
**JAMES A. KUCHTA, SAL OLIVO,
JERRY DEL TUFO, GERARD PARISI
and MARIA ALAMO**

v.

**DR. PHILIP CASALE
NUTLEY BOARD OF EDUCATION
ESSEX COUNTY**

**BEFORE THE SCHOOL
ETHICS COMMISSION**

**Dkt. Nos. C02-09, C04-09
C05-09, C06-09 Consolidated
DECISION**

PROCEDURAL HISTORY

This matter arises from complaints filed by James A. Kuchta on March 3, 2009 (C02-09), Sal Olivo and Jerry Del Tufo on March 6, 2009 (C04-09), Dr. Gerard Parisi on March 6, 2009 (C05-09) and Maria Alamo on March 9, 2009 (C06-09) alleging that the respondent, Dr. Philip Casale, a member of the Nutley Board of Education (“Board”), violated the School Ethics Act. Specifically, the complainants allege that the respondent violated N.J.S.A. 18A:12-24.1(c) and (e) of the Code of Ethics for School Board Members when he met with a construction company, Tri-Tech Environmental Engineering (“Tri-Tech”), for the purpose of arranging a settlement.¹ Answers to the complaints were filed on behalf of the respondent on March 20, 2009 and were later amended by answers dated March 26 (C05-09, C04-09) and March 30, 2009 (C02-09, C06-09).

Noting that the allegations in the four complaints were the same, the Commission contacted the complainants and the respondent by letter dated June 9, 2009 and proposed that the complaints be consolidated for the purpose of hearing and determination. The parties were accorded an opportunity to object to consolidation, but did not. The matter was heard at the Commission’s meeting on January 26, 2010. At the public portion of the Commission’s meeting, the Commission voted to find no violation and to dismiss this consolidated matter.

SUMMARY OF THE RECORD

Complainant Dr. Gerard Parisi testified that he has been a resident of Nutley since 1982 and served on the Board from 2001 to 2007. Dr. Parisi was involved with the Board’s negotiations with Tri-Tech, the company that was hired to be the District’s construction manager. The contract was already in place when Dr. Parisi was elected. According to Dr. Parisi, there were a number of failed referendums in the District and the Board began to realize that the newest phase of their construction did not require using Tri-Tech as the construction

¹ On April 15, 2009, the State Board of Education adopted amendments to N.J.A.C. 6A:28, the regulations governing matters that come before the School Ethics Commission. These rules became effective on May 18, 2009. However, because the complaints were filed before that date, the Commission followed procedures and rendered its determinations herein in accordance with the rules that were in effect at the time the complaints were filed. To the extent this decision cites to regulations, they are the regulations that were in effect when the complaints were filed.

manager, as doing so was not the best use of Board funds. Thus, the Board began to negotiate with Tri-Tech for a reduced scope of work. Shortly after this issue arose, the Board created a subcommittee comprised of the Board President, the Vice President, the Board attorney, the Business Administrator and the Superintendent to begin discussions with Tri-Tech. A few months later, Dr. Parisi's term expired and he had no interactions with Tri-Tech after April 2007. Consequently, Dr. Parisi stated on cross-examination that he was not present when the respondent had a phone call with the Board attorney in April 2008.

Complainant Sal Olivo has been a resident of Nutley for 57 years and served on the Board of Education from 2002 to 2008. He was the Board President for the 2007- 2008 term. As the President, he engaged in negotiations with Tri-Tech in an effort to reduce the costs that the District would be obligated to pay. Mr. Olivo explained that the initial contract with Tri-Tech for construction management was \$38 million. The Board thought it could reduce the scope of work to \$14 million, with a commission of \$539,000. Thus, the Board authorized him, the Vice President (Complainant Del Tufo), the Business Administrator, the Board attorney and the Superintendent to negotiate with Tri-Tech to try to narrow the scope of the work. He estimated that the number of meetings toward this goal was no less than five. Mr. Olivo stated that he never met alone with representatives from Tri-Tech and he was not authorized to do so.

Mr. Olivo further testified that during his term as Board President, after Tri-Tech sued the Board, the Board agreed to cap its settlement offer at \$750,000. The highest settlement offer made by Tri-Tech at that time was \$900,000. Mr. Olivo stated that, as Board President, he never authorized the respondent to meet with Tri-Tech and he did not have the power to do so. On cross-examination, Mr. Olivo stated that he was not present when the respondent had a phone call with the Board attorney in or around April 12, 2008 in order to ascertain the parameters for meeting with Tri-Tech.

Complainant Jerry Del Tufo has been a resident of Nutley for 22 years and served on the Board from 2002 to 2008. He was the Vice President for his last two years of his term. Mr. Del Tufo stated that the issue of modifying Tri-Tech's scope of work arose around January 2007. He served on the subcommittee that was established by the Board to negotiate with Tri-Tech to modify the terms of the contract, along with Board President Olivo, Superintendent Joseph Zarra, Business Administrator Robert Green, and the Board attorney. Mr. Del Tufo testified that the Board believed it could save money by limiting the scope of Tri-Tech's services to \$14 million of construction management, rather than \$38 million. The Board learned from prior referendums that it did not need construction management services on the more routine aspects of its building projects. After Tri-Tech sued the Board, according to Mr. Del Tufo, the Board attorney was authorized to settle for up to \$750,000. Mr. Del Tufo testified that Tri-Tech was willing to complete the balance of the balance of the work and settle all claims for \$900,000. Mr. Del Tufo stated that the Board did not authorize anyone to meet alone to negotiate with Tri-Tech. On cross-examination, Mr. Del Tufo stated that he was not present when the respondent had a phone call with the Board attorney in or around April 12, 2008 in order to ascertain the parameters for meeting with Tri-Tech.

Complainant Maria Alamo has been a resident of Nutley for 35 years. She served on the Board from 2000 until 2009. During her time on the Board, she was not directly involved in

negotiations with Tri-Tech, but was involved indirectly as a sitting Board member. Ms. Alamo stated that she was present at the April 24, 2008 reorganization meeting when the respondent was made Board President. There was no Executive Session action that evening. There were no discussions about Tri-Tech. The Board did not discuss any settlement offers or take any votes to authorize the respondent to meet with Tri-Tech. Ms. Alamo stated that she found out about the respondent's meeting with Tri-Tech about three weeks later. Ms. Alamo testified that she called the respondent and asked him about the meeting because the Board was scheduled to go to arbitration. According to Ms. Alamo, the respondent told her that after the reorganization meeting, he was at the Board office "going back and forth" with the Board attorney to try to get a settlement, but the respondent did not mention the presence of the Superintendent. Ms. Alamo affirmed that, just prior to the reorganization meeting, the maximum authorized settlement was \$750,000, then later, \$900,000.

Ms. Alamo stated that the Department of Education's Office of Fiscal Accountability (OFAC) conducted an investigation regarding the settlement agreement and she was interviewed. On cross-examination, Ms. Alamo stated that she was not present when the respondent had a phone call with the Board attorney in or around April 12, 2008 in order to ascertain the parameters for meeting with Tri-Tech.

Complainant James Kuchta has been a resident of Nutley since 1979 and was elected to the Board in 2007. He was not directly involved in negotiations with Tri-Tech. Mr. Kuchta stated that when he got on the Board, he was aware that there were negotiations with a subcommittee to reduce expenditures. Prior to the April 24, 2008 reorganization meeting, he was not aware that the respondent had any contact with Tri-Tech. Mr. Kuchta identified the report issued by the OFAC in February 2009 which was marked as Exhibit C-1. Mr. Kuchta testified that when he first got on the Board, the settlement offer was capped at \$750,000. He recalled that the last offer from Tri-Tech was \$900,000 as minimum, up to \$1.3 million.

Mr. Kuchta was present at the April 24, 2008 reorganization meeting; he affirmed that there were no closed session discussions, no discussions of settlement with Tri-Tech and the Board did not authorize the new President to meet with Tri-Tech. Mr. Kuchta stated that he first became aware of the respondent's meeting with Tri-Tech at the Board's meeting on April 28, 2008. According to Kuchta, at that meeting, there was a closed session and the respondent commented that he spent the last day of his vacation negotiating a settlement. The terms of the proposed settlement were presented to the Board on April 28, 2008; the proposed settlement was \$2.7 million to be paid to Tri-Tech, including closure for all outstanding invoices. The agreement was signed on May 5, 2008 and payment was made to Tri-Tech on May 7th.

Mr. Kuchta stated that he was contacted by an OFAC investigator. Mr. Kuchta further testified that the Superintendent did not recommend the settlement. Rather, the settlement was recommended by Board counsel and the respondent. On cross-examination, Mr. Kuchta stated that he was not present when the respondent had a phone call with the Board attorney in or around April 12, 2008 in order to ascertain the parameters for meeting with Tri-Tech.

Kenneth Reilly is currently completing his fifth year of service on the Board. He was present at the April 18, 2008 reorganization meeting. He could not recall whether the Board went

into closed session that evening. To the best of his recollection, he does not believe that the Board considered or discussed Tri-Tech that evening, or that the Board authorized the respondent to meet with Tri-Tech. The respondent did not tell him that he was going to meet with Tri-Tech the next day. Mr. Reilly testified that he first learned of the proposed settlement at the Board's special meeting the following week. Mr. Reilly stated that the Board was informed that there was a proposed settlement for \$3.2 to 3.5 million. Mr. Reilly was not contacted by the OFAC, but is aware of its report. He stated that Nutley filed a corrective action plan and read the report in public. Mr. Reilly also testified that the Board appealed the findings in the report, but the appeal was not successful.

On cross-examination, Mr. Reilly stated that, according to Board policy, the Superintendent and the Board President have direct access to counsel; other Board members are supposed to go through the Board President or the Superintendent when they have questions for counsel. Mr. Reilly stated that he was not present when the respondent had a phone call with the Board attorney in or around April 12, 2008 in order to ascertain the parameters for meeting with Tri-Tech.

Joseph Zarra is a resident of Nutley and has been the Superintendent for five years. He testified that the Board appointed a subcommittee to negotiate with Tri-Tech. He estimated that he attended two out of four of the subcommittee's meetings and stated, "I don't recall they amounted to much." Mr. Zarra attended the April 24, 2008 reorganization meeting, but did not recall whether there was an Executive Session that night or whether there was any discussion regarding a settlement with Tri-Tech. Mr. Zarra recalled that when the meeting was over, he spoke with the respondent and Board counsel.

According to Mr. Zarra, the respondent told him that he was meeting with Board counsel the next morning, April 25th, and he (Mr. Zarra) might want to stop by. Mr. Zarra noted that the school was closed at the time for Spring Break. Mr. Zarra testified that he went to the office the next morning, then met with the respondent and Board counsel at counsel's law office around 10:00 or 11:00. During the meeting, the respondent did not ask for authorization to offer Tri-Tech a settlement and did not indicate that he would be meeting with Tri-Tech later that day. He was not aware that the respondent met with Tri-Tech and was not asked to join the meeting with Tri-Tech. The respondent did not speak with Mr. Zarra on April 26th or April 27th. Mr. Zarra became aware of the meeting the following Monday at the Board's meeting, April 28th. The Board attorney presented a settlement offer from Tri-Tech to the Board.

Mr. Zarra testified that his statements to OFAC investigators were consistent with his testimony before the Commission. He further stated that the Board submitted a corrective action plan to the OFAC. As for an appeal of the OFAC's findings, Mr. Zarra stated that the Board appealed the financial penalty. Citing to Exhibit C-1, Mr. Zarra referred to Conclusion #2: that the Board's 2001 contract with Tri-Tech did not meet the requirements for a contract bidding exemption and consequently, the Board was required to refund \$326,004.47 in State aid. The first appeal was denied. The Board did not appeal Conclusion #5, that "Dr. Casale may have exceeded his authority by meeting with the Tri-Tech before he started his term as board president." (Exhibit C-2 at page 9)

On cross-examination, Mr. Zarra acknowledged that he was contacted by an investigator, William Wilks, but did not recall that Mr. Wilks asked him three specific questions. Neither did Mr. Zarra recall telling the investigator that he would send him a statement. Mr. Zarra restated that he and the respondent had a conversation at the reorganization meeting; then they met the next day at the Board counsel's office and there was a discussion of settling before going to court.

Complainants' counsel moved Exhibit C-2 into evidence without objection: a copy of Judge Kennedy's Superior Court decision in the matter entitled Tri-Tech Environmental Engineering, Inc. v. Nutley Board of Education, Dkt. No. L-009675-08.

After presentation of the complainants' case, counsel for the respondent moved for dismissal of the complaint, asserting that there had been no evidence to support a potential finding of violation. After deliberation, the Commission denied the motion; respondent's case moved forward.

William Wilks is the former Chief of Police from Verona and served as a public law enforcement officer for 30 years. He has been a private investigator for five years and is the owner of Veracity Expert Investigation Services. On February 23, 2009, he spoke with Mr. Zarra by telephone. Mr. Wilks testified that he asked Mr. Zarra three questions. During his testimony, he referred to a document which contained the three questions.² Mr. Wilks stated that it is extremely important to be precise with questions during an investigation. According to Mr. Wilks, the third question he asked was, "Is it fair to say that Dr. Casale's intentions in trying to reach a settlement with Tri-Tech, in light of the fact that he received legal advice that allowed him to do so, that he had the best interest of Nutley's Board of Education at heart? [sic]" The second question he asked Mr. Zarra was, "Is it fair to say that Mr. Casale advised you, directly or indirectly, that he had received legal advice that allowed him to move forward into a discussion and possible settlement with Tri-Tech in order to avoid any further expense to the Board of Education, as would be the case if the matter went to arbitration?" The first question Mr. Wilks asked Mr. Zarra was, "Are we comfortable in saying that you were aware that Philip Casale was going to sit down with Tri-Tech in an attempt to negotiate a settlement?"

Mr. Wilks testified that in response to the first question, Mr. Zarra replied that he would send the investigator a statement "to that effect" meaning, that he was aware that the respondent was going to meet with Tri-Tech. However, Mr. Wilks testified that he never received Mr. Zarra's statement. On cross-examination, Mr. Wilks read from the second page of the report wherein he wrote, "He went on to say that the first time he knew of the proposed settlement was when [Board counsel] made the recommendation."

Respondent Casale has served on the Board for 12 years. He testified that at the conclusion of the Board's reorganization meeting on April 24, 2008, he was approached by the owner of Tri-Tech and asked if the Board would be available to settle [the outstanding contract

² Questioning from the Commission established that the witness was referring to a report which he wrote. However, the report was not submitted to the Commission. Counsel for the complainants did not object to the witness refreshing his memory with the aid of the report. After the hearing, a copy of the report was provided to the Commission.

claim] before the parties went to binding arbitration the following Tuesday. After his conversation with Tri-Tech's owner, the respondent approached Superintendent Zarra and the Board attorney and told them that Tri-Tech was interested in settling. The Board's counsel suggested they meet in his office the next morning (Friday). Dr. Casale testified that on Friday morning, he received a document from Tri-Tech's owner which he brought with him to counsel's office. Mr. Zarra was present at the meeting and "there was a conversation." Dr. Casale stated that it was too soon to call a special meeting of the Board; there was a full Board meeting already scheduled for Monday (April 28th). Dr. Casale stated that he left the meeting and went home.

The respondent testified that about 1:00 or 2:00 pm that day, he received a call from the Board attorney asking him to be at the Board's office around 2:00 pm. The respondent said that he "showed up" and "there was an exchange of documents between the attorneys [for the Board and Tri-Tech]." The respondent stated that he knew it would be presented to the full Board at the coming meeting. He testified that his only input was that any settlement had to be consistent with the Board's 2006 referendum. The respondent stated that he made no personal promises and took no private action. The settlement proposal was brought on the eve of the binding arbitration. The Board voted on the proposed settlement and it passed. The respondent stated that this did not have anything to do a recommendation from him.

The respondent testified that Mr. Zarra was not unaware of the meeting with Tri-Tech. In this connection, Dr. Casale reasons that Mr. Zarra was present at the morning meeting with Board counsel on April 25th and he knew that there would be a follow-up meeting. That afternoon, the respondent stated that the parties met in Mr. Zarra's office. Mr. Zarra had the key to the office and opened the door to allow them to meet and speak. The respondent stated that the parties exchanged documents at the meeting and the Board's counsel said that they would make a presentation to the Board. Dr. Casale later stated that the meeting was in the Board's conference room, which is not "some private place." The meeting was attended by Board counsel, the owner of Tri-Tech and the attorneys from Tri-Tech. Dr. Casale stated that he met for about 10 minutes with Board counsel first.

On cross-examination, the respondent explained that prior to April 24th, he had the occasion to speak with Tri-Tech's owner. Dr. Casale referred to the OFAC's report at Conclusion #5 that he met with Tri-Tech before becoming the Board President and stated that he disagreed with that finding. He testified that he hired Patrick Toscano to represent him and would not use the Board attorney to appeal the finding. He also testified that he reminded the OFAC investigator that he asked for permission to tape the interview and the tape differed from what was in the report, but OFAC did not change its determination that he met with Tri-Tech on April 15, 2008.

In this connection, the respondent testified that on April 15, 2008, which was election day, about 200 people were present for a post-election celebration in a public restaurant. Tri-Tech's owner was also there; he approached Dr. Casale and said that "it was too bad we couldn't settle this thing." The respondent testified that the next day, he contacted Board counsel and told him that he spoke with Tri-Tech's owner.

On cross-examination, the respondent testified that he informed Mr. Zarra that Tri-Tech’s owner talked with him at the reorganization meeting and when he and Mr. Zarra left the meeting with Board counsel the next morning, there was no follow-up meeting scheduled. Dr. Casale did not ask the Superintendent if he could enter into negotiations with Tri-Tech; neither did he ask the Board. When he was called later on Friday April 25th and asked to go to the Board offices, Dr. Casale stated that he did not reach out to Mr. Zarra because he assumed he would be there. He believed that they were just there to receive a presentation.

The respondent stated that the meeting was not a negotiation. Rather, the Board’s attorney was getting information from Tri-Tech to bring to the full Board. As for the discussion that ensued, the respondent characterized it as “lots of legalese between the attorneys.” He did not take part in the discussion about money. He testified that “We listened to what they had to say and the attorneys were going to ‘hammer out a document.’”

The respondent further testified that settlement discussions had reached an impasse. He believed there was little chance of prevailing in a binding arbitration. Having received the call from the Board’s attorney, he believed he would “get whatever documents they had and bring it before the full Board on Monday.” He believed it was best for the Board to get what was presented. The respondent stated that as the Board President, he did not reach out to the Superintendent or to the Business Administrator who was “acting” pursuant to the resignation of the former Business Administrator as of April 1. The respondent testified that he knew the acting Business Administrator would be present on Monday and he could not, in any event, have taken any action on Friday.

Complainants’ Exhibits³

C-1	OFAC Report, February 2009
C-2	Judge Kennedy’s Superior Court decision in the matter entitled <u>Tri-Tech Environmental Engineering, Inc. v. Nutley Board of Education</u> , Dkt. No. L-009675-08.

FINDINGS OF FACT

The Commission was able to discern the following facts based on the testimony, pleadings and all documents submitted.

1. At all times relevant to this complaint, the respondent was a member of the Board.
2. In 2001, the Board entered into a contract with Tri-Tech to perform construction management services in connection with renovations in the Board’s schools. (Exhibit C-1 at p. 2)
3. In late 2006/early 2007, the Board began considering a reduced scope of work for Tri-Tech in order to save costs and so notified Tri-Tech. (Exhibit C-1 at p. 2; Exhibit C-2 at p. 8)

³ Respondent’s counsel did not introduce any documents into evidence.

4. Tri-Tech disagreed that the original contract permitted the reduced scope of work. (Exhibit C-2 at p. 8)
5. The Board appointed a subcommittee consisting of Board President Olivo, Vice President Del Tufo, Superintendent Zarra, the Business Administrator and the Board attorney to negotiate with Tri-Tech to modify the terms of the contract.
6. Efforts to resolve the conflict failed; on July 19, 2007, Tri-Tech terminated the contract and filed an arbitration demand, claiming that the Board unlawfully blocked performance of the contract and sought \$3,600,081.07 in damages. (Id. at pp. 8, 10)
7. When the Board discussed potential settlements with Tri-Tech, it capped its potential settlement offer at \$750,000.
8. The Board was scheduled for binding arbitration with Tri-Tech in late April/early May 2008.
9. On April 15, 2008, the respondent had a casual conversation with the owner of Tri-Tech in a public setting which did not rise to the level of a “meeting,” “settlement discussion” or “negotiation.”
10. At the Board’s reorganization meeting on April 24, 2008, the respondent was voted Board President.
11. After the reorganization meeting on April 24, 2008, Tri-Tech’s owner approached the respondent and indicated a willingness to settle the outstanding contract claim before the parties went to binding arbitration, which was scheduled for the following week.
12. After his conversation with Tri-Tech’s owner, the respondent approached Superintendent Zarra and the Board attorney and told them that Tri-Tech was interested in settling. The Board’s counsel suggested they meet in his office the next morning (Friday).
13. On Friday morning, April 25, 2008, the respondent met with Board counsel and Mr. Zarra at counsel’s office to discuss a potential settlement.
14. Later that day, the Board’s counsel called the respondent and asked him to come to the Board’s office around 2:00 that day.
15. The respondent did not reach out to Mr. Zarra to inform him about the afternoon meeting. However, having met with the respondent and Board counsel earlier that day, Mr. Zarra should have been aware that a settlement was imminent.
16. The respondent reported to the Board’s office, as did Board counsel.
17. The respondent and Board counsel met with the owner of Tri-Tech and Tri-Tech’s attorneys and the parties exchanged documents.

18. None of the complainants was present for the meeting.
19. The respondent's participation in this meeting was limited and did not involve a discussion of dollar figures, except to caution the parties that the settlement had to be consistent with the Board's 2006 referendum. It was his understanding that the attorneys would "hammer out a document."
20. The proposed settlement was presented to the full Board on April 28, 2008 by the respondent and Board counsel.
21. The Board voted to adopt the proposed settlement.
22. The Settlement Agreement and Rider obligated the Board to pay \$2,725,000.000 to Tri-Tech and obligated the Board to retain Tri-Tech's services for a specified period of time. (Id. at p. 14)
23. Tri-Tech approved the Settlement Agreement and Rider on May 2, 2008. On May 5, 2008, the acting Board Secretary of Nutley signed the Settlement Agreement and Rider pursuant to a resolution adopted by the Board on the same date. (Id. at pp. 14-15)
24. The Resolution provided:

BE IT RESOLVED that the Nutley Board of Education authorize the Board Attorney to negotiate a settlement agreement between the Nutley Board of Education and Tri-Tech Environmental Engineering, Inc. settling the pending arbitration filed by Tri-Tech environmental Engineering, Inc., pursuant to the terms discussed in Closed Executive Session, and

BE IT FURTHER RESOLVED that the Nutley Board of Education approve said settlement agreement subject to review of the closing documents evidencing said settlement agreement by the Board Attorney and authorize the Assistant Business Administrator/Acting Board Secretary to issue the appropriate payment pursuant to the settlement agreement.

BE IT YET FURTHER RESOLVED that the approval of this settlement is expressly contingent upon the opinion of bond counsel that the settlement obligation can be funded from the 2006 referendum. (Id. at p. 15)

25. Pursuant to an enforcement action filed by Tri-Tech, the Superior Court ordered a rescission of the Settlement Agreement and Rider based upon unilateral mistake, finding, in part, that the Board "has no source with which to completely fund the settlement and because the settlement ... contains provisions that are contrary to law." (Id. at p. 30)

ANALYSIS

The Commission initially notes that, pursuant to N.J.S.A. 18A:12-29b, the complainants bears the burden of factually proving any violations of the Code of Ethics for School Board Members. The consolidated complaints include three factual allegations: 1) that on or about April 15, 2008, prior to becoming Board President and absent authorization from the Board, the respondent met with Tri-Tech for the purpose of arranging a settlement in connection with a lawsuit that Tri-Tech had filed against the Board; 2) that on April 25, 2008, the respondent met with Tri-Tech and the Board's attorney for the purpose of discussing a settlement proposal, without consulting the Superintendent and without authorization from the full Board; and 3) that on April 28, 2008, the respondent and Board counsel recommended to the Board that the proposed settlement be accepted. The complainants assert that the respondent's conduct violated N.J.S.A. 18A:12-24.1(c) and (e) of the Code of Ethics for School Board Members.

As set forth above in the Findings of Fact, the complainant failed to establish that on or about April 15, 2008, the respondent met with Tri-Tech for the purpose of arranging a settlement with Tri-Tech. The complainants offered no testimony as to this factual allegation and the respondent's version of the events, which the Commission finds no cause to discredit, differed significantly. Presumably, the complainants based their allegation on the OFAC's February 2009 report which, in this proceeding, is hearsay. While hearsay evidence is admissible pursuant to N.J.A.C. 1:1-15.5, it is also subject to the "residuum rule," which requires that findings be supported by a residuum of competent evidence. Matter of Tenure Hearing of Cowan, 224 N.J.Super. 737 (App. Div. 1988). Here, there was no competent evidence to support the complainants' version of what happened on April 15, 2008. As to the remaining factual allegations, the Commission makes its findings, as set forth above and applies these findings to the two provisions set forth below.

N.J.S.A. 18A:12-24.1(c) states:

I will confine my board action to policy making, planning, and appraisal, and I will help to frame policies and plans only after the board has consulted those who will be affected by them.

All Board members and former Board members in this matter testified that the Board had been considering the issue of a reduction in Tri-Tech's scope of work since the early part of 2007 and, in this connection, appointed a subcommittee to negotiate with Tri-Tech to modify the terms of the contract. It was not clear, however, what purpose the subcommittee was intended to serve, if any, once Tri-Tech filed its arbitration demand in July of 2007. Nevertheless, it is a fair assumption that upon the Board's reorganization on April 24, 2008, there was a new Board and all prior subcommittees no longer existed. Thus, on the eve of the arbitration, there is no evidence on this record that a subcommittee existed to discuss the parameters of a potential settlement, which was unquestionably a Board issue and concern.

The respondent credibly testified that on April 24, 2008, after the reorganization meeting, he was approached by the owner of Tri-Tech who indicated a willingness to settle the

outstanding contract claim before the parties went to binding arbitration. The respondent had just been elected President of the Board. The respondent then informed Superintendent Zarra and the Board attorney that Tri-Tech was interested in settling. The Board's counsel suggested they (the respondent, Board counsel and the Superintendent) meet in counsel's office the next morning, April 25th, which they did. Notably, the complainants offered no testimony or evidence to counter the respondent's version of events on April 24th and the morning of April 25th. Any contention that the respondent's actions to this point were outside the scope of his duties as the Board President would be easily rejected.

It is the respondent's presence at the afternoon meeting on April 25th which apparently drives the complaints in this matter, as the complainants assert in their respective complaints that the respondent attended the meeting so that he could "negotiate" with Tri-Tech. The respondent specifically rejected this characterization of what took place that day. The complainants offered no testimony to rebut the respondent's repeated statement that he attended the meeting, with Board counsel, in order to receive Tri-Tech's offer of settlement, but that the attorneys would "hammer out a document." Indeed, the resolution set forth at Factual Finding #24 specifically states that the Board gave counsel this authority. Therefore, the Commission finds that respondent's attendance at the meeting on the afternoon of April 25, 2008 was not outside the scope of his duties as the Board President. Neither was the respondent's presentation of the settlement proposal at the April 28th Board meeting outside of his duties as Board President. The Commission further finds that such action is indeed related to the respondent's policy making and planning function. Accordingly, the Commission therefore finds that the complainants have not shown that the respondent's actions violated N.J.S.A. 18A:12-24.1(c).

The complainants also contend that the respondent violated N.J.S.A. 18A:12-24.1(e), which provides:

I will recognize that authority rests with the board of education and will make no personal promises nor take any private action that may compromise the board.

"Private action" means any action taken by a member of a district board of education that is beyond the scope of the duties and responsibilities of the member. N.J.A.C. 6A:28-7.1. It is noted, however, that in Marc Sovelove v. Paul Breda, Mine Hill Twp. Bd. of Ed., C49-05 (September 26, 2006), the Commission found that a Board member's action cannot be both board action *and* private action. Conversely, if a board member's action is found to be private action it cannot constitute board action. Having found, above, that respondent's actions were reasonably within his duties as Board President, such action cannot also be considered "private." However, even assuming that the respondent's action in meeting with Tri-Tech on the afternoon of April 25th was "private action," the complainants have not demonstrated that this action was of such a nature that it could have compromised the Board. The fact that the Board *accepted and approved* the proposed settlement wholly undercuts the complainants' contention that the respondent, alone, was somehow responsible for what turned out to be an unfavorable agreement. Therefore, the Commission finds that the complainants have failed to establish that the respondent violated N.J.S.A. 18A:12-24.1(e).

DECISION

Based on the testimonial and documentary evidence, the Commission finds that the complainants failed to prove that the respondent violated N.J.S.A. 18A:12-24.1(c) and (e) of the Code of Ethics for School Board Members. Consequently, this consolidated matter is dismissed. This decision is a final decision of an administrative agency. Therefore, it is appealable only to the Superior Court--Appellate Division. See, New Jersey Court Rule 2:2-3(a).

Robert W. Bender
Chairperson

Resolution Adopting Decision – C02-09, C04-09, C05-09 and C06-09 Consolidated

Whereas, the School Ethics Commission has considered the pleadings filed by the parties, the documents submitted in support thereof, and the testimony of the parties from its hearing on February 23, 2010; and

Whereas, at its meeting of February 23, 2010, the Commission found that the complainants failed to prove that the respondent violated N.J.S.A. 18A:12-24.1(c) and (e) of the Code of Ethics for School Board Members; and

Whereas, at its meeting on March 23, 2010, the Commission agreed that the within decision accurately memorializes its findings and recommendations; and

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

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.

Joanne Boyle, Executive Director