

IN THE MATTER	:	BEFORE THE SCHOOL
	:	ETHICS COMMISSION
OF	:	
	:	SEC Docket No.: C24-03
	:	OAL Docket No. EEC8592-2003S
DR. JAMES DWYER,	:	
<i>BLOOMINGDALE BOARD OF EDUCATION,</i>	:	FINAL DECISION
<i>PASSAIC COUNTY</i>	:	

The School Ethics Commission found probable cause to credit the allegation that Dr. James Dwyer used his position to secure an unwarranted privilege or advantage for the child of a board member by directing a teacher to change the child’s grade. The Commission transmitted the finding to the Office of Administrative Law (OAL) for a hearing in accordance with N.J.S.A. 18A:12-29(b). The Administrative Law Judge (ALJ) concluded that the probable cause finding was not sustained and dismissed the Commission’s finding in its entirety.

The record of this matter and the Initial Decision of the OAL have been reviewed. The Board’s exceptions and respondent’s reply thereto were submitted in accordance with N.J.A.C. 1:1-18.4.

The Complainant objects to the ALJ’s conclusion that respondent did not use his official position to secure an unwarranted privilege or advantage for the child of a board member in violation of N.J.S.A. 18A:12-24(b). He states that such a conclusion cannot be reconciled with the ALJ’s findings. Specifically, he cites the ALJ’s findings that the two weeks given to S.K. to make up the missing work, rather than the five days authorized by the policy, was an unwarranted privilege or advantage for S.K. and it afforded S.K. a privilege or advantage not afforded to other students under the terms of the policy. Complainant also notes the ALJ’s findings that the respondent looked at the grades for the teacher’s class, discussed with the teacher other students’ missing work resulting in lower grades, and directed a grade change for S.K. to an incomplete but did not take the same action with respect to other students who had received lower grades due to missed assignments. He argues that all of these findings lead to the conclusion that respondent violated N.J.S.A. 18A:12-24(b).

The complainant’s second exception is that the ALJ should have accepted as fact, the testimony of the teacher, whom the ALJ found to be credible, where her testimony conflicted with the respondent’s testimony because the respondent obviously has a stake in the outcome of these proceedings. Specifically, he argues that the ALJ should have found that the respondent explained to the teacher that he asked her to meet with him because he had received a phone call regarding the child of a board of education member. This fact, when taken with the others, he

argues, provide sufficient evidence that respondent was using his position to secure an unwarranted privilege for the child of a board member.

Respondent argues, however, in his reply that complainant's first argument fails to consider the ALJ's other finding that it was the teacher who afforded the student the opportunity to make up missed work over a two-week period. While it may have been an unwarranted privilege, he argues, the ALJ did not find that Dr. Dwyer gave S.K. the unwarranted privilege. Thus, Dr. Dwyer did not use his official position to secure an unwarranted privilege or advantage for the child as required by the statute.

Regarding the second exception, respondent argues in response that, although an ALJ may find a witness to be credible, as he did the teacher, the ALJ is not constrained to accept the entirety of the witness' testimony. He states that the ALJ concluded that the witness' recollection was faulty on that point because she admitted that she was under a lot of personal stress at that time and admitted that she was under stress from having to deal with Mrs. K's complaint and her attitude.

Respondent argues in cross-exceptions that 1) the ALJ should not have found that S.K. was actually given an "unwarranted" privilege or advantage; and 2) the ALJ should not have found that Dr. Dwyer made no mention of giving extra time to other students who had lower grades. Regarding the first cross exception, complainant argues in reply that the ALJ's finding was supported by the fact that S.K. was given two weeks to make up the work, rather than the five days authorized by the policy cited by the respondent. Regarding the second cross-exception, complainant argues that the teacher stated that respondent made no mention of giving extra time to other students with lower grades with missed assignments and respondent's insinuation to the contrary was self-serving. Thus, complainant argues that the ALJ's findings were justified by the record.

Upon review of the record, the Commission appreciates the exceptions, cross-exceptions and replies of both parties. With reference to complainant's first exception objecting to the ALJ's conclusion that respondent did not use his official position to secure an unwarranted privilege or advantage for the child of a board member in violation of N.J.S.A. 18A:12-24(b), the Commission agrees with respondent. The complainant's exception overlooks the ALJ's finding that the teacher, rather than Dr. Dwyer provided the student with the unwarranted privilege. Since the ALJ determined that Dr. Dwyer did not use his position to secure the unwarranted privilege or advantage, the Commission cannot reject the ALJ's conclusion that the evidence did not sustain a violation of N.J.S.A. 18A:12-24(b).

Regarding the second exceptions of both complainant and respondent, the Commission recognizes that these are matters that turn on the credibility of witnesses. In this regard, the Commission must give deference to the credibility determinations of the ALJ. "The reason for this rule is that the administrative law judge, as a finder of fact, has the greatest opportunity to observe the demeanor of the involved witnesses, and, consequently, is better qualified to judge

their credibility.” In the Matter of Tenure Hearing of Tyler, 236 N.J. Super. 478, 485 (App. Div.), certif. denied, 121 N.J. 615 (1989).” Upon review of the record, the Commission hereby determines that the ALJ’s findings that 1) respondent explained to the teacher that he asked her to meet with him because he had received a phone call from a parent complaining about her child’s grade; and 2) Dr. Dwyer made no mention of giving extra time to other students who had lower grades, were supported by sufficient, competent and credible evidence in the record, and therefore, must not be disturbed.

The respondent’s first exception to the determination that the extra time given to S.K. was an unwarranted privilege or advantage is an exception to a legal conclusion. As such, the Commission agrees that where the policy provided a five day extension to complete work and the student was provided with two weeks, one may reasonably conclude that the extension was an unwarranted privilege under N.J.S.A. 18A:12-24(b) of the Act. Therefore, the Commission declines to disturb that determination.

Thus, the conclusion of the ALJ that Dr. Dwyer did not violate N.J.S.A. 18A:12-24(b) by using his official position to secure an unwarranted privilege or advantage for S.K. is also supported by the record and must be upheld. Accordingly, the Initial Decision is adopted for the reasons expressed therein.

This decision is a final decision of an administrative agency. Therefore, it is appealable only to the Superior Court--Appellate Division.

Paul C. Garbarini
Chairperson

Resolution Adopting Decision – C24-03

Whereas, the Commission found probable cause to credit the allegation that Dr. James Dwyer violated N.J.S.A. 18A:12-24(b); and

Whereas, the Commission transmitted the matter to the Office of Administrative Law for a hearing; and

Whereas, the Administrative Law Judge concluded that the charge had not been sustained and therefore dismissed the finding of probable cause; and

Whereas, the parties filed exceptions and cross-exceptions to the ALJ's decision; and

Whereas, the Commission fully considered all of the documentation filed in response to the ALJ's decision and voted to accept the ALJ's decision;

Whereas the Commission has reviewed a draft decision; and

Whereas, the Commission agrees with the draft decision;

Now Therefore Be It Resolved that the Commission hereby adopts the decision and directs its staff to notify all parties to this action of the Commission's decision herein.

Paul C. Garbarini, Chairperson

I hereby certify that the School
Ethics Commission adopted
this decision at its public meeting
on October 26, 2004.

Lisa James-Beavers
Executive Director