

***Before the School Ethics Commission
Docket No.: C08-19
Decision on Motion to Dismiss***

***Peter Franco,
Complainant***

v.

***Denis Wilbeck,
Bayonne Board of Education, Hudson County,
Respondent***

I. Procedural History

This matter arises from a Complaint that was filed on February 4, 2019, by Peter Franco (Complainant), alleging that Denis Wilbeck (Respondent), a member/Trustee of the Bayonne Board of Education (Board), violated the School Ethics Act (Act), *N.J.S.A. 18A:12-21 et seq.* By correspondence dated February 7, 2019, Complainant was notified that the Complaint was deficient, and required amendment before the School Ethics Commission (Commission) could accept his filing. On February 26, 2019, Complainant cured all defects and filed an Amended Complaint (Complaint) that was deemed compliant with the requirements detailed in *N.J.A.C. 6A:28-6.3*. The Complaint alleges that Respondent violated *N.J.S.A. 18A:12-26* in Count 1, *N.J.S.A. 18A:12-24(b)* and *N.J.S.A. 18A:12-24(d)* in Count 2, and *N.J.S.A. 18A:12-24(c)* in Count 3.

On March 5, 2019, the Complaint was served on Respondent, via regular and certified mail, notifying him that charges were filed against him with the Commission, and advising that he had twenty (20) days to file a responsive pleading. On March 28, 2019, Respondent filed a Motion to Dismiss in Lieu of Answer (Motion to Dismiss). On April 18, 2019, Complainant filed a response to the Motion to Dismiss.

The parties were notified by correspondence dated May 13, 2019, that this matter would be placed on the Commission's agenda for its meeting on May 21, 2019, in order to make a determination regarding the Motion to Dismiss. At its meeting on May 21, 2019, the Commission considered the filings in this matter and, at a special meeting on June 19, 2019, the Commission voted to grant the Motion to Dismiss in its entirety because Complainant failed to plead sufficient, credible facts to support a finding that Respondent violated *N.J.S.A. 18A:12-26* as alleged in Count 1, *N.J.S.A. 18A:12-24(b)* and *N.J.S.A. 18A:12-24(d)* as argued in Count 2, and/or *N.J.S.A. 18A:12-24(c)* as contended in Count 3.

II. Summary of the Pleadings

A. *The Complaint*

In Count 1, Complainant asserts that, while serving as Board Vice President, Respondent undertook employment for which he was compensated by the Bayonne School District (District), but did not list the Board/District as a source of income on his 2016, 2017, or 2018 Personal/Relative and Financial Disclosure Statements (Disclosure Statements) during those years. According to Complainant, Respondent “claims” to be an employee of the National Federation of High School Volleyball Officials Association (NFHSVOA), but received checks signed by the Board. According to the information appended to his Complaint, Respondent was paid one hundred twenty-six dollars (\$126.00) during the 2015-2016 school year, four hundred seventy-five dollars (\$475.00) during the 2016-2017 school year, and seventy dollars (\$70.00) during the 2017-2018 school year. Complainant alleges that Respondent violated *N.J.S.A.* 18A:12-26(a) because as a Board member, he is responsible for disclosing all sources of income.

In Count 2, Complainant asserts that, while serving as Board Vice President, Respondent used his official position as Chairperson of the Personnel Committee to secure employment for himself. More specifically, during the 2016, 2017, and 2018 school years, Patricia Longo, Volleyball Coach, hired Respondent to serve as a volleyball official. Coaching appointments for employees – including the Volleyball Coach – are accepted and approved by the Personnel Committee. Respondent, as a member of the Personnel Committee, has voted to approve the financial stipend for Ms. Longo. In this way, Complainant alleges that Respondent violated *N.J.S.A.* 18A:12-24(b). Complainant further asserts that Respondent violated *N.J.S.A.* 18A:12-24(d) because he is a “voting member of the Board which awarded a contract to the [NFHSVOA], an association that Respondent is employed by.”

In Count 3, Complainant asserts that Respondent, while serving as Board Vice President, acted in a matter where he had financial involvement which might have reasonably impaired his objectivity or independence of judgment. More specifically, Respondent officiated games that affected the District’s standings in the county and the State brackets and created a “lens of impropriety.” As such, Complainant alleges that Respondent violated *N.J.S.A.* 18A:12-24(c).

B. *Motion to Dismiss*

Following receipt of the Complaint, Respondent filed a Motion to Dismiss, and notes that while officials are scheduled to officiate games by the county assignor, in some instances the entity hosting the volleyball match is the entity that pays the officials. Respondent contends that he earned \$126.00 in 2015-2016; \$475.00 in 2016-2017; and \$70.00 in 2017-2018 for officiating District games. Furthermore, during the period from April 1, 2016 through May 1, 2018, Respondent only officiated a total of ten (10) matches in Bayonne on seven (7) dates. Only two (2) of those matches were varsity matches, and the remaining eight (8) games were junior varsity (three) and freshman (five). Freshman matches are considered instructional and only varsity teams may compete for the county and/or State titles.

Regarding Count 1, Respondent argues that he filed his 2016, 2017, and 2018 Disclosure Statements. He further argues that the enforcement of *N.J.S.A. 18A:12-26(a)* is within the sole jurisdiction of the Commission and, therefore, Complainant does not have standing to file such a Complaint. Even if Complainant has standing, Respondent argues he complied with the statutory responsibility to file his Disclosure Statements. Furthermore, Respondent's Disclosure Statements do not state that he is an employee of NFHSVOA – instead, NFHSVOA is listed as a source of income. During all relevant years, Respondent was *assigned to* games by the county assignor's organization (the NFHSVOA is the parent organization to the county assignor's organization, which is why NFHSVOA is listed as the source of income). Even though NFHSVOA is listed, Respondent has never earned, or come close to, the \$2,000.00 threshold in any of the years named.

As for Count 2, Respondent argues that he is not assigned to officiate games by Ms. Longo, and instead is assigned by a third-party organization (the county assignor's organization); therefore, Respondent did not receive any "privilege, advantage or employment" by virtue of Ms. Longo's appointment. According to Respondent, his assignment to Bayonne matches "was done totally randomly by the independent county assignor." However, Respondent does admit that, on a few occasions, Ms. Longo asked Respondent to step in and officiate matches – which were freshman and junior varsity matches – when she was unable to secure a volleyball official through the county assignor's organization. As for Ms. Longo, Respondent notes that she has been a coach since 1984, and has been appointed every year thereafter. Ms. Longo's employment "was in no way impacted by Respondent," and, instead, is attributable to her tenure and success as a coach. In addition, Respondent did not impact Ms. Longo's employment nor were his official duties impacted by officiating ten District games. Lastly, Respondent is not employed by the NFHSVOA, but is a member who receives his officiating assignments from the county assignors' organization. Therefore, Respondent argues there is insufficient evidence to establish a violation of *N.J.S.A. 18A:12-24(b)* and/or *N.J.S.A. 18A:12-24(d)*, and Count 2 should be dismissed.

Regarding Count 3, as stated above, Respondent officiated two varsity games in the District (Bayonne won a game and lost a game). The remaining junior varsity and freshman games are not included in the county and/or State standings. Therefore, Respondent could not have impacted the District's standings. Furthermore, there is nothing to suggest that Respondent was anything less than fair and objective while officiating. Based on this, Respondent argues there is insufficient evidence to establish a violation of *N.J.S.A. 18A:12-24(c)*, and Count 3 should be dismissed.

Finally, as soon as it was brought to Respondent's attention that officiating District games could be viewed as a conflict of interest, Respondent consulted with the Board's counsel and decided to reimburse the District/Board for the \$671.00 in fees that he had earned from officiating games in the District. In addition, he requested that the county assignor not assign him any future matches in Bayonne.

C. *Response to Motion to Dismiss*

In response to the Motion to Dismiss, Complainant maintains that Respondent's conflict was "created" when he took the oath as a Board member. Whether he impacted any of the teams is a "separate question." Complainant also asserts that based on the actions taken subsequent to the Complaint (return of money to the Board), it appears that a conflict did exist and has somehow escaped everyone's attention until he filed his Complaint. The fact that Respondent made restitution, does not excuse him from the conflict that existed for the three years in question. Lastly, Respondent violated the Act, and he cannot claim ignorance as a defense. Although the conflict has been "resolved," it does not negate the fact that it happened.

III. Analysis

A. *Standard for Motion to Dismiss*

In determining whether to grant a Motion to Dismiss, the Commission shall review the facts in the light most favorable to the non-moving party (Complainant), and determine whether the allegation(s), if true, could establish a violation of the Act. Unless the parties are otherwise notified, a Motion to Dismiss and any response is reviewed by the Commission on a summary basis. *N.J.A.C.* 6A:28-8.1 *et seq.* Thus, the question before the Commission is whether Complainant has alleged facts which, if true, could support a finding that Respondent violated *N.J.S.A.* 18A:12-26 as set forth in Count 1, *N.J.S.A.* 18A:12-24(b) and *N.J.S.A.* 18A:12-24(d) as argued in Count 2, and/or *N.J.S.A.* 18A:12-24(c) as contended in Count 3.

B. *Personal/Relative and Financial Disclosure Statements (Count 1)*

In Count 1, Complainant alleges that, while serving as Vice President of the Board, Respondent undertook employment with/for the Board, and was compensated for such employment. Although Respondent undertook this employment during calendar years 2016, 2017, and 2018, he failed to list the Board as a source of income on his Disclosure Statements for those years. According to the information appended to his Complaint, Respondent was paid one hundred twenty-six dollars (\$126.00) during the 2015-2016 school year, four hundred seventy-five dollars (\$475.00) during the 2016-2017 school year, and seventy dollars (\$70.00) during the 2017-2018 school year.

In his Motion to Dismiss, Respondent argues that Complainant does not have standing to file an alleged violation of *N.J.S.A.* 18A:12-26. However, even if Complainant did have standing, Respondent argues that he appropriately listed all sources of income from which he received the threshold amount set forth in the statute.

Contrary to Respondent's argument, the Commission finds that any person – including Complainant – may file a Complaint against a school official who he/she believes may have violated a provision(s) of the Act, which necessarily includes *N.J.S.A.* 18A:12-26. As a result, Complainant has standing to assert a violation of *N.J.S.A.* 18A:12-26.

As for the asserted violation of the Act in Count 1, *N.J.S.A.* 18A:12-26(a)(1) requires all school officials to disclose, on an annual basis, a financial disclosure statement with the Commission that specifies, among other things, “[e]ach source of income, earned or unearned, *exceeding \$2,000.00* received by the school official” and/or a member of his immediate family during the preceding calendar year. School officials are also required to disclose, “[e]ach source of *fees and honorariums* having an aggregate amount *exceeding \$250* from any single source *for personal appearances, speeches or writings* received by the school official” and/or a member of his immediate family. *N.J.S.A.* 18A:12-26(a)(2).

After review of Complainant’s allegations, the Commission finds that even if the facts as alleged in the Complaint are proven true by sufficient credible evidence, they would not support a finding that Respondent violated *N.J.S.A.* 18A:12-26. In order for Respondent to have been required to disclose the Board/District as a “source of income” on his Disclosure Statements, he needed to have received in excess of two thousand dollars (\$2,000.00) in any given school year. Based on the documentation provided by Complainant, Respondent never met this monetary threshold. In addition, the payments provided to Respondent by the Board/District cannot be regarded as “fees” for “personal appearances, speeches or writings” within the meaning of *N.J.S.A.* 18A:12-26(a)(2). Therefore, the Commission finds that the alleged violation of *N.J.S.A.* 18A:12-26 should be dismissed.

C. *Allegations of Prohibited Acts*

In Count 2 and Count 3, Complainant argues that Respondent violated *N.J.S.A.* 18A:12-24(b) (Count 2), *N.J.S.A.* 18A:12-24(c) (Count 3), and *N.J.S.A.* 18A:12-24(d) (Count 2). These provisions of the Act provide, in pertinent part:

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;

c. 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 financial involvement that might reasonably be expected to impair his objectivity or independence of judgment. 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;

d. No school official shall undertake any employment or service, whether compensated or not, which might reasonably be expected to prejudice his independence of judgment in the exercise of his official duties;

i. *Count 2*

In Count 2, Complainant asserts that, while serving as Board Vice President, Respondent used his official position as Chairperson of the Personnel Committee to secure employment for

himself. More specifically, by approving the appointment of Ms. Longo to serve as Volleyball Coach, she, in turn, “hired” Respondent to serve as a volleyball official. In this way, Complainant alleges that Respondent violated *N.J.S.A. 18A:12-24(b)*. Complainant further asserts that Respondent violated *N.J.S.A. 18A:12-24(d)* because he is a “voting member of the Board which awarded a contract to the [NFHSVOA], an association that Respondent is employed by.”

In his Motion to Dismiss, Respondent argues that he is not assigned to officiate games by Ms. Longo, and instead is assigned by a third-party organization (the county assignor’s organization); therefore, Respondent did not receive any “privilege, advantage or employment” by virtue of Ms. Longo’s appointment. In addition, Respondent notes that he is not employed by the NFHSVOA, but is a member of this organization and receives his officiating assignments from the county assignors’ organization. Therefore, Respondent argues that there is insufficient evidence to establish a violation of *N.J.S.A. 18A:12-24(b)* and/or *N.J.S.A. 18A:12-24(d)*.

To credit the alleged violation of *N.J.S.A. 18A:12-24(b)*, the Commission must find evidence that Respondent used or attempted to use his official position to secure an unwarranted privilege, advantage or employment for himself, members of his immediate family, or “others.”

In order to credit the alleged violation of *N.J.S.A. 18A:12-24(d)*, the Commission must find evidence that Respondent engaged in employment or service, regardless of whether compensated, which might reasonably be expected to prejudice his independence of judgment in the exercise of his official duties.

Based on its review of Complainant’s allegations, the Commission finds that even if the facts as alleged in the Complaint are proven true by sufficient credible evidence, they would not support a finding that Respondent violated *N.J.S.A. 18A:12-24(b)*. More specifically, there are insufficient facts alleged to support a finding that Respondent’s involvement in the appointment of Ms. Longo resulted in an “unwarranted” privilege, advantage, or employment to Ms. Longo. Instead, the insinuation appears to be that Respondent’s involvement in the appointment of Ms. Longo resulted in Ms. Longo, in turn, “hiring” Respondent to serve as a volleyball official. However, even if Ms. Longo “hired” Respondent to officiate a select few games over the course of several school years, the Commission would have to find that Respondent’s actions as a Board member and a member of the Personnel Committee were made in anticipation of being assigned games by Ms. Longo – a person who is not regularly responsible for his official assignments – at some unforeseeable time or place. The Commission finds this insinuation to be unsupported by the facts alleged.

The Commission further finds that, even if the facts as alleged in the Complaint are proven true by sufficient credible evidence, they would not support a finding that Respondent violated *N.J.S.A. 18A:12-24(d)*. The stated basis for the alleged violation of this provision is that Respondent is a “voting member of the Board which awarded a contract to the [NFHSVOA], an association that Respondent is employed by.” However, these facts do not demonstrate that Respondent’s *employment as a volleyball official*, whether in or out of the District, prejudices his independence of judgment in the exercise of *his official duties as a Board member*. To sustain a

violation, Complainant needed to provide facts evidencing that Respondent's service as a volleyball official negatively impacted his independence of judgment as a Board member.

Therefore, and for the reasons set forth above, the Commission finds that the alleged violations of *N.J.S.A.* 18A:12-24(b) and *N.J.S.A.* 18A:12-24(d) in Count 2 should be dismissed.

ii. Count 3

In Count 3, Complainant asserts that because Respondent officiated games that affected the District's standings in the county and the State brackets, he acted in a matter where he had financial involvement which might have reasonably impaired his objectivity or independence of judgment in violation of *N.J.S.A.* 18A:12-24(c). In his Motion to Dismiss, Respondent notes that he only officiated two (2) games which could not have possibly affected the District's county and/or State standings and, moreover, there is nothing to suggest that Respondent was anything less than fair and objective while officiating. As a result, this allegation should be dismissed.

To credit the alleged violation of *N.J.S.A.* 18A:12-24(c), the Commission must find evidence that Respondent acted in his official capacity in a matter where he, or a member of his immediate family, had a direct or indirect financial involvement that might reasonably be expected to impair his objectivity, or in a matter where he had a personal involvement that created some benefit to him, a member of his immediate family, or to "others."

After review of Complainant's allegations, the Commission finds that even if the facts as alleged in the Complaint are proven true by sufficient credible evidence, they would not support a finding that Respondent violated *N.J.S.A.* 18A:12-24(c). Although Respondent is a Board member, there is nothing in the Complaint to suggest that, while officiating volleyball games – whether in or out of the District – he was acting in his "official capacity" as a Board member. The crux of Complainant's Complaint is that Respondent's *outside* employment as a volleyball official causes a conflict of interest. However, *N.J.S.A.* 18A:12-24(c) envisions a violation only if a school official is acting "in his official capacity" in a matter in which he has personal and/or financial involvement. Absent facts to suggest that Respondent was acting in his "official capacity" as a Board member while he was officiating volleyball games, the Commission finds that the alleged violation of *N.J.S.A.* 18A:12-24(c) in Count 3 should be dismissed.

Notwithstanding the Commission's findings as set forth herein, the Commission agrees with Complainant that Respondent's service as a volleyball official in the District, regardless of whether he is/was compensated, and regardless of whether he is/was assigned by the county assignor's organization, is extremely problematic. Unfortunately, based on the information set forth in the Complaint, and the alleged violations of the Act, the Commission cannot find sufficient facts to sustain a violation. Had additional facts and/or provisions been alleged, the Commission may have reached a different result. In the future, and as Respondent has indicated he would, Respondent must abstain from officiating volleyball games in the District.

Accordingly, and granting all inferences in favor of the non-moving party (Complainant), the Commission has determined to **grant** the Motion to Dismiss in its entirety because

Complainant failed to plead sufficient, credible facts to support a finding that Respondent violated *N.J.S.A.* 18A:12-26 as alleged in Count 1, *N.J.S.A.* 18A:12-24(b) and *N.J.S.A.* 18A:12-24(d) as argued in Count 2, and/or *N.J.S.A.* 18A:12-24(c) as contended in Count 3.

IV. Decision

Based on the foregoing, and in reviewing the facts in the light most favorable to the non-moving party (Complainant), the Commission voted to ***grant*** the Motion to Dismiss in its entirety because Complainant failed to plead sufficient, credible facts to support a finding that Respondent violated *N.J.S.A.* 18A:12-26 as alleged in Count 1, *N.J.S.A.* 18A:12-24(b) and *N.J.S.A.* 18A:12-24(d) as argued in Count 2, and/or *N.J.S.A.* 18A:12-24(c) as contended in Count 3.

Pursuant to *N.J.S.A.* 18A:12-29(b), the Commission hereby notifies Complainant and Respondent that, for the reasons set forth above, this matter is dismissed. This decision is a final decision of an administrative agency and, therefore, it is appealable only to the Superior Court-Appellate Division. *See, New Jersey Court Rule 2:2-3(a).*

Robert W. Bender, Chairperson

Mailing Date: June 20, 2019

***Resolution Adopting Decision
in Connection with C08-19***

Whereas, at its meeting on May 21, 2019, the School Ethics Commission (Commission) considered the Complaint, the Motion to Dismiss in Lieu of Answer (Motion to Dismiss), and the response to the Motion to Dismiss submitted in connection with this matter; and

Whereas, at its meeting on May 21, 2019, the Commission discussed granting the Motion to Dismiss in its entirety for failure to plead sufficient, credible facts to support the allegations that Respondent violated *N.J.S.A.* 18A:12-26 as alleged in Count 1, *N.J.S.A.* 18A:12-24(b) and *N.J.S.A.* 18A:12-24(d) as argued in Count 2, and/or *N.J.S.A.* 18A:12-24(c) as contended in Count 3;

Whereas, at a special meeting on June 19, 2019, the Commission reviewed and voted to approve the within decision as accurately memorializing its actions/findings from its meeting on May 21, 2019; and

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

Robert W. Bender, Chairperson

I hereby certify that the Resolution was duly adopted by the School Ethics Commission at a special meeting on June 19, 2019.

Kathryn A. Whalen, Director
School Ethics Commission