

	:	<b>BEFORE THE SCHOOL</b>
<b>DORIS MCGIVNEY</b>	:	<b>ETHICS COMMISSION</b>
	:	
<b>v.</b>	:	
	:	
<b>JOSEPH ZARISH</b>	:	
<b>FLEMINGTON-RARITAN REGIONAL</b>	:	
<b>BOARD OF EDUCATION</b>	:	<b>Dkt No. C31-09</b>
<b>HUNTERDON COUNTY</b>	:	<b>PROBABLE CAUSE NOTICE</b>
	:	

**PROCEDURAL HISTORY**

This matter arises from a complaint filed on July 22, 2009 by Doris McGivney alleging that Joseph Zarish, member of the Flemington-Raritan Regional Board of Education (Board) violated the School Ethics Act (Act), N.J.S.A. 18A:12-21 *et seq.* The complainant was notified on July 22, 2009 that the complaint was deficient in several aspects, but particularly because she cited to violations of “N.J.S.A. 18A:12-24.4” which does not exist. The complainant was accorded 20 days to amend the complaint, but failed to do so. In view of the nature of the allegations, by letter dated August 17, 2009, the complaint was accepted for review as one alleging violations of the prohibited acts portion of the School Ethics Act. The specific provisions alleged to be violated are paragraphs N.J.S.A. 18A:12-24(a), (b) and (c).<sup>1</sup> After obtaining an extension of time in which to file an answer, an answering certification was submitted on behalf of the respondent on October 5, 2009. The respondent therein asserted that the complaint was frivolous; the complainant was accorded 20 days to respond to the allegation of frivolousness. A reply was filed by the complainant on October 16, 2009.

The parties were notified by letter dated January 27, 2010 that the Commission would review this matter at its meeting on February 23, 2010 in order to make a probable cause determination, in accordance with procedures set forth at N.J.A.C. 6A:28-10.7. At its February 23rd meeting, the Commission found no probable cause to credit the allegations that the respondent violated the Act and dismissed the complaint. The Commission also voted to find that the complaint was not frivolous.

**SUMMARY OF PLEADINGS, DOCUMENTS AND INVESTIGATION**

In Count I(a), the complainant asserts that the respondent has a financial interest in a company, CC Productions, with which he insisted that the Business Administrator sign a contract. The complainant asserts that the company is the respondent’s “tenant” and the respondent used his position to “bully” the Business Administrator into signing the contract, not in the interest of the District, but in order to serve the interest of his tenant. The complainant alleges that the respondent violated N.J.S.A. 18A:12-24(a), (b) and (c). (Complaint at p. 1)

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<sup>1</sup> To the extent the complaint alleges violations of local Board policy, the complainant was notified that the Commission has no jurisdiction to consider these allegations.

In Count I(b), the complainant asserts that the respondent used “intimidating verbal tactics in his demands of the Business Administrator” in order to obtain a contract for his tenant in the presence of District staff when he interrupted the agenda at a Non-Instructional Committee Meeting on June 25, 2009. The complainant alleges that the respondent violated N.J.S.A. 18A:12-24(a) and (c). (Id.) In support of Count I, the complainant attaches emails from the Business Administrator to members of the Board (Exhibits 1-1 and 1-2), together with a series of emails between the respondent and the Board President.

In Count II, the complainant asserts that the respondent contacted the Superintendent by email and requested the rationale for the dismissal of a Teacher Assistant who is the respondent’s family friend. The complainant asserts that the respondent requested that the Superintendent “intervene on behalf of his long term friend.” The complainant alleges that the respondent violated N.J.S.A. 18A:12-24(b). (Id. at p. 2). In support of this count, the complainant attaches the emails which the respondent sent to the Superintendent.

In his answering certification, the respondent generally asserts that the complainant has no personal knowledge of the allegations set forth in her complaint. The respondent specifically denies that he has, or ever had, a financial interest in CC Productions. He offers the Certification of Buzz Cmaylo, President of CC Productions, to support this statement. Rather, the respondent affirms that CC Productions is a company that rents a small amount of office space in a building owned by R. Neumann & Co. and he has no financial interest in R. Neuman & Co. (Respondent’s Certification at paragraph 6) The respondent explains that he is a Comptroller for Richard William Realty Co. (RWR), but has no ownership interest in RWR. RWR is the managing agent for R. Neumann & Co.’s building, located in Hoboken, New Jersey; this is the same building wherein CC Productions leases space. Thus, the respondent states that he knows Mr. Cmaylo and CC Productions because CC Productions was a tenant in the building that is managed by RWR, the company for which he works. (Id. at paragraph 7).

While the respondent acknowledges that he had a conversation on June 25, 2009 with the Business Administrator, he disagrees with the representations made by the Business Administrator in her email that is appended to the complaint. The respondent acknowledges that he had a conversation with Buzz Cmaylo of CC Productions and asked him to explain the types of services they provide. Cmaylo informed the respondent that his company provided “point of sale services to restaurant and food services” including most of the major food services companies that provide services to schools in New Jersey and other states. According to the respondent, Cmaylo also informed him that CC Productions provides software to food service providers, including Machios Food Services, the current food services provider for the District. Cmaylo then informed the respondent that the District had not yet returned “a merchant agreement that was necessary for the district to utilize an online payment program that was part of he point of sale system” which the District had already purchased. Cmaylo said this was the same kind of agreement a business would sign with a credit card company in order to allow online credit card payments. It was the respondent’s understanding that the system was purchased by the District largely for its ease regarding online payments, so that parents could monitor their children’s diets and replenish their accounts online. (Id. at paragraphs 8 – 12)

After this conversation with Cmaylo, the respondent states that he attended the meeting referenced in the Business Administrator's email of June 26, 2009. He admits that he approached the Business Administrator prior to the start of the meeting and asked why the merchant agreement had not been signed. The respondent affirmed,

I do not believe that I was speaking in a condescending tone. Ms. Hope is the Business Administrator and I had been told that the parents and the children were not receiving the benefit of a system that the FRSD had paid for. My tone may have been firm but certainly was not condescending. More importantly however, I never told Ms. Hope that CC Productions was "my tenant" as represented in her e-mail and I would make no such statement. (Id. at paragraph 14)

The respondent also acknowledges that he asked the Business Administrator why she sent the agreement to the Board attorney, since it was his understanding that it was a standard agreement. (Id. at paragraph 17) In this connection, he also states, "I may have indeed questioned Ms. Hope's authority to engage the services of the board attorney." He clarifies, however, that he was new on the Board and did not know that she had the authority to do so; he states he did not intend to demean her. (Id. at paragraph 19) The respondent asserts that his actions were in the interest of the District and were in no way to secure any advantage to himself or an immediate family member.

With respect to the complainant's second allegation, the respondent notes that the Teacher Assistant referenced in the complaint was the daughter of an acquaintance; the acquaintance is not someone he considers a "family friend." He states that he never met the Teacher Assistant. The respondent states that in May of 2009, he received a call from the Teacher Assistant's mother (from whom he had not heard for over 10 years); her mother informed the respondent that she was upset with the Board's decision not to renew her daughter's contract. According to the respondent, the woman did not request that he intercede on her daughter's behalf. After speaking with her, the respondent states, "I thought it would be a proper question the Superintendent as to the criteria he used in making these personnel decisions." [sic]<sup>2</sup> In so doing, the respondent affirms that his major concern was not to seek reappointment of the Teacher Assistant or reconsideration of her dismissal. (Id. at paragraphs 36 - 40) Rather, he states, "My sole interest was to determine what factors our school Superintendent considered when he terminated people who were educated in the system and had more experience than others who were retained." Respondent continues:

[I]f, indeed, the Superintendent was choosing to terminate employees who had seniority (and thus were paid more) over teachers who were retained, I was concerned that he might be doing this in a short cited effort to reduce payroll resulting in

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<sup>2</sup> The respondent also provides a certification from the mother of the Teacher's Assistant, attesting to their conversation.

retention of less experienced teachers or teacher's [sic] aides to the detriment of our district. (Id. at paragraph 40)

Thus, the respondent admits he "chose to make some inquiries" regarding the matter "so that if the decision making process was not in the best interest of the students, as a Board member, I could suggest an alternative process." (Ibid.) The respondent then contacted the Superintendent, as shown in the complainant's Exhibit 2-1. He notes that the Board members copied on his initial correspondence were members of the Board's Personnel Committee. (Id. at paragraph 41) When the Superintendent did not provide "a rationale" for terminating the Teacher Assistant, the respondent discussed the matter with the Chairman of the Board's Personnel Committee, who suggested that the respondent send another letter to the Superintendent, which is Exhibit 2-2 appended to the complaint.<sup>3</sup> The respondent states that he did not get a response to this correspondence either and shortly thereafter, the Superintendent resigned. (Id. at paragraphs 45-46)

## **FINDINGS OF PROBABLE CAUSE**

This matter was before the Commission for a determination of probable cause pursuant to N.J.A.C. 6A:28-10.7. That is, the Commission must determine, based on the evidence before it, whether probable cause exists to credit the allegations in the complaint. 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.

### Counts I(a) and (b)

In Count I(a), the complainant asserts that the respondent has a financial interest in a company, CC Productions, with which he insisted that the Business Administrator sign a contract and thus violated N.J.S.A. 18A:12-24(a), (b), and (c) of the School Ethics Act. In Count I(b), the complainant asserts that the respondent used "intimidating verbal tactics in his demands of the Business Administrator" in order to obtain a contract for his "tenant" in the presence of District staff when he interrupted the agenda at a Non-Instructional Committee Meeting on June 25, 2009, thereby violating N.J.S.A. 18A:12-24(a) and (c). (Complaint at p. 1)

First, the Commission notes that N.J.S.A. 18A:12-24(a) provides:

No school official or member of his immediate family<sup>4</sup> shall have an interest in a business organization or engage in any business,

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<sup>3</sup> The respondent provides a certification from the Chair of the Personnel Committee affirming his conversation with the respondent.

<sup>4</sup> The School Ethics Act at N.J.S.A. 18A:12-23 defines "member of the immediate family" as the spouse or dependent child of a school official residing in the same household. The Commission's regulations at N.J.A.C. 6A:28-1.2 define "spouse" as "the person to whom the school official is legally married under New Jersey law and also includes a partner in a civil union couple as established in N.J.S.A. 37:1-33."

transaction, or professional activity, which is in substantial conflict with the proper discharge of his duties in the public interest;

The Commission notes that “interest” is defined by the Act as the ownership or control of more than 10% of the profits, assets or stock of a business. N.J.S.A. 18A:12-23. Although the complainant asserted that the respondent had a “direct or indirect” financial interest in CC Productions (complaint at p. 1), the respondent specifically denies that he has a financial interest in CC Productions. Rather, he certifies that he is employed as a Comptroller for Richard William Realty Co. (RWR), with no ownership interest therein. RWR is the managing agent for R. Neumann & Co.’s building, located in Hoboken, New Jersey, wherein CC Productions leases space. The respondent also certifies that he has no financial interest in R. Neumann & Co. (Answering Certification at paragraphs 6 and 7). There is no specific evidence to refute this claim. Thus, the record includes no evidence that the respondent, or a member of his immediate family, had an interest in a business organization which is in substantial conflict with the proper discharge of his duties.

Neither can the Commission find on this record that the respondent’s employment with RWR and resulting association with CC Productions indicates that he has engaged in some “business transaction or professional activity” which is in *substantial conflict* with the proper discharge of his duties as a Board member. On this, the Commission has looked for “an actual conflict in the substantive duties ...” of the school official. Turner v. Sacco, North Bergen Township Bd. of Ed., Bergen Co., (C24-95) slip op. at p. 2. Here, the Commission cannot find that the respondent’s professional activities as a Comptroller at RWR are in substantial conflict with his duties as a Board member. See also, Lacklund v. Graves, Pleasantville Bd. of Ed., C04-05 (April 25, 2006). Moreover, even assuming that the respondent used “intimidating verbal tactics” when he addressed the Business Administrator on June 25, 2009 as alleged by the complainant and as summarized in the Business Administrator’s email appended to the complaint at Exhibit 1-1, such behavior does not necessarily signal a conflict under N.J.S.A. 18A:12-24(a). Thus, the Commission finds no cause to credit the allegations in Count I(a) and I(b) that the respondent violated N.J.S.A. 18A:12-24(a).

The complainant also asserts that the respondent violated N.J.S.A. 18A:12-24(b) in connection with Count I(a) which provides:

No school official shall use or attempt to use his official position to secure unwarranted privileges, advantages or employment for himself, members of his immediate family or others;

In order to credit this allegation, the Commission must find that some evidence the respondent used, or attempted to use, his position as a Board member to secure some unwarranted privilege, advantage or employment for himself, a member of his immediate family or others. As noted above, there is no evidence on this record that the respondent, or a member of his immediate family, has a financial interest in CC Productions so as to suggest a potential privilege or advantage for himself or a member of his immediate family by urging the District to comply with CC Productions’ request to sign the merchant agreement. Neither is there any evidence to support a claim that he used his position to secure *unwarranted* privileges, advantages or

employment for others. Even granting that he pressed the Business Administrator about signing the merchant agreement with CC Productions (answer at paragraph 14), there is no evidence on this record to suggest that doing so was an attempt to secure an *unwarranted* benefit or privilege for CC Productions.<sup>5</sup> Accordingly, the Commission finds no cause to credit the allegation in Count I(a) that the respondent violated N.J.S.A. 18A:12-24(b).

The complainant next asserts that the respondent violated N.J.S.A. 18A:12-24(c), which provides:

No school official shall act in his official capacity in any matter where he, a member of his immediate family, or a business organization in which he has an interest, has a direct or indirect financial involvement that might reasonably be expected to impair his objectivity or independence of judgment. No school official shall act in his official capacity in any matter where he or a member of his immediate family has a personal involvement that is or creates some benefit to the school official or member of his immediate family;

In order to credit this allegation, the Commission would have to find evidence that the respondent had either: 1) taken action in his official capacity in a matter where he, or a member of his immediate family had a direct or indirect financial involvement that might reasonably be expected to impair his objectivity or independence of judgment or 2) acted in his official capacity in a matter where he or a member of his immediate family had a personal involvement that is or created some benefit to him or the member of his immediate family.<sup>6</sup>

It is unclear from this complaint what the complainant is asserting to be action in the respondent's "official capacity" as a Board member. The complainant merely asserts that the respondent "used his position to 'bully' the Business Manager [sic] into signing a contract" in Count I(a) and used "intimidating verbal tactics in his demands of the Business Administrator" in order to obtain a contract for his "tenant" in Count I(b). (Complaint at p. 1). Even assuming, *arguendo*, that this could be considered "official action," the Commission does not find that the potential signing of the agreement with CC Productions was "a matter where [the respondent], a member of his immediate family, or a business organization in which he has an interest, has a direct or indirect financial involvement that might reasonably be expected to impair his objectivity or independence of judgment." Neither does the Commission find that "official action" was taken in a matter where the respondent or a member of his immediate family has a personal involvement that is or creates some benefit to the school official or member of his

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<sup>5</sup> See, I/M/O Doris Graves, Pleasantville Board of Education, C45-07 (May 27, 2008), Commissioner of Education Decision No. 301-08, decided July 10, 2008, rejecting a claim of violation of N.J.S.A. 18A:12-24(b) because the record did not demonstrate that the respondent Board member's relative did not deserve the continued appointment to the position of head custodian; Freeman v. Jackson, Camden City Bd. of Ed., C18-02 (October 29, 2009) where the Commission declined to find probable cause that the respondent violated N.J.S.A. 18A:12-24(b) without information to show that when she voted on the reinstatement of her friend/occasional live-in companion to employment in the district, such reinstatement was unwarranted.

<sup>6</sup> "Benefit" as used in the Act means advantage, profit, privilege or gain. N.J.A.C. 6A:28-1.2.

immediate family. Accordingly, the Commission finds no cause to credit the allegations in Count I(a) and (b) that the respondent violated N.J.S.A. 18A:12-24(b).

## Count II

In Count II, the complainant asserts that the respondent contacted the Superintendent by email and requested the rationale for the dismissal of a Teacher Assistant who is the respondent's family friend. The complainant asserts that the respondent requested that the Superintendent "intervene on behalf of his long term friend" which is a violation of N.J.S.A. 18A:12-24(b). (Complaint at p. 2). As noted above, in order to credit this allegation, the Commission must find some evidence that the respondent used, or attempted to use, his position as a Board member to secure some unwarranted privilege, advantage or employment for himself, a member of his immediate family or others.

The complainant is alleging that the respondent violated N.J.S.A. 18A:12-24(b) as a result of his actions on behalf of the "family friend." The respondent specifically rejects the complainant's characterization of the Teacher Assistant as a "family friend" and, instead, characterizes the relationship as an "acquaintance." (Respondent's Answer at paragraph 37) Notwithstanding this difference, the respondent acknowledges that he sought to question the Superintendent about the reason for the non-renewal of the Teaching Assistant's contract. (Id.) The respondent then contacted the Superintendent, as shown in the complainant's Exhibit 2-1 appended to the complaint. He notes that the Board members copied on his initial correspondence were members of the Board's Personnel Committee. (Id. at paragraph 41) That correspondence/email to the Superintendent states, in full:

I am aware of the non-renewal of [name] as a Teacher Assistant in the FRSD. Please provide me with information or rationale as regards why she is not being re-hired. [sic]

[Name] is herself a graduate of the Raritan Township School system, thru Hunterdon Central. She has a degree with honors from Ohio University. I personally think those things should count for something in hiring decisions. Her degree is higher level than at least some, if not all, of the Teachers Assistant's [sic] who were retained. She has worked for the District for over 17 years.

I know her family for over 30 years and they are fine and decent people.

It seems a shame to turn away graduates of the Flemington Raritan School District who want to give back to the community from which they come. Lord knows that one of the problems we have with the District is that we educate fine people and then most of them move away, so the community doesn't get the benefit of their fine educations.

As previously requested, please look into this situation and provide me with the information or rationale for this situation. Your urgent intervention is appreciated.

Very truly yours,

Joe Zarish. (Complaint at Exhibit 2-1)

When the Superintendent did not provide “a rationale” for terminating the Teacher Assistant, the respondent discussed the matter with the Chairman of the Board’s Personnel Committee, who suggested that the respondent send another letter to the Superintendent, which is Exhibit 2-2 appended to the complaint. That correspondence/email to the Superintendent states, in full:

I would like further explanation as to the reasons why [Name] is not being reinstated as a Teacher’s Assistant in the FRSD. Thank you.

Very truly yours,

Joe (Complaint at Exhibit 2-2)

The respondent states that he did not get a response to this second correspondence and shortly thereafter, the Superintendent resigned. (Answer at paragraphs 45-46)

Even assuming for the purpose of this analysis that the respondent was writing to the Superintendent on behalf of a long time family friend, the Commission does not find that, in so doing, he was using, or attempting to use, his position as a Board member to secure some unwarranted privilege, advantage or employment for the non-renewed Teacher Assistant. This record merely shows that he was asking for an explanation for her non-renewal. Accordingly, the Commission finds no cause to credit the allegation in Count II that the respondent violated N.J.S.A. 18A:12-24(b).

## **REQUEST FOR SANCTIONS**

Pursuant to N.J.A.C. 6A:28-7.2(b), the respondent alleged in his Answer that the complaint herein is frivolous. In accordance with N.J.A.C. 6A:28-7.2(b)1, the Commission gave the complainant an opportunity to respond to the allegation. At its meeting on February 23, 2010, the Commission considered the respondent’s request that the Commission find that the complaint was frivolous and impose sanctions pursuant to N.J.S.A. 18A:12-29(e).

The Commission can find no evidence which might show that the complainant filed the complaint in bad faith solely for the purpose of harassment, delay or malicious injury. The Commission also has no information to suggest that the complainant should have known that the complaint was without any reasonable basis in law or equity or that it could not be supported by a good faith argument for an extension, modification or reversal of existing law. For the



foregoing reasons, the Commission finds that the complaint is not frivolous and denies the respondent's request for sanctions against the complainant.

## **NOTICE**

Pursuant to N.J.S.A. 18A:12-29(b), the Commission hereby notifies the complainant and respondent that it finds no probable cause to credit the allegations that the respondent violated N.J.S.A. 18A:12-24(a), (b), (c) and further finds that the complaint is not frivolous. The complaint is, therefore, dismissed. This decision is a final decision of an administrative agency, appealable only to the Superior Court--Appellate Division. See, New Jersey Court Rule 2:2-3(a).

Robert W. Bender  
Chairperson

**Resolution Adopting Decision – C31-09**

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

**Whereas**, at its meeting of February 23, 2010, the Commission found no probable cause to credit the allegations that the respondent violated N.J.S.A. 18A:12-24(a), (b) and (c), and further found that the complaint is not frivolous; and

**Whereas**, the Commission has reviewed, and agrees with, the proposed probable cause notice;

**Now Therefore Be It Resolved**, that the Commission hereby adopts the proposed probable cause notice in this matter and directs its staff to notify all parties to this action of said notice.

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Robert W. Bender, Chairperson

I hereby certify that this Resolution was duly adopted by the School Ethics Commission at its public meeting on March 23, 2010.

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Joanne Boyle, Executive Director  
School Ethics Commission