Before the School Ethics Commission
OAL Docket No.: EEC-15476-19
SEC Docket No.: C13-19
Final Decision

I/M/O Eric Hibbs,
Marlboro Board of Education, Monmouth County

I. Procedural History

The above-captioned matter arises from a Complaint that was filed on March 4, 2019, by Craig Marshall (Complainant), a former member of the Marlboro Township Board of Education (Board), alleging that Eric Hibbs (Respondent), an administrator employed by the Board, violated the School Ethics Act (Act), *N.J.S.A.* 18A:12-21 *et seq*. More specifically, the Complaint avers that Respondent violated *N.J.S.A.* 18A:12-24(a) in Count 1, violated *N.J.S.A.* 18A:12-24(f) in Count 2, violated *N.J.S.A.* 18A:12-24(a), *N.J.S.A.* 18A:12-24(b), *N.J.S.A.* 18A:12-24(c), and *N.J.S.A.* 18A:12-24(d) in Count 3, and violated *N.J.S.A.* 18A:12-24(c) in Count 4.

At its meeting on April 26, 2019, and following a review and discussion of the parties' filings at a previous meeting, the Commission adopted a decision finding that the Complaint was timely filed; granting the Motion to Dismiss as to Count 1, Count 2, Count 4, and as to the alleged violations of *N.J.S.A.* 18A:12-24(a) and *N.J.S.A.* 18A:12-24(d) in Count 3; denying the Motion to Dismiss as to the alleged violations of *N.J.S.A.* 18A:12-24(b) and *N.J.S.A.* 18A:12-24(c) in Count 3; and finding the Complaint not frivolous, and denying Respondent's request for sanctions. The Commission also directed Respondent to file an Answer to Complaint (Answer) for the remaining allegations in the Complaint, which he did on August 23, 2019.

Thereafter, and at its meeting on October 25, 2019, the Commission adopted a decision finding probable cause for the alleged violations of *N.J.S.A.* 18A:12-24(b) and *N.J.S.A.* 18A:12-24(c) in Count 3. Based on its finding of probable cause, the Commission also voted to transmit the within matter to the Office of Administrative Law (OAL) for a plenary hearing and, pursuant to *N.J.A.C.* 6A:28-10.7(b), the attorney for the Commission (Petitioner) was charged with prosecuting the allegations in the Complaint which the Commission found probable cause to credit.

At the OAL, the matter was assigned to the Honorable Jacob S. Gertsman, Administrative Law Judge (ALJ Gertsman) for a contested case hearing. *Initial Decision (Amended)* at 4. On May 1, 2020, Respondent filed a motion for summary decision, which was opposed by Petitioner. *Id*. After reviewing the parties' submissions, ALJ Gertsman denied the motion because "there were genuine issues of material fact necessitating a hearing to determine if, and to what extent, [Respondent] violated the [Act]." *Id*.

After hearings on January 14, 2021, January 15, 2021, and January 22, 2021, Respondent filed a motion for involuntary dismissal on January 30, 2021; Petitioner submitted an opposition on April 26, 2021; and Respondent filed a reply brief on May 17, 2021. *Id* at. 4-5. Following review, ALJ Gertsman issued an order granting Respondent's motion for involuntary dismissal with respect to *N.J.S.A.* 18A:12-24(b), but denying the motion as to *N.J.S.A.* 18A:12-24(c).[1] *Id*. at 5. As a result, hearings were held on November 9, 2021, November 18, 2021, and December 6, 2021; the parties filed post-hearing briefs on February 9, 2022; Respondent filed a responsive brief on March 4, 2022; and Petitioner filed its response on March 14, 2022; and, thereafter, the record closed. *Id*.

On May 16, 2022, Respondent's counsel informed ALJ Gertsman of an Appellate Division decision related to "recantation of testimony" (*Metro Marketing, L.L.C. v. Nationwide Vehicle Assurance, Inc.*). Consequently, ALJ Gertsman reopened the record, and directed both parties to file submissions with their position on the applicability of that decision to this matter. Respondent filed his submission on May 18, 2022; Petitioner filed its submission on May 31, 2022; and then the record was closed again. *Id*.

On August 2, 2022, ALJ Gertsman issued an *Initial Decision (Amended)* detailing his findings of fact and legal conclusions.[2] The Commission acknowledged receipt of ALJ Gertsman's *Initial Decision* on the date it was issued (August 2, 2022); therefore, the forty-five (45) day statutory period for the Commission to issue a Final Decision was September 16, 2022. Prior to September 16, 2022, the Commission requested a forty-five (45) day extension of time to issue its decision so as to allow the Commission, which only meets monthly, the opportunity to receive and review the full record, including the parties' Exceptions (if any). Pursuant to *N.J.S.A.* 52:14B-10(c) and *N.J.A.C.* 1:1-18.8, and for good cause shown, the Commission was granted an extension until October 31, 2022.

Following a discussion at a special meeting on September 14, 2022, during which the full record was reviewed, the Commission voted, at a special meeting on October 17, 2022, to adopt the findings of fact from ALJ Gertsman's *Initial Decision (Amended*); to adopt the legal conclusion that, based on the evidence presented, Petitioner failed to prove that Respondent violated *N.J.S.A.* 18A:12-24(b) and/or *N.J.S.A.* 18A:12-24(c); and to adopt ALJ Gertsman's decision to dismiss the above-captioned matter.

II. Initial Decision

Involuntary Dismissal of the Alleged Violation of N.J.S.A. 18A:12-24(b)

In the June 30, 2021, order granting Respondent's motion for involuntary dismissal, which was incorporated in his *Initial Decision (Amended*), ALJ Gertsman concluded that

[1] The Commission notes it did not receive a copy of ALJ Gertsman's order granting Respondent's motion for involuntary dismissal with respect to *N.J.S.A.* 18A:12-24(b) until August 2, 2022.

[2] ALJ Gertsman issued an amended decision "solely to add [his] June 30, 2021, order on the motion for involuntary dismissal to the exhibits, which was inadvertently omitted from the initial decision."

Petitioner did not present sufficient evidence that Respondent "came up with the idea" to hire Dana Blair (Ms. Blair); instead, the suggestion emanated from Michael Ballone (Mr. Ballone), the Director of Curriculum. *Id*. at 7. In addition, Petitioner did not present sufficient evidence that Ms. Blair's hiring was unwarranted, even if it "may have been unconventional, given her lack of special education experience, and the fact that she did not directly apply or interview for that position … ." *Id*. In his review, ALJ Gertsman found that the testimony "indicated that [Ms. Blair] possessed the necessary credentials, and leadership and interpersonal skills, that would make her a good fit for the position, especially with guidance from a mentor [Bernard Bragen (Dr. Bragen)] with special education experience." *Id*. at 8. Further, although other directors who held this position prior to Ms. Blair, did not have a mentor, the "interview committee" thought that Ms. Blair would benefit from a mentor for the first year and this also "does not lead to the conclusion that [Ms.] Blair's hire was unwarranted," *Id*. Finally, Petitioner "did not present any credible evidence linking [Respondent's] support of [Ms.] Blair's candidacy to some sort of scheme to secure a paid mentorship for [Dr.] Bragen." *Id*.

In sum, ALJ Gertsman concluded that Petitioner "failed to make a prima facie case showing that [Respondent] violated *N.J.S.A.* 18A:12-24(b), such that he used his position as superintendent to secure unwarranted employment for [Ms.] Blair, that [Respondent] had a relationship with [Ms.] Blair that created a conflict of interest in recommending her to the Board for employment, or that [Respondent] recommended [Ms.] Blair to the Board as pretext for retaining [Dr.] Bragen." *Id*. Consequently, ALJ Gertsman ***concluded*** that "the testimony and exhibits presented by [Petitioner] failed to establish a prima facie case that [Respondent] violated *N.J.S.A.* 18A:12-24(b) by using his position as Superintendent to secure unwarranted employment for [Ms.] Blair … ." *Id*.

Alleged Violation of N.J.S.A. 18A:12-24(c)

Based on the testimonial and documentary evidence presented at the hearings in connection with the alleged violation of *N.J.S.A.* 18A:12-24(c), ALJ Gertsman issued the following ***findings of fact***:

1. While Dr. Bragen was the Superintendent of the Hazlet School District (Hazlet), his company Defined Learning Solutions (Defined), received payments for child study team trainings conducted in the Marlboro School District (Marlboro or District) in November 2016 and March 2017, for a total of $1,100.00.

2. The initial engagement of Defined occurred in 2016 after Mr. Ballone informed Respondent that the special education department did not have any programs planned for its professional development day. Respondent knew that Dr. Bragen had presented on learning strategies so he reached out to see if he could do that session.

3. Respondent did not impose Dr. Bragen on Robert Klein, a former Director of Special Services for the District.

4. All services provided by Dr. Bragen through Defined were done while he was on vacation or at other times when he was not being paid by his employer.

5. Dr. Bragen handed over day to day operations in Hazlet in the fall of 2017 and played a minimal role in the operations of the district from then until his official retirement on December 31, 2017. Dr. Bragen has not been involved in Hazlet since that date.

6. Hazlet paid Respondent $5,500.00, and AME Educational Consultants (AME) $9,500.00 for services provided in 2016 and 2017 while Dr. Bragen was Superintendent.

7. AME additionally provided services to Hazlet for which a payment of $2,500.00, was made on August 27, 2018. Dr. Bragen was not involved in the retention of AME for these services since he left the district on December 31, 2017.

8. All services provided by Respondent through AME were done while Respondent was on vacation or using personal days.

9. Dr. Bragen and Respondent were colleagues as fellow superintendents but were not friends. Further, once Dr. Bragen left Hazlet, he would have had no reason to interact with Respondent.

10. On February 22, 2018, after Dr. Bragen left Hazlet, Cindy Barr-Rague (Ms. Barr-Rague), the former Business Administrator (BA) for the District, and Christine Jelinsky (Ms. Jelinsky), the Assistant BA, attended a meeting of the Monmouth County Association of School Business Officials (MCASBO) where Dr. Bragen made a presentation pitching his company to aid District special education departments, on issues including staffing and efficiencies.

11. Once the decision was made to hire Ms. Blair as the new Director of Special Services in Marlboro, the need for her to have a mentor arose from the significant amount of change at one time in the department.

12. The idea to hire Dr. Bragen as Ms. Blair's mentor originated with Ms. Barr-Rague. During a conversation in her office, Ms. Barr-Rague told Respondent that she had an idea and stated that Dr. Bragen should be a mentor for Ms. Blair. Ms. Barr-Rague became familiar with Dr. Bragen when she and Ms. Jelinsky attended his MCASBO presentation.

13. Ms. Barr-Rague signed two certifications stating that she, not Respondent, recommended Dr. Bragen as Ms. Blair's mentor.

14. After Ms. Barr-Rague made the recommendation, Respondent did not know how to get ahold of Dr. Bragen since they had no personal or professional dealings dating to before the date that Dr. Bragen left Hazlet.

15. Once Respondent tracked Dr. Bragen down, a meeting was set up to see if he was interested in becoming a mentor. During that conversation, Respondent questioned Dr. Bragen about whether his day-to-day schedule would allow him to commit to the position and told Dr. Bragen that Ms. Barr-Rague recommended him to mentor Ms. Blair.

16. The Marlboro Board voted to hire Ms. Blair as the Director of Special Services and Dr. Bragen as her mentor at the June 19, 2018, Board meeting. While the recommendation to hire Dr. Bragen as Ms. Blair's mentor originated from Ms. Barr-Rague, Respondent made the formal recommendation to the Board as "the recommendation for anything on the agenda has to come from the [S]uperintendent."

17. Dr. Bragen was not the superintendent of Hazlet at the time of his hiring in Marlboro and had not been since he officially left on December 31, 2017.

18. Respondent did not disclose to the Board the work that AME did in Hazlet; however, his income from Hazlet was included in his 2018 FDS forms.

19. Dr. Bragen was paid $1,000.00, per month for his mentoring of Ms. Blair. The payment made from November 2018 through June 2019 totaled $12,000.00.

20. Ms. Barr-Rague submitted her resignation from Marlboro on Monday, October 29, 2019, which became effective on December 31, 2019.

Id. at 36-38.

In the "Legal Analysis and Conclusion" section of his *Initial Decision (Amended)*, and citing *I/M/O Famularo*, Asbury Park Board of Education, Monmouth County, Docket No. C23-96, ALJ Gertsman determined that the issue is whether "in connection with [Dr.] Bragen's hire as [Ms.] Blair's paid mentor, [Respondent] acted in his official capacity as Superintendent in a matter in which he had a personal involvement that might have been reasonably expected to impair his objectivity, in violation of *N.J.S.A.* 18A:12-24(c)." *Id*. at 41. Before more fully analyzing this provision, ALJ Gertsman noted that the Complaint filed by Mr. Marshall contained two notable inaccuracies. *Id*. at 42. First, Dr. Bragen was *not* the Hazlet Superintendent when he was approved by the Marlboro Board to serve as Ms. Blair's mentor (on June 19, 2018); and when Dr. Bragen was hired by the Marlboro Board, Respondent and his company (AME) were *not* "employed or retained by Hazlet as AME's last engagement in Hazlet was in 2017." *Id*. at 41-43. Further, the "August 27, 2018, engagement [in Hazlet] came after [Dr.] Bragen had left his position as superintendent and he had no involvement in [Hazlet's] retention of AME." *Id*. at 42.

In addition, ALJ Gertsman found that the decision to hire Dr. Bragen as Ms. Blair's "mentor originated with [Ms.] Barr-Rague, not [Respondent]." *Id*. at 44. Furthermore, despite Petitioner's argument that Respondent/AME offered services to Hazlet at the same time that Dr. Bragen/Defined offered services to Marlboro, "and that Marlboro's retention of [Dr.] Bragen/Defined … in June 2018 was a quid pro quo for" the longstanding relationship between Respondent and Dr. Bragen, ALJ Gertsman determined that "this argument fails as it is unsupported by the record." *Id*. at 44. More specifically, Petitioner's argument fails because: the credible testimony of both Dr. Bragen and Respondent is that "they were only colleagues and not friends"; they had not been in contact for "at least one year" when Respondent wanted to reach out to Dr. Bragen about serving as Ms. Blair's mentor; Respondent and Dr. Bragen both "provided credible testimony that there was no express or implied agreement that they trade off engagements in one district for engagements in another"; and Petitioner "has offered no documentary

evidence or credible testimony to demonstrate that such an agreement existed." Moreover, "the record is devoid of any evidence to suggest that either [Respondent] or [Dr.] Bragen directed their respective districts to retain the other's company." *Id*. at 44-45.

Regarding Petitioner's argument that approximately the same amount of money was paid to Dr. Bragen and Respondent by their respective school districts, this argument also fails because "the record lacks any documentary evidence or credible testimony to demonstrate that the mere fact that the amounts paid are close in number is in anyway connected to the services provided to the respective districts or any alleged agreement between [Respondent] and [Dr.] Bragen." *Id*. at 45. Furthermore, Petitioner's argument that Respondent's "failure to notify the Board of AME's previous consulting contracts is 'fatal to this case' is meritless," as Petitioner "has pointed to no statute, regulation or any of its decisions that would have put [Respondent] on notice that, in addition to this financial disclosure statement, he was required to specifically inform the Board of his past consulting engagements in Hazlet or face an ethics charge for not doing so." *Id*. at 45-46.

In summary, ALJ Gertsman notes that although Respondent and Dr. Bragen knew each other as "fellow superintendents," they were not friends; the record does not contain any evidence to support that the two administrators had "an express or implied agreement that they trade off engagements in one district for engagements in another, or that they directed engagements in their districts to the other"; the fact that they were "leading their respective districts … is insufficient to establish that any relationship existed between" the two administrators; and, therefore, ALJ Gertsman ***concludes*** Petitioner has failed to meet its burden of proving that a longstanding relationship existed between Respondent/AME and Dr. Bragen/Defined. *Id*. at 46.

As to Petitioner's assertion that Respondent hired Dr. Bragen as a mentor for Ms. Blair as a "quid pro quo" for Hazlet's previous retention of Respondent's company (AME), ALJ Gertsman ***concludes*** Petitioner has not met its burden to prove this assertion because: Petitioner has failed to meet its burden to support its argument that a longstanding relationship existed between Hibbs/AME and Bragen/Hazlet; Petitioner has failed to provide any evidence that there was an express or implied agreement between Respondent and Dr. Bragen to exchange services in their respective districts; and, importantly, the record demonstrates that the idea to hire Dr. Bragen originated with Ms. Barr-Rague, not Respondent. *Id*. at 46-47. The fact that the recommendation to hire Dr. Bragen emanated from Ms. Barr-Rague "disproves" the allegation that Respondent "acted to exchange the retention of [Dr.] Bragen as [Ms.] Blair's mentor for previous services in Hazlet by AME." *Id*.

Finally, and as for whether there could be a violation based on *Famularo*, and "[t]he violation is based on an actual relationship that a reasonable person would expect to create a conflict of interest," ALJ Gertsman found *Famularo* distinguishable because: there is no evidence that Respondent and Dr. Bragen were *ever* associated with each other publicly, and were not at the time Marlboro retained Dr. Bragen; "there was no 'actual relationship' [between Respondent and Dr. Bragen] that a reasonable person would expect to create a conflict of interest"; and Respondent and Dr. Bragen had not been in contact with one another in more than six months prior to the hiring of Dr. Bragen by Marlboro. *Id.* at 47. As such, ALJ Gertsman

concludes that this period of time (more than six months) is sufficient "to dilute any reasonable suspicion of favoritism"; and further concludes that the idea to retain Dr. Bragen originated with Ms. Barr-Rague, not Respondent, the retention of Dr. Bragen was not a quid pro quo for the previous engagements of AME in Hazlet, and Respondent did not have a direct or indirect financial involvement in the retention of Dr. Bragen that impaired his objectivity and did not have a personal involvement that created a benefit to anyone. *Id.*

Accordingly, ALJ Gertsman concluded that Respondent did not act in his official capacity as Superintendent in a matter in which he had a personal involvement that might have been reasonably expected to impair his objectivity, and/or one in which he had a personal involvement that created a benefit to an 'other,' in violation of *N.J.S.A.* 18A:12-24(c), and ***dismissed*** the Complaint. *Id*.

III. Exceptions

Petitioner's Exceptions
(filed September 6, 2022)

In its Exceptions, Petitioner argues that the *Initial Decision (Amended)* "is incorrect and must be overturned." More specifically, and regarding the violation *N.J.S.A.* 18A:12-24(b), Petitioner argues that ALJ Gertsman, "overlooked significant evidence that [Respondent] recommended unwarranted employment for [Ms.] Blair, an unqualified individual." According to Petitioner, Ms. Blair "did not meet the qualifications for the position of Director of Special Services" in that she never worked in special education or in special education administration at a multi-school district; did not have, despite it being stated in the job description, a valid New Jersey Certificate as a "Teacher of the Handicapped, Teacher of Students with Disabilities, School Social Worker, School Psychologist or Learning Disabilities Teacher Consultant"; did not have experience teaching special education; did not have experience as a child study team member or supervisor of special services; her knowledge of "applicable laws, regulations, [and] procedures governing special education was minimal"; and she was a vice principal for an elementary school for less than one year before she was recommended to be hired for the role of Director of Special Services, for "a large school district that faced multiple special education lawsuits every year."

In addition, the "hiring process for [Ms.] Blair significantly diverged from that" of her predecessor, in that her predecessor applied for the position, participated in two rounds of interviews and, in preparation for the second interview, she presented a PowerPoint, submitted a parent letter, presented a staff evaluation that described her educational philosophy, and provided a critique of an Individualized Education Plan. On the other hand, Ms. Blair "did not submit an application for the [Director of Special Services] position and did not attend any interviews for the position." As such, Petitioner submits that, contrary to Respondent's assertion, there is no evidence that Ms. Blair's hiring "was 'the end result of a rigorously vetting process.'" In addition to Ms. Blair's lack of qualifications for the position, Respondent made "countless misrepresentations to the Board and the public" about what led to her (Ms. Blair's) hiring, including his suggestion that there were no other qualified applicants for the position. Accordingly, Petitioner maintains that the evidence supports the conclusion that Respondent

violated *N.J.S.A.* 18A:12-24(b) when he recommended Ms. Blair for the Director of Special Services position.

As for the violation of *N.J.S.A.* 18A:12-24(c), Petitioner asserts that the "evidence presented during the hearing suggests that [Respondent] and his company AME offered services to Hazlet at the same time that [Dr.] Bragen and his company Defined offered services to Marlboro, and that Marlboro's retention of [Dr.] Bragen/Defined in June 2018 was a quid pro quo for this longstanding relationship." In support of its argument, Petitioner states, "Marlboro compensated [Dr.] Bragen/[Defined] approximately the same amount of money that Hazlet compensated [Respondent] and AME" during roughly the same period of time; and Respondent and Dr. Bragen "knew each other as members of the Monmouth County Superintendent's Round Table" and "have a long history of working with each other's school districts." In addition, according to testimony provided by a witness (Robert Klein, former Director of Special Services in Marlboro), Respondent "had been trying to find a place for [Dr.] Bragen."

Petitioner also notes that Respondent "never informed the [Board] regarding his consulting contracts at Hazlet," which is "fatal to the case since [Dr.] Bragen, Hazlet's then Superintendent, provided service to Marlboro during that same period." Furthermore, Petitioner contends that Respondent "presented the hearsay testimony of [Ms.] Blair and [Mr.] Ballone to support his [Respondent's] claim that he did not recommend hiring [Dr. Bragen]." There was also testimony about a "running joke" that Ms. Blair should thank Ms. Barr-Rague for Dr. Bragen's hiring; however, according to Petitioner, the testimony "lacks credibility" and should be "discounted as hearsay" because there is "no way to verify [Ms.] Barr-Rague's tone or intended meaning." Moreover, the "running joke" theory "contradicts [Ms.] Blair's testimony that [Ms.] Barr-Rague's statements should be taken at face value." Furthermore, Ms. Blair testified that "she had no direct personal knowledge about who recommended [Dr.] Bragen to mentor her, and she testified that she was not present for conversations between [Ms.] Barr-Rague and [Respondent] when [Ms.] Barr-Rague allegedly recommended [Respondent] to hire [Dr.] Bragen to mentor [Ms.] Blair." Not only was Ms. Blair not present, neither was Mr. Ballone. In addition, Ms. Jelinsky testified that, aside from attending a presentation in February 2018 where Dr. Bragen presented, and discussing the possibility of bringing in Dr. Bragen for a special education audit, Ms. Jelinsky "played no further role in bringing in [Dr.] Bragen," and testified she did not know who spoke to whom, and "was ordinarily not privy to conversations between [Ms.] Barr-Rague and [Respondent]."

According to Petitioner, Respondent "relies on a certification" that [Ms.] Barr-Rague "signed while she was undergoing cancer treatment." However, Ms. Barr-Rague "recanted" her certification, and testified that she did not recommend Dr. Bragen as a mentor, but rather recommended him to "evaluate the special services department," and did so shortly after observing his (Dr. Bragen's) presentation in February 2018. Per Petitioner, Dr. Bragen was hired in mid-June 2018, four months after Ms. Barr-Rague made the recommendation. Petitioner further submits, "There is a big difference between recommending that [Dr.] Bragen conduct an audit of the special services department and recommending that [Dr.] Bragen mentor [Ms.] Blair." Petitioner maintains that Respondent's denial that he hired Dr. Bragen as a quid pro quo "is belied by the record that clearly outlines the longstanding relationship between both AME/Hazlet and [Defined]." As such, Petitioner maintains that it has "produced sufficient

evidence demonstrating [Respondent's] violation" of *N.J.S.A.* 18A:12-24(c), as the pecuniary interest is "evident," and the long-standing relationship between Dr. Bragen and Respondent is "undeniable."

Finally, Petitioner asserts that Dr. Bragen's testimony should be stricken because he was not truthful. Petitioner notes that "While under oath, [Dr.] Bragen viewed his phone and read a communication about the subject matter of this hearing." During the hearing, Dr. Bragen told ALJ Gertsman that, during a brief recess, he looked at his phone, and saw a text message from the Hazlet school business administrator (BA). According to Dr. Bragen, the BA, a witness providing testimony, stated in the text message, "Deputy Attorney General Sadi Ahsanuddin was asking him [(BA)] if I [(Dr. Bragen)] was in Hazlet, if I charged the district for any work under [Define]." Thereafter, ALJ Gertsman asked Dr. Bragen to provide Respondent's counsel with a screen shot of the text message; however, Dr. Bragen provided a screenshot of an email, which does not reflect what the BA allegedly texted to Dr. Bragen. In light of this discrepancy, Petitioner maintains that Dr. Bragen "has irredeemably tainted his testimony and it should be stricken from the record in its entirety."

Based on the above, Petitioner contends the "[I]nitial [D]ecision must be rejected because" Respondent violated *N.J.S.A.* 18A:12-24(b) and *N.J.S.A.* 18A:12-24(c).

Respondent's Reply to Petitioner's Exceptions
(filed September 8, 2022)

Respondent argues that because ALJ Gertsman resolved this matter "on the basis of witness credibility," the Commission cannot reject the ALJ's findings "as to issues of credibility of lay witness testimony unless it is first determined … that the findings are arbitrary, capricious or unreasonable or are not supported by sufficient, competent and credible evidence in the record." Per Respondent, ALJ Gertsman's rulings on both alleged violations of *N.J.S.A.* 18A:12-24(b) and *N.J.S.A.* 18:12-24(c) "were based on his assessment of the witnesses' credibility and are entitled to the deference required" by the administrative procedure act, as well as precedent. Moreover, ALJ Gertsman's "findings were amply supported by the evidence in the record and should be adopted by the Commission."

As to the alleged violation of *N.J.S.A.* 18A:12-24(b), Respondent contends ALJ Gertsman dismissed this allegation because the "Commission's own witnesses and evidence failed to establish even a *prima facie* case that [Respondent] used his position to secure 'unwarranted' employment" for Ms. Blair. Respondent further contends, "The reasons for the ALJ's determination are explained, in detail, in [the order on involuntarily dismissal] which clearly is based on his assessment of the credibility of the Commission's own witnesses."

According to Respondent, "much of" Petitioner's argument "focuses on [Ms.] Blair's qualifications for appointment as Director of Special Services." However, Respondent argues Ms. Blair's "fitness for that job is not material *per se*." Furthermore, Petitioner did not provide any competent evidence to "refute [Respondent's] account of the events leading to [Ms.] Blair's appointment, which was certified to by numerous individuals with personal knowledge." Moreover, despite Petitioner's argument, Ms. Blair "held the certification legally required to

serve as a Director of Special Services" and, without more, this means "she had at least the minimum qualifications to perform the job." Respondent acknowledges that Ms. Blair " never served as a Director of Special Services, that other candidates who submitted applications for the position were not interviewed, and that [Ms.] Blair did not submit a separate written application for the Director position (although she orally expressed interest)," and these acknowledgments are "entirely consistent" with Respondent's account of the events in this matter. Respondent submits, "There is nothing suspicious about the District seizing the opportunity to hire a highly talented administrator who had just been fully vetted without having to reinitiate an exhaustive application process from scratch." Respondent continues, there were eight qualifications for the Director of Special Services position, and Ms. Blair had six of them – one of the two she did not possess was only "preferred." Thus, to say that Ms. Blair "had none of the required qualifications" for the position is "flat out wrong."

Respondent asserts Petitioner relies "heavily" on Mr. Hendrickson's testimony, who was "surprised" by Mr. Ballone's suggestion that Ms. Blair be hired for the Director Special Services position; however, in the end, Mr. Hendrickson ultimately agreed "that with the proper mentoring [Ms. Blair's] exemplary administrative and leadership skills would make her a good fit."

Petitioner attempts to discredit Ms. Blair's credentials, noting she did not possess a majority of the requirements noted in the job posting; however, witnesses testified Ms. Blair possessed "administrative and leadership qualities most important to establishing a rapport with the special education community to eliminate the acrimony and exorbitant litigation that had existed for too long while her predecessors held the job." In addition, Petitioner attempts to demonstrate that providing a mentor for Ms. Blair "is itself proof positive that she was unqualified." To the contrary, Respondent testified, "Marlboro routinely provides mentors for newly hired educators in the district, even beyond what is legally required." As to Petitioner's reliance on Mr. Klein's testimony, Respondent notes ALJ Gertsman "found Klein's testimony 'not credible,' as he acknowledged having a strained relationship with [Respondent] while employed in the [D]istrict, and 'still harbored animosity toward [Respondent][.]'"

Respondent asserts ALJ Gertsman's dismissal of this charge should be affirmed by the Commission, as there is nothing in Petitioner's case from which a "reasonable fact finder could have concluded that [Respondent] concocted a scheme to hire an unfit candidate as a pretext to create an otherwise unnecessary mentorship to benefit [Dr.] Bragen." Respondent also notes that because ALJ Gertsman "dismissed this charge on a motion at the conclusion of the Commission's proofs before [Respondent] was required to put on a defense, the Commission could not find [Respondent] guilty of a violation in any event without remanding the matter to the ALJ to permit [Respondent] the opportunity to present additional testimony and evidence in his own defense." Respondent notes, however, he is "confident the Commission will find this unnecessary as the record amply supports [ALJ Gertsman's] decision and it should not be disturbed."

Regarding the purported violation of *N.J.S.A.* 18A:12-24(c), Respondent maintains ALJ Gertsman "correctly found that the original complaint was flawed from the start, containing at least two allegations that were demonstrably false as a matter of public record," namely "[Dr.]

Bragen was not the Superintendent of Hazlet when the Marlboro [Board] approved his hiring as [Ms.] Blair's mentor on June 19, 2018"; and when Dr. Bragen was hired in Marlboro, Respondent and AME were not working in Hazlet as AME's last engagement was in 2017.

Respondent notes as to Petitioner's reliance on Ms. Barr-Rague's testimony, and the issue of whether the recommendation to hire Dr. Bragen emanated from Respondent or Ms. Barr-Rague, "the record contained two sworn certifications from [Ms.] Barr-Rague taking credit for recommending [Dr.] Bragen," despite her subsequent attempt (during testimony) to recant her written statements, "because she was impressed with him from attending an in-service presentation earlier in the year." Moreover, ALJ Gertsman found Ms. Barr-Rague's testimony to be "defensive, inconsistent, and evasive, and directly contradicted by the credible testimony of multiple witnesses." In addition, Ms. Barr-Rague admitted she signed both certifications "without any coercion or duress," and that her job was not in jeopardy even if she did not want to sign the certifications. She also conceded she could have revised the documents she signed, but she declined to do so. Further, Ms. Barr-Rague's denial of any friction between she and Respondent "was plainly untrue," as the record "overwhelmingly established a month-long crescendo of conflicts culminating in her abrupt resignation … ."

As to Petitioner's argument that Respondent and Dr. Bragen "had a long history of working with each other's districts and a longstanding relationship that proved an unethical *quid pro quo*," Respondent maintains that, at the time he contacted Dr. Bragen to serve as Ms. Blair's mentor, Respondent had not had contact with Dr. Bragen for a "very long time"; their interaction at the county roundtable meetings was limited; Respondent had no other personal or professional dealings with Dr. Bragen since the work that he (Respondent/AME) did for Hazlet in 2017; Petitioner's argument that the payments were "roughly equal" is inaccurate (because any amount earned by Respondent would have been shared with his partners); and Petitioner "included in its calculation the fee Hazlet paid to [Respondent's] consulting firm in August 2018 for an engagement well after [Dr.] Bragen retired from that district, as to which he had no involvement in [Respondent's] appointment and couldn't have had."

Regarding Petitioner's suggestion that Respondent's failure to disclose (to the Board) his consulting contracts with Hazlet (when Dr. Bragen was recommended to be hired) was "fatal to his case," Respondent reaffirms his 2018 Personal/Relative and Financial Disclosure Statements disclosed the income he received from Hazlet, and his statements were "filed just two months before [Dr.] Bragen's appointment." Thus, Respondent's business relationship with Hazlet "was a matter of public record" that was accessible on the Department of Education's website.

For all these reasons, the ALJ's recommended dismissal of *N.J.S.A.* 18A:12-24(c) "is amply supported by the record and should be accepted by the Commission."

Next, Respondent argues that Petitioner's attempt to dismiss Ms. Blair's and Mr. Ballone's testimony as "inadmissible hearsay" is "wrong." Furthermore, Petitioner's attempt to strike Dr. Bragen's testimony because it was "tainted" is without merit because "nothing in the contents of the text message had any relevance to the subject matter of his testimony," Dr. Bragen "did not contact anyone, it was he who was contacted by the Deputy Attorney General's

own witness," and Dr. Bragen "did nothing wrong by looking at his messages on a break." As such, there is no basis upon which to strike Dr. Bragen's testimony, as requested by Petitioner.

Based on the information provided, Respondent concludes Petitioner's Exceptions "should be rejected, and the [C]omplaint should be dismissed in its entirety."

IV. Analysis

Following receipt of an Initial Decision, the Commission "may enter an order or a final decision adopting, rejecting, or modifying" it. *N.J.A.C.* 1:1-18.6(a). The Commission is also authorized to "reject or modify conclusions of law, interpretations of agency policy, or findings of fact not relating to issues of credibility of lay witness testimony," but "may not reject or modify any finding of fact as to issues of credibility of lay witness testimony unless it first determines from a review of a record that the findings are arbitrary, capricious or unreasonable, or are not supported by sufficient, competent, and credible evidence in the record." *N.J.A.C.* 1:1-18.6(b); *N.J.A.C.* 1:1-18.6 (c).

Given the limited circumstances in which it may reject or modify a finding(s) of fact as to credibility, and seeing no basis to do so here, the Commission **adopts** ALJ Gertsman's findings of fact, and **adopts** the legal conclusion that Respondent did not violate *N.J.S.A.* 18A:12-24(b) and/or *N.J.S.A.* 18A:12-24(c). Following a careful, thorough, and independent review of the record, the Commission is constrained to agree that, regarding the alleged violation of *N.J.S.A.* 18A:12-24(b), Petitioner did not present sufficient evidence that Respondent "came up with the idea" to hire Dana Blair (Ms. Blair); that Ms. Blair's hiring was "unwarranted" even though it was unconventional and substantially deviated from how her predecessors were selected; and/or that Respondent supported Ms. Blair's candidacy *so that* he could then secure a position for Dr. Bragen (as a mentor).

In addition, and as for the alleged violation of *N.J.S.A.* 18A:12-24(c), the Commission is again constrained to agree that Petitioner did not present sufficient evidence that: the hiring of Dr. Bragen (as Ms. Blair's mentor) was a quid pro quo for any relationship between he (Respondent) and Dr. Bragen; Respondent and/or Dr. Bragen had "an express or implied agreement" in which they agreed to hire the other to provide consulting services in/for their respective school district; there was a longstanding relationship between Respondent/AME and Dr. Bragen/Defined; the decision to hire Dr. Bragen emanated from Respondent; Respondent had a direct or indirect financial involvement in the retention of Dr. Bragen (as a mentor for Ms. Blair); and/or Respondent had a personal involvement in the decision to hire Dr. Bragen that created a benefit to him or to a member of his immediate family.

V. Decision

After review, the Commission **adopts** the findings of fact from the *Initial Decision (Amended)*, **adopts** the legal conclusion 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(c), and **adopts** the decision to dismiss the above-captioned matter.

Accordingly, this is a final agency decision and is appealable only to the Superior Court-Appellate Division. *See*, *N.J.A.C.* 6A:28-10.11 and *New Jersey Court Rule* 2:2-3(a).

Robert W. Bender, Chairperson

Mailing Date: October 17, 2022

Resolution Adopting Decision in Connection with C13-19

Whereas, on or about October 30, 2019, the School Ethics Commission (Commission) transmitted the above-captioned matter to the Office of Administrative Law (OAL) for a hearing; and

Whereas, the Honorable Jacob S. Gertsman, Administrative Law Judge (ALJ Gertsman) issued an *Initial Decision (Amended)* dated August 2, 2022; and

Whereas, in his *Initial Decision (Amended)*, ALJ Gertsman issued findings of fact and found that Respondent did not violate *N.J.S.A.* 18A:12-24(b) and/or *N.J.S.A.* 18A:12-24(c) as alleged; and

Whereas, Petitioner filed Exceptions to ALJ Gertsman's *Initial Decision (Amended)*, and Respondent filed a reply to Petitioner's Exceptions; and

Whereas, at a special meeting on September 14, 2022, the Commission reviewed and discussed the full record; and

Whereas, at a special meeting on September 14, 2022, the Commission discussed adopting the findings of fact from ALJ Gertsman's *Initial Decision (Amended*); adopting the legal conclusion that, based on the evidence presented, Petitioner failed to prove that Respondent violated *N.J.S.A.* 18A:12-24(b) and/or *N.J.S.A.* 18A:12-24(c); and adopting ALJ Gertsman's decision to dismiss the above-captioned matter; and

Whereas, at a special meeting on October 17, 2022, the Commission reviewed and voted to approve the within decision as accurately memorializing its actions/findings from its special meeting on September 14, 2022; and

Now Therefore Be It Resolved, the Commission hereby adopts the within decision.

_____
Robert W. Bender, Chairperson

I hereby certify that this Resolution was duly adopted by the School Ethics Commission at a special meeting October 17, 2022.

_____
Kathryn A. Whalen, Esq.
Director, School Ethics Commission