

***State of New Jersey***

OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**

**SUMMARY DECISION**

OAL DKT. NO. EEC13635-12

AGENCY DKT. NO. C28-12

**JANINE WALKER CAFFREY,**

Complainant,

v.

**KENNETH PUCCIO, PERTH AMBOY BOARD**

**OF EDUCATION, MIDDLESEX COUNTY,**

Respondent.

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**Janine Walker Caffrey, complainant, pro se**

**Rita F. Barone, Esq., for respondent (Purcell, Mulcahy, O'Neill & Hawkins, attorneys)**

Record Closed: April 25, 2013 Decided: May 30, 2013

BEFORE **MICHAEL ANTONIEWICZ, ALJ,**

## STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This is a complaint against school board member Kenneth Puccio (Puccio) brought by the complainant Janine Walker Caffrey (Caffrey or superintendent), who is the superintendent of the district, under the School Ethics Act, N.J.S.A. 18A:12-21 to N.J.S.A. 18A:12-34. On August 28, 2012, the School Ethics Commission (Commission) voted to dismiss Counts One and Three in their entirety. In Count Two of the complaint, the superintendent accuses school board member Puccio of having voted against the reappointment of Principals Michelle Velez-Jonte (Velez) and Alvaro Cores (Cores) on June 28, 2012. The superintendent alleges that Puccio violated N.J.S.A. 18A:12-21 et seq.

The matter comes before the Office of Administrative Law (OAL) on respondent's motion to dismiss the complaint. For the reasons that follow, the respondent's motion is granted.

On July 6, 2012, Caffrey filed a written complaint against Puccio with the Commission. Thereafter, on August 15, 2012, Puccio filed an answer to the complaint. At its scheduled meeting on August 28, 2012, the Commission voted to dismiss Counts One and Three in their entirety and decided to refer Count Two to the OAL for an administrative hearing after finding that the complaint was not frivolous.

While the matter was pending before the OAL, Puccio filed a motion for summary decision, together with supporting certifications, a statement of material facts and a legal brief, and a form of Order. Caffrey filed opposition papers, which consisted of a one-page letter stating that she opposed any motions to dismiss and that there continues to be interference in personnel and educational matters on February 12, 2013. Accordingly, Caffrey insisted that this case move forward.

## SUMMARY DECISION

Summary decision is the administrative counterpart to summary judgment in the judicial arena. N.J.A.C. 1:1-12.5 provides that summary decision should be rendered if the papers and discovery which have been filed, together with the affidavits or certifications, if any, show that

there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law. Use of the summary procedure is aimed at the swift uncovering of the merits and either their effective disposition or their advancement toward prompt resolution by trial. Judson v. Peoples Bank and Trust Co., 17 N.J. 67, 74 (1954). While cautioning that a judge should not weigh the truth of the evidence or resolve factual disputes at this early stage of the proceedings, the New Jersey Supreme Court held that when the evidence is so one-sided that one party must prevail as a matter of law, the trial court should not hesitate to grant summary judgment. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995); accord Liberty Surplus Ins. Corp. v. Nowell Amoroso, P.A., 189 N.J. 436, 445–46 (2007).

On a motion for summary decision, a judge must treat all opposing papers indulgently and “grant all the favorable inferences to the non-movant.” Brill, supra, 142 N.J. at 536. That does not mean, however, that the judge must accept an unsubstantiated general denial as tantamount to a genuine issue of disputed fact. Even if the allegations of the pleadings, standing alone, appear to raise a factual dispute, summary decision ought not to be denied if other papers pertinent to the motion show palpably the absence of any issue of material fact. Summary-decision procedure “pierces the allegations of the pleadings to show that the facts are otherwise than as alleged.” Judson, supra, 17 N.J. at 75.

### FINDINGS OF FACT

All of the material facts necessary for disposition of the motion may be derived from the pleadings, certifications, and exhibits. I **FIND**:

Puccio voted against Velez and Cores for reappointment as principals, which took place on June 28, 2012. Both Velez and Cores were on the list of recommendations for reappointment made by Caffrey, as the district's superintendent. The list of recommendations was an item on the agendas for the June 28, 2012, and July 5, 2012, Board meetings. Caffrey allegations a violation of N.J.S.A. 18A:12-24.1(c) and (f), (g), (h) and (i).

During the public session of the meeting, Puccio voted “no” to the reappointments of principals Cores and Velez. This took place one day prior to the expiration of the contracts for Cores and Velez.

## CONCLUSIONS OF LAW

Based on the foregoing facts and the applicable law, I **CONCLUDE** that Puccio did not violate the Code of Ethics under either N.J.S.A. 18A:12-24.1(c), (f), (g), (h) or (i).

In establishing the School Ethics Act, the New Jersey Legislature declared that school board members "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." N.J.S.A. 18A:12-22 (a). Additionally, the Legislature determined that school board members "should have the benefit of specific standards to guide their conduct and of some disciplinary mechanism to ensure the uniform maintenance of those standards among them." N.J.S.A. 18A:12-22(b); Friends Ref. Concepts v. Bd. of Educ., 356 N.J. Super. 203, 212 (Law Div. 2002).

To accomplish its objectives, the Legislature promulgated a Code of Ethics by which all school board members must abide. N.J.S.A. 18A:12-24.1. Further, it established within the Department of Education a nine-member School Ethics Commission to hear complaints and make determinations regarding alleged violations of the Code of Ethics. N.J.S.A. 18A:12-27, -29. Where appropriate, the Commission is expressly authorized to refer matters within its jurisdiction to the OAL for hearing.

### Violations alleged under N.J.S.A. 18A:12-24.1(c)

Specifically, the present matter involves a complaint brought by Caffrey charging that Puccio violated N.J.S.A. 18A:12-24.1(c), requiring that a school board member shall confine their board action to policy making, planning, and appraisal and will help frame policies and plans only after the board has consulted those who will be affected by them. In the present case, Puccio voted on the superintendent's recommendations for reappointment as is in furtherance of his Board member duties of policy making, planning and appraisal. Accordingly, I **FIND** that the actions of Puccio were not in violation of N.J.S.A. 18A:12-24.1(c).

### Violations alleged under N.J.S.A. 18A:12-24.1(f)

This matter also involves a complaint brought by Caffrey charging that Puccio violated N.J.S.A. 18A:12-24.1(f), which states that the school board member shall refuse to surrender their independent judgment to special interests or partisan political groups or to use the schools for personal gain or the gain of friends. Pursuant to N.J.A.C. 6A:28-6.4(a)(6) it states:

a violation of N.J.S.A. 18A:12-24.1(f) shall include evidence that the respondent(s) took action on behalf of, or at the request of, a special interest group or persons organized and voluntarily united in opinion and who adhere to a particular political party or cause; or evidence that the respondent(s) used the schools in order to acquire some benefit for the respondent(s), a member of his or her immediate family or a friend.

Caffrey made no allegation in her complaint or submission of February 12, 2013, that fulfills the guidelines set forth above. No mention is made of an alleged special interest groups or partisan political groups or Puccio's personal gain or that for family or friends. Accordingly, I **FIND** that the actions of Puccio did not violate N.J.S.A. 18A:12-24.1(f).

#### **Violations alleged under N.J.S.A. 18A:12-24.1(g)**

Pursuant to N.J.S.A. 18A:12-24.1(g), a Board member will hold confidential all matters pertaining to the schools which, if disclosed, would needlessly injure individuals or the schools. In the implementing regulation it states that N.J.S.A. 18A:12-24.1(g) prohibits a board member from "mak[ing] public, reveal[ing] or disclos[ing] information that was not public under any laws, regulations or court order of this State, or information that was otherwise confidential in accordance with board policies, procedures or practices." N.J.A.C. 6A:28-6.4(a)(7).

In Caffrey's allegations, she states that Puccio voted against the reappointments of Cores and Velez at a public meeting. Caffrey fails to set forth allegations that Puccio made any public comments regarding the employment of Cores or Velez. Any allegation regarding Puccio's discussion of their employment is limited to comments made in the Board's executive session. There can be no finding that Puccio made any public disclosure of confidential information. Accordingly, I **FIND** that the actions of Puccio did not violate N.J.S.A. 18A:12-24.1(g).

### **Violations alleged under N.J.S.A. 18A:12-24.1(h)**

Caffrey further alleges that Puccio violated N.J.S.A. 18A:12-24.1(h), which states that board members will vote to appoint the best qualified personnel available after consideration of the recommendation of the chief administrative officer. Caffrey claims that she provided no recommendation to the Board and thus their action violated this statute. However, based on the minutes of the Board meeting of June 28, 2012, it is clear that Caffrey did make a recommendation regarding the employment of Cores and Velez. In addition, both Cores and Velez were on a list of recommendations for reappointment by Caffrey.

It is clear that the Commission has held that "a board is not bound by the recommendation of the superintendent." Johanna Barry v. Robert Gannon, Kathy Lindert, Jeneene Norman, Bernard Lenihan and Zenon Dawidowicz, C16-03 (August 26, 2003), <<http://www.state.nj.us/education/legal/ethics/>>. This case went on to say that "although the Board may only appoint, transfer and remove officers and employees of the District upon the recommendation of the superintendent, the Board is not required to accept the superintendent's recommendation." Ibid. In the Barry case, the Commission held that a school board did not violate N.J.S.A. 18A:12-24 by removing the name of a teacher from the board's agenda, even though the superintendent recommended that appointment. Accordingly, I **FIND** that the actions of Puccio did not violate N.J.S.A. 18A:12-24.1(h).

### **Violations alleged under N.J.S.A. 18A:12-24.1(i)**

Caffrey also alleges that Puccio violated N.J.S.A. 18A:12-24.1(i), which provides that a Board member will support and protect school personnel in proper performance of their duties. Not every policy debate or difference of opinion among board members should be elevated to an ethics complaint. Cf. Kliszus v. Gardner, EEC 13510-10, Initial Decision (Sept. 15, 2011), <<http://njlaw.rutgers.edu/collections.oal/>>, adopted, Sch. Ethics Comm'n (Oct. 26, 2011), <<http://www.state.nj.us/education/legal/ethic/>> (it is not the intent of the Code of Ethics to allow the Commission to become involved every time a board member does not like what a school administrator is doing). See Spicer v. Della Vecchia, C31-04 (February 22, 2005), <<http://www.state.nj.us/education/legal/ethics/>>. The Commission stated that it should not be involved in every dispute between a board member and chief school administrator because "then any time a board [member] said that he or she did not like what the administrator was

doing and asked him or her to stop, a complaint would be filed with the Commission. The Commission does not believe that the Legislature intended to open that door.” Id. at slip op. at 5.

In this case, Caffrey has failed to make any allegations which would support such a violation. It appears that Caffrey is upset by the fact that Puccio opted to vote contrary to the recommendations made by Caffrey. Accordingly, I **FIND** that the actions of Puccio did not violate N.J.S.A. 18A:12-24.1(i).

Implementing regulations adopted by the Department of Education prescribe that “the complainant has the burden to factually establish a violation” in accordance with the standards set forth in the regulations. N.J.A.C. 6A:28-6.4(a).

### **ORDER**

It is **ORDERED** that respondent’s motion for summary decision be **GRANTED**.

It is further **ORDERED** that the ethics complaint against Kenneth Puccio be **DISMISSED**.

I hereby **FILE** my Initial Decision with the **SCHOOL ETHICS COMMISSION**. Pursuant to N.J.S.A. 18A:12-29, the School Ethics Commission has jurisdiction to determine whether a violation of the School Ethics Act occurred. If it concludes that the conduct constitutes a violation of the School Ethics Act, it shall recommend an appropriate penalty to the Commissioner of Education. The Commissioner of Education shall issue the final decision in this matter.

The recommendations of this decision as to whether the conduct constitutes a violation of the School Ethics Act may be adopted, modified or rejected by the **SCHOOL ETHICS COMMISSION**. If the School Ethics Commission does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision.

If the School Ethics Commission determines that a violation has occurred, it shall issue a written decision recommending to the Commissioner of Education an appropriate penalty and shall forward the record, including this recommended decision and its decision, to the Commissioner of Education. The Commissioner of Education may subsequently render a final decision as to the appropriate penalty. If the Commissioner of Education does not render a final decision within forty-five days of its receipt of this initial decision, and unless such time period is otherwise extended, the recommended decision of the School Ethics Commission shall become the final decision.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **SCHOOL ETHICS COMMISSION, DEPARTMENT OF EDUCATION, P.O. Box 500, Trenton, NJ 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

May 30, 2013

DATE MICHAEL ANTONIEWICZ, ALJ

Date Received at Agency:

Date Mailed to Parties:

jb

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JANINE WALKER CAFFREY

BEFORE THE SCHOOL  
ETHICS COMMISSION

v.

KENNETH PUCCIO  
*PERTH AMBOY BOARD OF EDUCATION,  
MIDDLESEX COUNTY*

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SEC Docket No. 28-12  
OAL Dkt. No. EEC 13635-12  
FINAL DECISION

### PROCEDURAL HISTORY

This matter arises from a complaint filed by Janine Walker Caffrey, Superintendent of the Perth Amboy Board of Education on July 6, 2012 and amended on July 13, 2012, alleging that the respondent violated N.J.S.A. 18A:12-24.1(a) (c) (d) (f) (g) (h) (i) and (j) of the Code of Ethics for School Board Members. On August 15, 2012, the respondent filed an Answer, alleging that the complaint was frivolous. Pursuant to a predecision determination, at its meeting on August 28, 2012, the Commission voted to find that the above-captioned complaint was not frivolous, in accordance with the standard set forth at N.J.A.C. 6A:28-1.2 and to dismiss Counts 1 and Count 3 in their entirety for lack of jurisdiction, pursuant to N.J.S.A. 18A:12-22 et seq. and N.J.A.C. 6A:28-1.4(a). In accordance with N.J.A.C. 6A:28-10.8(a), the Commission voted to transmit this complaint to the Office of Administrative Law (OAL) for a plenary hearing on Count 2 of the amended complaint. The complainant had the burden to prove factually any violations of N.J.S.A. 18A:12-24.1 (c), (f), (g), (h), and (i) under the Code of Ethics for School Board Members within the standards set forth at N.J.A.C. 6A:28-6.4.

The complaint was transmitted to the OAL on September 28, 2012.

While at the OAL, the respondent filed a Motion for Summary Decision, to which the complainant filed her opposition on February 12, 2013, pursuant to N.J.A.C. 1:1-12.5. The ALJ granted the Motion for Summary Decision and electronically transmitted the Initial Decision to the Commission on May 30, 2013 and mailed it to the parties the same day. On May 31, the Commission requested an extension of time to review the full record, including exceptions. The extension was granted until August 28, 2013. Neither party filed exceptions to the Initial Decision. At its meeting on June 25, 2013, the Commission adopted the findings and conclusions of the ALJ for the reasons expressed in the Initial Decision and dismissed the matter.

### ANALYSIS

The complainant bears the burden of factually proving any violations of the Code of Ethics for School Board Members in accordance with the standards set forth at N.J.A.C. 6A:28-6.4(a). See also, N.J.S.A. 18A:12-29(b). The Commission recognizes that summary decision may be granted:

if the papers and discovery, which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law. When a motion for summary decision is made and supported, an adverse party in order to prevail must by responding affidavit set forth specific facts showing that there is a genuine issue, which can only be determined in an evidentiary proceeding. N.J.A.C. 1:1-12.5(b).

Upon careful and independent review, the Commission finds that the record supports the ALJ's conclusion that Count 2 is ripe for summary dismissal.<sup>1</sup> In so finding, the Commission concurs that the papers and discovery, together with the affidavits in this matter, show that there is no genuine issue as to any material fact and the respondent is entitled to prevail as a matter of law inasmuch as the facts fail to demonstrate that: (1) respondent, by voting against the complainant's recommendations, acted beyond the scope of his authority so as to violate N.J.S.A. 18A:12-24.1(c) (see, N.J.A.C. 6A:28-6.4(a)3); (2) respondent ceded his independent judgment to a special interest or political group for personal gain so as to violate N.J.S.A. 18A:12-24.1(f) (see, N.J.A.C. 6A:28-6.4(a)6); (3) respondent made a public disclosure of confidential information so as to violate N.J.S.A. 18A:12-24.1(g) (see, N.J.A.C. 6A:28-6.4(a)7); (4) respondent failed to hire the best qualified personnel when he did not accept the Superintendent's recommendation so as to violate so N.J.S.A. 18A:12-24.1(h) (see, N.J.A.C. 6A:28-6.4(a)8); or (5) respondent failed to support and protect school personnel voting contrary to the Superintendent's recommendation so as to violate N.J.S.A. 18A:12-24.1(i) (see, N.J.A.C. 6A:28-6.4(a)9).

## DECISION

The Commission determines to adopt the ALJ's Initial Decision, granting summary decision to the respondent and dismissing Count 2. This decision is a final decision of an administrative agency. Therefore, it is appealable only to the Superior Court-Appellate Division. See, New Jersey Court Rule 2:2-3(a).

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Robert W. Bender, Chairperson

Mailing Date: July 31, 2013

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<sup>1</sup> The School Ethics Commission has recognized that the Commission lacks jurisdiction to consider *Rice* notice violations. To the extent that this issue arose during the pendency of this matter at the OAL, the Commission concurs with the ALJ that same is dismissed.

## Resolution Adopting Decision – C28-11

Whereas, pursuant to N.J.A.C. 6A:28-10.8(a), the Commission voted to transmit this matter to the Office of Administrative Law for hearing; and

Whereas, the Administrative Law Judge concluded in his Initial Decision that summary decision should be granted to the respondent and the complaint should be dismissed; and

Whereas, neither party filed exceptions in response to the ALJ's decision; and

Whereas, at its meeting of June 25, 2013, the Commission determined to adopt the Initial Decision of the ALJ as the Final Decision; and

Whereas, the Commission finds that the within decision accurately memorializes its adoption of the Initial Decision;

**Now Therefore Be It Resolved**, the Commission hereby adopts the within decision as a Final Decision and directs it staff to notify all parties to this action of the decision.

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Robert W. Bender, Chairperson

I hereby certify that this Resolution was duly adopted by the School Ethics Commission at it public meeting on July 30, 2013.

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Joanne M. Restivo  
Interim Executive Director  
School Ethics Commission