SEC #C8-96
C #38-97SEC
SB #16-97

IN THE MATTER OF FRANK PANNUCCI, :

BOARD OF EDUCATION OF BRICK : STATE BOARD OF EDUCATION

TOWNSHIP, OCEAN COUNTY. : DECISION

Decided by the School Ethics Commission, November 26, 1996

Decided by the Commissioner of Education, January 28, 1997

Decision on motion by the State Board of Education, June 4, 1997

For the Complainant-Cross/Appellant, Martin J. Anton, Esq.

For the Respondent-Appellant, Jay C. Sendzik, Esq.

For the Respondent School Ethics Commission, Geraldine Callahan, Deputy Attorney General (John J. Farmer, Jr., Attorney General of New Jersey)

For the amicus curiae New Jersey School Boards Association, Michael F. Kaelber, Esq.

For the amicus curiae New Jersey Education Association, Zazzali, Zazzali, Fagella & Nowak (Kathleen A. Naprstek, Esq., of counsel)

This is an appeal by respondent Frank Pannucci from a determination by the School Ethics Commission that he violated N.J.S.A. 18A:12-24(c) of the School Ethics Act, N.J.S.A. 18A:12-21 et seq., by voting on the collective negotiations agreement adopted by the Brick Township Board of Education ("Board" or "Brick Township Board") on November 3, 1994. A cross-appeal was thereafter filed by Joseph Sangiovanni, the individual who initiated the proceedings before the School Ethics Commission which

resulted in that determination, from the sanction imposed on Mr. Pannucci by the Commissioner of Education.

Mr. Pannucci, who is employed as a teacher in East Orange, has been a member of the Brick Township Board since 1990, with the exception of the period between April 1995 and April 1996.

Mr. Sangiovanni's complaint alleged that Mr. Pannucci, in violation of the School Ethics Act, had participated in negotiation sessions between the Board and the Brick Township Education Association after May 1994, at which time the School Ethics Commission had issued an advisory opinion on the subject, and that he had voted on the collective negotiations agreement between the Board and the teachers' union.

Mr. Pannucci denied that he had participated in any negotiations after May 1994. He admitted, however, that he had voted on the collective negotiations agreement.

Both Mr. Sangiovanni and Mr. Pannucci appeared before the School Ethics Commission on July 23, 1996, at which time the Commission determined that there was probable cause to credit the allegations in the complaint and to transmit the matter to the Office of Administrative Law ("OAL") for hearing.

However, in a written decision dated September 24, 1996, the Commission dismissed all of the allegations in the complaint except that Mr. Pannucci had violated the Ethics Act by voting on a collective negotiations agreement. Then, finding that there were no material facts in dispute, the Commission determined to give respondent the opportunity to submit his position to the Commission in writing instead of transmitting the case to OAL for hearing.

After written submissions from both the complainant and the respondent, and based on the undisputed facts, the Ethics Commission found that Mr. Pannucci had violated the School Ethics Act when he voted on the agreement in November 1994. In so concluding, the Commission relied on its advisory opinion of June 23, 1994 and reasoned that "respondent's statewide general union looks to salary and benefits statewide to determine what salary to seek for its members. The comparison of salaries creates the justifiable impression among the public that the public trust is being violated when respondent votes on the collective bargaining agreement when he is a member of the same statewide general union as the local bargaining unit." Commission's Decision, slip op. at 5-6.

The Commission, however, recommended to the Commissioner that because Mr. Pannucci had received inadequate advice from counsel and because the advisory opinion on the subject had been issued recently when he voted on the agreement, the appropriate penalty would be a censure.

The Commissioner agreed and directed that Mr. Pannucci "be censured as a school official found to have violated the School Ethics Act." Commissioner's Decision, slip op. at 10.

Mr. Pannucci appealed to the State Board of Education from the Ethics Commission's finding that he had violated the Ethics Act by voting on the agreement and from the Commissioner's imposition of a penalty on the basis of that finding.

Mr. Sangiovanni cross-appealed, seeking the imposition of a more severe penalty.

In addition, the New Jersey School Boards Association ("NJSBA") and the New Jersey Education Association ("NJEA") are participating in the matter as amicus curiae.

Mr. Pannucci argues that a fair and reasonable reading of N.J.S.A. 18A:12-24(c) does not support the Ethics Commission's finding that, solely by virtue of his membership in the New Jersey Education Association, he had violated the School Ethics Act by voting on the agreement between the Brick Township Board and the Brick Township Education Association. He contends that such conclusion was not intended by the Legislature and effectively legislates qualifications for membership on a district board of education beyond those in statute. Mr. Pannucci further contends that the Commission's conclusion unnecessarily infringes upon his First Amendment right to freedom of association and that it supercedes the will of the voters, who knew of his employment as a teacher in East Orange when they re-elected him to the Brick Township Board.

In response, Mr. Sangiovanni contends that Mr. Pannucci's status as a union member "might reasonably be expected to impair his objectivity or independence." Hence, he argues, the Ethics Commission did not need any factual findings to support its conclusion that by voting on the agreement, Mr. Pannucci had violated N.J.S.A. 18A:12-24(c). In addition, by his cross-appeal, Mr. Sangiovanni urges the State Board to increase the penalty which the Commissioner had imposed in this case. In this respect, he argues that an increased penalty is warranted because Mr. Pannucci still does not recognize the "impropriety of his actions." Brief in support of cross-appeal, at 5.

In a brief on behalf of the Ethics Commission, a deputy attorney general argues that Mr. Sangiovanni has no standing to appeal either the Ethics Commission's determination finding a violation of the Ethics Act or the Commissioner's determination of the appropriate penalty because, as a complainant, his role was "informational" once the Ethics Commission initiated its investigation and issued its probable cause determination. In a separate brief on behalf of both the Ethics Commission and the Commissioner, the Deputy argues for affirmance of the penalty recommended by the Commission and imposed by the Commissioner.

The NJSBA challenges the entirety of two advisory opinions issued by the Ethics Commission. These opinions concluded that the School Ethics Act automatically precludes participation by board members in a variety of activities on the basis of union affiliation and/or representation. Among those advisory opinions is the June 23, 1994 opinion that provided the foundation for the Commission's determination in the matter now before us.

The NJSBA argues that both advisory opinions, as well as the determination now on appeal, go beyond the legislative intent of the School Ethics Act and have a significant negative impact on the operations of district boards of education. It further argues that the Commission's determination in this case impermissibly infringes on the constitutional rights of the members of district boards.

Like the NJSBA, the NJEA contends that both advisory opinions are incorrect as a matter of law and that, consequently, the Ethics Commission's determination in this case should be reversed.

Initially, we agree with the Deputy Attorney General representing the Ethics Commission that Mr. Sangiovanni does not have standing to appeal to the State Board from the determinations rendered in this matter by the Ethics Commission and the Commissioner. Examination of the controlling statutes reveals that the role of a complainant was designed to provide the vehicle by which allegations against a school official would be brought to the School Ethics Commission, but that these statutes do not confer on the individual who files the complaint the right to prosecute the matter.

N.J.S.A. 18A:12-29(a) provides that "[a]ny person, including a member of the commission, may file a complaint alleging a violation…by submitting it, on a form prescribed by the commission, to the commission." The statute further provides that no complaint shall be accepted by the Ethics Commission unless it has been signed under oath by the complainant. N.J.S.A. 18A:12-29(b) requires that upon receipt of a complaint, the Commission must serve a copy of the complaint on each school official named in it and provide such official with the "opportunity to submit a written statement under oath."

At that point, the Commission is charged with the responsibility of deciding by majority vote whether "probable cause exists to credit the allegations in the complaint." N.J.S.A. 18A:12-29(b). If the Commission decides that probable cause does not exist, it must dismiss the complaint and notify the complainant and any school official named in the complaint. The statute expressly provides that such dismissal constitutes "final agency action." Id. In addition, N.J.S.A. 18A:12-29(e) confers on the Commission the authority to impose a fine not to exceed $500 on the complainant if it determines that the complaint was frivolous.

In contrast, in those cases in which the Ethics Commission finds that there is probable cause, it must refer the matter for a hearing to be conducted in accordance with the requirements of the Administrative Procedure Act. N.J.S.A. 18A:12-29(b). Upon completion of the hearing, the Commission must decide by majority vote whether the conduct complained of constitutes a violation of the Ethics Act. N.J.S.A. 18A:12-29(c). If the Commission finds such violation, it must recommend a sanction to the Commissioner of Education, who then acts on the Commission's recommendation. Id. Any appeal from the Commission's determination of a violation or the Commissioner's decision regarding the sanction is to the State Board of Education. N.J.S.A. 18A:12-29(d).

Consistent with N.J.S.A. 18A:12-29(d) and the statutory framework governing appeals to the State Board, see N.J.S.A. 18A:6-27 through 6-29, the State Board's regulations delineate that "any party aggrieved by a decision...or by the School Ethics Commission finding a violation of the School Ethics Act may appeal to the State Board of Education." As set forth in N.J.A.C. 6:3-9.2, a complainant is the person bringing a complaint of an alleged violation of the School Ethics Act. Quite simply, given the role of a complainant as defined in the statute and implementing regulations, regardless of whether the proceedings result in a finding of a violation and the imposition of a penalty, a complainant is not an "aggrieved party" by virtue of his status as a complainant. In re Lazarus, 81 N.J. Super. 132 (App. Div. 1963).

However, we recognize that neither the statute nor regulations automatically preclude standing. Although we are mindful of the distinctions between judicial power and the quasi-judicial authority exercised in administrative proceedings, City of

Hackensack v. Winner, 82 N.J. 1, 28-29 (1980), we find that the assessment of whether an individual complainant has standing to pursue an administrative appeal in this context is most appropriately resolved under the principles expressed by the judicial opinions on the subject.

Even under the liberal approach taken by the New Jersey courts, standing is generally confined to situations where the individual concerned with the subject matter of the litigation evidences a sufficient stake in the outcome and real adverseness. New Jersey State Chamber of Commerce v. New Jersey Election Law Enforcement Commission, 82 N.J. 57, 68 (1980); Crescent Park Tenants Ass'n v. Realty Equity Corp. of N.Y., 58 N.J. 98, 107 (1971). At the same time, the courts have recognized that lack of standing to invoke the power of judicial review may confer a conclusive character on administrative action to the possible great detriment of the public. Elizabeth Federal Savings & Loan Ass'n v. Howell, 24 N.J. 488 (1957). They have further recognized that a narrow approach to standing may lose sight of the overriding need of the system to make sure that someone shall in fact be able to secure review of administrative action. Id. Hence, where a substantial public interest is involved, a slight interest may be sufficient to give standing to invoke judicial review. New Jersey State Chamber of Commerce, supra; Elizabeth Federal Savings and Loan, supra.

We stress that the complainant in this case is not attempting to appeal the Ethics Commission's determination that there was not probable cause to support his allegations relating to negotiations. As previously stated, the statute provides that such determinations constitute the final agency decision in the matter, so that review would

presumably be obtainable through the Superior Court. Rather, the complainant is participating in this matter as a respondent/cross-appellant.

While the complaint indicates that the complainant is a resident of Brick, there is no expression that he possesses any interest in this matter other than as a member of the public. In this respect, the complainant has not shown how he has been affected adversely and in any degree greater than the public generally by the Commissioner's determination that a censure was sufficient sanction. Moreover, it is not the function of the Ethics Commission or the Commissioner in this context to adjudicate the rights of complainants vis-à-vis school officials. In re Lazarus, supra.

Again, the function of a complainant is to bring acts by school officials which may indicate a violation of the School Ethics Act to the attention of the Ethics Commission so as to protect the public's confidence. See N.J.S.A. 18A:12-22. It is the Commission, not the complainant, which is charged in this context with acting as the guardian of the public interest.

We therefore hold that complainant in this case does not have standing to seek review on appeal by the State Board of Education of the determinations of either the Ethics Commission or the Commissioner. Nor does he have the right to participate in Mr. Pannucci's appeal as a party respondent.

We turn now to the substance of Mr. Pannucci's appeal. After review of the matter, we reverse the Ethics Commission's determination that Mr. Pannucci violated the School Ethics Act by voting on the collective negotiations agreement involved.

Prior to enactment of the Ethics Act, conduct such as involved here was controlled by N.J.S.A. 18A:12-2. It was well established under that statute that Mr.

Pannucci's conduct in voting on the contract while a member of the same statewide employee association as that with which the local in Brick was affiliated was not prohibited. See Salerno v. Board of Education of the Township of Old Bridge, decided by the Commissioner of Education, April 23, 1984, Larsen v. Woodbridge Bd. Of Ed., decided by the Commissioner of Education, March 18, 1985. However, this does not automatically result in the conclusion that respondent's conduct did not violate the Ethics Act.

In its decision, the Ethics Commission found that respondent had violated N.J.S.A. 18A:12-24(c). That statute provides in pertinent part 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 personal involvement that might reasonably be expected to impair his objectivity or independence of judgment.

The Commission found that respondent had an "indirect financial involvement in the outcome of collective bargaining between the local bargaining unit and the board."[1] Commission's Decision, slip op. at 5. In reaching this conclusion, the Commission reasoned that:

> respondent's statewide general union looks to salary and benefits statewide to determine what salary to seek for its members. The comparison of salaries creates the

[1] We note that N.J.S.A. 18A:12-24(c) was subsequently amended to eliminate the prohibition on school officials acting in instances in which such official or a member of his immediate family has a direct or indirect personal involvement that night reasonably be expected to impair his objectivity. Instead, the statute now provides in this respect that:

> 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.

This change, however, has no bearing on the instant matter.

> impression among the public that the public trust is being violated when respondent votes on the collective bargaining agreement when he is a member of the same statewide general union as the local bargaining unit.

Id. at 5-6.

This reasoning is more fully explicated in the advisory opinion issued by the Commission on June 23, 1994 pursuant to N.J.S.A. 18A:12-31.[2] It is this advisory opinion, along with the opinion issued on May 26, 1994, that provides the underpinnings for the Commission's decision in the instant case.[3]

The May 26, 1994 opinion, A10-93, addressed questions relating to negotiations rather than to voting on the resultant agreement. This opinion concluded that a board member could not participate directly in negotiations if the member or a member of his immediate family belonged to the same statewide general union. Relying on this opinion, the Commission's June 23, 1994 advisory opinion, A10-93(b) and AO7-94, concluded that a board member could not vote on a negotiated contract if the board member or a member of his immediate family was a member of the same statewide general union "that has negotiated the contract with the school board." In that opinion, the Ethics Commission found that:

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[2] N.J.S.A. 18A:12-31 provides the authority under which the Ethics Commission may issue advisory opinions. The statute provides in pertinent part that:

> A school official may request and obtain from the Commission an advisory opinion as to whether any proposed activity or conduct would in its opinion constitute violation a violation of the provisions of this act. Advisory opinions shall not be made public, except when the commission, by a vote of at least sia members, directs that the opinion be made public. Public advisory opinions shall not disclose the name of the school official.

[3] We note that these opinions resulted from requests by an attorney representing several district boards, rather than from a request by a school official. See DeSimone v. New Jersey School Ethics Commission, decided by the State Board of Education, December 7, 1994.

> it is likely that the public could perceive that the member's independence of judgment is impaired if he or she votes on such a contract, even though the board member or his family member is not subject to the specific contract before the board. It is reasonable for the public to perceive that voting for one's fellow union members to receive a contractual award or service, etc., could be publicly perceived to create a conflict for a school board member. Likewise, if a school official's spouse were a member of the union, the same conflict would arise since the board member has an indirect involvement with that union. Lastly, the board member's business organization has an involvement that could prejudice the board member's independence of judgment.

A10-93(b) and AO7-94 (June 23, 1994), at 2.

The Commission rejected the view that the distinction between the fact that a vote on an agreement takes place in public while negotiations are private makes a difference. In this respect the Commission reasoned that by voting to increase the pay rate for members of one bargaining unit, a board member could be influencing the rate of payment to all union members, thereby benefiting himself or his spouse. Id. Accordingly, the advisory opinion barred not only union members from voting on a collective bargaining agreement, but also barred non-members and their spouses from voting if either of them was represented by that union through their employment, i.e., an agency shop situation. Id.

We stress that our jurisdiction in this matter is over the Ethics Commission's final decision of November 26, 1996 and the Commissioner of Education's decision of January 28, 1997 regarding the appropriate sanction. Accordingly, we are concerned with the Commission's advisory opinions only to the extent that the Commission's final decision relies upon or incorporates them. DeSimone v. New Jersey School Ethics Commission, remanded to the School Ehics Commission by the State Board of

Education, October 5, 1994, and decided by the State Board, December 7, 1994. Our decision in this matter therefore addresses only the question involved in the Commission's June 23, 1994 opinion, i.e., whether a board member is precluded from voting on a collective negotiations agreement if he or his spouse are either members of the same statewide union representing the bargaining unit whose contract is before that board member or are non-members represented by the union through employment within the scope of another bargaining unit in a different school district.

After careful review, we reject the view that status as a member of another local union within the same statewide union should, on a per se basis, preclude a board member from voting on a collective negotiations agreement in the district where he or she is a member of the district board of education. Quite simply, any connection between a vote by a member of a district board on a collective negotiations agreement applicable to an employee negotiations unit in that district and the salary structure of a whole class of employees on a statewide basis is far too attenuated to justify mechanically barring all board members with ties to a statewide union from voting. Similarly, it is not reasonable to assume that an individual who belongs to or is represented by a local affiliate of a statewide union would necessarily be influenced by that status when voting on a contract applicable to an employee unit represented by a different local affiliate of that statewide union.

The unreasonableness of such a blanket disqualification is even more dramatic if applied to a board member whose spouse is represented by a different local affiliate and who is employed in an entirely different job classification than the one to which the contract at issue would apply. The School Ethics Act does not demand such a result.

It was previously well settled that the only blanket prohibition to board service was that a professional employee could not serve on the board which employed him. N.J.S.A. 18A:6-8.4; Schulman v. O'Reilly-Lando, 226 N.J. Super. 626 (App. Div. 1988). Nothing in the legislative history of the School Ethics Act indicates that the Legislature intended to limit the service of board members purely on the basis of the status of such member and his immediate family with respect to a statewide employee association. Accordingly, there is nothing in the legislative history to provide a factual underpinning for the overly broad interpretation which the Ethics Commission has adopted. Nor are there any factual findings in the record of this matter to support such an interpretation.

In sum, we hold that N.J.S.A. 18A:12-24(c) does not automatically prohibit a board member from voting on a collective negotiations agreement solely on the basis of his status or that of his immediate family with respect to membership or representation by a different local affiliate of the same statewide association with whom the agreement is made. In that there is nothing in the record that suggests that the particular circumstances of Mr. Pannucci's involvement with such local affiliate has or appears to have compromised his objectivity or independence of judgment, we reverse the Ethics Commission's finding that he violated N.J.S.A. 18A:12-24(c) and the Commissioner's imposition of a sanction on the basis of that finding.

Attorney exceptions are noted.

Maud Dahme, Donald C. Addison, Jr., Jean D. Alexander, Dr. Ronald K. Butcher, Thomas P. McGough, and Robert A. Woodruff join in the opinion of the majority.

March 1, 2000

Date of mailing _____

Daniel J.P. Moroney dissenting:

Up to Page 9, Paragraph 4 starting "We turn now to the substance of Mr. Pannucci's appeal…" I have no problem with the Legal Committee's Report [henceforth LCR] on SB #16-97.

The substance of this case is an appeal from a determination by the Ethics Commissioner [henceforth EC] that a Brick Township School Board member, Mr. Pannucci, violated the School Ethics Act [henceforth SEA] by voting on the Collective Bargaining Negotiations Agreement [henceforth CBNA].

The LCR's reference to N.J.S.A. 18:12-2 is essentially irrelevant and prejudicial in that it has been superceded by the SEA. But even so in the cited Salerno v. Old Bridge decided under that old standard of "substantial and material" Commissioner Cooperman in his decision for the Board members "noted with approval the treatment herein describing safeguards to be observed by a member of the board of education who has close relatives in the employ of the board to avoid even the appearance of a conflict of interest" which in that case was evidenced by abstaining from voting. The operative phrase therein is to "avoid even the appearance of a conflict of interest."

June 23, 1994 EC issued opinions A10-93b and A07-94. Those opinions stated that under the SEA [N.J.S.A. 18A:12-24c] a school board member is prohibited from voting on a CBNA for a local bargaining unit of a statewide union when a school board member or his immediate family member belongs to the state-wide union – opinion to be applied prospectively including labor negotiations begun before that date and continued thereafter.

By letter of August 16, 1994, the Brick Township Board received advice from its attorney setting forth the EC's opinions in A10-93, A10-93b and A07-94 as follows: "Our reading of the aforesaid statute and opinions is that a board member, who is a member of the same statewide union as the union in which the Board is involved with in labor negotiations, cannot vote after the date of the advisory opinion of June 3, 1994 irrespective of whether the legal negotiations began before the June date and continued thereafter." The attorney goes on to express his disagreement with the EC's opinion but ultimately gives no specific direction and leaves it up to the board member and his union to decide whether the board member should vote. The EC decision stated that "because that quote was the only portion of the attorney's opinion that was unambiguous the EC concluded that the board member was aware of the EC decision that he would be in violation of the SEA if he voted on the CBNA.

Given the clear wording of the attorney's reading of the advisory opinion, and respondents testimony that indicated that the attorney would not advise him that he could vote, the most prudent course of action would have been to abstain from voting. Respondent chose not to do so.

Furthermore one must read all subsections of Section 24 in conjunction with the Legislator'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:12-22a.

The EC found that the respondent had an indirect financial involvement in the outcome of the collective bargaining between the local bargaining unit and the board.

The EC reasons that respondent's statewide general union looks to salary and benefits statewide to determine what salary to seek for its members. The comparison of salaries creates the justifiable impression among the public that the public trust has been violated when respondent votes on the CBNA when he is a member of the same statewide general union as the local bargaining unit.

In conducting a balancing test here it is noteworthy that the appellant seeks to participate on behalf of the [local] board and the public and vote on the CBNA with the local bargaining unit of the same statewide union in which he holds membership. On the other side of the balance is the EC and the [Ethics] Act which show a state interest in fostering and maintaining the "respect and confidence of the people" in the operations of government. N.J.S.A. 18A:12-22a. Our lawmakers have found and declared that this requires school officials not only to avoid conduct in violation of the public trust but also that conduct "which creates a justifiable impression among the public that such trust is being violated." N.J.S.A. 18A:12-22a.

The LCR avers, without foundation, that the EC decision is a blanket prohibition to board service. Clearly it does not in any way prevent teachers or any other members of a national school union from serving on a school board. It only sets a limit on their ability to vote on matters that the EC has deemed them to have a conflict. That decision has not prevented and will never prevent the continuing participation of national school union members from participating on school boards. The EC decision does not amount to a per se finding that being a teacher and school board member are incompatible. Appellant was found to have a limited conflict of interest under N.J.S.A. 18A:12-24c.

The decision did not preclude appellant from participating on other board business and was not "overly broad."

The EC rightfully found that respondent violated N.J.S.A. 18A:12-24c of the SEA. Because respondent received inadequate advice from counsel as to whether he should vote and the EC had only recently issued the advisory opinion setting forth that his voting on the contract would violate the Act, the EC recommended a lower penalty than it would for the violation. It recommended a penalty of censure because a censure does not force respondent to miss any board meetings, but yet it is a public disciplinary action so that other board members and the public are notified of the violation.

For the reasons contained herein, I would move that the finding of the EC that the respondent violated N.J.S.A. 18A:12-24c and the Commissioner of Education's imposition of a sanction based on that finding be affirmed and the matter be returned to the Legal Committee for preparation of a formal decision.

Anne S. Dillman and Samuel J. Podietz join in the dissent.

March 1, 2000

Date of mailing _____