SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
V.	:	
	:	**Docket No.: C12-94**
MICHAEL KILMURRAY,	:	
LACEY TOWNSHIP	:	**DECISION**
BOARD OF EDUCATION,	:	
OCEAN COUNTY	:	
	:	

The School Ethics Commission has reviewed the record of the above-captioned matter and the decision of Administrative Law Judge Kathleen Duncan finding that Michael Kilmurray violated the School Ethics Act, N.J.S.A. 18A:12-24(c), in connection with the board's hiring of his sister-in-law in June 1994. The Administrative Law Judge (hereinafter "ALJ") set forth that a reprimand was an appropriate penalty. Upon mailing of the Administrative Law Judge's decision to the parties on January 16, 1998, the parties were provided 13 days to file written exceptions to the School Ethics Commission for its consideration. Deputy Attorney General Arlene Lutz filed timely exceptions on January 28, 1998. Lawrence Silver, Esq. filed a timely reply and cross-exceptions on behalf of Michael Kilmurray on February 3, 1998. DAG Lutz then filed a timely reply to Mr. Silver's cross-exceptions on February 6, 1998. The Commission considered the Initial Decision, the exceptions, cross-exceptions and replies at its meeting of February 24, 1998.

The School Ethics Commission adopts the procedural history and the findings of fact set forth in the ALJ's decision. The Commission defers to the Administrative Law Judge's credibility determinations since she had full opportunity to perceive all of the witnesses. However, the Commission would not give any special commendation to Mr. Kilmurray for being candid in his testimony, as the ALJ did, since he was under oath and required to be truthful. The Commission does, however, disagree with some of the conclusions reached by the ALJ and discusses same below.

The Administrative Law Judge concluded that Mr. Kilmurray violated the School Ethics Act, N.J.S.A. 18A:12-24(c) when he interfered with the hiring of his sister-in-law. Subsection c sets forth:

> 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 or personal involvement that might reasonably be expected to impair his objectivity or independence of judgment.

DAG Lutz supports the conclusion of the ALJ that Mr. Kilmurray violated the School Ethics Act three times when he participated in the Lacey Township board's

consideration of the candidacy of his sister-in-law, Theresa Kilmurray. However, she excepts to the sanction of reprimand recommended by the ALJ. Regarding the violation, she argues that the evidence supports the conclusion that he violated the act three times on June 20, 1994: 1) when he interjected himself into deliberations on the proposed appointment of his sister-in-law in the closed session; 2) when he commented that his sister-in-law and another candidate were both good candidates; and 3) when he made and supported the motion to re-vote on the appointment of Ms. Kilmurray.

Conversely, in his cross-exceptions, Mr. Silver argues that Mr. Kilmurray should not be found in violation of the Act. He states that what DAG Lutz refers to as "interjecting himself" was the making of merely two comments as they entered the executive session meeting, "What the hell is going on here? Why are we not supporting the superintendent's recommendations?" He argues that these two comments had no effect on the outcome, whatsoever.

The Commission notes that the issue is not whether the comments affected the outcome, but whether a reasonable person would expect that Mr. Kilmurray's independence of judgment was impaired when he was making such comments in a matter in which he had a personal involvement. Mr. Kilmurray had a personal involvement with the sister-in-law's appointment that may reasonably be expected to impair his objectivity. Therefore, the Commission concludes that Mr. Kilmurray violated N.J.S.A. 18A:12-24(c) of the Act when he made comments that clearly indicated his support for the appointment of his sister-in-law. Even if his goal were solely to get the board to support the superintendent's recommendations, he acted in his official capacity in a matter in which he had a personal involvement in violation of the Act.

The Commission also agrees with the Administrative Law Judge's conclusions that Mr. Kilmurray's statement that Theresa Kilmurray and another candidate were both good candidates, and his motion for and support of a re-vote after the motion to appoint Ms. Kilmurray failed, were violations of his ethical obligation to refrain from any official action in matters of personal interest to him. The Commission rejects the argument of Mr. Silver that the statement and the motion were of such minute consequence that they are hardly ethical violations. Regarding the statement, if Mr. Kilmurray had just said Theresa Kilmurray is a good candidate, there would be no doubt that there was an ethical violation. The fact that he said both candidates are good does not obviate the fact that the statement promotes the candidacy of Theresa Kilmurray. Regarding the motion for a re-vote on the failed appointment, this motion clearly had no purpose other than to further the hiring of Ms. Kilmurray. The fact that the superintendent called for such a motion certainly did not require that Mr. Kilmurray make it. Again, in both instances, Mr. Kilmurray acted in his official capacity in matters in which he had a personal involvement that might reasonably be expected to impair his objectivity in violation of N.J.S.A. 18A:12-24(c).

The Commission disagrees with the conclusion that Mr. Kilmurray did not violate the Act when he sat in on private session discussions concerning the appointment of his

sister-in-law. As the ALJ reasoned, the Commission must look to the Legislature's findings and declarations set forth at N.J.S.A. 18A:12-22a, which state:

> In our representative form of government it is essential that the conduct of members of local boards of education and local school administrators hold the respect and confidence of the people. These board members and administrators must avoid conduct which is in violation of their public trust or which creates a justifiable impression among the public that such trust is being violated.

The Legislature's findings and declarations reinforce the notion that the purpose of the act is to develop standards that avoid not just unethical conduct, but also the perception thereof. When a school official has a conflict of interest of which the public is aware, and that school official goes behind closed doors when that item is discussed, the situation creates a justifiable impression among the public that their trust is being violated. In the present case, the public may believe that the respondent is actively participating in the discussion behind closed doors, that the board member will tell his relative what was said, or at the least, that the other board members will be inhibited in their discussion of the matter because of his presence. The Commission understands the ALJ's concern for an elected member of the board's right to be privy to all discussions. However, in the present case, the Commission believes that his right is subordinate to the rest of the board's right to have an unfettered discussion of the qualifications of the relative. The board member's rights are not circumscribed by leaving the private session only while that particular item is being discussed. This is consistent with the Commission's public advisory opinion A33-95. This opinion advised that a board member who has a conflict prohibiting him from negotiating would be in violation of the Act if he sat in on the board's closed session strategy discussions. This advisory followed the Superior Court-Appellate Division's ruling in Scotch Plains v. Syversten, 251 N.J. 566 (App. Div. 1991)(School board member who had litigation pending against the district could not attend executive sessions of the board discussing that litigation.) Thus, the Commission concludes, contrary to the ALJ, that Mr. Kilmurray violated N.J.S.A. 18A:12-24(c) by acting in his official capacity in a matter in which he had a personal involvement when he sat in on the part of the private session when the board discussed his sister-in-law.

The Commission recognizes that the advisory opinion A33-95 had not issued at the time of the June 20, 1994 meeting. The Commission also recognizes that counsel advised Mr. Kilmurray that he could attend the private sessions. However, the Commission concludes, as did the ALJ, that these are considerations to take into account when determining the penalty. They do not constitute a defense to the violation. See, e.g., In re Harrison, 96 N.J.A.R. 2D (EDU) 553 and Dilzer v. Sweet, 96 N.J.A.R. 2D (EDU) 132.

Regarding the penalty, the ALJ concluded, "The sanction of reprimand is most commensurate with the nature of the offenses in the within matter and will fully serve to penalize respondent for the conduct." (Initial Decision at p.16). In so ruling the ALJ noted that Mr. Kilmurray had been elected to the board in April 1994, two months before

the June 20, 1994 meeting and had not yet gone through board member training. She also notes, as set forth above, that he thought he was abiding by the advice given by the board attorney. In addition, she states that Mr. Kilmurray testified credibly that the main motivating force for his comments was his annoyance at the behavior of some members for failing to support the superintendent's recommendations and his belief that they were abstaining in order to obtain an equal teaching position for another candidate.

In her exceptions, DAG Lutz argues first that a reprimand is inappropriate for a school official who violated the Act three times in one night. Second, she argues that the board attorney had advised Mr. Kilmurray to refrain from voting on matters involving members of his family prior to June 1994. Thus, he did not need board member training to know that he should not participate in such matters. She points to the ALJ's reference to two other matters from which Mr. Kilmurray abstained affecting his brother-in-law. DAG Lutz notes that Mr. Kilmurray refrained from interfering in his sister-in-law's appointment until the motion to appoint her failed. She suggests, therefore, that the Commission should be guided by the case, In the Matter of Carol Scudillo, 97 N.J.A.R. 2D (EDU) 617, where a board member voted for her son-in-law to become superintendent after she saw that his appointment was in trouble. In that case, the Commissioner of Education imposed the highest penalty possible for a former member of the board, a censure. She argues that Mr. Kilmurray should receive the highest penalty possible, which is removal.

Mr. Silver argues conversely that Mr. Kilmurray's conduct was of minute consequence, comparable to that in the case, In the Matter of Frank Montagna, C40-95, where a board member voted in favor of a list of 33 game personnel that included the name of his wife. He states that Scudillo is distinguishable because Mr. Kilmurray did not willfully or knowingly vote to appoint his sister-in-law. He also stresses that Mr. Kilmurray was a new board member and he believed that he was acting in accordance with advice from counsel. All of these factors, he argues, support the ALJ's decision to give the lowest penalty if the Commission finds a violation.

The Commission disagrees that Mr. Kilmurray's violations of the Act noted above merit the lowest sanction. The Commission notes the mitigating factors recognized by the ALJ that he was a new board member and he believed that he was acting in accordance with the advice of counsel, in determining penalty. However, since counsel's advice was to abstain from matters concerning his relatives, the Commission concludes that Mr. Kilmurray should have known, even without board member training, that he was violating the act when he approached board members going into private session and demanded to know why they were not supporting the superintendent's recommendations. The Commission also respectfully disagrees with the ALJ's characterization of Mr. Kilmurray's actions. She describes his conduct as lesser than a vote that is in conflict with his obligation to refrain from acting in a matter in which he had a personal interest. The characterization is especially questionable since she notes that his actions appeared designed to secure employment for his sister-in-law. (Initial Decision at p.15.)

Having said that, however, the Commission does not agree that Mr. Kilmurray's violation was as egregious as that of Carol Scudillo. Likewise, it does not agree with respondent's counsel that the conduct is as innocuous as that of Frank Montagna. After all, game personnel are persons who receive a small stipend for assisting at school athletic events, as opposed to full-time teachers. Mr. Kilmurray violated the School Ethics Act four separate times in one night trying to revive the superintendent's recommended appointments, which included that of his sister-in-law. Thus, the Commission recommends a penalty of censure, which is a step higher than the lowest sanction of reprimand.

DECISION

For the foregoing reasons, the School Ethics Commission adopts the findings of fact of the Administrative Law Judge. Regarding the violations of the Act, the Commission rejects the conclusion of law that Michael Kilmurray did not violate N.J.S.A. 18A:12-24(c) of the School Ethics Act by attending the private session discussion of his sister-in-law's appointment. The Commission adopts the conclusions that he violated the Act when he made comments concerning the appointment to his colleagues as they entered the private session, when he described both his sister-in-law and another applicant as "good candidates" and when he made and supported the motion to re-vote after the vote to hire Ms. Kilmurray failed. The Commission modifies the ALJ's recommendation regarding the appropriate sanction for the above violations for the reasons set forth above. It therefore recommends that the Commissioner of Education impose a sanction of censure.

This decision has been adopted by formal resolution of the School Ethics Commission. The matter will now be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction only, 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, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission and all other parties.

Paul C. Garbarini
Chairperson

Resolution Adopting Decision -- C12-94

Whereas, the Commission found probable cause to credit the allegations in the complaint and transmitted this matter for a hearing at the Office of Administrative Law; and

Whereas, the School Ethics Commission has considered the Initial Decision in this matter and has considered the exceptions and replies of the parties regarding the decision; and

Whereas, the Commission has reviewed all of the information and now adopts the conclusion of the Administrative Law Judge that respondent violated N.J.S.A. 18A:12-24(c) of the School Ethics Act when he interfered withthe hiring of his sister-in-law three times; and

Whereas, the Commission rejected the conclusion of the Administrative Law Judge that he did not violate the Act when he sat in on closed session discussions regarding the sister-in-law; and

Whereas, the Commission modified the recommended sanction from reprimand to censure; and

Whereas, the Commission has reviewed the proposed decision of its staff setting forth the reasons for its conclusion; and

Whereas, the Commission agrees with the proposed decision;

Now Therefore Be It Resolved that the Commission hereby finds that Michael Kilmurray violated N.J.S.A. 18A:12-24(c) of the School Ethics Act and recommends that the Commissioner of Education impose a sanction of censure against him; and

Be It Further Resolved that the Commission adopts the enclosed decision referenced as its decision in this matter.

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Paul C. Garbarini, Chairperson

I hereby certify that the Resolution
was duly adopted by the School
Ethics Commission at its public meeting
on February 24, 1998.

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Lisa James-Beavers
Executive Director

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