

BENJAMIN DAGOSTINO	:	BEFORE THE SCHOOL
	:	ETHICS COMMISSION
	:	
v.	:	
	:	
MICHELLE KENNEDY	:	Dkt. No. C17-11
FAIRFIELD BOARD OF EDUCATION	:	DECISION
CUMBERLAND COUNTY	:	
	:	

**PROCEDURAL HISTORY**

This matter arises from a complaint filed on April 18, 2011 by Benjamin Dagostino alleging that Michelle Kennedy, a member of the Fairfield Board of Education (“Board”) violated the School Ethics Act (“Act”), N.J.S.A. 18A:12-21 *et seq.* Specifically, the complainant alleges that the respondent violated N.J.S.A. 18A:12-24.1(a), (c), (e) and (f) of the Code of Ethics for School Board Members when she solicited monies from local businesses on behalf of the Board, but did so without Board approval, then never deposited the checks. The respondent filed an answer on May 10, 2011. The answer alleged that the complaint was frivolous. Pursuant to N.J.A.C. 6A:28-7.2(b), the complainant submitted a reply to the frivolous allegation.

The parties were notified by letter dated May 26, 2011 that the Commission would consider this matter at its June 28, 2011 meeting in order to make a determination pursuant to N.J.A.C. 6A:28-10.8(a) as well to consider the allegation of frivolousness. At that meeting, the Commission voted to find that the above-captioned complaint was not frivolous, in accordance with the standard set forth at N.J.A.C. 6A:28-1.2. Additionally, pursuant to N.J.A.C. 6A:28-10.8(a), the Commission voted to retain this complaint for hearing.

By letter dated September 14, 2011, the parties were notified that this matter would be scheduled for hearing at the Commission’s meeting on December 20, 2011. The complainant appeared *pro se* and the respondent appeared with her attorney, Kim C. Belin, Esq. After hearing testimony from the complainant, counsel for the respondent moved for dismissal of the complaint. The Commission granted the motion and voted accordingly during the public portion of its meeting to dismiss the complaint.

**SUMMARY OF THE RECORD**

The complainant, Benjamin Dagostino, a former member of the Board, testified that, in June 2010, the respondent, then school Board President, solicited monies from local businesses with the help of two other Board members in the name of the Board in order to establish an award for the 2010 eighth grade class valedictorian. She did so without Board knowledge or resolution. Further, the complainant testified that although the respondent obtained checks and cash from local businesses, she held the funds for almost a year. At the Board’s meeting on March 24, 2011, the complainant testified that he and the Superintendent confronted the respondent about the [2010 graduating] students never getting their awards. According to the

complainant, the respondent stated at the March meeting that she had just found the monies. At the Board's meeting on April 21, 2011, the Board passed a resolution authorizing the solicitation of contributions, after the fact. The complainant stated that the respondent's answer confirms his allegations.

The complainant acknowledged that while serving on the Board, he also made a contribution to a valedictorian award. He testified that he did so privately and in concert with another former Board member, Kevin Fox. Exhibit C-1, a letter from Kevin R. Fox, was accepted into evidence. The letter states that, "for a few years," the complainant and Mr. Fox presented the valedictorian at graduation with a \$1,000 savings bond. The two Board members purchased the bond in their names. This action was not connected to the Board.

On cross-examination, the complainant confirmed that he and Mr. Fox gave a \$1,000 savings bond to the class valedictorian which was purchased in their names. To his knowledge, the Board did not give an award. The complainant stated that he and Fox stopped the practice when it no longer became economically feasible. In response to questions from the Commission, the complainant stated that the principal usually sent letters to local business to solicit donations, but the district did not always need to solicit as much for the valedictorian's award since he and Mr. Fox were making a contribution. These funds solicited by the administration were placed in an activities account.

The complainant acknowledged on cross-examination that on June 15, 2010, former Superintendent Klug sent an email to the respondent, wherein he noted that Mr. Fox and the complainant would not be donating the \$1,000 savings bond in 2010. Therein, Mr. Klug asked the respondent if anyone else might be making a donation. The respondent replied to the Superintendent that it was short notice to be asking people to make contributions toward the 2010 graduation awards.

The complainant could not point to any specific policy adopted by the Board concerning the solicitation of funds. He acknowledged that the respondent found the missing funds almost one year later. The complainant further acknowledged that the current Business Administrator, Richard Davidson, has certified that the monies were accounted for. In response to questions from the Commission, the complainant stated he had no knowledge that the checks that were initially lost had been cashed. He had no knowledge that any funds were misappropriated; they were lost. Approximately one year later, the respondent told the Board at a meeting that she found the checks which she had solicited. In April 2011, the respondent sent out a subsequent solicitation asking the local businesses to reissue the checks that they had written in 2010, since they were, by this date, stale. The students actually received their 2010 graduation awards approximately one year later. The complainant stated that he had been a Board member for 15 years, but did not run for reelection in 2011.

**Complainant's Exhibits**

C-1	Letter dated December 18, 2011 from Kevin R. Fox
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Pursuant to N.J.A.C. 6A:28-8.3(d), upon completion of complainant's case, the respondent's counsel moved to dismiss the complaint. After hearing arguments from the parties, the Commission asked the parties to leave the room so that it could deliberate. When the parties returned, the Commission informed the parties that it would grant the respondent's Motion to Dismiss.

## **FINDINGS OF FACT**

The Commission finds the following facts:

1. At all times relevant to this complaint, the respondent was a member of the Board.
2. The complainant was a member of the Board for 15 years, but did not run for reelection in 2011.
3. Prior to 2010, former Board members Kevin Fox and the complainant donated money to purchase a \$1,000 savings bond that was given to the valedictorian at graduation. Mr. Fox and the complainant did not make the donation in 2010. On June 15, 2010, former Superintendent John Klug notified the respondent of the same.
4. Thereafter, the respondent and two other Board members sent letters to local businesses seeking a donation to defray the cost of an award for the 8<sup>th</sup> grade valedictorian(s).
5. The Board did not adopt a resolution authorizing the solicitation of funds in 2010. There is no evidence on this record that the Board ever adopted such a resolution or that the Board has a policy about the solicitation of funds.
6. The respondent misplaced the donations that were received in 2010 and did not locate the monies until approximately March 2011.
7. There is no evidence that the funds, while misplaced, were misappropriated. All funds were ultimately accounted for.
8. In April 2011, the respondent again contacted the local businesses and requested that they reissue the checks which had been written for the 2010 award.
9. The 2010 graduating students received their awards approximately one year later.
10. On April 21, 2011, the Board passed a resolution authorizing the solicitation of contributions, after the fact.

## **ANALYSIS**

The complainant bears the burden of factually proving any violations of the Code of Ethics for School Board Members in accordance with the standards set forth at N.J.A.C. 6A:28-6.4(a). See also, N.J.S.A. 18A:12-29(b). Here, the complainant asserts that the respondent's

actions violated N.J.S.A. 18A:12-24.1(a), (c), (e) and (f) of the Code of Ethics for School Board Members.

### Count 1

In Count 1 of the complaint, the complainant asserts that in 2010, the respondent solicited monies from local businesses and persons in the name of the Board, in violation of N.J.S.A. 18A:12-24.1(a) and (e). (Complaint at paragraph 1) The complainant asserts he learned of this on January 13, 2011.<sup>1</sup> The Commission initially considers the allegation that the respondent violated N.J.S.A. 18A:12-24.1(a), which states:

I will uphold and enforce all laws, rules and regulations of the State Board of Education, and court orders pertaining to schools. Desired changes shall be brought about only through legal and ethical procedures.

The Commission's regulations require that:

Factual evidence of a violation of N.J.S.A. 18A:12-24.1(a) shall include a copy of a final decision from any court of law or administrative agency of this State demonstrating that the respondent(s) failed to enforce all laws, rules and regulations of the State Board of Education, and/or court orders pertaining to schools or that the respondent brought about changes through illegal or unethical procedures. N.J.A.C. 6A:28-6.4(a)1.

The complainant produced no evidence that there had been a final decision rendered with respect to this respondent from any court of law or administrative agency of this State demonstrating that she failed to enforce all laws, rules and regulations of the State Board of Education, and/or court orders pertaining to schools or that the respondent brought about changes through illegal or unethical means. See, David Hollander v. Judith Millman, et al., Springfield Twp. Board of Education, Union County, C33-07 (January 22, 2008); Denise Bouyer v. Rita Owens and Oscar McCoy, Willingboro Board of Education, Burlington County, C37-09 (December 15, 2009); Martha Oramas-Shirey v. Peter Gallo et. al., Bethlehem Twp. Bd. of Ed., Hunterdon County, C43-10 (March 22, 2011). Accordingly, the complainant failed to establish that the respondent violated N.J.S.A. 18A:12-24.1(a).

The Commission next considers the complainant's allegation that the respondent violated N.J.S.A. 18A:12-24.1(e), which provides:

I will recognize that authority rests with the board of education and will make no personal promises nor take any private action that may compromise the board.

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<sup>1</sup> At no time did the respondent challenge the complainant's assertion that he did not learn of this until January 13, 2011.

The Commission's regulations require that:

Factual evidence of a violation of N.J.S.A. 18A:12-24.1(e) shall include evidence that the respondent made personal promises or took action beyond the scope of his or her duties such that, by its nature, had the potential to compromise the board. N.J.A.C. 6A:28-6.4(a)5.

The Commission finds that, even granting that the respondent may have taken action which was not officially authorized by the Board by way of a resolution, the complainant failed to provide a sufficient factual basis to conclude these actions were actions outside of the scope of her duties as a Board member and that these actions were of such a nature that they had the potential to compromise the Board. (See, K.S.M. v. Chris Haley, Manasquan Bd. of Ed., Monmouth County, C27-10 (March 23, 2011). Accordingly, the complainant has failed to establish that the respondent violated N.J.S.A. 18A:12-24.1(e).

## Count 2

In Count 2 of the complaint, the complainant asserts that the respondent never obtained Board approval or a resolution to solicit monies in the name of the Board, which was a violation of N.J.S.A. 18A:12-24.1(c), which states:

I will confine my board action to policy making, planning, and appraisal, and I will help to frame policies and plans only after the board has consulted those who will be affected by them.

The Commission's regulations require that:

Factual evidence of a violation of N.J.S.A. 18A:12-24.1(c) shall include evidence that the respondent(s) took board action to effectuate policies and plans without consulting those affected by such policies and plans, or took action that was unrelated to the respondent's duty to:

- i. Develop the general rules and principles that guide the management of the school district or charter school;
- ii. Formulate the programs and methods to effectuate the goals of the school district or charter school; or
- iii. Ascertain the value or liability of a policy. N.J.A.C. 6A:28-6.4(a)3.

Presumably, the complainant asserted this allegation because he maintained that the respondent solicited the donations *in the name of the Board*, notwithstanding that he concurrently asserts in Count 2 that the respondent's actions were unauthorized by the Board. In this connection, the Commission notes that it has found that a Board member's action cannot be both board action *and* private action. See, Marc Sovelove v. Paul Breda, Mine Hill Twp. Bd. of Ed., Morris

County, C49-05 (September 26, 2006). In any event, the Commission finds that the complainant has failed to present facts that establish that the respondent's actions constituted a breach of her duty to limit her board action to policy making, planning, and appraisal. Accordingly, the complainant failed to establish that the respondent violated N.J.S.A. 18A:12-24.1(c).

### Count 3

In Count 3 of the complaint, the complainant asserts that the respondent obtained checks and cash, but never deposited them into a school account and never established an account for the use of the funds. (Complaint at paragraph 3) The complainant contends that in an email addressed to the Superintendent on January 13, 2011, the respondent stated that she was still in possession of these funds. Thus, the complainant contends that the respondent violated N.J.S.A. 18A:12-24.1(f), which provides:

I will refuse to surrender my independent judgment to special interest or partisan political groups or to use the schools for personal gain or for the gain of friends.

The Commission's regulations require that:

Factual evidence of a violation of N.J.S.A. 18A:12-24.1(f) shall include evidence that the respondent(s) took action on behalf of, or at the request of, a special interest group or persons organized and voluntarily united in opinion and who adhere to a particular political party or cause; or evidence that the respondent(s) used the schools in order to acquire some benefit for the respondent(s), a member of his or her immediate family or a friend. N.J.A.C. 6A:28-6.4(a)6.

Although there is no dispute on this record that the respondent misplaced the funds and did not locate them until approximately March 2011 (see, respondent's answer), the complainant presented no evidence that the respondent's misplacement of the funds was anything other than careless error. Moreover, the complainant presented no evidence that the funds were misappropriated, used for personal gain or for the gain of a friend. Accordingly, the complainant failed to establish that the respondent violated N.J.S.A. 18A:12-24.1(f).

### **DECISION**

The Commission finds that the complainant did not factually establish that the respondent violated N.J.S.A. 18A:12-24.1(a), (c), (e) and (f) of Code of Ethics for School Board Members. Consequently, the Commission granted the respondent's Motion to Dismiss the complaint. This decision is a final decision of an administrative agency. Therefore, it is appealable only to the Superior Court--Appellate Division. See, New Jersey Court Rule 2:2-3(a).

Robert W. Bender, Chairperson

Mailing Date: January 24, 2012

**Resolution Adopting Decision – C17-11**

**Whereas**, the School Ethics Commission has considered the pleadings filed by the parties, the documents submitted in support thereof, and the testimony from its hearing on December 20, 2011; and

**Whereas**, at its meeting on December 20, 2011, the Commission found that the complainant failed to factually establish that the respondent violated N.J.S.A. 18A:12-24.1(a), (c), (e) or (f); and

**Whereas**, the Commission granted the respondent’s Motion to Dismiss the complaint; and

**Whereas**, at its meeting on January 24, 2012, the Commission agreed that the within decision accurately memorializes its findings and recommendations; 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 W. Bender, Chairperson

I hereby certify that the Resolution was duly adopted by the School Ethics Commission at its public meeting on January 24, 2012.

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Joanne Boyle  
Executive Director