

OFFICE OF THE BAR COUNSEL  
OF THE  
BOARD OF BAR OVERSEERS  
OF THE SUPREME JUDICIAL COURT  
FOR THE  
COMMONWEALTH OF MASSACHUSETTS

REQUEST FOR INVESTIGATION

Date October 7, 2003

Instructions:

- (1) Please type, if possible. Otherwise, use a dark pen.
- (2) Write only on the front side of the paper.
- (3) Specify exactly what the attorney did that you believe to have been misconduct.
- (4) Attach additional sheets, if necessary, as well as copies of any documents which will help explain the facts. Please do not send original documents.
- (5) Retain copies for your records of this and any subsequent correspondence and documentation sent to this office.
- (6) Please return to:

OFFICE OF THE BAR COUNSEL  
75 FEDERAL STREET  
BOSTON, MASSACHUSETTS 02110  
(617) 728-8750  
<http://www.state.ma.us/obcbbo/>

1. I, David Lawrence Higgs,  
(type or print your full name)  
allege that attorney Mark W. Batten, Esq., BBO #566211,  
whose office address is Bingham McCutchen LLP, 150 Federal St., Boston MA 02110-1726,  
has committed acts of misconduct as set forth in the Statement of Facts  
attached.
2. I request that the Office of the Bar Counsel investigate this  
misconduct.
3. I understand that a copy of this statement may be mailed to the  
attorney for a reply.
4. I understand that this matter must be kept confidential by Bar  
Counsel and the Board of Bar Overseers.

(signature) \_\_\_\_\_

(address) \_\_\_\_\_

1269 Pleasant Street

Weymouth, MA 02189-2701

(telephone): \_\_\_\_\_

Work 781-830-9690 / x-158

Home 781-335-3301

**ACAP**

PLEASE USE ATTACHED SHEET FOR STATEMENT

Complaint of David L. Higgs and Rodney W. Young

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STATEMENT OF FACTS

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Please do not write above this line and write only on the front of this and any other pages you attach.

Please fill in the following, if applicable:

Court case name: Beck et al. v. DOE et al.

Name of court: Plymouth County Superior Court

Court case number: Civil Action 00-0076

Statement of Facts:

*Note: tab references in footnotes are to appendices of attached 'Super Brief.'*

**1. Attorney Batten denied the existence of the so-called 'Pollets Report' requested in discovery, in violation of Rule 34 of Civil Procedure.**

**Background:**

Five months prior to the filing of Beck v. DOE in Superior Court, Defendant Gregory Thornton, Chairman of the Board of Trustees of the South Shore Charter School, on August 26, 1999 dismissed a formal complaint of fiscal fraud at the School, filed in person by plaintiffs Roberta Beck and Rod Young, per G.L.c.71§89(jj) and 603 CMR 1.08, at a trustees meeting held on June 16, 1999. In rendering the School's official finding of investigation, Chairman Thornton suppressed a (draft) investigative report, dated July 13, 1999, prepared by two of his colleagues, trustees Miriam Brownwall and John Pollets, Esq., whom the board appointed during its June 16 meeting to respond to the plaintiffs' charges.

Advised by the School's attorney Mark W. Batten of Bingham McCutchen LLP, Thornton would not acknowledge the so-called "Pollets Report," until after the Secretary of State a year later on July 11, 2000, ruling on a petition submitted by the plaintiffs the prior September,<sup>1</sup> ordered release of the document, with related material, as a public record.

The findings of the Pollets Report were consistent with plaintiffs' charges of malfeasance against Defendant Timothy Anderson, the School's CEO from 1995 through July 1999. In his official response to Beck and Young's complaint, Thornton reversed Brownwall and Pollets' findings. Thornton exonerated Anderson of all wrongdoing, while in effect attributing to Beck and Young up to \$1.1 million in unsupported "tuition reimbursements" found in a recently released state audit on the School, which the plaintiffs had initiated in 1997.<sup>2</sup>

Plaintiff Young filed a public-records request with the School on September 8, 1999 specifying the Pollets Report and related documents, by author, date, and subject. Thornton denied the request on September 17, 1999 without acknowledging the requested documents,<sup>3</sup> as required by the state's public-records / freedom-of-information law. Shortly afterwards Young petitioned the Public Records Division.

**Violation alleged:**

In discovery, extending from May 2000 through July 2001, Thornton and Attorney Mark Batten of Bingham Dana LLP continued to deny the existence of the 'Pollets Report,' which had been described in detail not only in the public-record request filed by Young the prior September, but subsequently identified in a production request of Plaintiff David Higgs served under Rule 34 of Civil Procedure on May 5, 2000.

Batten responded by letter dated July 6, 2000 to Plaintiff Higgs' May 2000 production request and July 3 follow-up, asserting untruthfully, "The School has searched its files for documents responsive to your request ...."<sup>4</sup> The Pollets Report was not returned.

The record, however, damningly reveals that on January 11, 2000 Batten provided a copy of the Pollets Report and associated material, the same requested by Higgs and Young, to the Public Records Division of the Office of the Secretary of State, for in-camera review.<sup>5</sup>

On July 11, 2000 – five days after Batten's most recent denial of the availability of the Pollets Report – the Secretary of State unexpectedly ordered the set of documents produced by Trustees Brownwall and Pollets, as described in Young's original public-record request, to be released.<sup>6</sup> Thornton and Batten complied.

Without the Secretary's decision, plaintiffs believe they would not have acquired the requested documents by order by the Plymouth Superior Court. The Pollets Report would still be withheld.

On November 22, 2000 the Court denied plaintiffs' motion for sanctions against Thornton and Attorney Batten for violating Rules 34 and 37 of Civil Procedure regarding production of documents. Sidestepping the issue of misrepresentation, presiding Justice Thomas Connolly, wrote wordily, "... the Court denied the motion *at this time* as being totally unwarranted and not called for in the circumstances of this case *at this time*." <sup>7</sup> [italics supplied] Since Connolly's decision, the Court in summary judgment has dismissed all charges against the defendants. Therefore the matter might be revisited *at this time*.

In his decision Judge Connolly opined that the plaintiffs could not request sanctions under Rule 37, because they had not moved the Court to enforce the original production request.<sup>8</sup> However, the plaintiffs *had already obtained* the requested documents through other auspices, namely, those of the Office of the Secretary of State, thereby obviating any enforcement order they would otherwise have requested.

Irrefutably the Pollets Report had long been in defendants' possession, as evidenced by the aforementioned January 11, 2000 letter from Attorney Batten to the Division of Public Records, in which Batten speciously represented to Division attorney Michael Pierce that *all materials* produced by Brownwall and Pollets,' including the draft report, could be withheld on the basis of the attorney-client privilege.

## **2. Attorney Batten devised or condoned *ex parte* materials provided to the Court.**

Without basis in the record, the Court in its decision and order of summary judgment gratuitously *added and extended* arguments in the defense of Timothy Anderson and Gregory Thornton,<sup>9</sup> both clients of Attorney Batten. Presumably the Court would incorporate *factual assertions* relative to allegations of defamation against these defendants into its decision and order only with documentation *provided by their counsel*. The Court may unwittingly have accepted *ex parte* materials from the defendants and their attorney believing them to be legitimate excerpts from the record.

While each of thirteen blatant distortions of the record,<sup>10</sup> which the plaintiffs identify in their *Super Brief* [attached], relate to Anderson and Thornton, only several also pertain, variously, to the arguments of their co-defendants, who are represented by other counsel.

Plaintiffs have attempted unsuccessfully to obtain from the Department of the Superior Court the identity(ies) of the licensed members of the legal staff of Regional Associate Justice Richard Chin, who presided in summary judgment.<sup>11</sup> Plaintiffs expect that any investigation undertaken by the Board of Bar Overseers will perforce uncover *ex parte* material that Attorney Batten directly or indirectly afforded the Court, and upon which Judge Chin's legal staff relied in drafting a remarkably injudicious decision and order of summary judgment.

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<sup>1</sup> See 'Pollets Report,' 7/13/99 [TAB 15]; see pages 50-59, 86 in the attached 'Super Brief;' see Decision and Order of Summary Judgment, February 25, 2001 [TAB 3], page 5. See Secretary of State's order to release Pollets Report as a pub-

lic document, 7/11/00 [TAB 15]; see Plaintiffs' Opposition to SSCS' motion for summary judgment [TAB 7], page 42 ['(d)'].

<sup>2</sup> See Letter from Thornton to plaintiffs denying July 1999 complaint, 8/26/99 [TAB 16].

<sup>3</sup> See Public-record request by Plaintiff Young to SSCS CEO Edward Gotgart specifying the Pollets Report, 09/08/99 [TAB 15].

<sup>4</sup> Higgs requested with specificity, "any and all documents drafted or referenced by SSCS Trustees John Pollets and Miriam Brownwall ... taking part in an investigation called by the SSCS Board of Trustees on June 16, 1999 and subsequently by formal complaint submitted to the Board by plaintiffs Roberta Beck and Rodney W. Young on July 28, 1999 into allegations of "mistakes" ... made in an official SSCS communication to the Office of the State Auditor, dated November 23, 1998 and signed by then SSCS CEO Timothy Anderson ...." See Higgs' request for production of documents, 05/05/00 [TAB 15 / p. 357], page 3; see page 49 in the attached 'Super Brief.'

See Letter by Higgs complaining of non compliance with his 05/05/00 document request, 07/28/00 [TAB 15]. See Letter from defense attorney Batten to Higgs denying existence of Pollets Report, 7/6/00 [TAB 15 / p. 361].

<sup>5</sup> See Letter from School to the Secretary of State, 1/11/00, arguing against release of Pollets Report [TAB 15 / p. 355].

<sup>6</sup> See Secretary of State's order to release Pollets Report as a public document, 7/11/00 [TAB 15].

<sup>7</sup> See Justice Thomas Connolly denies plaintiff's motion for sanctions [motion for reconsideration thereof], November 22, 2000 [TAB 15]. Plaintiffs resorted to verse, to no avail; see Notice of appeal from order on motion to sanction, 12/19/00 [TAB 15].

<sup>8</sup> Id. Connolly wrote in reconsideration of his ruling on plaintiffs' motion for sanctions (last page and paragraph), "...the plaintiffs must first obtain in (sic) order under Mass. R. Civ. P. 37(a) for the production of documents, before a Motion for Sanctions may be filed or allowed. (on the issue of document production). The Court has looked through the docket and papers and found no such underlying order."

Plaintiffs submitted their production request to defendants on May 5, 2000, in part specifying, "... any and all documents drafted or referenced by SSCS Trustees John Pollets and Miriam Brownwall, and any other person, taking part in an investigation called by the SSCS Board of Trustees on June 16, 1999 and subsequently by formal complaint submitted to the Board by plaintiffs Roberta Beck and Rodney W. Young on July 28, 1999, into allegations of "mistakes" made by these two plaintiffs on an FY Charter School Claim Form - such allegations made in an official SSCS communication to the Office of the State Auditor, dated November 23, 1998 and signed by then SSCS CEO Timothy Anderson ...."

On July 3, 2000 Plaintiff Higgs wrote to Attorney Mark Batten protesting that a general statement included in defendants' tardy June 30 response to his production request, with regard to the Pollets Report and related documents, was non responsive, per Rules of Civil Procedure 34 and 37. Batten had written on June 30 only that "[s]ubject to and without waiving the General Objections, the School will produce responsive documents, if any, that are in its possession, custody or control."

On July 6, 2000, Attorney Mark Batten responded more definitively, "I received your letter dated July 3, 2000. The School has searched its files for documents responsive to your request ... The School will supplement its production if it locates any additional documents, but the enclosed appear to be the only documents in the School's possession that are responsive to your requests."

No documents relating in the least to Pollets and Brownwall's investigation were enclosed, just as there had been none with the prior June 30, 2000 answer to Higgs' production request.

Plaintiffs considered both the defendants' June 30 and July 6 responses to be "evasive or incomplete" and therefore a "failure to answer," per Rule 37(a)(3).

Plaintiffs accordingly began to prepare a motion for court order compelling discovery of the Pollets materials, per Rule 37(a), but were notified on July 11 of an order already issued by the Secretary of State for release of the long requested 'Pollets' documents. Subsequently the plaintiffs obtained the items exhibited to the Division of Public Records in a timely

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manner. Application “for an order compelling discovery ...,” under Rule 37, which Judge Connolly noted the plaintiffs had failed to make, was therefore unnecessary and presumably would have been denied as superfluous.

<sup>9</sup> See ‘Table of Court Errors,’ pp. vi and vi in the attached ‘Super Brief.’ The ‘significant factual distortions’ referenced in the 13 dark-gray cells of the table cannot be justified either by the record or by any exercise of judicial notice.

<sup>10</sup> Ibid.

<sup>11</sup> See Public Records Request, June 13, 2002 [**TAB 37**].