

The matter was scheduled for a probable cause review by the Commission on August 25, 2009, but was adjourned because the Commission did not have a quorum to consider the complaint. The matter was rescheduled for the Commission's meeting on September 22, 2009. After hearing testimony, however, the Commission voted to table a probable cause determination and request additional documents, as set forth below.⁴ At its meeting on October 27, 2009, and after consideration of post-review submissions, the Commission voted to find no probable cause to credit the allegation that the respondent violated the Act and further voted to find that the complaint was not frivolous.

SUMMARY OF PLEADINGS, DOCUMENTS AND INVESTIGATION

In the first amended complaint filed on June 11, 2008, the complainant asserts that the respondent, who is in charge of Human Resources in the district: made illegal appointments; was appointed to the position of Assistant Superintendent without proper credentials; is stealing public funds and is making administrative decisions relevant to public education without proper certification. The complainant alleges respondent is using his position to obtain unwarranted privileges and hide corrupt activities. In the second amended complaint filed on June 17, 2008, the complainant asserts that the respondent has obtained salary illegally. The complainant asserts the respondent violated N.J.S.A 18A:12-24(b).

The respondent denies that at any time he violated N.J.S.A 18A:12-24(b). He maintains that his appointments were legal, that his certification was proper (First Answer at paragraph 38) and further states that numerous documents have been made available to the complainant through Open Public Records Act (OPRA) procedures. The respondent counterclaims that the within complaint was motivated by the complainant's inability to obtain documents through OPRA procedures, and he is well aware, in this regard, that the respondent is not the Custodian of Records. (Id. at Counterclaim, paragraph 4) Accordingly, he requests that the complainant be sanctioned.

The Commission invited the parties to attend its meeting on September 22, 2009 to aid in its investigation of this complaint. The complainant attended the meeting, along with his witness, Richard Rivera⁵. The respondent did not attend.

Mr. Valdes testified that the respondent violated N.J.S.A. 18A:12-24(b) by securing unwarranted privileges, by being hired without the proper qualifications and by using his fraudulent hiring to acquire unwarranted salary increases and make administrative decisions without being qualified to do so. Mr. Valdes asserted that there is no proof that the respondent had the proper certification to obtain his position. Yet, he has been represented in this matter by the Board's attorney and the respondent has presented no evidence to prove that he was hired legally. Mr. Valdes asserted that there was no contract in place when the respondent was hired in 2003 [to the position of Assistant Superintendent] and he was not covered by the collective

⁴ Former Chairperson Paul C. Garbarini appointed Commissioner Bender as Acting Chairperson to preside over the probable cause proceedings on September 22, 2009. Mr. Garbarini recused himself from consideration of this matter and left the room.

⁵ The Commission determined that Mr. Rivera did not have any first-hand knowledge of the underlying events which form the basis of this complaint. Rather, he had made some requests for documents from the District pursuant to the Open Public Records Act.

bargaining agreement. With respect to the documents submitted by Mr. Valdes in reply to the respondent's counterclaim, Mr. Valdes acknowledged that his voluminous response was not relevant to the complaint, but was triggered by the respondent's allegations that the complaint was disingenuous.

By letter dated September 23 2009, the Commission requested that the respondent provide the following documents:

- (1) Copies of the respondent's certificate of eligibility for a school administrator's endorsement; provisional certificate and standard administrative certificate with a school administrator's endorsement (Respondent's Answer, August 19, 2008 at paragraph 43); and
- (2) A copy of the respondent's employment contract, with salary details, for the 2003-2004 school year, together with any board minutes confirming the board's appointment to the position of Assistant Superintendent in Charge of Personnel.

Additionally, by letter dated October 2, 2009, the complainant was accorded the opportunity to provide the Commission, by October 15, 2009, with the names of persons that he believed could assist the Commission in its investigation by providing testimony relative to the issues before the Commission, as set forth below.

By letter dated October 9, 2009, respondent's counsel forwarded the following documents to the Commission:

- The respondent's certificate of eligibility for school administrator certification, issued June 2003;
- The respondent's provisional school administrator certificate, issued March 2004;
- The respondent's standard school administrator certificate, issued February 2005;
- A contract dated April 1, 2004 between Mr. Caputo and the Board; and
- Meeting minutes for a Special Meeting dated July 1, 2003 approving the respondent's appointment to the position of Assistant Superintendent, effective July 1, 2003.

By letter dated October 13, 2009, the complainant provided the Commission with the following names of persons which he asserts to have personal knowledge of information relative to the respondent's hiring in 2003 and his certifications:

- Stanley Unger, Superintendent of Union City School District;
- Anthony Dragona, Interim Board Secretary;
- Christopher F. Irizarry, Commissioner of Recreations and Parks for Union City and former Board Secretary;
- Felina Del Nodal, former Board President;
- Leonard Calvo, former Board President;
- Eva Festa, Secretary;

- John J. Hart, Chief of Staff, Department of Education; and
- Robert Osak, former Hudson County Superintendent.

FINDINGS OF PROBABLE CAUSE

This matter was before the Commission for a determination of probable cause. That is, the Commission must determine, based on the documentary and testimonial evidence before it, whether probable cause exists to credit the allegations in the complaint. A finding of probable cause is not an adjudication on the merits, but, rather, an initial review whereupon the Commission makes a preliminary determination whether the matter should proceed to an adjudication on the merits, or whether further review is not warranted.

When making a probable cause determination, the Commission reviews the complaint and answer provided by the complainant and respondent, together with any relevant documentation. N.J.A.C. 6A:28-6.7(d)6. Additionally, in order to carry out the Commission's responsibilities under the School Ethics Act to determine whether probable cause exists, the Commission is authorized to conduct investigations, hold hearings, compel the attendance of witnesses and the production of documents and examine such witnesses under oath. N.J.S.A. 18A:12-28(b); N.J.A.C. 6A:28-6.7(b).

The Commission viewed the issues before it as follows: (1) Whether the respondent was properly certified at the time he was appointed to the position of Assistant Superintendent in Charge of Personnel in 2003; (2) Whether the respondent's appointment and salary were memorialized by contract; and (3) Whether the respondent is entitled to legal representation in this matter, given the responses to #1 and #2. The complainant asserts the respondent violated N.J.S.A. 18A:12-24(b), which provides:

- b. 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;

First, the respondent has provided the documentation to show that he possessed the necessary certificates to be appointed to his position of Assistant Superintendent. Second, the respondent has provided minutes from a special meeting held on July 1, 2003 showing that the Board approved:

[T]he appointment of Gerald Caputo to the position of Assistant Superintendent of Human Resources effective July 1, 2003. Salary in accordance with Non-Guide Personnel Schedule. (Union City Minutes of Special Meeting, July 1, 2003 and paragraph 29)

Additionally, the contract signed between respondent and the Board in April 2004 was for a term having commenced on July 1, 2003 and ending June 29, 2005 and included a specific compensation clause for an initial salary of \$146,700 for the 2003-2004 school year with a 4% salary increase on July 1, 2004. (Employee Contract, Assistant Superintendent in Charge of Personnel, dated April 24, 2004 at pages 1 and 3.) Thus, based on the documents and testimony

placed on this record,⁶ the Commission finds no cause to credit the allegation that the respondent secured unwarranted privileges, advantages or employment for himself, members of his immediate family or others in violation of N.J.S.A. 18A:12-24(b) either by virtue of his compensation received or by virtue of the legal representation which the Board provided for him. Accordingly, the Commission finds no cause to credit the allegation that the respondent violated N.J.S.A. 18A:12-24(b).

In so finding, the Commission notes that to the extent the complainant maintains that the respondent's initial appointment in July 2003 was improper, such allegation implicates statutes which are not within the jurisdiction of the School Ethics Commission. Moreover, such an allegation would be raised against the Board of Education pursuant to N.J.S.A. 18A:6-9, since the Board, as the respondent's employer, is responsible for ensuring that all employees are appointed in accordance with the law. Similarly, to the extent that the complainant maintains that the certifications issued to the respondent were not in accordance with State law or regulation, any such cause of action is not with this Commission. For these reasons, the Commission finds no reason to subpoena the testimony of the persons named by the complainant.

COUNTERCLAIM/REQUEST FOR SANCTIONS

The respondent counterclaimed in his answer that the complaint was frivolous.⁷ The Commission accorded the complainant an opportunity to respond to that allegation. At its meeting on October 27, 2009, the Commission considered the respondent's request that the Commission find that the complaint was frivolous and impose sanctions pursuant to N.J.S.A. 18A:12-29(e), but declined to find that the complaint herein was frivolous. Although the Commission recognizes that the complainant has a history of legal proceedings with the Union City Board of Education, it does not find that the complainant "[c]ommenced, used or continued [this matter] in bad faith, solely for the purpose of harassment, delay or malicious injury;" or that the complainant "knew, or should have known," that the matter "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." N.J.A.C. 6A:28-1.2. For the foregoing reasons, the Commission finds that the complaint is not frivolous and denies the respondent's request for sanctions against the complainant.

⁶ In letters dated October 13 and 14, 2009, the complainant appears to question the legitimacy of the documentation presented by respondent's counsel. The Commission, therefore, specifically states that it accepts as authentic and valid documentation which is submitted by an attorney who owes a duty of candor to this tribunal.

⁷ In a correspondence dated October 19, 2009, the complainant questioned why the respondent's counterclaim for sanctions was accepted. Although the Commission's newly-adopted regulations prohibit the filing of counterclaims at N.J.A.C. 6A:28-7.2(d), there was no such prohibition in the prior rules that were applied in this matter. (See, footnote #1) Moreover, N.J.S.A. 18A:12-29(e) specifically authorizes the Commission to consider whether a complaint is frivolous and whether the complainant should be subject to sanctions.

NOTICE

Pursuant to N.J.S.A. 18A:12-29b, the Commission hereby notifies the complainant and respondent that it finds no probable cause to credit the allegations that the respondent violated N.J.S.A. 18A:12-24(b) of the Act and the Commission dismisses the complaint. 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 – C22-08

Whereas, the School Ethics Commission has considered the pleadings filed by the parties, the documents submitted in support thereof, the testimony presented on September 22, 2009 and the documents submitted to the Commission thereafter; and

Whereas, at its meeting on October 27, 2009, the Commission found no probable cause to credit the allegation that the respondent violated the School Ethics Act, N.J.S.A. 18A:12-24(b) and further voted that the complaint was not frivolous; and

Whereas, the Commission dismissed the complaint; and

Whereas, the Commission directed its staff to prepare a notice consistent with the aforementioned conclusion; and

Whereas, at its meeting on November 24, 2009 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 it 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 it public meeting on November 24, 2009.

Joanne Boyle, Executive Director