

In April, 2013, the State of New Jersey, Department of Education, Office of Fiscal Accountability and Compliance (OFAC) issued a report entitled “West New York School District Hiring Practices Review” (hereinafter the “Report”). Its findings alleged that (i) the Mayor of West New York interjected himself into the district’s hiring process; (ii) district employees felt obligated to contribute to political campaigns to ensure continued employment and (iii) there was “potential” retaliation against individuals “deemed” to be unsupportive of the Mayor. See Exhibit-1. The Report discussed the nature of the OFAC investigation, which included interviews and review of records, as well as gratuitously referenced without discussion, an indictment unrelated to the Board of Education filed against the Mayor, which subsequently resulted in an acquittal of all charges against the Mayor.

Because of the nature of the allegations, the Town of West New York undertook a review of the Report and the underlying documents. During its review, the Town learned that the interviews which were referenced in the Report had been tape recorded. The Town sought to review the recorded interviews, which formed its substance. The Department of Education refused to provide the recorded interviews after an Open Public Records Act request was made pursuant to law. Subsequently the Assignment Judge for the Superior Court of New Jersey, Law Division, Mercer County ordered the Department of Education to produce the recorded interviews to the Town.

The OFAC investigation was authorized pursuant to N.J.S.A. 18A:4-23 and 24. See Exhibit-2. It is incumbent upon any state agency conducting an investigation, and particularly an investigation which involves elected public officials and which will ultimately become public, to perform a complete investigation in an impartial and unbiased fashion. Investigators must look at both sides of the issues investigated. Witness statements should be critically analyzed for

accuracy and bias. Persons or entities which are the subject of the investigation and/or against whom criticism is leveled must be given the opportunity to provide statements to investigators to rebut allegations, especially those allegations that are predicated upon innuendo or conjecture, rather than observations or fact. An initial analysis of the Report evidences that the investigators ignored these basic principles.

A fair review of the transcripts of the interviews makes clear that the Report blatantly mischaracterized testimony, quoted testimony out of context, and reported conclusions contrary to witness statements. The Report failed to evaluate the bias of many of the witnesses interviewed and investigators failed to conduct interviews of persons who clearly had knowledge of the subject matter of the investigation and who might reasonably be expected to contradict the ultimate findings. Interviewees were not placed under oath under penalty of perjury. And while witnesses testified as to their own beliefs or feelings, no testimony was taken evidencing a single instance in which any representative of the Town, and especially the Mayor, pressured any employee to make political contributions. And no fact was elicited to evidence the basis for a conclusion that any employee was retaliated against because of political affiliation or belief. “Leading” questions seemed to be the rule, rather than the exception, and were designed to attempt to put words into witnesses’ mouths, instead of being used to clarify witnesses’ statements. Conclusions of fact were founded upon anecdotal stories based upon beliefs and not observations. And finally, the actual interview transcripts contradict references to witnesses’ testimony. A select analysis of these interviews follows.¹

¹ A complete analysis of the discrepancies between the Report and the underlying interview transcript is attached hereto as Exhibit-3.

ALLAN ROTH INTERVIEW

A prime example, of many examples, is the Report's findings concerning witness Allan C. Roth, Esq. who was the then Administrative Assistant to the Director of Special Education Services. His duties included appointment as the affirmative action officer, evaluation of special education IEP's and providing analysis and review of legal expenses. The Report, when speaking about purchasing of tickets, concluded "He (Mr. Roth) was of the opinion that his purchases were, 'the cost of doing business.'" The interview transcript of Allan C. Roth, Esq. is attached hereto as Exhibit-4.

The actual transcript related to Mr. Roth's personal desire and belief that he wanted to support the Mayor. The investigator asked "The cost of doing business?" Mr. Roth's response was "No, just to support the Mayor." Exhibit-4 (Tr. 58:20.) Mr. Roth did not state his purchases were "the cost of doing business." The Report's allegations are inaccurate.

The Report further maintains that a request to hire Reuben Vargas was "channeled through district employee Allan Roth. According to Statements made by Mr. Roth and Superintendent Fauta, the Mayor was adamant that Mr. Vargas obtain employment with the district." See Exhibit-1.

Contrary to the Report's finding, the investigator asked Mr. Roth "were you present or aware of any conversations with regard to his (Vargas) hiring?" Mr. Roth responded, "I mean I was at resolution meetings when it was discussed. I was in various meetings to determine what the appropriate title would be, whether or not the person who took that position was going to be in the Union or out of the Union, you know, issues like that." Exhibit-4 (Tr. 29:18-24) The investigator subsequently stated in a leading question, "So it was suggested by someone in the District that, you know, look around and find a spot for him. There's got to be something." Mr.

Roth responds, “I wasn’t privy to that conversation.” Exhibit-4 (Tr. 33:9-11.) Clearly there is no evidence to support the Report’s findings that Mr. Vargas’ employment was “channeled” through Mr. Roth. No witness testified to that fact.

The Report also alleged that in 2011 Mr. Roth “purchased” two \$2,000.00 tickets to attend the Mayor’s event. See Exhibit-1. To the contrary, Mr. Roth received two tickets to attend the event. The investigators asked “But you didn’t purchase them?” and Mr. Roth answered “I did not purchase them.” Exhibit-4 (Tr. 57:23.) This inaccuracy is significant when the findings of the Report wrongfully suggest that employees were requested to “purchase” tickets to fundraisers. There was no testimony that the Mayor solicited any school administrator to purchase tickets. And no witness testified that they purchased fundraising tickets under pressure placed upon them by anyone. More importantly no investigator attempted to speak with the Mayor, or any campaign aid with the view to ascertain the truth.

PATRICK GAGLIARDI INTERVIEW

Patrick Gagliardi was Director of Human Resources. ” The interview transcript of Patrick Gagliardi is attached hereto as Exhibit-5. The Report attributes to him the allegation that “there was a campaign of harassment and bullying by town hall to gain influence in the district.” Exhibit-1. What the Report does not reflect was that Mr. Gagliardi stated that “I mean, I wasn’t privy to a lot of this because it went directly to John, but secondhand information.” Exhibit-5 (Tr. 4:21-23.) And the investigators recognized the insufficiency of second hand information by asking for Mr. Gagliardi to focus on “what you can say you experienced firsthand.” Exhibit-5 (Tr. 5:10.) Yet the Report takes Mr. Gagliardi’s hearsay information as true, despite his lack of firsthand knowledge of the facts. The investigators failed to follow up with any individual with firsthand knowledge related to the reported hearsay. Similarly, while the Report alleges Joseph

DeMarco, Town Administrator and Allan Roth as persons “generally responsible,” Mr. Garliardi actually stated that Mr. DeMarco and Mr. Roth “yielded the phone calls” and when asked for specifics Mr. Gagliardi stated, “I can’t recall if this, you know, if the – if the contact at the time was Allan...It could have been Mr. Fauta.” Exhibit-5 (Tr. 19:14.) In any event, once again the Report, in a broad brush, mischaracterizes the actual testimony.

Similarly, the Report alleges that “Mr. Gagliardi stated he received daily phone calls from the superintendent regarding requests for terminations, transfers, and new hires.” See Exhibit-1. In actuality there was no testimony about daily telephone calls and no testimony that he was informed that requests were coming from the Mayor.

The most damaging, but inaccurate reference to Mr. Gagliardi’s testimony was the allegation that “To accomplish his objective, the names of certain individuals, referred to as the Mayor’s hit list, were forwarded to the district’s Human Resources Department and presented to the superintendent by Clara Brito-Herrera, who was then a school principal in the district.” Exhibit-1. The Report characterizes this “hit list” as some living document to which the Mayor added names in an effort to effectuate some employment actions. When specifically asked about a “hit list,” Mr. Gagliardi disputed the existence of a written list given to anybody or for anybody. In fact, the only “list” that Mr. Gagliardi did see consisted of three names in Ms. Herrera’s organizer. And Mr. Gagliardi assured that nothing “happened” to the three individuals and nothing was written on the same piece of paper which would indicate otherwise. These facts were not contained in the Report.

Mr. Gagliardi told investigators that his office did prepare a list of non-tenured employees before an August Board of Education meeting. He explained that (i) the list was prepared for the Superintendent’s Council meeting, which was held every August; (ii) it was

prepared so that the people who do evaluations of those individuals are aware of the number of evaluations and who must be evaluated; and (iii) it was prepared so supervisors could review the list to determine how many evaluations their personnel must complete. “So it’s basically just a way that we don’t-nobody slips through and does not get the proper number of evaluations”. Exhibit-5 (Tr. 27:5-7.) In a leading fashion, the investigators attempted to obtain testimony that this list was received by the Mayor’s office, but Mr. Gagliardi replied that was just an assumption on his part. Notwithstanding, the Report concludes that the names of non-tenured staff members were a result of the Mayor’s “successful campaign” when instead legitimate, professional and administrative reasons for the non-tenured employee list existed and was made known to investigators.

CLARA BRITO-HERRERA INTERVIEW

Clara Brito-Herrera was the Assistant Superintendent of Educational and Personnel Services. The interview transcript of Clara Brito-Herrera is attached hereto as Exhibit-6. A fair reading of the actual statements provided to investigators demonstrates that the Report’s conclusion that Ms. Herrera facilitated the employment action requests of the Mayor is based solely upon innuendo and conjecture. The investigators attempted to suggest through their questioning that because Ms. Herrera had served as the campaign treasurer for the Mayor, she somehow performed her duties at the bequest of the Mayor. No testimony was elicited to support this conclusion. To the contrary, Ms. Herrera denied this allegation and no other testimony provides a basis for the Report’s conclusions.

The investigators stated (and did not pose a question) “We are aware that you’re very close to the Mayor. I mean, after all, you’re his campaign treasurer, you know.” Ms. Herrera responded, with the clear purpose of clarifying her role “Was. (as opposed to is the campaign

treasurer). I was during the campaign. I'm no longer-once he became the Mayor, he had his own different team that helps him because I'm an educator." Exhibit-6 (Tr. 79:8-11.)

The Report also leaves out the Mayor's role as Board of School Estimate. Ms. Herrera and Mr. Roth both discussed the Mayor's role in that position in their interviews. Specifically Ms. Herrera stated that as liaison, she did deliver a message from the Mayor to the Superintendent and Mr. Gagliardi requesting an analysis of the need for certain high paying positions in the administrative and supervisor roles, "but no one was told to, you know, fire or anything, just question because he did not want to raise the taxes and the need for that if that need was justifiable." Exhibit-6 (Tr. 80:20-24.) Both Mr. Roth and Ms. Herrera stated that the Mayor's interest was as a result of his role as the Board of School Estimate.

The Report also concluded that the Mayor instructed the superintendent to appoint Ms. Herrera to her position. See Exhibit-1. This allegation is not only inconsistent with Ms. Herrera's recount of how she achieved the position of Assistant Superintendent, it is also inconsistent with Mr. Roth's account that the position was created at the direction of Ms. Sires, the Board President. The position was lawfully posted and communicated throughout the district. The investigators had a copy of the job posting that was sent out electronically to every staff member. The Report fails to note that fact when alleging that Ms. Herrera was the only person to apply for the assistant superintendent's position. Once posted, anyone could apply. This was not a secret. The investigators asked Ms. Herrera "were any other candidates for the position" to which Ms. Herrera did not know the answer. Exhibit-6 (Tr. 9:4.) She directed the investigators to follow-up with human resources, but they failed to do so in their interview with the Director of Human Resources, Mr. Gagliardi. The Report makes an unsupported leap in concluding that Mayor Roque caused the appointment of Ms. Herrera, and that she did his bidding.

The Report also states “The Mayor and Ms. Herrera **may** (emphasis added) also have suggested the hiring of Mrs. Acosta.” See Exhibit-1. This statement cannot be justified from the underlying record. And is evidential of the Report’s conclusions based upon innuendo and conjecture. What was not reported was Ms. Herrera’s statement articulating the actual process by which Mrs. Acosta applied to the District; “Actually, Mr. Acosta had mention if there was a job for her here. I said, she can put in the application. I don’t get jobs. When people approach me and ask me if there’s a job, I say, you can put in the application and if the job comes to be, you’ll get the interview, which is conducted through a panel, they get recommended and I don’t make the sole recommendation. It’s a team of people and that really was instituted here.” Exhibit-6 (Tr. 67:5-17.)

After hearing Ms. Herrera’s response the investigators did not inquire who was on “the team,” did not interview anyone on “the team,” did not interview the Mayor, and produced no evidence to support the Report’s conclusion that “The Mayor and Ms. Herrera may also have suggested the hiring of Mrs. Acosta”. See Exhibit-1.

MICHELLE LOPEZ INTERVIEW

Michelle Lopez is a third grade teacher in the District. The interview transcript of Michelle Lopez is attached hereto as Exhibit-7. The Report alleges “Following the appointment of Dr. Roque as Mayor, she learned her name was included on the mayor’s hit list.” See Exhibit-1. Ms. Lopez was not asked and made no indication in her entire interview as to the existence of a “hit list”. She told investigators that while she had been approached to purchase fundraising tickets she also told them “but not like in threatening way. Exhibit-7 (Tr. 24:12.)

At the time of the interview Ms. Lopez had nine family members employed in the District. Ms. Lopez related hearsay statements about conversations to which she was not a participant and the investigators did not follow up to interview any person with direct knowledge concerning her statements.

RUBEN VARGAS EMPLOYMENT

The Report concludes that the Mayor directed the district to hire Commissioner Rueben Vargas in some capacity and that the request was channeled through Allan Roth. The interview transcript of Ruben Vargas is attached hereto as Exhibit-8. The Report fails to apprise the reader that each individual who was interviewed and asked about the hiring of Mr. Vargas had different recollections. The investigators “cherry-picked” statements to fit their conclusion. Specifically, Ms. Herrera stated that Mr. Vargas’ hiring came through the superintendent. The superintendent stated that Mr. Roth or Ms. Herrera (he couldn’t recall) requested the hire. Mr. Roth stated that he was not privy to any conversation regarding the request to find a “spot” for Mr. Vargas. Mr. Gagliardi had no understanding at all concerning the hire. Not one individual could provide evidence of one statement made by the Mayor, least not in a threatening manner, requesting the hiring of Mr. Vargas. Mr. Vargas identified one individual who apprised him of the opening for the assistant to the supervisor of transportation position, “Octovio”. Exhibit-8 (Tr. 26:10.) Investigators made no effort to find the one individual they knew of that had a direct conversation with Mr. Vargas. They did not interview the Mayor.

The Report also, in a distorted manner, alleged that “OFAC was also informed on occasion Mr. Vargas left his assigned work station at the transportation office on 53rd Street without authorization to engage in activities outside his area of responsibility.” See Exhibit-1. The interview transcript of Francisco Menendez is attached hereto as Exhibit-9; the interview

transcript of Roberto Sanchez is attached hereto as Exhibit-10. Mr. Vargas' supervisor, Mr. Menendez, stated that Mr. Vargas did come to work every day. Exhibit-9 (Tr. 53:24.) Mr. Vargas also had permission from the superintendent to leave his work station to attend his duties as Town Commissioner. This includes attending meetings once a month at Town Hall. Exhibit-8 (Tr. 8:8.) Mr. Menendez confirmed that there is a time card system in place which accounts for time when Mr. Vargas fulfills his duties as Commissioner. Mr. Vargas did not need to ask Mr. Menendez for permission. Exhibit-9 (Tr. 62:11.) Assistant Superintendent Roberto Sanchez was also asked about Mr. Vargas' attendance. Mr. Sanchez related that there were no performance issues with Mr. Vargas and he regularly showed up for work. Exhibit-10 (Tr. 14:17.)

While the transcripts do not support the facts alleged in the Report, the Town of West New York identifies that the import of the Report is to recognize the balance required in local elected politics. Candidates for local public office solicit the electorate with fundraising activities. Portions of the electorate are public employees. It is imperative that municipal public employees as well as the electorate in general are confident that employment decisions are not predicated upon whether public employees choose to donate to candidates to public office. The Mayor and Commissioners of West New York unequivocally are committed to ensuring that the nature of political support by public employees, for or against any candidate, does not affect employment decisions. At the same time the evidence does not support the allegations contained in the Report relating to political influence upon employment decisions. The conclusions in the Report were reached by a flawed and incomplete investigative process. The citizens of the Town of West New York, the West New York Board of Education and the citizens of New Jersey expect fairness, impartiality and a complete investigation when the Department of Education undertakes its oversight functions. Instead the Department of Education's Report seemed to take

as gospel the allegations which instituted its investigation, conducted its investigation with a view toward establishing the allegations alleged, and failed to challenge the allegations made by interviewing only those persons who might be expected to support the anticipated findings.

4839-8177-0797, v. 2