

345-15ASEC (SEC Decision: <http://www.state.nj.us/education/legal/ethics/2013/C16-14.pdf>)

AGENCY DOCKET NO. 2-4/15A
SEC DOCKET NO. C16-14

COREY LOWELL, :
COMPLAINANT, :
v. : COMMISSIONER OF EDUCATION
GENEVA SMALLWOOD AND FELICIA : DECISION
SIMMONS, ASBURY PARK BOARD OF
EDUCATION, MONMOUTH COUNTY, :
RESPONDENTS. :

This matter involves appeals of the School Ethics Commission's March 24, 2015 determination that respondents – Geneva Smallwood, Board President, and Felicia Simmons, Board Member, Asbury Park Board of Education – violated *N.J.S.A. 18A:12-24.1(c)* and (e) of the Code of Ethics for School Board Members when they conducted a site visit to assess a candidate for interim Superintendant, without Board authority and without approval of the State Monitor, and by advancing the possibility of his employment.¹ The Commission recommended a penalty of censure for the violation. Having carefully reviewed the Commission's decision and the record in its entirety, the Commissioner finds that the Commission's decision is supported by sufficient, credible evidence, and that respondents failed to establish that the decision is arbitrary, capricious or contrary to law. *N.J.A.C. 6A:4-1.1(a)*. Additionally, the Commissioner finds that a penalty of censure is appropriate.

In her appeal to the Commissioner, respondent Smallwood argues that the Commission's decision was arbitrary, capricious and contrary to law because the evidence presented to the Commission does not support a finding that she violated *N.J.S.A. 18A:12-*

¹ The Commission dismissed the allegations that respondents violated *N.J.S.A. 18A:12-24.21(a), (d), and (g)*.

24.1(c) or (e). (Respondent Smallwood’s brief at 9-13) Respondent Smallwood maintains that complainant was not present during executive session of the Board’s March 18, 2014 meeting, and that complainant had no personal knowledge that the site visit took place; that it occurred without the knowledge of the Board; or that it had the potential to compromise the Board. (*Id.* at 2-4) Respondent Smallwood further contends that the evidence produced by complainant – her testimony, minutes of the March 18, 2014 Board meeting, and an email exchange between Respondent Smallwood and the candidate for interim Superintendant – was hearsay evidence without any supportive legally competent evidence, in violation of the residuum rule, *N.J.A.C. 1:1-15.5*. (*Id.* at 4-9) Finally, respondent Smallwood challenges the Commission’s recommendation of the penalty of censure. (*Id.* at 14-15)

Similarly, respondent Simmons argues that complainant failed to provide a “scintilla of evidence” that respondent Simmons violated *N.J.S.A. 18A:12-24.1(c)* or (e) and the Commission’s decision must therefore be reversed. (Respondent Simmons’ brief at 2) Respondent Simmons contends that the Commission made significant errors in its findings of fact; the Commission relied on hearsay that was unsupported by any competent evidence as required by the residuum rule; and the Commission made improper inferences. (*Id.* at 7-10) Respondent Simmons points out that her name was not mentioned in the email exchange between respondent Smallwood and the candidate for interim Superintendant, and that the Commission fails to show how her purported actions could be construed as personal promises of employment. (*Id.* at 10-11) Finally, respondent Simmons argues that a penalty of censure is unjustified and excessive. (*Id.* at 11-12)

In opposition, complainant argues that the Commission’s decision is supported by sufficient credible evidence in the record, as her own testimony was not hearsay and she demonstrated that she was in attendance during executive session at the March 18, 2014

Board meeting.² (Complainant's brief at 1) While reflecting their obvious disagreement with the Commission's findings and conclusions, respondents' arguments on appeal are unpersuasive.

Upon a comprehensive review of the record, the Commissioner finds that the decision of the Commission as to a determination of a violation of N.J.S.A. 18A:12-24.1(c) and (e) is supported by sufficient credible evidence, and the respondents have not established that the Commission's decision is arbitrary, capricious or contrary to law.³ N.J.A.C. 6A:4-4.1(a). First, as to the violation of N.J.S.A. 18A:12-24.1(c), the evidence in the record fully supports the Commission's determination that respondents took action beyond the scope of their authority when they conducted a site visit without Board approval. The complainant testified as to her personal knowledge of the March 18, 2014 Board meeting – which was found to be credible by the Commission – during which respondent Smallwood made statements that she and respondent Simmons attended a site visit with administrators and the Board of the Pleasantville School District to discuss the candidate's qualifications for employment.⁴ (Testimony of Corey Lowell, T at 30-31)⁵ Complainant's testimony was supported by respondent Smallwood's email and respondent Simmons' Answer, in which both, respectively, admit to attending the site visit. (Complainant's Exhibit C-1; Respondent Simmons' Answer) Additionally, complainant offered

² Complainant references her testimony in *Lesinsky v. Smallwood, Asbury Park Board of Education, Monmouth County*, SEC Dkt. No. C14-14, October 28, 2014, and included an un-redacted copy of the executive session Board minutes from March 18, 2014. (Complainant's brief at 1-2) Respondents objected to the inclusion of this additional documentary evidence. Although the transcript of the September 23, 2014 School Ethics Commission hearing for docket number C14-14 is included in the Statement of Items Comprising the Record, it has no impact on the Commissioner's decision. The un-redacted minutes of the executive session of the Board's March 18, 2014 meeting was not entered into evidence at the hearing and is not a part of the record on appeal. Accordingly, it will not be considered by the Commissioner. N.J.A.C. 6A:4-2.5.

³ The Commissioner is also in accord with the Commission's determination that the respondent did not violate N.J.S.A. 18A:12-24.1(a), (d) and (g).

⁴ Such statements are exceptions to the hearsay rule, as they are admissions of respondent Smallwood. N.J.R.E. 803(b).

⁵ This citation refers to a transcript of a hearing held before the School Ethics Commission on February 24, 2015.

testimony that she did not authorize respondents to conduct a site visit and the Board directed the personnel committee to meet with the State Monitor to discuss the possibility of hiring an interim superintendent. (Testimony of Corey Lowell, T at 29) The fact that three other Board members confirmed to complainant that they did not authorize respondents to conduct a site visit, and that the State Monitor did not object at the meeting, offer support for complainant's testimony, which went uncontradicted.⁶ (*Id.* at 31; *SEC Decision* at 15) For the reasons expressed in the Commission's comprehensive decision, respondents' conduct was in violation of N.J.S.A. 18A:12-24.1(c).

Second, as to the violation of N.J.S.A. 18A:12-24.1(e), the evidence in the record fully supports the Commission's determination that respondents took action beyond the scope of their authority – with the potential to compromise the Board – when they attended the site visit, and that the promise of future employment was also a personal promise that had the potential to compromise the Board. In addition to respondents conducting the site visit, respondent Smallwood also participated in an email exchange with the candidate in which she said, "I'm doing everything I can to resolve this CSA [Chief School Administrator] situation." (Complainant's Exhibit C-1) Both the site visit and the email exchange had the potential to compromise the Board because they implied that respondents were acting on behalf of the Board when there was no authorization for a site visit or to communicate with the candidate about the position. For the reasons expressed in the Commission's comprehensive decision, respondents' conduct violated of N.J.S.A. 18A:12-24.1(e).

The Commissioner also accepts the Commission's recommendation – for the reasons expressed in the Commission's decision – that a censure is the appropriate penalty in this

⁶ In administrative matters, the trier of fact is permitted to draw an adverse inference from the silence of a party who declines to testify. *State Dep't of Law and Public Safety v. Merlino*, 216 N.J. Super. 579 (App. Div. 1987), aff'd 109 N.J. 134 (1988).

matter. In so ruling, the Commissioner finds that issuance of a censure here is consistent with penalties in prior cases involving violations of *N.J.S.A.* 18A:12-24.1(c) and (e).

Accordingly, IT IS ORDERED that Geneva Smallwood and Felicia Simmons each be censured as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.⁷

COMMISSIONER OF EDUCATION

Date of Decision: October 16, 2015

Date of Mailing: October 20, 2015

⁷ This decision may be appealed to the Superior Court, Appellate Division, pursuant to P.L. 2008, c. 36. (*N.J.S.A.* 18A:6-9.1)