

IN THE MATTER OF FREDERICK :  
CONFESSORE, BOARD OF EDUCATION : COMMISSIONER OF EDUCATION  
OF HARRISON, HUDSON COUNTY. : DECISION  
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SYNOPSIS

This matter arose from a complaint alleging that respondent Assistant Superintendent of Schools violated the School Ethics Act (Act) in connection with his part ownership of Study Hall, Inc., a daycare facility located in the District.

The Commission found that respondent violated *N.J.S.A.* 18A:12-24(b) of the Act: 1) when he set forth that the District would have to use all daycare centers in order to obtain an opinion to allow him to provide daycare to the District and then sent the letter to the New Jersey Department of Human Services to ensure that those facts would remain the same; 2) when he sent a May 18, 2000 correspondence to the residents of the District using his title; and 3) when, by doing so, he contravened the representations he made in a request for an advisory opinion from the Commission and violated the Commission's caution to him. Having considered any mitigating and aggravating factors, the Commission determined that the violation of section 24(b), the use of one's official position to secure unwarranted privileges for oneself, is a very serious offense for which reprimand or censure would not be appropriate unless there were mitigating circumstances. Respondent's requests for advisory opinion did not provide mitigating circumstances because he sought an advisory opinion and then acted contrary to its advice. The Commission recommended that the appropriate penalty for a school official's use of his position to secure unwarranted privileges or advantages for himself is a suspension for one month.

Initially, the Commissioner emphasized that the determination of the Commission as to violation of the Act is *not reviewable by the Commissioner*. The Commissioner's jurisdiction is limited to reviewing the sanction to be imposed following a finding of violation by the Commission. Upon independent review of the record, the Commissioner found and determined that the Commission's recommended penalty to suspend respondent for one month was an appropriate penalty. The fact that the suspension may be the harshest penalty thus far levied against a school administrator for a violation of *N.J.S.A.* 18A:12-24(b) in no way mitigates against application of such penalty as long as the penalty is deemed proportional to the violation. Further, the Commissioner concurred with the Commission that "[o]ne cannot seek an advisory opinion and then act contrary to its advice without consequences." The Commissioner determined that a one-month suspension, without pay, is neither "Draconian" nor contrary to legislative intent simply because it has punitive, as well as remedial/deterrent, effects. Thus, the Commissioner ordered respondent suspended for one month without pay from his position as Assistant Superintendent. However, in light of respondent's responsibilities as Assistant Superintendent in an *Abbott* District, implementation of the sanction is deferred pending appeal to the State Board of Education.

June 16, 2000

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The record of this matter and decision of the School Ethics Commission (Commission) have been reviewed. Respondent's exceptions were timely submitted pursuant to *N.J.A.C.* 1:6C-18.3. No response to respondent's exceptions was filed by the Commission.

In his exceptions, respondent requests that the Commissioner reject the sanction of a one-month suspension recommended by the School Ethics Commission and that he reduce the penalty to one which accomplishes the legislative mandate of the School Ethics Act (Act). Respondent also requests that the implementation of a sanction, if any, be stayed during the pendency of his exhaustion of all applicable administrative remedies and appeals.

Respondent avers, *inter alia*, that the Commission failed to consider adequately the mitigating circumstances proffered by him and alleges that the Commission committed a due process violation in its zeal to justify the sanction. He argues that the Commission has trivialized his proofs that he twice sought advisory opinions from it, and maintains that he has complied with the spirit and letter of the second advisory opinion by the Commission.

Further, it is respondent's position that the recommended sanction is violative of the statutory scheme, is inconsistent with the School Ethics Commission's prior rulings, and is punitive rather than remedial in nature. As to this point, respondent argues that the touchstone of

any sanction by the Commission is proportionality to the offense, stating, *inter alia*, that nowhere is legislative authorization bestowed upon the Commission to enact punitive, “Draconian,” sanctions to effectuate its charge. Respondent asserts that the recommended one-month suspension would constitute the harshest sanction ever imposed by the Commission against a school administrator for violation of *N.J.S.A. 18A:12-24(b)*, and perhaps even the harshest in the history of the Act for a violation of that particular subsection. As such, respondent maintains that he has been treated in a disparate fashion. (Respondent’s Exceptions at 6) In support of his position, respondent essentially reiterates the legal arguments regarding penalty presented to the Commission in his March 8, 2000 letter brief, adding several other cases wherein the Commission determined a violation of subsection (b) occurred and recommended only a censure. *In the Matter of Raymond Bonker, Lenape Valley Regional Board of Education*, decided by the Commissioner May 22, 1998 and *In the Matter of Lawrence James, Chesilhurst Board of Education*, decided by the Commissioner February 9, 1999. (*Id.* at 7) Moreover, respondent avers that his conduct does not rise to the level of any of the violations in School Ethics cases; yet, in his estimation, he would be punished more severely, even than in those instances where a violation of *N.J.S.A. 18A:12-24(c)* was found by the Commission.

In his arguments relative to violations of *N.J.S.A. 18A:12-24(c)*, respondent maintains that a strong inference may be drawn from the plain language of the Act that a violation of this subsection warrants a much greater sanction than a violation of subsection (b) because subsection (c) requires the school official to “act” in his/her official capacity. Respondent points out that those counts of the present matter filed against him relating to subsection (c) were dismissed by the Commission. (*Id.* at 8) In support of his position that prior School Ethics decisions dealing with subsection (c) violations militate against acceptance of the

Commissioner's recommended penalty, respondent cites *Irvington Municipal Council v. Steele*, 95 N.J.A.R.2d (EDU) 123, a matter wherein the functions and duties as school business administrator were found to be inherently antagonistic to functions and duties as Mayor, thus warranting a one-year suspension; *Scannella v. Scudillo*, 95 N.J.A.R.2d (EDU) 190, *rev'd and remanded* State Board 195, decided by the Commissioner June 10, 1997, wherein a Board member cast the deciding vote for her son-in-law as superintendent and sold gloves to district employees, which, after a tortuous administrative journey, ultimately resulted in a censure<sup>1</sup>; *In the Matter of John Harrison, Ewing Township Board of Education*, 96 N.J.A.R.2d (EDU) 553, wherein a board member whose firm did work for the board architect voted to extend the architect's contract at the request of the general contractor, which resulted in the Commissioner rejecting the Commission's recommended penalty of censure and imposition of a reprimand<sup>2</sup>; and *In the Matter of Kenneth Seppelt, Roselle Park Board of Education*, decided by the Commissioner July 1, 1996, wherein a Board member voted on a payment of a bill for a bakery in which he was a partner, a violation which eventually, by way of a consent order, resulted in a reprimand.

Respondent next avers that the recommended sanction of a one-month suspension would have a devastating effect on him, because, unlike when a board member is suspended, his suspension could be without pay. Respondent further argues with respect to his suspension that:

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<sup>1</sup> The Commissioner notes that at the time when the penalty for violation of the Act was ultimately determined in the *Scudillo* matter, Ms. Scudillo was no longer a member of the Board, so that the penalties of suspension or removal from office were recognized as being no longer possible as sanctions to be levied against her for violations of N.J.S.A. 18A:12-24(c).

<sup>2</sup> In the *John Harrison* case, the Commissioner levied the sanction of reprimand because respondent was a new board member who had not yet received the board member training course; he had sought and received a legal opinion with respect to the facts of the matter *before* the filing of the complaint; the board at a subsequent date unanimously approved the prior vote, absent participation by Harrison; and the record confirmed that there was an extremely remote connection between the interests of Harrison's company to the particular vote in dispute.

In an *Abbott* district such as Harrison, the loss would be particularly acute. [Respondent] is an Assistant Superintendent, overseeing technology programs. This involves him with all technology-related curriculum and instruction, and the purchase, installation and networking of hardware and software. He is also responsible for the mandated Professional Development Program. Additionally, he writes the district's competitive grants, which has resulted in the awarding of almost \$1,000,000.00. Ultimately the real cost of [respondent's] suspension would be paid by the students.

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Moreover, the penalty is harsh, punitive, and self-serving. This conclusion is supported by the Commission's own words. At page 9 of the April 25<sup>th</sup> decision, it states: "...one cannot seek an advisory opinion and then act contrary to its advice without consequences." At page 10, it goes on to say: "...The Commission believes that a suspension length of one month will have the necessary punitive and deterrent effects." (Respondent's Exceptions at 9-10)

Lastly, respondent contends that the desired deterrent effects have already occurred, avowing that all procedural safeguards have been put in place at the Study Hall by him following the filing of the complaint. Of this he states: "Suffice to say, the [Commission] has gotten Mr. Confessore's attention. The only effect of the recommended sanction will be to punish him more than any other school administrator since the inception of the Act, for a violation of *N.J.S.A.* 18A:12-24(b). Such a result is not supported by the legislative history of the Act, nor in keeping with the spirit or the letter of *N.J.S.A.* 18A:12-22." (*Id.* at 10)

#### COMMISSIONER'S DETERMINATION

Initially, it must be emphasized that, pursuant to *N.J.S.A.* 18A:12-29(c), *N.J.A.C.* 6A:28-1.14 and *N.J.A.C.* 6A:3-9.1, the determination of the Commission as to violation of the Act is **not reviewable by the Commissioner** herein. Only the School Ethics Commission may determine whether a violation of the School Ethics Act occurred. The Commissioner's jurisdiction is limited to reviewing the sanction to be imposed following a finding of a violation

by the School Ethics Commission. Therefore, this decision is restricted solely to a review of the recommended penalty and its implementation.

Upon independent review of the record in this matter, the Commissioner finds and determines that the Commission's recommended penalty to suspend respondent for a period of one month from his position as Assistant Superintendent for violation of *N.J.S.A. 18A:12-24(b)* is, under the factual circumstances presented herein, an appropriate penalty for his violation of the School Ethics Act.

It was well-established by the record that the Commission in its second advisory opinion to respondent on March 24, 1999 made it abundantly clear to respondent that the Urban League could contract with his daycare center to serve Harrison School District students *based solely* on the information that he set forth in his February 11, 1999 request for an advisory opinion. That information included, but was not limited to, representations that (1) the Urban League of Hudson County would be responsible for every phase of the early childhood plan, from the initial contact of families to the ultimate placement and payment of services, based on parental choice and (2) if his daycare center was ineligible to service Harrison's preschool students, it would be impossible for the District to serve its early childhood students locally because of insufficient space in the two other local daycare centers; *i.e.*, respondent would not have to compete for business with other centers because the great demand for services ensured that every center could be filled to capacity and *only* the Urban League would have *any* role or involvement in the placement process and payment of students in preschool programs, based on parental choice.

On April 26, 1999, a month following issuance of the Commission's advisory opinion, respondent wrote to the Department of Human Services seeking to foreclose the referral

of preschool students to two new centers trying to open in Harrison, and, in a letter dated May 18, 1999 sent to Harrison residents, he engaged in the direct marketing of his daycare program to parents of preschool students in a document which describes him as an “Assistant Superintendent of Schools with over 25 years of public school experience as a teacher, elementary and middle school principal.” Consequently, on this basis, as well as for the other reasons delineated in the Commission’s decision, the Commissioner finds and determines that such actions taken in contravention of the Commission’s second advisory opinion and in violation of *N.J.S.A. 18A: 12-24(b)* warrant a one-month suspension.

The fact that the suspension may be the harshest penalty thus far levied against a school administrator for a violation of *N.J.S.A. 18A: 12-24(b)*,<sup>3</sup> in no way mitigates against application of such a penalty in this matter, as long as the penalty is deemed proportional to the violation(s), as the Commissioner so finds herein. As such, the penalty does not constitute disparate treatment. Further, the Commissioner finds respondent’s position to be without merit that the Commission failed to consider adequately the mitigating circumstances proffered by him or trivialized his proofs that he twice sought advisory opinions from the Commission. Upon review of the record, the Commissioner fully concurs with the Commission that “[o]ne cannot seek an advisory opinion and then act contrary to its advice without consequences.” (Commission Decision at 9) The Commissioner further determines that a one-month suspension, without pay, is neither “Draconian” nor contrary to legislative intent simply because it has punitive, as well as remedial/deterrent, effects.

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<sup>3</sup> It is noted by the Commissioner that there have been very few school ethics decisions involving the sanctioning of school administrators. As correctly noted by respondent at page 6 of his exceptions, the majority of the Commission’s cases since inception of the Act pertain to school board members, not administrators. The Commissioner also agrees with respondent that the Act makes no distinction between these two categories of school

Accordingly, IT IS HEREBY ORDERED that Frederick Confessore be suspended for the period of one month, without pay, from his position as Assistant Superintendent in the Harrison School District based upon the findings of the Commission that he has violated the School Ethics Act. In so holding, however, the Commissioner determines that in light of the fact that respondent is an Assistant Superintendent who has responsibility for such critical areas as technology and professional development in a special needs *Abbott* district, respondent's request with respect to deferring implementation of the above sanction is HEREBY GRANTED during the pendency of an appeal to the State Board of Education.<sup>4</sup>

COMMISSIONER OF EDUCATION

Date of Decision: June 16, 2000

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officials with regard to sanctions; therefore, sanctions applied in previous Commission cases against board members are relevant to the instant matter.

<sup>4</sup> This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A. 18A:6-27 et seq.* and *N.J.A.C. 6A:4-1.1 et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.