

SEC #C20-03/C21-03 (consolidated)
C #623-03SEC
SB # 50-03

IN THE MATTER OF THE REMOVAL OF :
RONALD UDY AND THE CENSURE OF : STATE BOARD OF EDUCATION
DAVID A. EWART AND FRANK B. FRAZIER : DECISION
PURSUANT TO N.J.S.A. 18A:12-21 ET SEQ., :
WOODSTOWN-PILESGROVE BOARD OF :
EDUCATION, SALEM COUNTY. :

Decision issued by the School Ethics Commission, September 23, 2003

Decided by the Deputy Commissioner of Education, November 10, 2003

For the Appellants, John D. Jordan, Esq.

This appeal arises from two complaints filed with the School Ethics Commission on May 2, 2003, by a member of the Woodstown-Pilesgrove Board of Education. The complaints alleged that fellow Board members Ronald Udy, David A. Ewart, and Frank B. Frazier (hereinafter “respondents”) had violated the School Ethics Act, N.J.S.A. 18A:12-21 et seq.¹ Answers were filed on behalf of the respondents and, by letters dated June 30, 2003, the complainant and the respondents to each complaint were notified that the matters had been placed on the agenda for discussion by the School Ethics Commission at its meeting on July 22, 2003. Each letter stated that:

¹ Complainant also named Matthew Nowick in his complaint against respondents Udy and Ewart, but withdrew his complaint against Mr. Nowick when he resigned from the Board.

At the meeting the School Ethics Commission may take one of several actions. The Commission may table the matter and ask for additional information and/or legal advice, the Commission may dismiss the matter, or the Commission may determine that probable cause exists.

The letters also advised the complainant and the respondents that they had the right to appear before the Commission, but were not required to do so, and that they could bring counsel and present witnesses.

By letter dated July 11, 2003, the complainant requested that the hearing be delayed. By letter of July 15, 2003, the Commission granted the complainant's request and rescheduled both matters for its meeting of August 26, 2003.

By letter of July 23, 2003, counsel for respondents Udy and Ewart advised the Commission that he intended to attend the August meeting and that his clients would also appear. He further advised the Commission that:

At the present time, the respondents do not intend to present witnesses. Rather, we will rely on the documentation already submitted. I would like the opportunity, however, to address the Commission on behalf of my clients.

At the complainant's request, the Commission issued subpoenas on August 8, 2003, directing the school district's superintendent and the board secretary to appear before the Commission on August 26, 2003.

On August 26, the Commission considered the complaints as a consolidated matter. Respondents Udy and Ewart were represented by counsel, and respondent Frazier and the complainant appeared pro se. After hearing testimony from the board secretary, the school district's superintendent, and two board members, the Commission determined that respondent Udy's conduct was in violation of N.J.S.A. 18A:12-24.1(a), (c), (d) and (f) of the Code of Ethics for School Board Members

("Code").² The Commission further determined that respondents Ewart and Frazier had violated N.J.S.A. 18A:12-24.1(a) and (f). The Commission recommended that the Commissioner impose the penalty of removal on respondent Udy and censure for respondents Ewart and Frazier.

The Commission notified the parties of the determination it had made at its August 26 meeting and, on September 23, 2003, the Commission issued its written decision in the matter.

Respondents Udy and Ewart filed comments with the Commissioner of Education. Their primary contention was that they had been denied due process because the School Ethics Commission's letter of June 30, 2003 notified them that the Commission's consideration of the matter at the meeting to be held on August 26 would be to determine the existence of probable cause and, as a result, they had proceeded on that basis. Hence, the fact that the Commission determined at that meeting that respondents had violated the School Ethics Act was not only contrary to the applicable regulations, but also had deprived them of a meaningful opportunity to be heard with regard to the allegations against them.

Respondents Udy and Ewart also argued that it was implausible that the Commission could conclude that there were no facts in dispute given the record before it. In this respect, they took exception to the factual errors in the Commission's written decision, arguing that these errors demonstrated that the process used by the Commission was defective.

² We note that effective July 26, 2001, the Legislature amended the School Ethics Act, N.J.S.A. 18A:12-21 et seq., to include N.J.S.A. 18A:12-24.1, the Code of Ethics for School Board Members. As a result the School Ethics Act now includes a statutory provision specifying the conduct expected of school board members, N.J.S.A. 18A:12-24.1, as well as a provision that specifies prohibited acts, N.J.S.A. 18A:12-24.

With respect to the penalties recommended by the School Ethics Commission, respondents Udy and Ewart maintained that they had not violated either the School Ethics Act or the Code of Ethics. Respondent Frazier stated that respondent Udy was no more responsible than he was and should not be removed from the Board.

In his decision, the Deputy Commissioner of Education³ emphasized that the Commissioner's jurisdiction in cases in which the School Ethics Commission has determined that the School Ethics Act has been violated is limited by statute to determining the appropriate sanction and therefore that he was precluded from reviewing respondents' procedural and substantive claims with respect to the violations that had been found by the Commission. Constrained to accept the Ethics Commission's findings with respect to the violations, the Deputy Commissioner, on the basis of those findings, determined that the penalties recommended by the Ethics Commission were appropriate. However, the Deputy Commissioner determined that in light of the troubling allegations of procedural errors, implementation of those penalties should be stayed pending appeal to the State Board of Education.

Respondents Udy, Ewart and Frazier appealed to the State Board, challenging both the Ethics Commission's determination that they had violated N.J.S.A. 18A:12-24.1 and the penalty imposed by the Deputy Commissioner. The respondents again contend that since they had been notified, as provided by the applicable regulations, that the proceedings at the Ethics Commission's August 26 meeting were to determine the existence of probable cause, they have been denied due process. They further argue that the Commission's failure to provide them with due process resulted in a number of

³ The Deputy Commissioner decided this matter under authority delegated to him by the Commissioner pursuant to N.J.S.A. 18A:4-33.

factual errors on matters that are critical to a proper determination. In support of this contention, they contest specific factual determinations made by the Ethics Commission. Respondents' Brief, at 6. While denying that any ethical violations occurred, the respondents argue that even if such violations were found to exist, they would not be so significant as to require anything more than a reprimand.

After reviewing the record, we find that the School Ethics Commission violated respondents' right to due process when it decided the merits of the matter at its August 26 meeting after notifying them that the proceedings were for the purpose of determining whether probable cause existed to credit the allegations made by the complainant. Not only did the Ethics Commission fail to comply with N.J.A.C. 6A:28-1.12, which is the regulatory provision that applies when, as here, a complainant alleges violations of the School Ethics Act and the Code of Ethics,⁴ but its failure to do so deprived respondents of their right to properly defend themselves against the merits of the allegations that the complainant had made. The significance of this failure is highlighted by the fact that, as set forth in their comments to the Commissioner and the brief they submitted to the State Board in support of their appeal, respondents are disputing material facts relating to whether the alleged violations occurred. Given these circumstances, the decision of the School Ethics Commission is fatally flawed and cannot be sustained. We therefore set that determination aside and remand the matter to the School Ethics Commission for a determination as to whether probable cause exists to credit the allegations. In the event that the Commission finds that probable

⁴ Although the Code of Ethics for School Board Members is part of the School Ethics Act, *see supra* note 2, the current regulations include separate provisions for "Commission review of complaints under the School Ethics Act or the Act and the Code of Ethics," N.J.A.C. 6A:28-1.12, and for "Commission review of complaints alleging a violation of the Code of Ethics only," N.J.A.C. 6A:28-1.13.

cause exists, we direct that the matter be transmitted to the Office of Administrative Law for hearing.

April 7, 2004

Date of mailing _____