

The Commission invited the parties to submit written statements within two weeks instead of closing statements at the meeting. Both sides submitted timely statements.

The issue now before the Commission is whether there is probable cause to credit the allegations in the complaint that respondents violated N.J.S.A. 18A:12-24(b), (c), (e) or (g) of the School Ethics Act. In a submission prior to the Commission meeting, the complainants also request that the Commission find the respondents in violation of N.J.S.A. 18A:12-22, the Legislature's findings and declarations. The declarations provide that board members and administrators must avoid conduct which is in violation of the public trust or "which creates a justifiable impression among the public that such trust is being violated." N.J.S.A. 18A:12-22(b).

FACTS

Mr. Brodsky testified before the Commission that he is currently serving his fifth year as a board member. He indicated that the superintendent had three years to evaluate the principal and it was clear from the April 29, 1996, memorandum that he was unsatisfied with her performance. Mr. Brodsky provided the April 25, 1996, memorandum from the board attorney indicating that the superintendent was on firm ground if he chose not to renew her. Mr. Brodsky testified that he discussed the superintendent's intentions with him on May 16, 1996. At that time, the superintendent said that he would meet with the principal and advise her that he would not recommend her renewal. However, on May 16, 1996, the superintendent advised him that he would allow her to be renewed "because he had to protect himself." Mr. Brodsky urges the Commission to find that the superintendent allowed the principal to get tenure by default despite his clear intention not to renew her. He did so because of a meeting with the board president and vice-president that caused him to believe that his employment was in danger.

Ms. Dale Pardo testified that she has just completed her first year on the board. She testified that the board never discussed the superintendent's April 29, 1996, memorandum because the principal had not received "Rice"¹ notice before the meeting, although the memorandum was part of the agenda for the board's meeting. She stated that all of the superintendent's actions were consistent with the memorandum indicating that he would not renew the principal until after the May 15, 1996, deadline for nonrenewal passed.

The complainants presented two witnesses. First, Richard McArdle, a resident of the township, testified that Dr. Ferrone showed him an evaluation of the principal in the summer of 1994 that indicated that the superintendent was dissatisfied with the principal. Thus, he stated that the superintendent's impression of the principal was long-standing. Second, Paul Urso, also a resident of the township, testified that he has attended board meetings for the last 10 to 12 years.

¹ "Rice" refers to the case, *Rice v. Union Cty. Regional High School Bd. of Ed.*, 155 N.J. Super. 64 (App. Div. 1977), *certif. den.* 76 N.J. 238 (1978), which held that when a board intends to discuss the termination of an employee in closed session, it must provide the employee with reasonable notice of its intention to do so in order to allow her to exercise her statutory right to request a public hearing.

His spouse was a board member for three years and served as president. He testified that he went to the school on April 15, 1996, on election business and spoke with the superintendent about the principal. The superintendent said at that time that he would remain firm against her renewal. The next conversation that he had with the superintendent was at the reorganization meeting on May 2, 1996, and at that time he indicated that he had not changed his mind. However, after the June 11, 1996, meeting, at which the principal received tenure by default, he confronted the superintendent. The superintendent would only say that he had to protect himself and only repeated it when he asked him what he meant by that statement.

Dr. Ferrone testified that he initially approached Mr. Brodsky about his contract in November 1994 because his contract was concluding on June 30, 1995. Mr. Brodsky told him at that time that he would have to wait until the board settled the teachers' contract. He waited as Mr. Brodsky requested. The superintendent denied showing Mr. McArdle a copy of an evaluation of the principal and indicated that he gave her a positive evaluation at the beginning of 1995. He indicated that the employees who were up for renewal were all "rice-noticed" for the meeting of April 29, 1996, as the purpose was to discuss the evaluations. He indicated that although he sent his memorandum to the board members, he was still trying to resolve matters with the principal. He testified that he told the board members that he was trying to resolve matters with the principal and reserved his right to hold off on a final decision until May 15, 1996. He met with the principal on May 2, 1996. He stated that he advised the principal at a May 6, 1996, meeting with her that he was going to renew her.

Dr. Ferrone further testified that the May 9, 1996, meeting with the board president and vice-president was to discuss his concerns about the May 2, 1996 reorganization. He said that they discussed how to help the principals to get along and act more as a team. He denied that they specifically discussed the principal at all initially. Then he indicated that they discussed her but not her evaluations. He denied that they discussed her in any way connected with his contract. Contrary to the testimony of the other witnesses, he testified that he advised the board in executive session on May 14, 1996, that he was going to renew the principal. Mr. Urso confronted him on May 14, not May 16, and threatened that he would be of a job.

Ms. Klimkowski testified that Ms. Pardo ran against Ms. Core in the last election. She indicated that Ms. Pardo and Mr. Brodsky were against the principal. She testified that she discussed the principal with Dr. Ferrone at dinner, and he indicated then that he had not made a decision. She said that he told them that it is his decision and he is still thinking about it. He did not tell them that he had told her he was going to renew her. She also defended her decision to not pull the agenda item on June 11, 1996, to make it a grant of tenure for the principal rather than a renewal. She stated that she told Ms. Pardo that she would have to go through the board president in order to change the agenda. Ms. Pardo did want the agenda item removed.

The Commission finds the following material facts to be undisputed. Dr. Ferrone was initially appointed to the position of interim Superintendent of Schools for the Florham Park school district on June 8, 1992. He worked at a per diem rate until he received a three-year contract to serve as Superintendent from July 1, 1992, to June 30, 1995. He continued serving in

the position beyond the contract date of June 30, 1995, although the board had not officially provided him with a new contract. In December 1996, Dr. Ferrone received two three-year contracts with salary set to the year 2001. Mr. Brodsky and Mr. Crane negotiated the contract terms. All board members agreed to the terms.

In April 1996, Rita Klimkowski was the board president and Jack Crane was the board vice-president. In her bid for re-election in April 1996, Ms. Maryann Core had the signatures of the principal and the principal's spouse on her nominating petition.

On April 25, 1996, Dr. Ferrone received an opinion regarding renewal and non-renewal of non-tenured employees' contracts from Board Attorney, Stephen Fogarty, at his request. Mr. Fogarty's opinion letter in response, dated April 25, 1996, was distributed to all board members by Dr. Ferrone on that date. On April 29, 1996, Dr. Ferrone advised the board by memorandum dated April 29, 1996, that he did not intend to recommend the renewal of contract and subsequent tenure for the principal for the 1996-1997 school year.

Ms. Klimkowski, Mr. Crane and Ms. Core each denied the allegations that they had a personal and social relationship with the principal. However, they supported the renewal of her contract for the 1996-97 school year and resultant tenure.

On May 9, 1996, Mr. Crane and Ms. Klimkowski took Dr. Ferrone out to dinner. They discussed Dr. Ferrone's pending contract for five years and discussed the principal. Although there is a dispute about what respondents discussed at the dinner regarding the principal, they all state that at no time was there discussion linking Dr. Ferrone's contract with the principal getting tenure. On May 11, 1996, board vice-president Crane called Mr. Brodsky and informed him that he and Ms. Klimkowski had dinner with the Superintendent and had discussed the principal's contract and Dr. Ferrone's pending contract.

Ultimately, Dr. Ferrone took no action at all regarding the principal. He did not notify the principal of the pending nonrenewal. Thus, because the principal received no notice by May 15, 1996, the principal was effectively granted renewal for the 1996-97 school year and tenure in the Florham Park School District, effective on or about August 17, 1996. N.J.S.A. 18A:27-11 and N.J.S.A. 18A:28-5.

On June 11, 1996, the principal's position was included in item B-6 of the board meeting agenda, which was a list of employment renewals, for board approval. It had been the past practice of the board to approve employees receiving tenure in a separate agenda item. Ms. Pardo brought to Mrs. Klimkowski's attention that the matter was a grant of tenure, not just another renewal. However, Ms. Klimkowski refused to separate the renewal from the tenure and refused to include the term "tenure" in the agenda item.

ANALYSIS

Complainants set forth in their initial complaint that respondents violated N.J.S.A. 18A:12-24(b), (c), (e) and (g) of the School Ethics Act. Subsection b sets forth that:

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.

Complainants urge the Commission to find that the respondent board members accomplished the unwarranted renewal of the principal by their deliberate inaction on her re-employment. In support of this theory, the complainants cite to the fact that there was no communication at all regarding her candidacy. They also cite the fact that they allowed the required May 15, 1996, notification date to go by in total silence (except for certain statements by the superintendent to Mr. Brodsky). They also point to the fact that there was no agenda listing or board discussion until June 11, when it was too late to undo. Last, they point to the fact that the agenda item was listed in a way that shielded from public notice the fact that this rehiring would effectively involve the granting of tenure. They ask the Commission to conclude that the vital determination regarding the tenure of the principal must have been made by private and unofficial conduct of respondents and not by appropriate board action. This follows from the fact that no discussion or consideration of granting tenure to the principal took place at a board or board committee meeting.

Complainants base their argument on inferences to be drawn from a sequence of events. The only actual evidence against respondents is that they met with the superintendent over dinner. This meeting, in and of itself, did not violate any provisions of the School Ethics Act, N.J.S.A. 18A:12-21 et seq. The Commission has insufficient evidence that the discussion that took place during the dinner meeting was aimed at getting the superintendent to change his mind about the renewal of the principal. Each of the individuals who was present at the dinner meeting testified that there was no discussion linking the superintendent's contract to the principal's tenure. The inference raised from the principal's receipt of tenure subsequent to the meeting is not sufficient to support a finding of probable cause.

Further undermining complainants' argument is their own inaction with regard to the passing of the May 15, 1996 notification date. Although the complainants are not responsible for setting the board's agenda, the board as a whole allowed the deadline to pass, even after receiving the superintendent's scathing memorandum regarding the principal. The minutes from the board minutes do not show that the complainants raised objections until the June 11, 1996 board meeting.

Regarding the conduct of the superintendent, complainants argue that he openly and blatantly suppressed his stated educational determination that a candidate for tenure as principal lacked the qualifications to receive it. Further, without ever withdrawing his memorandum

supporting her non-renewal or explaining his new position, he changed his position in between the time of writing the memorandum and letting the deadline pass for notification of non-renewal. He also refused to respond to a question at the June 11, 1996, public meeting. The board asked him whether he could say that permitting Ms. Hill to receive tenure in the district was consistent with the standards of excellence required of one seeking tenure in the district. Complainants urge the Commission to find that these actions and omissions on the part of the superintendent, taken together with his own interest in re-employment in the district, make it appear that he used his position to secure unwarranted employment for himself or others.

With regard to the superintendent, the Commission was unable to draw a connection between the superintendent's own contract and the tenure of the principal. The superintendent was never in danger of losing his contract. The only question was whether he would receive a five-year or a three-year contract. There is insufficient evidence to support a probable cause finding that he used his position to secure unwarranted privileges for himself or others.

The complainants also argue that the superintendent's actions set forth above violated N.J.S.A. 18A:12-24(c). Subsection (c) sets forth that:

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 or personal involvement that might reasonably be expected to impair his objectivity or independence of judgment.

The complainants charge that the superintendent's actions and failures to act on the part of the Superintendent, taken together with his own stated and sought after interest in reemployment in the district, make it appear that he violated subsection (c). If the Commission accepted the premise that the superintendent's personal and financial involvement is his own contract renewal, the superintendent would be rendered unable to act in his official capacity in any matter, at least in the year when his contract is up for renewal. This would certainly result in a quandary for superintendents who must make all recommendations for hiring, renewal and tenure within the district. Considering the record before it, the Commission cannot find probable cause to credit the allegations that the superintendent acted in his official capacity in a matter in which he had a financial or personal involvement that might reasonably be expected to impair his objectivity.

The complainants also urge the Commission to find that the actions and omissions of the superintendent in the above matter violated N.J.S.A. 18A:12-24(e). Subsection (e) sets forth, in pertinent part:

No school official, or member of his immediate family, or business organization in which he has an interest, shall solicit or accept any ... promise of future employment, or other thing of value based upon an understanding that the ... promise, or other thing of value was given or offered for the purpose of influencing him, directly or indirectly, in the discharge of his official duties.

The complainants ask the Commission to find probable cause that respondents violated subsection (e) based on the inference that because the tenure of the principal followed the dinner with the president and vice-president of the board, the superintendent had to have made a deal at that time. The respondents have all testified that they did not discuss such a deal during the course of the dinner. They were the only persons present who could testify as to what occurred that evening. Thus, the Commission has no evidence from which to find probable cause that the superintendent violated subsection (e). In order to find a violation of subsection (e), one must show more than an appearance of a violation, but evidence that the promise of employment was actually solicited or accepted. Such evidence is lacking in this case and therefore, the Commission dismisses this charge.

Subsection (g) sets forth in pertinent part:

No school official shall represent any person other than the school board or district in connection with any application or other matter pending before the school district.

Although the complainants have charged the respondents with violating this provision, they do not significantly argue it in their closing papers. The Commission does not find subsection (g) to be applicable to the facts in the present case. There has been no evidence presented that the respondents represented any person in connection with any application or other matter pending before the school district. Thus, the Commission dismisses this charge.

Last, complainants argue that the superintendent placed himself in a position of having his independence and integrity of action appear to the public and to other Board members to have been severely compromised. They charge that this violated the general prohibition that school officials must avoid conduct which creates a justifiable impression among the public that such trust is being violated. N.J.S.A. 18A:12-22. They further argue that the unexplained series of events that resulted in a principal receiving tenure without any discussion of the principal's qualifications by the full board runs clearly against the legislative declaration cited. The Commission has never found a school official in violation of the Act without finding that he or she violated one of the specific prohibited acts set forth at N.J.S.A. 18A:12-24. The Legislature's findings and declarations set forth the purpose behind the standards of conduct, but they were not to be used as a basis for a violation without a finding that the school official engaged in specific prohibited conduct. Thus, the Commission agrees that the sequence of events created an unsavory appearance, it cannot find that that only is sufficient to find probable cause that the respondents violated the School Ethics Act.

The Commission notes that the record shows instances in which the superintendent and the board did not follow the education statutes. Because the statute regarding renewal of an employee is separate and distinct from that granting tenure, the Commission believes that employees who are candidates for tenure should be separate from those on the board agenda for renewal. Clearly, the superintendent and the board should see that they adhere to the deadline of May 15, 1996, for taking action on nonrenewals and begin the process before April 29. Nevertheless, despite the Commission's discomfort with the superintendent's and the board's

execution of procedures in this matter, the Commission finds that there is insufficient evidence to conclude that there is probable cause to credit the allegations in the complaint.

CONCLUSION

For all the foregoing reasons, the Commission finds no probable cause to credit the allegations that respondents violated N.J.S.A. 18A:12-24(b), (c), (e) or (g) of the School Ethics Act and hereby dismisses the complaint.

The respondents have requested that the complainants be found to have filed a frivolous complaint and be sanctioned under N.J.S.A. 18A:12-29(e) of the School Ethics Act. The Act provides that the standard for determining whether a complaint is frivolous is that set forth at N.J.S.A. 2A:15-59.1, which sets forth:

In order to find that a complaint, counterclaim, cross-claim or defense of the nonprevailing party was frivolous, the judge shall find on the basis of the pleadings, discovery, or the evidence presented that either:

- 1) The complaint...was commenced, used or continued in bad faith, solely for the purpose of harassment, delay or malicious injury; or
- 2) The nonprevailing party knew, or should have known, that the complaint...was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law.

The New Jersey Supreme Court has held that the term “frivolous” should be given restrictive interpretation, in light of the premise that in a democratic society, citizens should have ready access to all branches of government. McKeown-Brand v. Trump Castle Hotel & Casino, 132 N.J. 546 (1993).

The Commission finds no basis to conclude that the complainants filed the complaint solely for the purpose of harassment, delay or malicious injury. The fact that Mr. Brodsky negotiated the extended contract for the superintendent shows that there was no bad faith. Similarly, regarding paragraph two, the Commission finds that the complainants had reason to believe that they could make a good faith argument that the timing of the respondents’ meeting, the resultant outcome of the principal’s renewal, and the secrecy surrounding the meeting created an appearance of impropriety. The appearance however, was insufficient to prove a violation. Thus, the Commission finds that the complaint in question does not meet the standard set forth in N.J.S.A. 2A:15-59.1 and denies the request for sanctions.

This decision constitutes final agency action and thus may be appealed directly to the Appellate Division of the Superior Court.

Paul C. Garbarini
Chairperson

Resolution Adopting Decision -- C20-96

Whereas, the School Ethics Commission has considered the pleadings filed by the parties and the documents submitted in support thereof and has considered the arguments raised by parties in testimony; and

Whereas, the Commission found no probable cause to credit the allegations in the complaint that respondent violated N.J.S.A. 18A:12-24(b), (c), (e) or (g) of the School Ethics Act; and

Whereas, the Commission has reviewed the proposed decision of its staff setting forth the reasons for its conclusion; and

Whereas, the Commission agrees with the proposed decision;

Now Therefore Be It Resolved that the Commission hereby finds no probable cause to credit the allegations that respondents Fred Ferrone, Rita Klimkowski, Jack Crane or Maryann Core violated N.J.S.A. 18A:12-24(b), (c), (e) or (g) of the School Ethics Act, dismisses the charges against them and adopts the proposed decision as its decision in this matter.

Paul C. Garbarini, Chairman

I hereby certify that the Resolution was duly adopted by the School Ethics Commission at its public meeting on April 22, 1997.

Lisa James-Beavers
Executive Director

[c2096/c:lisa/decisions]