this event, and I wanted her to know that the board of education did not have anything whatsoever [to do] with the canceling of this event, rather it was not a board of education event, it was not within our purview to cancel it at all, so we did not have anything to do with it.

I then indicated to her that because two of her principals had stopped me in the parking lot that I felt it was very important that all the principals were made aware that this is absolutely not a board of education function, this is not something that we cancelled, this is not something we had anything to do with. It was a PTA function. I asked her to “please call your members and let them know that we did not do this, we’re not trying to hang them out to dry.” The perception was from her two principals that stopped me, that “there we go again having a situation where the heat gets turned up you guys leave us just dangling out there by ourselves,” and I wanted her to know that that’s not what we were doing, that the board of education had nothing to do with this, and I asked her to call her members and let them know.

Q: Did you ever insist that Mrs. Lucas make the phone calls in your presence?

A: No.

Q: Did you issue Mrs. Lucas a direct order to take action to call those principals?

A: I did not issue her a direct order at all. I asked her to do it for clarity’s sake and (inaudible) relations of the collective bargaining unit.

Q: Did you ever directly order Mrs. Lucas to tell her membership to permit the mock election to proceed?

A: I did not.

Q: In your mind, did you ever contradict any statement that you had understood the superintendent had made that day?

A: The only contradiction was I had been told the superintendent said the board of education, the nine on the board had cancelled the election, and I wanted it to be very clear that the board of education did not cancel the mock election.

Q: Did you intend for Mrs. Lucas to take action to contradict the superintendent as a result of your statement to her?

A: I did not, and it was my understanding that she made the phone calls and gave them the information, but there was no indication from me – to me that she had contradicted what the superintendent had said....so, no, that wasn't the intent and it wasn't what I was looking to have happen.

Q: After your speaking engagement, did you have occasion to see Mrs. Lucas again?

A: Absolutely. Before I exited the building I stopped by her office again to advise her that I was finished and I was leaving the building.

Q: Did you mention the mock election in your second encounter with Mrs. Lucas?

A: I did...I said, "Did you talk to any of your members?" And she said, "Yes, I did talk to them." And I said, "Okay, thank you." And then I left.

(Direct Examination, Transcript of Hearing at 157-163, Appendix to Respondent's Brief at 206a-212a)

Q: Do you recollect sending in this email, and I'm going to read an excerpt from it. "I proceeded to Willingboro High School where I was scheduled to speak. Once in the building I contacted Ms. Theresa Lucas, building administrator, president of the WEAA. I indicated to Mrs. Lucas that she should contact the principals as the president to the WEAA and inform them that the mock election was not a board of education function. I further indicated that it was unprecedented for a PTA function to be cancelled by the superintendent, therefore she was to instruct them not to interfere or stand in the way of said event." Do you recall that?

A: Yes.

Q: ...[Earlier] you said you had no discussion about that, but clearly in this you did give a directive.

A: No, I did not. I indicated as I said in there...that the board of education is not involved, had nothing to do with that, and that her people should not proceed or not proceed on that basis, and that is what I said too. I did not give her a directive to tell them to countermand anything that the superintendent did. Rather I gave her the facts that the board did not cancel it, and I did not want them proceeding, or not proceeding under the auspices of the board of education having any directive whatsoever, but I did not give her, nor did I say in there that I gave her direction to cancel it.

(Cross Examination, Transcript of Hearing at 197-199, Appendix to Respondent's Brief at 246a-248a)

Thus, it is apparent that where respondent and the Commission actually differ is not in their material accounts of respondent's actions during the exchange in question, but in their views of whether such actions constituted a violation of the Board Member Code of Ethics. In this regard, the Commissioner finds the Commission's reasoning neither arbitrary and capricious nor contrary to law. *N.J.A.C. 6A:4-4.1(a)*

Notwithstanding respondent's attempts to rely on subtle distinctions and nuances in wording – as in denying that he gave Lucas “direct orders” to contact WEAA members in his presence or “expressly contradicted” the superintendent's directive to cancel the mock election – the Commissioner finds that any reasonable person could easily construe respondent's statements to Theresa Lucas as an implied directive to promptly contact fellow administrators and convey the message that the Board had not cancelled the mock election, contrary to what they might have been told – a message that could, under the circumstances, have at best done nothing but cause confusion and create a dilemma for principals uncertain as to how to proceed given the Interim Superintendent's earlier instructions. Moreover, it was respondent who raised the issue of the mock election – a matter wholly unrelated to his purpose for being in the building, which pertained to his private status as a successful Willingboro graduate and not to his Board office – both at the beginning and the end of his stay at the high school, first to provide “clarification” of the Board's role (or lack thereof) in its planning and cancellation and later to inquire whether his message had been conveyed to WEAA members. Clearly, respondent did, as found by the Commission, insert himself into the day-to-day operations of the school district, intervening in a situation which was the responsibility of the administration to address and

failing to support the chief school administrator in the performance of his duties.⁹ Moreover, while respondent's actions may not, in fact, have resulted in a challenge to the validity of the annual school election, the Commission is certainly correct that they had the potential to do so – and thus to compromise the Board – since the “mixed message” they inherently conveyed could very well have led to at least some principals moving forward with the mock elections notwithstanding that such activity might have subjected the annual election to allegations of taint due to previously offered and advertised incentives.

In so holding, the Commissioner is not unmindful of respondent's contention that he was acting out of necessity to protect the Board from potential lawsuits and other consequences of what he perceived to be incorrect actions by the Interim Superintendent; nor is he unmindful of respondent's assertions that he is the target of self-interested complainants representing an adversarial faction on the Board and that the Commission's decision is tantamount to a declaration that Board members must “look the other way” in the face of administrative error or risk facing ethics charges. However, the Commissioner finds these arguments unpersuasive: Questionable motivation does not negate a complaint when its underlying facts are found proven by the Commission, nor did the happenstance that the Interim Superintendent was unreachable and the Business Administrator was unfamiliar with the situation give respondent license to overstep his role as a Board member and intervene directly in matters properly within the purview of the administration – in the process additionally failing to support school personnel in the performance of their duties. Moreover, in the situation with which he was confronted, private action by respondent was neither necessary nor appropriate,

⁹ The Commissioner would further note that – whatever respondent's intentions – by suggesting that principals had a basis to disregard the directive of the chief school administrator, he additionally placed them in a difficult position in the performance of their own duties.

since, to whatever extent respondent perceived that Board-employee relationships might have been harmed by the misinformation he sought to correct, any misunderstanding could easily have been cleared up by the Board afterward, and any perceived improper actions by the Interim Superintendent could (and should) have been brought to the attention of the Board for due exercise of its powers of supervision and oversight and for any action it deemed necessary to address such objections as may have been raised by the organizers of the mock election.

Finally, having affirmed the Commission's finding of violation, the Commissioner is satisfied that the recommended penalty of reprimand is appropriate in this instance, where the Commission dismissed all other allegations against respondent and recommended its least severe penalty – after having taken into account that the violations it found all arose out of a single incident in which respondent acted out of a well-intentioned but misguided attempt to “straighten out misinformation” rather than any desire to contradict or confront the decisions of the Interim Superintendent. (Commission's Decision at 22-23)

Accordingly, for the reasons set forth therein and above, the decision of the School Ethics Commission finding respondent in violation of the School Ethics Act is affirmed and its recommendation as to penalty is adopted by the Commissioner. Consistent with such determination, respondent Ken Gordon is hereby reprimanded for having violated *N.J.S.A.* 18A:12-24.1(d), (e) and (i) of the Code of Ethics for School Board Members.

IT IS SO ORDERED.¹⁰

COMMISSIONER OF EDUCATION

Date of Decision: March 30, 2010

Date of Mailing: March 30, 2010

¹⁰ Pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1), Commissioner decisions are appealable to the Appellate Division of the Superior Court.