

CONFIDENTIAL

NORTH CAROLINA
WAKE COUNTY

BEFORE THE STATE ETHICS COMMISSION
20-C-002(E); 20-C-003(E); 20-C-004(E);
20-C-005(E); 20-C-006(E); 20-C-008(E); &
20-C-009(E)

IN THE MATTER OF:
Superintendent Mark Johnson

NOTICE OF SUSPENDED INVESTIGATION

THIS CAUSE, coming before the North Carolina State Ethics Commission (“the Commission”), by and through its duly-constituted Probable Cause Panel (“Panel”), pursuant to North Carolina General Statute (G.S.) § 138A-12(j), and 30 NCAC 9B .0101, and it appearing to the Commission that:

1. On February 18, 2020, five separate Complainants (collectively, “Complainants”) filed complaints against Mark Johnson (“Respondent”), Superintendent of the North Carolina Department of Public Instruction. A sixth complaint was filed on March 2, 2020, and a seventh complaint was filed on March 11, 2020. As Superintendent, Respondent is a covered person over whom the Commission has jurisdiction. Respondent was hand-delivered copies of the complaints and was informed that the Commission had initiated an inquiry in the complaints.
2. Complainants alleged that on February 11, 2020, they received emails and text messages from Respondent regarding “Common Core.” Some 800,000 emails and 540,000 text messages were sent to personal email addresses, work emails if the recipients were employed by the North Carolina School System, and personal cell phones. These messages were sent to teachers, parents, and caregivers of children in the North Carolina School System. Complainants allege that the timing of these emails and texts coincided with the start of early voting in the upcoming primary election, and that Respondent used his State office to increase name recognition and garner support for his bid for election as Lt. Governor. Complainants alleged that Respondent violated the State Government Ethics Act (“Ethics Act”) by using his office for private gain and misusing confidential information for his private benefit. *See* G.S. §§ 138A-31(a), 138A-34, and 138A-36(a).
3. On March 11, 2020, a bipartisan Panel directed staff to conduct further inquiry into the matter to determine whether there was probable cause to believe that Respondent had violated the Ethics Act, as alleged by Complainants. The probable cause phase is the initial phase of a Commission investigation, where Commission staff collects all information required to determine whether the facts support a finding of probable cause of a violation of the Ethics Act. If probable cause is found by a Commission panel, a complaint goes to a hearing where the Commission makes a final determination of whether a violation of the Ethics Act occurred. A panel determination of no probable cause would result in the dismissal of the complaint. *See* G.S. § 138A-12(j).

4. Respondent was notified of the Panel's determination and invited to submit a response to the complaints. In his April 13, 2020, response, Respondent stated that the messages were sent "in furtherance of my official duties as State Superintendent and were not intended for any political, financial, or personal benefit." Respondent concluded his written response with, "[p]lease let me know if the Commission has any questions; I would be happy to answer them." Respondent did not question the Commission's jurisdiction to further investigate Complainants' allegations that he had misused his office to bolster his campaign for Lt. Governor.
5. In accordance with direction from the Panel, Commission staff initiated an investigation of the complaints. That investigation included requests for information from Respondent related to the circumstances underlying the text and email communications in question. Those requests sought information from Respondent's agency and from his campaign committee.
6. As the investigation proceeded, Commission staff encountered significant resistance to providing the information requested. Staff received incomplete responses requiring frequent follow-up and were met with claims that Commission staff could only gain access to documents that were subject to the Public Records Act. It took several months for Commission staff to receive the documents and information sought from Respondent's agency.
7. In addition to information about the communications sent by Respondent, Commission staff sought information about the connection between those communications and Respondent's campaign for Lt. Governor. On September 18, nearly two months after the Commission's initial July 2020 request for that information, Respondent's staff declined to provide any information, instead directing those requests to an outside attorney hired by Respondent. Upon renewing those requests with outside counsel in early October, Commission staff agreed, at the request of Respondent's outside counsel, to narrow the scope of the information sought. Counsel in turn agreed to provide the information requested. When that information was not provided, Commission staff followed up with counsel repeatedly. Counsel explained that he was working on those responses but was tied up with other matters.
8. Finally, on November 18, four months after campaign information had been requested by Commission staff and six weeks after Respondent's outside counsel agreed to provide the requested information, Respondent declined to provide that information. Respondent first questioned the Commission's jurisdiction to request records "that didn't go through any tools of the state." Subsequently, Respondent's counsel argued that "none of the complaints at issue even suggest a financial benefit to Mark, his family, or business entities." Respondent's counsel argued that official actions taken by an official to benefit his political campaign would not provide a direct pecuniary benefit to the official. Rather, counsel argued that, if anything, use of State resources for an official's political campaign would provide a "reputational," not a financial benefit. Respondent also declined to be interviewed by Commission staff on any topic.

9. As a covered person, Respondent is required by the Ethics Act to promptly and fully cooperate with any Commission-related inquiry. G.S. § 138A-12(g) states that a covered person's failure to cooperate fully with the Commission in an inquiry shall be grounds for sanctions as set forth in G.S. § 138A-45. The willful failure of an official to comply with the Ethics Act is considered malfeasance in office for purposes of G.S. § 123-5 (causes for impeachment). However, Respondent will be leaving office effective January 1, 2021, and at that point will no longer be a covered person subject to the Commission's jurisdiction. Thus, unless Respondent subsequently assumes a position covered by the Ethics Act, the Commission will lose jurisdiction to address Respondent's failure to cooperate with the Commission's investigation and to seek court intervention to require Respondent's cooperation. *See* G.S. §§ 138A-12(t) and 138A-12(s1).

Since Respondent has declined to fully cooperate in the Commission's investigation, the Panel is unable to determine whether there is probable cause to conclude that Respondent's actions violated the Ethics Act. Because Respondent will no longer be within the Commission's enforcement jurisdiction upon the expiration of his term, the Commission's investigation of Respondent is suspended until Respondent returns to a position subject to the Ethics Act, at which time the Commission will resume its investigation and further address Respondent's failure to cooperate.

Written notice of this investigation's suspension will be provided to the Complainants and Respondent. As provided by G.S. § 138A-12(p), the complaint, this notice, and all other related information and documentation are confidential and not public records.

This the 31st day of December 2020.

STATE ETHICS COMMISSION



Kathleen S. Edwards, Executive Director
For the Panel