
IN THE MATTER	:	BEFORE THE SCHOOL
	:	ETHICS COMMISSION
OF	:	SEC Docket No.: C32-05 & C24-05
	:	OAL Docket No. EEC01110-06
JOSEPH ATALLO,	:	FINAL DECISION
<i>PATERSON BOARD OF EDUCATION,</i>	:	
<i>PASSAIC COUNTY</i>	:	

On December 2, 2005, the School Ethics Commission found probable cause to credit the allegation that Joseph Atallo, a member of the Paterson Board of Education (Board), violated N.J.S.A. 18A:12-24.1(e) by threatening then interim superintendent, Dr. Dennis Clancy, and Fredrick Mutooni, a member of the public, using profanity on two separate occasions. The Commission transmitted the finding to the Office of Administrative Law (OAL) for a hearing in accordance with N.J.S.A. 18A:12-29(b). On March 26, 2007, the Administrative Law Judge (ALJ) concluded in her Initial Decision that the Commission failed to establish, by a preponderance of credible evidence, that Dr. Atallo violated N.J.S.A. 18A:12-24.1(e) and dismissed the Commission’s finding of probable cause.

The record of this matter and the Initial Decision of the ALJ have been reviewed by the Commission. The Deputy Attorney General (DAG) representing the Commission submitted exceptions and the attorney for the respondent, Joel M. Miklacki, Esquire, submitted reply exceptions in accordance with N.J.A.C. 1:1-18.4. The exceptions and reply exceptions were also reviewed by the Commission. At its meeting of July 24, 2007, the Commission did not adopt the ALJ’s Initial Decision and recommendation to dismiss the Commission’s finding of probable cause. Rather, the Commission voted to reject the ALJ’s finding that no violation occurred. The Commission also voted to find that Dr. Atallo violated N.J.S.A. 18A:12-24.1(e), and recommended to the Commissioner of Education that Dr. Atallo be suspended from the Board for one year.

In her exceptions, the DAG argues that the ALJ improperly found that the security officer’s incident report was hearsay. The DAG maintains that the report falls within the “Records of Regularly Conducted Activity” exception to the hearsay rule. The Commission concludes that, although the report fell under the hearsay exception, the statement therein is offered for the truth of the matter asserted. Therefore, it is hearsay. Furthermore, there was no direct testimony that would have corroborated the report to support the hearsay statement in the report. Upon review of the record, the Commission hereby concludes that the ALJ’s determination that the report was hearsay was correct and cannot be overturned.

The DAG also argues that the ALJ erred in concluding that the Commission failed to prove by a preponderance of the credible evidence that Dr. Atallo violated N.J.S.A. 18A:12-24.1(e) when he threatened the interim superintendent, Dr. Clancy, with profanity. The Commission must give deference to the ALJ's credibility determinations. "The reason for this rule is that the administrative law judge, as a finder of fact, has the greatest opportunity to observe the demeanor of the involved witnesses, and, consequently, is better qualified to judge their credibility." In the Matter of Tenure Hearing of Tyler, 236 N.J. Super. 478, 485 (App. Div.), certif. denied, 121 N.J. 615 (1989)." The ALJ found that Dr. Clancy's testimony was significantly impaired by his failure to report or take any action regarding the alleged incident. Upon review of the record, the Commission hereby concludes that the ALJ's credibility determinations regarding the April 5, 2005 public forum must be given deference and her findings based on those determinations cannot be overturned.

In her first exception, the DAG argues that the ALJ erred in concluding that the Commission failed to prove by a preponderance of the credible evidence that Dr. Atallo violated N.J.S.A. 18A:12-24.1(e) when he threatened Fredrick Mutooni, a member of the public, with profanity at the April 27, 2005, board meeting. See, DAG exceptions page 2. The DAG maintains that the testimony and evidence establishes that Dr. Atallo threatened Mr. Mutooni. In the respondent's reply exceptions, he argues that the ALJ, "summarily discounted Mr. Mutooni's testimony as being false, disingenuous and not credible." See, Reply Exceptions, page 1. The Commission notes that at no place in the Initial Decision does the ALJ indicate that Mr. Mutooni's testimony was false or disingenuous. The Commission recognizes that these are matters that turn on the credibility of witnesses. In this regard, the Commission must give deference to the credibility determinations of the ALJ.

While the Commission gives deference to the credibility determinations of the ALJ, it agrees with the DAG that the testimony and evidence establishes that Dr. Atallo threatened Mr. Mutooni. Upon a review of the record before it, the Commission concludes that the ALJ erred when she placed limited weight upon Mr. Mutooni's account of what happened on April 27, 2005, due to inconsistencies in the testimony of the various witnesses when such inconsistencies were not regarding a material fact. For example, the ALJ placed significant weight upon the fact that Mr. Mutooni, Dr. Atallo and Anthony Vancheri offered contradictory versions as to when Dr. Atallo left the stage. See, Initial Decision page 19. While Mr. Mutooni estimated that Dr. Atallo left the stage approximately one hour after Mr. Mutooni's comments, Dr. Clancy estimated that it was approximately one and one half to two hours later and Mr. Vancheri estimated that it was a couple of minutes after Mr. Mutooni spoke. The Commission finds that it is immaterial as to when Dr. Atallo left the stage. What is material is the fact that Dr. Atallo left the stage and headed to the back of the auditorium towards Mr. Mutooni who was in the back of the auditorium. Therefore, it was incorrect for the ALJ to place significant weight upon the inconsistent testimony regarding the time that Dr. Atallo left the stage in weighing Mr. Mutooni's testimony.

The Commission also finds that the ALJ erred when she gave greater weight to the testimony of the respondent's witnesses who were community members because they have no vested interest in the outcome of the proceeding. The Commission is aware that in many communities there are community members that regularly attend board meetings. In the respondent's reply exceptions, he indicates that the witnesses were "concerned citizens who regularly attend board meetings." See, Respondent's Reply exceptions, page 2. The Commission recognizes that there are many concerned citizens who faithfully attend board meetings. However, the Commission also recognizes that many of those who regularly attend board meetings do so because of personal interests. It may be that they are concerned with rising property taxes or they have an interest in the special education program. They may also attend board meetings to support certain board members or to influence the board in certain matters. The Commission can find no evidence to establish that the community members who testified had no vested interest in the outcome of the proceeding. The ALJ also erred when she gave greater weight to respondent's witness, James Smith, because he has no vested interest in the outcome of the proceedings. Mr. Smith has served as the Executive Director of School Security for the Paterson School District for five years. The Commission finds it hard to believe that Mr. Smith has no vested interest when Dr. Atallo is a member of the board overseeing the district where Mr. Smith is employed.

In concluding that the totality of the evidence failed to establish by a preponderance of credible and competent evidence that Dr. Atallo threatened Mr. Mutooni after he left the stage, the ALJ indicated that, "[a]t best, the proofs regarding Dr. Atallo's conduct after leaving the stage are in equipoise..." See, Initial Decision, page 23. The Commission finds that the ALJ's error in placing limited weight on Mr. Mutooni's testimony based on immaterial inconsistencies, and the error in placing greater weight on the respondent's witnesses because of a presumption that they had no vested interest in the outcome of the proceedings, slightly tip the balance of the evidence so that it no longer provides equal support to two inconsistent inferences. These errors coupled with the fact that there was testimony that Dr. Atallo made threatening statements to Mr. Mutooni also shift that balance of evidence even more. Both Dr. Clancy and Mr. Vancheri testified that Dr. Atallo made threatening statements to Mr. Mutooni. The Commission acknowledges that Mr. Vancheri did not directly link Dr. Atallo's comments to Mr. Mutooni. However, given the testimony of Dr. Clancy that Dr. Atallo made a comment to Mr. Mutooni that he, Dr. Atallo, would see Mr. Mutooni outside, the Commission is led to conclude that when Mr. Vancheri heard Dr. Atallo say, "kick your ass" it was directed to Mr. Mutooni.

The Commission finds and concludes that the preponderance of the evidence establishes that Dr. Atallo threatened Mr. Mutooni by words on April 27, 2005. The Commission further finds that this conduct was a private action that could have compromised the Board. The Commission notes that any time a board member reacts in a threatening manner towards members of the public attending the board meeting it has the potential to compromise the board. Based on the foregoing, the Commission finds that Dr. Atallo violated N.J.S.A. 18A:12-24.1(e) when he threatened Mr. Mutooni at the April 27, 2005 Board meeting.

In determining what sanction to recommend to the Commissioner of Education, the Commission notes that in N.J.S.A. 18A:12-22 the Legislature found that “board members ...must avoid conduct which is in violation of the public trust...” Dr. Atallo’s threat to Mr. Mutooni is one of the most egregious violations of the public trust that a board member can commit. Therefore, the Commission recommends to the Commissioner of Education that Dr. Atallo be suspended from the Board for one year.

This decision has been adopted by a formal resolution of the School Ethics Commission. This matter shall now be transmitted to the Commissioner of Education for action on the Commission’s recommendation **for sanction only**, pursuant to N.J.S.A. 18A:12-29. Within 13 days from the date on which the Commission’s decision was mailed to the parties, Mr. Miklacki may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, NJ 08625, marked “Attention: Comments on Ethics Commission Sanction.” A copy of any comments filed must be sent to the School Ethics Commission and all other parties.

Paul C. Garbarini
Chairperson

Resolution Adopting Decision – C32-05 & C24-05

Whereas, the Commission found probable cause to credit the allegation that Joseph Atallo violated N.J.S.A. 18A:12-24.1(e) in connection with conduct that he engaged in as a member of the Paterson Board of Education; and

Whereas, the Commission transmitted the matter to the Office of Administrative Law for a hearing; and

Whereas, the Administrative Law Judge concluded that the charge had not been sustained and therefore dismissed the finding of probable cause; and

Whereas, the complaining party filed exceptions to the ALJ's decision and respondent filed reply exceptions; and

Whereas, the Commission fully considered all of the documentation filed in response to the ALJ's decision and voted to not adopt the ALJ's Initial Decision and recommendation to dismiss the Commission's finding of probable cause; and

Whereas, the Commission voted to uphold its finding of probable cause, found that Dr. Atallo violated N.J.S.A. 18A:12-24.1(e) and recommended to the Commissioner of Education that Dr. Atallo be suspended from the Board for one year; and

Whereas, the Commission agrees with the draft decision finding that Dr. Atallo violated N.J.S.A. 18A:12-24.1(e) and recommending to the Commissioner of Education that Dr. Atallo be removed from the Board;

Now Therefore Be It Resolved that the Commission hereby adopts the decision and directs its staff to notify all parties to this action of the Commission's decision herein.

Paul C. Garbarini, Chairperson

I hereby certify that the School Ethics Commission adopted this decision at its public meeting on July 24, 2007.

Mary E. Torres
Acting Executive Director