
IN THE MATTER OF : **SCHOOL ETHICS COMMISSION**
DAVID W. FULLER, : **Docket No.: C32-95**
Irvington Township Board of Education :
Essex County : **DECISION**

PROCEDURAL HISTORY

This matter comes before the School Ethics Commission (Commission) by way of complaint filed with the Commission on August 24, 1995 by Irvington Board of Education (Board) member Cathy Southerland against Board member David W. Fuller. In her complaint, Ms. Southerland alleges that Mr. Fuller violated the School Ethics Act (Act), specifically N.J.S.A. 18A:12-24(a) and (c), by holding simultaneously the positions of Board Member and Township of Irvington Business Administrator. Complainant further alleges that Mr. Fuller violated the Act because, as Township Business Administrator, he should have been aware of the transfer of approximately \$3.9 million in interest from the School Construction Fund to the Township.

Mr. Fuller filed his answer by letter dated December 19, 1995 and received by the Commission on January 2, 1996. In his answer, Mr. Fuller denies that serving as both Board member and Township Business Administrator violates the Act. Mr. Fuller notes that the complaint does not contain any allegations that he, or anyone related to him does business with the Township. In support of his position, Mr. Fuller cites N.J.S.A. 18A:12-2, which allows school employees to sit on municipal governing bodies. Mr. Fuller further denies the allegations that he knew or should have known about the transfer of funds from the School Construction Fund to the Township.

By letter dated June 4, 1997, the Commission requested Mr. Fuller to appear before the Commission at its June 27, 1997 meeting to provide information to the Commission as part of its investigation. The Commission also sent a letter dated June 4, 1997 to Ms. Southerland advising her that the Commission would be considering her complaint at its June 27, 1997 meeting and that she could attend to provide information if she so desired. Mr. Fuller appeared with counsel. Ms. Southerland did not attend.

By letter dated September 25, 1997 and adopted by the Commission at its September 23, 1997 meeting, the Commission advised Mr. Fuller that it was dismissing the allegations concerning his knowledge of the transfer of funds, but that it had found probable cause to credit the allegations that Mr. Fuller violated the Act by serving in the dual capacity as Board member and Township Business Administrator. The Commission advised Mr. Fuller that serving in both capacities may violate N.J.S.A. 18A:12-24(a), (c) and (d). The Commission further found that the material facts were undisputed and, therefore, advised Mr. Fuller that he could provide a written submission to the Commission setting forth his position on the matter. The letter also advised Mr. Fuller that if he felt that there were material facts in dispute such that would

necessitate an evidentiary hearing, he should set forth such facts and explain his position as to why they are material to a determination in this matter. Finally, the letter advised Mr. Fuller that he should address the issue of sanction if the Commission should find a violation.

Mr. Fuller submitted his papers by letter dated October 13, 1997 and received by the Commission on October 14, 1997. In his submission, he argues that there are material facts in dispute and that the Commission should conduct an evidentiary hearing. Mr. Fuller further argues that it does not violate that Act for him to serve simultaneously as a Board member and Township Business Administrator. The Commission has considered Mr. Fuller's submission and reaches the within conclusion.

FACTS

Based on the pleadings, the information provided by the testimony on June 27, 1997, and the Commission's investigation in this matter, the following facts are not in dispute. Mr. Fuller began employment as the Township Business Administrator in 1990. As of this date, he still holds that position. Township Business Administrator is a paid, full time position. Article VII, Sec. 5-6.3 et seq., of the Irvington Code establishes the Department of Administration and sets forth the responsibilities and duties of the Township Business Administrator. The Township has had financial difficulties and presently the State is monitoring the Township's finances.

Mr. Fuller was appointed to the Board by the Mayor in 1991 and served as Board president in 1991. At the time of his appointment, the Irvington School district was a Type I district. In 1995, the district changed from a Type I to a Type II district. Mr. Fuller remains on the Board as an appointed member and his term is due to expire in 1998. As a Board member, Mr. Fuller has served on the Board's four standing committees, specifically, Finance, Buildings and Grounds, Personnel and Bylaws, Policy and Curriculum.

ANALYSIS

Initially, the Commission will consider Mr. Fuller's arguments that an evidentiary hearing is necessary because there are material facts in dispute. Mr. Fuller sets forth six questions that he believes raise material factual disputes. Of those six, four specifically involve facts surrounding the transfer of the \$3.9 million from the School Construction Fund to the Township.¹ The Commission dismissed the allegations concerning Mr. Fuller's knowledge of the transfer of funds. The Commission found that the allegations that Mr. Fuller violated the Act simply because he knew or should have known about the transfer as Township Business Administrator did not amount to a possible violation of the Act. The Commission did note in its probable cause decision that the possibility that Mr. Fuller may obtain information in his capacity as Township Business Administrator that could be necessary or useful to the Board could be illustrative of why it may not be appropriate for him to hold both positions and that Ms. Southerland's allegations concerning the transfer of funds really went to that issue. This does not mean, however, that an evidentiary hearing needs to be held into the specifics of the transfer.

¹ The four that involve the transfer of funds are those Mr. Fuller has numbered 2,3,4 and 5 on page two of his submission.

The Commission does not need to know the facts surrounding the transfer to determine whether Mr. Fuller may serve as both Board member and Township Business administrator.

Mr. Fuller also argues that an evidentiary hearing needs to be held to determine his exact duties as Township Business Administrator. The Commission disagrees. Mr. Fuller's duties and responsibilities as a business administrator are set forth in Title 40 and the Irvington Code. The Commission can determine whether there is a conflict of interest under the Act by evaluating the statutory and regulatory requirements. Whether Mr. Fuller may perform duties above and beyond those set forth in relevant statutes or municipal code is not essential to a determination as the Commission can resolve the issue based on the statutes and code.

Finally, Mr. Fuller argues that an evidentiary hearing should be held to determine whether he or other board members have "...abstained from or absented themselves from votes involving potential conflicts?" Mr. Fuller does not explain how he feels this inquiry is relevant to a resolution of the issue at hand. The Commission does not see its relevancy. What Mr. Fuller or other Board members may have done in regard to other situations where they may have had a conflict is not relevant to a determination of whether Mr. Fuller can sit as a Board member while he is Township Business Administrator. Likewise, it is not relevant to a possible sanction since the issue to be resolved is whether Mr. Fuller may serve in the dual capacities. If the conclusion is that he may not, then the appropriate remedy is that he must give up one of his positions.

In its probable cause decision, the Commission found that there was probable cause that Mr. Fuller's holding of the two positions in question violates N.J.S.A. 18A:12-24(a), (c), and (d). In his submission to the Commission, Mr. Fuller does not address each section specifically. Rather, he argues generally that none of the provisions apply because neither the Board nor the municipality have any control or supervision over the other. Mr. Fuller argues that there is no violation because he has no personal interest in the municipality as opposed to the district. In support of his arguments, Mr. Fuller points out that over the six years that he has served in both capacities, this complaint is the only time a conflict of interest has been alleged against him. Regarding the school construction project, Mr. Fuller notes that he voted in favor of the financing, which he states was in the best interests of the district. Since it was the municipality that was to incur the debt, Mr. Fuller claims that this demonstrates that his position as Township Business Administrator cannot be said to influence his decisions as a Board member. It is Mr. Fuller's position any potential conflict of interest can be cured by recusal on individual matters.

After consideration of the three above cited sections, the Commission finds that N.J.S.A. 18A:12- 24(d) is the provision that is relevant to whether Mr. Fuller can serve simultaneously as a Board member and Township Business Administrator. N.J.S.A. 18A:12-(d) provides:

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.

This provision prohibits a school official from holding employment which might reasonably be expected to interfere with the exercise of his duties as a school official. This provision, and the

Act as a whole, is intended to prohibit the appearance of impropriety as well as actual conflicts of interest. N.J.S.A. 18A:12-22. Thus, Mr. Fuller's argument that his position as Township Business Administrator did not influence his vote on the school construction project is not determinative as to whether he may hold both positions. The issue is whether the public could reasonably perceive that Mr. Fuller's independence of judgement is prejudiced and whether the conflicts are so pervasive that Mr. Fuller cannot hold both positions under N.J.S.A. 18A:12-24(d). After considering the duties and responsibilities of both positions, the Commission concludes that Mr. Fuller cannot hold both positions.

As the Township Business Administrator, Mr. Fuller performs his duties under the supervision, direction and control of the Mayor. N.J.S.A. 40:69A-40(c). Pursuant to N.J.S.A. 40:69A-44, Mr. Fuller is the head of the Department of Administration and is required to:

- (a) Assist in the preparation of the budget;
- (b) Administer a centralized purchasing system;
- (c) Be responsible for the development and administration of a sound personnel system; and
- (d) Perform such other duties as council may prescribe.

The municipal council also may authorize the business administrator to supervise other municipal departments. N.J.S.A. 40:69A-44(e). In this case, the Irvington Town council has adopted the Irvington Code which sets forth the duties of the business administrator and those duties are identical to those set forth in N.J.S.A. 40:69A-44(a) to (d). Article VII, Sec. 5-69.

One of the most public responsibilities of Mr. Fuller, as well as all business administrators, is to assist the Mayor in the preparation of the municipal budget. The Mayor is responsible for preparing the municipal budget with the assistance of the business administrator. N.J.S.A. 40:69A-44(a) and 45. While the council ultimately has the responsibility to adopt the budget, it is the budget recommended by the mayor and business administrator that the council considers. N.J.S.A. 40:69A-46. Mr. Fuller, as Township Business Administrator, is vitally interested and involved in the preparation and passage of the municipal budget. Not only is it his responsibility to assist in the preparation of the overall budget, but he also must take into account the needs of the Department of Administration of which he is head. Likewise, the public is concerned about the municipal budget because it will address the provision of municipal services and affect local property taxes. Taxpayers' interests logically are the maintenance of municipal services at the lowest possible cost so that local property taxes can be set at an acceptable level. Thus Mr. Fuller, as Township Business Administrator, must balance his interests as Department of Administration head, overall municipal needs and the taxpayers' interests in achieving an acceptable level of property taxes. He is very much involved in the financial situation of the Township.

As a Board member, Mr. Fuller is involved with the school budget. N.J.S.A. 18A:22-7. As a Board member, he must vote on the school budget. Also, many decisions he makes as a

board member ultimately could impact the school budget. For example, decisions on class size, curriculum and school programs could have an effect on the school budget. The Commission recognized that the municipal budget and the school budget are separate and that the Town Council would only become involved with the school budget in the event the voters defeat the school budget. N.J.S.A. 18A:22-37. In this case, however, we are dealing with a situation where the individual who is intimately involved with municipal finances and whose employment may depend upon keeping taxes at a low level, is called upon as a Board member to make school decisions that will affect taxes and that may have financial implications for municipal residents. Under these circumstances, the public could reasonably perceive that Mr. Fuller may be making decisions as a Board member with his employment as Township Business Administrator in mind rather than the interests of the district. Additionally, Mr. Fuller was appointed to the Board by the Mayor and is under the control and supervision of the Mayor as Township Business Administrator. The public could reasonably perceive that given this, Mr. Fuller may act to advance the Mayor's interest and policies rather than acting in the interests of the district. Recusal on matters that may affect taxes is not feasible as such matters would be far reaching. The Conflict of interest is so pervasive that N.J.S.A. 18A:12-24(d) would prohibit the holding of both provisions.

The New Jersey Supreme Court has explained the common law doctrine of incompatibility of offices as a situation where there is "...a conflict or inconsistency in functions of an office." Reilly v. Ozzard, 33 N.J. 529, 542 (1960) As the court noted, it is found where the duties of one office clash with another, inviting the individual to prefer one obligation over the other. Ibid. While not exactly on point since Reilly involved the common law doctrine and here the Commission is addressing a comprehensive statutory scheme on ethics, Reilly is nonetheless instructive. As discussed above, it is the Commission's conclusion that Mr. Fuller's duties as Board member can reasonably be perceived to clash with his employment as Township Business Administrator.

The Commission is aware that the Township of Irvington has suffered financial difficulties that necessitated the intervention of the Department of Community Affairs. Given the State's involvement, Mr. Fuller's duties may be more limited. This, however, does not alleviate the perceived conflict. Indeed, it could exacerbate it. The public could reasonably perceive that, given the Township's financial difficulties, and Mr. Fuller's responsibilities as Township Business Administrator, he may be tempted to make school decisions with an eye towards the Township's finances.

The Commission notes that in making this decision, it is not finding that Mr. Fuller disregarded the interests of the district when acting as a Board member. As explained previously, the Act addresses the appearance of impropriety as well as actual conflicts. In this case, the Commission finds that there could be a reasonable perception of a conflict of interest.² The Commission notes that this decision is based on the particular facts of this case.

² Although not mentioned in his written submission, in his answer, Mr. Fuller states that the holding of both positions does not violate the Act because N.J.S.A. 18A:12-2 allows school employees to sit on municipal governing bodies. The Commission questions the applicability of that provision to the facts of this case where Mr. Fuller seeks to hold both positions in the same municipality. In any event, the Commission is deciding this matter under the Act. Jurisdiction to interpret N.J.S.A. 18A:12-2 lies with the Commissioner of Education.

DECISION

For the foregoing reasons, the Commission finds that pursuant to N.J.S.A. 18A:12-24(d), Mr. Fuller may not serve as both a Board member and Township Business Administrator. This situation is slightly different from other violations since in most other situations, the Commission can address the particular action which occurred and impose an appropriate sanction. In this case, however, it is not a particular act, such as a vote, that the Commission is addressing. Rather, the Commission has found that Mr. Fuller may not serve as a Board member while he is a Township Business Administrator. Under these circumstances, the Commission recommends to the Commissioner that Mr. Fuller be removed from the Board unless he resigns one of his positions within thirteen days.

Upon the Commission's adoption of this decision by a formal resolution, the matter shall be transmitted to the Commissioner of Education for action on the Commission's sanction recommendation pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed to the parties, any party may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 River View Plaza, PO Box 500, Trenton, NJ 08625-0500, marked "Attention: Comments on Ethics Commission Sanction." Alternatively, Mr. Fuller may advise the Commissioner within the same time period that he has resigned from one of his positions. A copy of any comments filed must be sent to the School Ethics Commission and complainant.

Paul C. Garbarini
Chairperson

Resolution Adopting Decision – C32-95

Whereas, the School Ethics Commission has considered the pleadings filed by the parties and the documents submitted in support thereof and if applicable, has considered the arguments raised by parties in subsequent submissions; and

Whereas, the Commission finds that the respondent David Fuller violated N.J.S.A. 18A:12-24(d) of the School Ethics Act by serving as both a board member of the Irvington Board of Education and the Irvington Township Business Administrator; and

Whereas, the Commission concludes that the appropriate sanction for the violation is to remove Mr. Fuller from his position as board member if he fails to resign from one of those positions within 13 days and recommends such sanction to the Commissioner of Education; and

Whereas, the Commission has reviewed the proposed decision of its staff; and

Whereas, the Commission agrees with the proposed decision;

Now Therefore Be It Resolved that the Commission hereby adopts the proposed decision referenced as its decision on this matter and directs its staff to notify all parties to this action of the Commission's decision herein.

Paul C. Garbarini, Chairperson

I hereby certify that the Resolution was duly adopted by the School Ethics Commission at its public meeting on November 25, 1997.

Lisa James-Beavers
Executive Director