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April 24, 2015

Honorable Stuart A. Minkowitz, P.J.Cr.
Superior Court of New Jersey - Morris County Courthouse
P.O. Box 910
Washington & Court Streets
Morristown, New Jersey 07963-0910

Re: State of New Jersey v. Nicole L. McDonough
Morris County Indictment No. 15-02-00197

Honorable Presiding Judge Minkowitz:

Please accept this letter in lieu of a formal brief in support of defendant's motion to dismiss the indictment charging Ms. McDonough with three counts of official misconduct.

Preliminary Statement

By the logic of the State's indictment, the Morris County Prosecutor's Office has the power to throw a teacher in jail for five years for tweeting "Happy Birthday" to a student, for friending a student on Facebook, or for failing to wear a tie to school in violation of a dress code. All of those actions would violate one of the West Morris Regional High School District Board of Education's policies. And it would be simplicity itself to assert that all were done for the mental or emotional gratification of the actor as most things that most people do in life, they do for their mental or emotional gratification. Hence, all of those actions would subject the erring teacher not only to a sanction imposable by the school board, such as counseling, or a letter of reprimand, but would require the imposition of a sentence of five years in state's prison without the possibility of parole. Thankfully, however, for those who believe that our Penal Code should

be sanely interpreted, two Appellate Division cases demonstrate that the State's understanding of the scope of the crime of official misconduct is patently erroneous. Those cases, State v. Thompson, 402 N.J. Super. 177 (App. Div. 2008), and State v. Duble, 172 N.J. Super. 72 (App. Div. 1979), hold that codes regulating employee behavior, particularly locally enacted codes, cannot, consistent with Due Process notice requirements, constitute the basis for charging official misconduct.

We can hear the State's protests even now: But this is not that; but we would never do that. Such answers would be manifestly insufficient. The law must be guided by principle, not whim. If all the State can say by way of response is that it would not do so, but not that it could not do so, that answer is no answer. It must not be that all that stands between an errant teacher and a five-year jail term is which side of the bed the prosecutor got up on in the morning. As Lord Seldon famously stated nearly two centuries ago, the law must rest upon fixed principles, not the length of the Chancellor's foot. Gee v. Pritchard, 36 ER 670 (1818). Hence, it is respectfully submitted that this indictment must be dismissed.[1]

And there is a second flaw in this indictment. Ms. McDonough did not use her position or authority as a teacher with regard to her relationships with the alleged victims. Assuming the truth of the allegations against her, she was guilty of misconduct, but not official misconduct. Case law, particularly State v. DeCree, 343 N.J. Super. 410 (App. Div.), certif. denied, 170 N.J. 388 (2001), shows that an official-misconduct charge cannot be predicated on the notion that but for the defendant's governmental position, he or she would not have committed the misconduct

[1] To underscore this point, the attached Order of Revocation, issued in In the Matter of the Certificates of Ivan Piedra, NJ Dept. of Education Docket No. 0708-176, shows that if this matter had occurred in Passaic County, rather than Morris, there would have been no indictment. The Order is also available at http://www.nj.gov/education/legal/examiners/2009/mar/0708-176.pdf.

at issue. Rather, a charge of official misconduct must be predicated upon an abuse by the defendant of his or her governmental powers. Here, no such abuse occurred. There is no claim, for example, that Ms. McDonough changed a grade to entice or reward the alleged victims. There is no claim that she used any power she possessed as a teacher in connection with those relationships. For this reason as well, it is respectfully submitted that this indictment must be dismissed.

Procedural History

The Morris County grand jury has returned a three-count indictment against defendant. All three counts charge the crime of second-degree official misconduct, in violation of N.J.S.A. 2C:30-2a. Count one charges that Ms. McDonough, a teacher, for the purpose of obtaining a benefit for herself or another, that is emotional, mental, and/or physical sexual gratification, did engage in acts of improper communication, fraternization and/or sexual conduct with a student, C.B. Counts two and three charge that Ms. McDonough, a teacher, for the purpose of obtaining a benefit for herself or another, that is emotional, mental, and/or physical sexual gratification, did engage in acts of improper communication and/or fraternization with students C.T (count two) and A.C. (count three).

Facts

The relevant grand jury allegations are that Ms. McDonough, a teacher at Mendham High School, within the West Morris Regional High School District, gave her cell phone number to the three alleged victims and engaged in several text messages and other electronic communications with them, which were personal in nature, that is, not pertaining to school matters, and some of which were sexual in nature.

It is also alleged that Ms. McDonough engaged in three sex acts with C.B. at her home. Those sex acts, as well as all of her communications with C.B., occurred after he had reached the age of eighteen.

In addition, Morris County Prosecutor's Office Detective LeFera advised the grand jury that under West Morris Regional High School District Board of Education Policy No. 4119.26, improper electronic communications between teachers and students are prohibited. Teachers are not permitted to exchange cell phone numbers with students. They may not engage in electronic communications of a sexual nature. They may not fraternize with students through such communications. They may not send electronic messages to students that do not pertain to school business. That same policy also prohibits "inappropriate and unprofessional behavior." (GJT of Feb. 26 2015 at 17-19).

Detective LeFera stated that the teachers are apprised of the board's policies at an in-service training session. At that session, teachers are told that the consequences of violating Policy No. 4119.26 could include dismissal from one's position. (GJT of Feb. 26 2015 at 16-19).

Detective LeFera further told the grand jury that school board Policy No. 4119.22 "prohibits an employee from creating conditions that effect the proper operations of the schools, whether that conduct occurs within schools or outside normal duties" and that same policy "states that an employee's personal life should not affect the employee's professional relationship with students." (GJT of Feb. 26 2015 at 18-19).

Legal Argument

Point I

This Prosecution is Fatally Flawed Because, Pursuant to Due Process Notice Requirements, Disobeying School Board Policies Regulating Employee Conduct Cannot Be the Basis for an Indictment for Official Misconduct.

The charge of official misconduct cannot be predicated upon one's failure to abide by a school board's policies regulating the behavior of its employees. Here, the policies promulgated by the West Morris Regional High School District certainly advised teachers that a violation of its provisions might lead to the civil sanction of dismissal, but they give no warning whatsoever that a violation could result in a prison term. Two Appellate Division cases, State v. Thompson, 402 N.J. Super. 177 (App. Div. 2008), and State v. Duble, 172 N.J. Super. 72 (App. Div. 1979), hold that such codes of conduct may not, consistent with Due Process notice requirements, be the basis for criminal liability.

In State v. Thompson, supra, the State sought to base several official misconduct charges upon violations by state employees of the Conflicts of Interest Law, N.J.S.A. 52:13D-12, et. seq. The Appellate Division dismissed those charges on the ground that the statute did not provide clear and understandable notice that a violation of its provisions would lead to criminal liability, as opposed, of course, to mere civil penalties:

> We also agree with the trial court that the Conflicts of Interest Law does not provide the criminal defendant with the necessary constitutional protections. The guarantee of procedural due process in criminal law requires that the defendant receive notice of illegality in a clear and understandable fashion. *State v. Clarksburg Inn*, 375 N.J. Super. 624, 632, 868 A.2d 1120 (App.Div.2005). "[T]he vagueness doctrine sets forth the principle that the law must give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *State v. Lisa*, 391 N.J. Super. 556, 578, 919 A.2d 145 (App.Div.2007) (citations and internal quotation marks omitted), *aff'd*, 194 N.J. 409, 945 A.2d 690 (2008). The defendant must be apprised of "that against which

> he must defend." *State v. Spano*, 128 N.J. Super. 90, 92, 319 A.2d 230 (App.Div.1973), *aff'd*, 64 N.J. 566, 319 A.2d 217 (1974).
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> To be sure, this case does not present the same inadequacy of notice as that rejected by our Supreme Court in *Lisa, supra.* The State indicted the defendant in that case with the reckless manslaughter of a teenage girl staying at his home; the girl died of multiple organ failure after the ingestion of a number of drugs. 194 N.J. at 410, 919 A.2d 145. The State argued that the law imposed on defendant a duty to act to prevent harm to the girl. *Ibid.* The State located this duty in the *Restatement (Second) of Torts*, and instructed the grand jury accordingly. *Ibid.* The trial court dismissed the indictment on the defendant's motion, and we affirmed. *Id.* at 411, 919 A.2d 145. The Supreme Court affirmed as well, agreeing that "the Restatement of Torts did not provide sufficient notice of a duty to which a theory of criminal omission liability may attach." *Ibid.*
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> Here, the alleged duty does not arise from an amorphous "scholarly treatise that has never made its way into New Jersey substantive criminal law, and perhaps not into our civil law either." *Lisa, supra*, 391 N.J. Super. at 579, 919 A.2d 145. It arises from an enacted statute. However, for the reasons expressed above, the Conflicts of Interest Law and our jurisprudence do not provide sufficient notice that the unreasonable appearance of impropriety may lead to a defendant's conviction of a crime.
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> [Id. at 203-4.]

Logic dictates that if a state statute prohibiting unethical conduct by state employees "do[es] not provide sufficient notice that the unreasonable appearance of impropriety may lead to [an employee's] conviction of a crime," it follows with even greater force that a local school board's policies cannot do so.

Moreover, the particular policy described to the grand jury, Policy No. 4119.26, regulating staff use of electronic communications, actually provides an assurance that a violation will not lead to a jail sentence, but, at worst, might result in the civil sanction of the loss of one's job. Specifically, section H of that policy states: "Staff shall be informed of the consequences that may result from inappropriate electronic communications up to and including dismissal from employment." To repeat, because it is worth repeating, the school board directed that teachers be informed that the worst that could happen for a violation of this policy was that they could lose

their job. Yet this is the policy the State wants to twist into a crime. Not only is this an absence of fair notice, it is the opposite. It is notice by a government agency, the school board, that the severest sanction possible for a violation of its policy regarding electronic communications is the civil sanction of the loss of one's employment. Truly, we have gone through the looking-glass if a state prison sentence can be founded upon a policy that explicitly and unambiguously warns that the severest punishment available is the loss of one's job.

An older case, interpreting the predecessor crime to the Code's official-misconduct statute, also establishes that it would be improper, and indeed dangerous, to allow local authorities to define the crime of official misconduct through the promulgation of local laws or policies. In State v. Duble, 172 N.J. Super. 72 (App. Div. 1979), the defendant was a Trenton police officer. He was charged in a two-count indictment with unlawful possession of a controlled dangerous substance, under N.J.S.A. 24:21-20(a)(1), and neglect of official duty, under N.J.S.A. 2A-135-1, and was only convicted of the latter charge. Id. at 73. Both charges arose from an investigation during which the defendant took possession of a deck of heroin that was later found in his private locker. The neglect-of-duty charge was premised upon the defendant's failure to file a report detailing his discovery of the heroin. The statute under which the indictment was returned declared it to be punishable as a misdemeanor for any public officer willfully to refuse or neglect to perform any duty "imposed upon him by law." The duty to file written reports for members of the Trenton Police Department arose from rules and regulations governing the operation of the police department which were approved by resolution of the Trenton City Commission. Id. at 74.

On appeal, the defendant claimed that his failure to file a report, while a violation of the department's rules, did not violate the statute. The Appellate Division agreed. In the following

passage from Duble, the Court, speaking as if it had the instant indictment in mind, expresses the point that not every transgression by a public employee that might subject that employee to administrative disciplinary sanctions can form the basis for a criminal complaint. The Court explains that to hold otherwise would effectively empower every petty bureaucrat to create classes of indictable offenses:

> Among other contentions, defendant argues that the duty created by the foregoing regulation is not one which was imposed upon him "by law," within the meaning of N.J.S.A. 2A:135-1. We agree. The rule in question is purely administrative in character, affecting only the internal operation of the department and the conduct of its members. For breach thereof disciplinary proceedings may be available. Jansco v. Waldron, 70 N.J. 320, 360 A.2d 321 (1976). But it was never intended that such should be prosecuted by indictment under the criminal statute. To conclude otherwise would authorize department heads and municipal governing bodies to create broad classes of indictable offenses chargeable against public officers merely by administrative regulations covering the most commonplace and inoffensive forms of conduct and agency procedure.
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> [Id.; emphasis added].

The holdings of Thompson and Duble are particularly pertinent here, where the State has charged three second-degree crimes, each carrying a five-year parole-ineligibility period, for acts constituting violations of policies promulgated by a mere school board against improper communication or fraternization with students.

As noted at the outset, if this indictment can stand, a teacher who tweets "Happy Birthday" to a student, or who friends a student on Facebook, or fails to wear a tie to school,[2] is subject to indictment for those derelictions at the whim of the Morris County Prosecutor's Office. But in a sane world, that cannot be. Hence, this indictment must be dismissed.

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[2] West Morris Regional High School District Policy No. 4119.11/4219.22 states: "The West Morris Regional High School District Board of Education expects all staff members to be neatly groomed and dressed in clothing suitable for the subject of instruction, the work being performed, or the occasion."

Point II

The Indictment Must Be Dismissed Because Ms. McDonough Did Not Abuse Her Governmental Powers With Regard to Any of the Alleged Victims.

No proofs were presented to the grand jury (and none exist) that Ms. McDonough used her position or authority as a teacher to establish or foster her relationships with any of the alleged victims. No proofs were presented to the grand jury (and none exist) that she rewarded anyone, through her position as a teacher, because of those relationships. (Of course, while C.B. was a student at the high school, he was never in any of Ms. McDonough's classes.)

Because the official misconduct statute is aimed at preventing "the abuse of government power for personal benefit," State v. Vickery, 275 N.J.Super. 648, 651, 646 A.2d 1159 (Law Div.1994) (emphasis added), and Ms. McDonough did not use her position or authority as a teacher with regard to her relationships with the alleged victims, she should not have been indicted for official misconduct.

In State v. DeCree, 343 N.J. Super. 410 (App. Div.), certif. denied, 170 N.J. 388 (2001), the defendant was a school security guard who was convicted of second-degree official misconduct under N.J.S.A. 2C:30-2a for having participated in a fraud and kickback scheme involving the submission of false medical claims to the State Health Benefits Program. The defendant argued on appeal that even if she was properly found guilty of second-degree conspiracy to commit theft by deception, her misconduct did not constitute official misconduct. The State sought to counter that claim by arguing that the "defendant's actions constitute[d] official misconduct because she was employed as a security guard by the Newark Board of Education and spoke to Burns [a coconspirator] about the scheme on school premises, while in uniform and on duty." Id. at 417. Hence, "[a]ccording to the State, these circumstances were

sufficiently related to her official status to constitute the crime of official misconduct." Id. The Appellate Division, however, wisely rejected the State's view that simply because the misconduct was job-related, that is, it took place on the job and would not have occurred but for the defendant's employment, it was official misconduct. In the following passage, this Court explained that because the defendant's illegal conduct did not involve an abuse by her of her governmental powers as a security guard, that misconduct could not form the basis for an indictment charging the crime of official misconduct:

> The official misconduct statute is aimed at preventing "the abuse of government power for personal benefit." State v. Vickery, 275 N.J.Super. 648, 651, 646 A.2d 1159 (Law Div.1994). Examples of conduct that have been found to constitute official misconduct are sexual misconduct by a police officer while conducting a motor vehicle stop, State v. Stevens, 203 N.J.Super. 59, 495 A.2d 910 (Law Div.1984), modified, 222 N.J.Super. 602, 537 A.2d 774 (App.Div.1988), aff'd, 115 N.J. 289, 558 A.2d 833 (1989); facilitating the payment of bribes to obtain a rent increase not otherwise permitted, State v. Bryant, 257 N.J.Super. 63, 607 A.2d 1343 (App.Div.1992); a teacher exposing young students to inappropriate material, State v. Parker, 124 N.J. 628, 592 A.2d 228 (1991), cert. denied, 503 U.S. 939, 112 S. Ct. 1483, 117 L.Ed.2d 625 (1992). Defendant had no official functions relating to law enforcement. She was neither a police officer nor an investigator. Her duties were confined to preventing unauthorized persons from entering the school. Her actions in joining the scheme had nothing to do with her status as a security guard but everything to do with her public employment and participation in the State Health Benefits Program.
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> [Id. at 418; emphasis added].

The application of DeCree to the instant case is clear. Assuming the truth of the State's allegations, Ms. McDonough's electronic communications with the three alleged victims and her acts of sex with C.B. were not official misconduct, even if improper, because the State offered no proof to the grand jury that she somehow used or abused her authority as a teacher to do so or as a consequence of having done so. Indeed, the crux of the State's claim that she violated the

school board's policies is that she was not engaged in any legitimate school business in any of her dealings with the three students (one of whom, C.B., she had never actually had in class). There was no proof, for example, that she promised a better grade to the alleged victims in exchange for either their communications or for her sex with C.B., or, for that matter, that she did or promised to do anything for any of the alleged victims in her role as a teacher. Just as with the security guard in DeCree, where the defendant could not have committed fraud but for her employment as a school security guard, the fact that Ms. McDonough might not have met the alleged victims but for her having been a teacher at the high school, and, as well, the simple fact that she was the teacher of two of the students, does not make her interactions with them violations of the official misconduct statute.

There exist several federal circuit cases recognizing that either a police officer or a teacher who meets someone through his or her official duties and then engages in misconduct with that person outside of his or her official duties does not act under color of law while engaging in that misconduct. Roe v. Humke, 128 F.3d 1213 (8th Cir.1997) (although police officer met the student through his role as goodwill ambassador to school, no nexus existed between his official duties and molestation of student where the defendant molested the student at his farm, while he was off-duty, in plain clothes, driving his personal car, and did not pretend to be engaged in any official activity); Becerra v. Asher, 105 F.3d 1042, 1047 (5th Cir.1997) (although teacher had "first befriended and shown a special interest in" the victim at school, there was no nexus between official duties as teacher and sexual assault where teacher molested student off campus five months after student withdrew from school); D.T. v. Independent School District, 894 F.2d 1176, 1186-88 (10th Cir.1990) (teacher was not acting under color of law when he molested students during summer vacation, while under no contractual obligation to

school district, molestation took place at his home following a fundraising activity for a basketball camp not affiliated with the school; and the events were the product of a private activity that the plaintiffs voluntarily and freely participated in as private individuals).

The above case law echoes the following long-ago comment of Chief Justice Weintraub, no less cogent because of its age:

> All persons have the "duty" to obey the law. More accurately, there is no "duty" but rather a liability to punishment. Every public officer of course is thus amenable in his capacity of private citizen, but he does not necessarily commit two crimes by a single act merely because he happens also to be a public official.
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> [State v. Cohen, 32 N.J. 1, 13 (1960) (Weintraub, C.J., concurring).]

Accordingly, just because defendant met the alleged victims in school while she was a teacher, and just because she was the teacher of two of those students, does not make her communications with them or her sex with C.B. acts of official misconduct.

Conclusion

Ms. McDonough deserves our opprobrium if we assume the truth of the allegations against her. But she did not commit the crime of official misconduct. The Morris County Prosecutor's Office should have followed the example of the Passaic County Prosecutor's Office, see Piedra, supra, and left this matter to the school authorities because violations of school board policies are not crimes. No reasonable person (including, apparently, those in charge of the Passaic County Prosecutor's Office) could read the West Morris Regional High School District Policy Manual, where the policies here at issue are set forth, and recognize that he or she was reading a list of jailable offenses. One must wonder if anyone would enter the teaching profession if it were true that County Prosecutors have the power to review such violations and turn them into crimes, particularly crimes carrying five-year parole-ineligibility

periods. Likewise, do we want to confer upon school principals the power to threaten teachers that they will be turned over to the Prosecutor's Office if they violate any district policy?

In this regard, recall that Detective LeFera told the grand jury that Policy No. 4119.22 "prohibits an employee from creating conditions that effect the proper operations of the schools, whether that conduct occurs within schools or outside normal duties" and that same policy "states that an employee's personal life should not affect the employee's professional relationship with students." (GJT of Feb. 26 2015 at 18-19). Detective LeFera also testified that school board Policy No. 4119.26 prohibited "inappropriate and unprofessional behavior." (GJT of Feb. 26 2015 at 17-18). Do we want to confer upon the Prosecutor's Office the power to choose to send a teacher to state prison for five years with no possibility of parole for "inappropriate or unprofessional behavior," or "creating conditions that effect the proper operations of the schools," or for any actions in a teacher's "personal life" that "affect the employee's professional relationship with students"? It should be terrifying to even contemplate that prospect. Yet, make no mistake about it, upholding this indictment would confer such authority upon the State. No sane justice system requires we all hold our breath, close our eyes, and silently pray for the infallibility of the Prosecutor's Office in the exercise of that office's discretion to prosecute or decline to prosecute where there exists a *prima facie* case for an indictable offense.

The second fatal defect in this indictment is this. Not every inappropriate act by a government employee, no matter how condemnable, constitutes official misconduct. The essence of official misconduct is an abuse of power. Absent such an abuse, inappropriate actions by government employees must be dealt with outside the criminal justice system. Here, the State apparently saw wrongdoing in the relationships between Ms. McDonough

and the alleged victims, but also knew that those relationships were not of themselves criminal. Rather than allowing the school system to respond to Ms. McDonough's actions (as the Passaic County Prosecutor's Office would have done), the State turned to the official misconduct statute to condemn her conduct as criminal acts. But the facts here do not involve an abuse of power by her. They do not involve any use of power by her in connection with her relationships with the alleged victims. Hence, for this second reason as well, these facts do not fit the crime of official misconduct.

For these reasons, it is respectfully submitted that this Court should dismiss the indictment.

Respectfully submitted,
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