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**CARLOS ALMA**

**v.**

**RAFAEL FAJARDO AND  
PABLO MUNOZ,  
ELIZABETH BOARD OF EDUCATION  
UNION COUNTY**

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**BEFORE THE SCHOOL  
ETHICS COMMISSION**

**Docket No. C07-07  
DECISION**

### **PROCEDURAL HISTORY**

The above-captioned matter arises from a complaint filed on February 2, 2007 by Carlos Alma alleging that the respondents, Rafael Fajardo, President of the Board of Education of the City of Elizabeth and Pablo Munoz, Superintendent of the Elizabeth School District (“District”) violated the School Ethics Act (Act), N.J.S.A. 18A:12-21 *et seq.*<sup>1</sup> Prior to an answer being filed in this matter, on April 29, 2007, counsel for respondents, Karen A. Murray, Esq., filed a request before the Commission that the complaint be held in abeyance pursuant to N.J.S.A. 18A:12-32, that no answer be required and that the charges not be processed further. Respondents contended that the issues in the complaint are part of a number of matters currently in litigation or otherwise under review by another agency and the Commission is required, therefore, to hold this complaint in abeyance pending resolution of these related matters.<sup>2</sup>

By letter dated August 13, 2007, the complainant responded to the Board’s request wherein he concurred that one of the cited cases was relevant and another may “touch on the matter.”<sup>3</sup> By letter dated October 22, 2007, counsel for respondents again argued that the matter should be placed in abeyance.

At its meeting on October 30, 2007, the Commission reviewed the complaint and all papers filed by the complainant and the respondents on the issue of abeyance. The complainant generally alleges that the respondents violated the Act by using taxpayer/Abbott monies to fund political campaigns and political publications, by authorizing the use of taxpayer funds for Superintendent Munoz to send correspondence to Elizabeth residents “to promote his own

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<sup>1</sup> On April 15, 2009, the State Board of Education adopted amendments to N.J.A.C. 6A:28, the regulations governing matters that come before the School Ethics Commission. These rules became effective on May 18, 2009. However, because the complaint in this matter was filed before May 18, 2009, the Commission followed procedures and rendered its determinations herein in accordance with the rules that were in effect at the time the complaint was filed. To the extent this decision cites to regulations, they are the regulations that were in effect when the complaint was filed.

<sup>2</sup> Notwithstanding this position, counsel also noted that “the Complainant’s charges are not presented in an organized fashion, but rather by way of narrative which mixes alleged facts, proposed issues and unsubstantiated assertions.” (Respondents’ Letter, October 22, 2007 at p. 2)

<sup>3</sup> This submission appears to have been supplemented by letter dated September 14, 2007.

agenda and advance his personal reputation,” and by creating new positions in the District for respondents’ family and friends. (Complaint at pp. 1-4) The Commission noted, *inter alia*, that there were four lawsuits filed in United States District Court alleging issues of nepotism, hiring of family members and friends, wrongful termination of employees, politically-motivated employment practices, and discriminatory employment based upon political affiliation, as well as an appeal before the Commissioner of Education wherein the petitioning Board requested that a report issued by the Department’s Office of Fiscal Accountability and Compliance (OFAC) deducting from the District’s State aid those amounts used for investigating and litigating issues related to defamatory publications be set aside. Therefore, while the Commission noted that the complaint “lacked the clarity required in order to initiate an investigation,” (Commission’s Letter, December 5, 2007) it acknowledged that N.J.S.A. 18A:12-32 directs that the Commission “shall not process any complaint, issue a final ruling or issue any advisory opinion on a matter actually pending in any court of law or administrative agency of this State.” Accordingly, the Commission determined that C07-07 be placed in abeyance.

By letter dated July 7, 2008, and by way of an update, counsel for the respondents notified the Commission that four matters were still pending in Federal District Court. Counsel requested that the within complaint continue to be held in abeyance, or, in the alternative, dismissed. (Respondents’ Letter, July 8, 2008 at p. 2)

On July 7, 2008, through the enactment of P.L. 2008, c. 36, School Ethics Commission decisions which had previously been appealable to the State Board of Education became appealable to the Commissioner of Education. Pursuant to an interlocutory appeal, the Commissioner of Education issued a decision on November 24, 2008 addressing the abeyance statute, N.J.S.A. 18A:12-32, in the consolidated matter entitled Horvath et al. v. Rosenwald, Freehold Regional High School District Bd. of Ed. and Rosenwald v. Horvath et al., Freehold Regional High School District Bd. of Ed., Commissioner of Education Decision No. 459-08, decided November 24, 2008. The decision provided, for the first time, a standard of review for the Commission when considering the question of whether to place a complaint in abeyance.

By letter dated February 4, 2010<sup>4</sup>, the Commission notified the parties that this matter would be placed on the Commission’s agenda for its March 23, 2010 meeting, potentially for a probable cause review.<sup>5</sup> The parties were advised that to the extent they wished to argue that this complaint should continue to be held in abeyance, they should address the standard of review set forth in the Horvath decision, supra.

By letter dated February 25, 2010, Robert Varady, Esq. notified the Commission that he was representing the complainant. By letter dated March 9, 2010 and in response to Ms. Murray’s request for an adjournment of the scheduled March 23<sup>rd</sup> review date, Mr. Varady argued that this matter should no longer be held in abeyance. On March 11, 2010, the

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<sup>4</sup> This letter was resent on February 17, 2010 with a corrected address for respondents’ counsel.

<sup>5</sup> A finding of probable cause is not an adjudication on the merits, but, rather, an initial review whereupon the Commission makes a preliminary determination whether the matter should proceed to an adjudication on the merits, or whether further review is not warranted.

Commission granted counsel's request for adjournment and rescheduled this matter for its May 25, 2010 meeting. Counsel were accorded until April 30, 2010 to submit any additional papers they would like the Commission to consider.

By notice dated April 15, 2010, Frank C. Capece, Esq. was substituted as counsel for the respondents. Thereafter, on April 30, 2010, Mr. Capece submitted arguments in support of continued abeyance, referencing specific cases that are still pending. On May 12, 2010, counsel were provided copies of two decisions recently issued by the Commission which specifically address the Commission's lack of jurisdiction to hear complaints challenging actions by a full Board of Education or Board of Trustees: Dericks et al. v. Johnson et al., Sparta Board of Education, Sussex County, C01-08, (October 27, 2009), and Lovett et al. v. Bret Asbury et al., Freedom Academy Charter School Board of Trustees, C01-09 (April 28, 2009).

At its meeting on May 25, 2010, the complainant, Carlos Alma appeared, with counsel. Frank Capece, Esq. appeared on behalf of the respondents. After hearing arguments from counsel regarding the preliminary matters of abeyance and jurisdiction, the Commission deliberated in closed session and determined that, in light of the Commissioner of Education's guidance in Horvath, supra, the within matter should no longer be held in abeyance. However, upon further review of the complaint and in light of its recent decisions in Dericks and Lovett, supra, the Commission determined that it was without jurisdiction to review the complaint, since the gravamen of the allegations were directed at the full Board, rather than the named respondents. Consequently, the parties were advised that, at the public portion of its meeting, the Commission would dismiss the complaint.

## **SUMMARY OF PLEADINGS AND DOCUMENTS**

The gravamen of the complaint is that: (1) the respondents were complicit, and perhaps instrumental, in the Board's use of taxpayer/Abbott funds to "shamefully promote and advance their political agenda while deceiving the residents of Elizabeth" through television commercials and print publications (Complaint at pp. 1-2); (2) Respondent Munoz used taxpayer/Abbott funding to send a letter to residents defending himself against what appeared to be a false claim; and (Id. at p. 3) (3) the Board and Respondent Munoz created nine new positions for friends and family and many of their family members were hired. (Id. at pp. 2-3)<sup>6</sup> The complainant alleges that the respondents violated N.J.S.A. 18A:12-24(b).<sup>7</sup> Appended to the complaint were documents essentially germane to the alleged misuse of taxpayer funds.

## **ANALYSIS**

As a threshold matter, the Commission considers whether it is required, pursuant to N.J.S.A. 18A:12-32, to continue to hold C07-07 in abeyance, pursuant to N.J.S.A. 18A:12-32, which states:

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<sup>6</sup> As noted above, the complaint lacked clarity. Accordingly, at the May 25, 2010 meeting, complainant's counsel was specifically requested to address and clarify the allegations therein.

<sup>7</sup> Although the complainant also cites to N.J.S.A. 18A:12-26, the portion of the Act which requires school officials to disclose financial interests, he appears to do so without making any specific allegations as to these respondents.

The commission shall not process any complaint, issue a final ruling or issue any advisory opinion on a matter actually pending in any court of law or administrative agency of this State.

In this connection, the Commission reviewed the cases still pending in other forums, as cited by respondents' counsel, against the standard set forth by the Commissioner of Education in Horvath, supra. The Commission finds that these cases primarily consist of actions taken by former employees claiming wrongful termination, political favoritism in the hiring of school personnel and discrimination. As such, under this narrower standard of review, the Commission finds that the fact finding, legal issues and relief to be accorded in the matters cited by the respondents is sufficiently different from the within matter so as to permit the within complaint to be taken out of abeyance.

Next, in anticipation of making a probable cause determination in this matter, the Commission reviewed the complaint in light of principles established in its relatively recent decisions in Dericks et al. v. Johnson et al., Sparta Board of Education, Sussex County, C01-08, (October 27, 2009), and Lovett et al. v. Bret Asbury et al., Freedom Academy Charter School Board of Trustees, Camden County, C01-09 (April 28, 2009). The question before the Commission was whether it had jurisdiction to consider a complaint where the essential allegations are charging improper Board action, as opposed to specific allegations, with factual support, that a school official violated the Act.

In this connection, the Commission recognizes that the Commissioner of Education has already taken subject matter jurisdiction and ruled on the matter entitled In the Matter of the Use of Abbott Funds by the Board of Education of the City of Elizabeth, Union County, Commissioner Decision No. 279-07, decided July 2007, aff'd State Board of Education Decision No. 21-07 (December 5, 2007); aff'd Appellate Division, Dkt. No. A-2409- 07T3 (August 18, 2009). There, the Deputy Commissioner, to whom the matter was delegated pursuant to N.J.S.A. 18A:4-33, found that the Board had improperly expended \$88,373 of State Abbott funds to produce communications that violated the precepts of Citizens to Protect Public Funds v. Bd. of Ed. of Twp. of Parsippany Troy Hills, 13 N.J. 172 (1953). According to the Deputy Commissioner, the Board's communications could not remotely be viewed as information, but, rather represented "a one-sided emotionally charged exhortation to public action on the side of the Board in a local political controversy \*\*\*." Abbott, supra, slip op. at p. 5 Thus, the Department of Education deducted \$88,373 from the Board's 2006-2007 school budget. The Commission finds that the issue before the Commissioner in Abbott Funds is fundamentally the issue raised by the complainant when he asserts that the respondents were complicit in the Board's use of taxpayer/Abbott funds to "shamefully promote and advance their political agenda while deceiving the residents of Elizabeth" through television commercials and print publications (Complaint at pp. 1-2).

The Commission further notes that this record shows that the Department of Education's Office of Compliance Investigation (OFAC) issued a report in July 2007 in connection with an investigation into the use of Board funds to file a civil matter, seeking damages, as a result of a defamatory letter allegedly sent by Superintendent Munoz. According to the OFAC report, the

letter “was apparently fabricated and issued by an unknown party or parties and was made to appear as though the Board and district administration were inappropriately attempting to influence election results the community.” (OFAC Report at p. 1) Subsequently, the Board engaged special counsel, using district funds for the Board, the Board President and the Superintendent to sue for damages against the unnamed parties. (Id.) The OFAC determined that “the Board should not have authorized the use of school funds in this manner \*\*\*.” (Ibid.) The Board was directed to refund over \$52,000 to the Department of Education for the State’s share of the unnecessary legal costs associated with the matter filed in Superior Court. The Commission finds that the issue before the OFAC was fundamentally the issue raised by the complainant when he asserts that Respondent Munoz used taxpayer/Abbott funding to send a letter to residents defending himself against what appeared to be a false claim. (Id. at p. 3) Although the Board appealed the OFAC’s findings to the Commissioner of Education, the appeal was later withdrawn. Board of Ed. of the City of Elizabeth v. New Jersey Department of Education, Agency Dkt. No. 303-10/07, OAL Dkt. No. 12705-07.

Additionally, the Commission notes that since the filing of this matter, the Commissioner of Education has promulgated regulations establishing procedures to ensure effective and efficient expenditure of District funds, including procedures for the use of District funds for public relations efforts and a prohibition on the use of legal counsel “to pursue any affirmative claim or cause of action on behalf of district administrators and/or any individual board members for any cause of action in which the damages to be awarded would benefit an individual other than the district as a whole.” See, N.J.A.C. 6A:23A-5.2(b), (d).

Finally, the Commission reflects on Dericks et al. v. Johnson et al., Sparta Board of Education, Sussex County, C01-08, (October 27, 2009), where it determined that it does not have the authority to review actions (such as hiring or terminating employment) taken by local boards of education, as opposed to allegations that individually-named school officials violated the School Ethics Act. The Commission therein noted that the legislative purpose of the Act does not speak to the need for the Commission to address *Board actions*, which are properly taken in a public forum and, therefore, subject to scrutiny or challenge. The Commission further stated:

The Commission does not view the scope of its authority to extend to the review of Board actions where the complainants are not alleging that Board members were conflicted when they voted, pursuant to N.J.S.A. 18A:12-24 et seq., but are alleging that the substance or subject matter of the action was in some manner inappropriate. If it were to accept otherwise, the Commission would be placed in the position of reviewing, or as counsel for the respondents proposes, “second guessing,” potentially any and all Board action which a complainant (who need not, according to the Act, demonstrate interest in the matter) asserted was “unethical.” The Commission finds that such an interpretation is not supported by the plain language or the legislative intent of the Act. (Dericks, supra at p. 5)

Similarly, in Lovett et al. v. Bret Asbury et al., Freedom Academy Charter School Board of Trustees, Camden County, C01-09 (April 28, 2009), the Commission dismissed a complaint, which, on its face, alleged violations of the Code of Ethics for School Board Members when the Board of trustees hired someone who did not possess the required certification, but failed to advance any specific allegations, or facts to support the allegations, that the individual trustees acted contrary to the School Ethics Act when they did so. Likewise, the Commission finds that because the within complaint fundamentally charges that *the Board* and Respondent Munoz created nine new positions for friends and family, then hired friends and family members (Id. at pp. 2-3), it is without jurisdiction to review the claim.

For the reasons set forth above, the Commission finds that the within complaint lacks specific allegations and supporting facts, that the named respondents individually violated the School Ethics Act, but, rather, presents a list of grievances essentially charging that the Board has improperly spent taxpayer funds and abused its hiring authority. The Commission is persuaded, therefore, that it is without jurisdiction to review the merits of the complaint.

## **DECISION**

Based on the foregoing, the complaint is dismissed. This is a final decision of an administrative agency, appealable to the Superior Court, Appellate Division. See, New Jersey Court Rule 2:2-3(a).

Robert W. Bender  
Chairperson

Mailing Date: June 23, 2010

**Resolution Adopting Decision – C07-07**

**Whereas**, the School Ethics Commission has considered all papers filed by the parties;  
and

**Whereas**, at its meeting on May 25, 2010, the Commission determined that the within  
matter should no longer be held in abeyance, pursuant to N.J.S.A. 18A:12-32; and

**Whereas**, the Commissioner further determined that the within complaint must be  
dismissed for lack of jurisdiction; and

**Whereas**, at its meeting on June 22, 2010, the Commission agreed that the within  
decision accurately memorializes its findings and conclusions; and

**Now Therefore Be It Resolved**, that the Commission hereby adopts the within decision  
and directs it staff to notify all parties to this action of the decision.

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Robert Bender, Chairperson

I hereby certify that this Resolution  
was duly adopted by the School Ethics  
Commission at it public meeting on  
June 22, 2010.

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Joanne Boyle, Executive Director