

breach. She argues that the Commission should have been given the opportunity to present evidence that the report's critical nature required Respondent to prevent further discussion of the superintendent's performance of his duties.

The Commission does not agree with the ALJ that N.J.S.A. 18A:12-24.1(i) is only a statement of principle and, therefore, not enforceable without specific code language. However, in the present case, the Commission will accept the ALJ's conclusion that the failure to stop a report that is critical of an employee alone does not constitute a failure to support and protect school personnel. The DAG has not set forth what other evidence would have been presented if the motion had not been granted in order to support her contention. Without such a proffer, it is difficult to overturn the ALJ's conclusion that there was insufficient evidence to sustain a finding of probable cause.

The DAG's second exception is that the ALJ erred in his conclusion that Respondent did not violate N.J.S.A. 18A:12-24.1(c), (d) or (e) in failing to refer complaints to the superintendent prior to having the Solicitor investigate an issue regarding a Statement of Assurances. The ALJ concluded that the Board reached a consensus to refer the matter to the Solicitor at its meeting and therefore Respondent did not exceed his authority. The DAG argues that the ALJ's finding was based on hearsay evidence that was unreliable. The DAG presented testimony of Board member Susan Kolarovic to contradict the Respondent's testimony, but no other witnesses or statements. Ms. Kolarovic had no recollection of such a discussion where a consensus was reached. Since the hearsay corroborated the testimony of the Respondent and the ALJ found the Respondent's testimony to be credible, the admittance of hearsay was not in error.

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 finding that there was a consensus reached as to the investigation by the Solicitor was not in error.

The DAG next argues that, even if the Board gave its authorization to have the Solicitor investigate the matter, the Board was unaware of the extent of the investigation being undertaken. She cites Respondent's testimony as indicating the purpose of the investigation was to have the Solicitor "find out some information to present to the Board so that we could then consider whether this -- there was a problem on that Statement of Assurance." (Tr. 30:16-23) However, she argues that what resulted was a full scale investigation with conferences and interviews culminating in a report that took three and a half billable hours to prepare. The Commission is satisfied that, if, as the ALJ found, the Board approved the hiring of the Solicitor to investigate the Statement of Assurances issue, then Respondent cannot be found to have violated the Code of Ethics because the investigation took more time and money than perhaps

even Respondent contemplated. The subsequent report should have been provided to all of the board members, not just the Respondent, the superintendent, the board secretary and Mr. Bostock, who initially raised the issue. However, the failure to widely disseminate the report among the board members may be the fault of the solicitor. There is insufficient evidence to show that Respondent intentionally withheld the report from the other board members. Therefore, the Commission concurs that the finding of probable cause that Respondent violated N.J.S.A. 18A:12-24.1(c), (d) and (e) has not been sustained.

Last, the DAG argues that the ALJ erred in dismissing the probable cause finding that Respondent violated N.J.S.A. 18A:12-24.1(j) when he wrongfully called for a vote on approving the investigation by the Solicitor of a complaint, the nature and source of which was not provided to the full Board. The ALJ concluded that since the Board voted to approve the investigation, Respondent should not be held solely responsible for this action. Because the facts upon which the ALJ made his findings were essentially stipulated, it is difficult to reach a different conclusion. The Commission therefore finds that the probable cause finding was not sustained as to the referral of the complaint to the Solicitor to investigate.

As to the ALJ's general concern set forth at the conclusion of his initial decision, the Commission does not share the ALJ's opinion that without the promulgation of regulations, the Code of Ethics for School Board Members set forth at N.J.S.A. 18A:12-24.1 will be a snare for the unwary. It would be impossible and unnecessary to codify every type of conduct that may give rise to an ethical violation under the Code. N.J.S.A. 18A:12-24.1(j) of the Code, for example, which sets forth that:

I will refer all complaints to the chief administrative officer and will act on the complaints at public meetings only after failure of an administrative solution,

is quite clear on its face. It is only because the Respondent was found to have acted in concert with the majority of the Board that the charge on N.J.S.A. 18A:12-24.1(j) was not sustained. Nonetheless, since the Code was intended to be a guide to foster better cooperation among board members rather than a deterrent to achieving consensus, the Commission will forward the ALJ's recommendation to promulgate regulations to the State Board of Education for further action.

For the foregoing reasons, the Commission accepts the conclusions of the Administrative Law Judge and dismisses the probable cause finding against Respondent. 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 – C47-03

Whereas, the Commission found probable cause to credit the allegation that William O'Brien violated N.J.S.A. 18A:12-24(i), (j), (c), (d) and (e) in connection with conduct that he engaged in as president of the Palmyra Board of Education; 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 to the ALJ's decision and replies; and

Whereas, the Commission fully considered all of the documentation filed in response to the ALJ's decision and voted to accept the conclusions of ALJ's decision, but not all of the reasoning set forth therein; and

Whereas, the Commission agrees with the draft decision dismissing the complaint;

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 January 24, 2006.

Lisa James-Beavers
Executive Director