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ALBERT A. MONILLAS	:	BEFORE THE SCHOOL
	:	ETHICS COMMISSION
	:	
v.	:	
	:	Docket No. C09-08
JOHN GABAUER	:	
BORDENTOWN	:	DECISION ON
BOARD OF EDUCATION	:	MOTION TO DISMISS
BURLINGTON COUNTY	:	
	:	

PROCEDURAL HISTORY

This matter arises from a complaint filed on March 11, 2008 by Dr. Albert A. Monillas alleging that John Gabauer president of the Bordentown Board of Education (Board) violated the School Ethics Act (Act), N.J.S.A. 18A:12-21 et seq. The complainant filed an amended complaint on April 3, 2008, which included the name and address of the respondent and specifically alleged that the respondent violated N.J.S.A. 18A:12-24.1(a) thru (j) of the Code of Ethics for School Board Members.

The respondent, through his attorney, Stephen J. Mushinski, Esq., pursuant to N.J.A.C. 6A:28-6.5(e), timely filed a Motion to Dismiss the Complaint in lieu of filing an Answer on May 12, 2008, together with supporting certifications. The complainant submitted a response to the Motion. The Commission considered the amended complaint, the Motion to Dismiss and the complainant’s response to the Motion at its meeting on June 24, 2008, at which time the Commission voted to grant the respondent’s Motion to Dismiss the complaint.

THE PLEADINGS

By way of background, there is no dispute that, at all times relevant to the complaint, the complainant was the Superintendent of the Bordentown Regional School District and the respondent was President of the Board. The complainant alleges that the respondent used email to evaluate him, as superintendent, without providing him with a *Rice*¹ notice prior to the e-mail communications. The complainant contends that one Board member cites her “uncomfortableness with this email exchange.” (Complaint at paragraph 1) The complainant asserts that the respondent and the Board vice-president spoke to him “on their own without regard to the Board to discuss rumors that arose.” (Id. at paragraph 2) In his response to the Motion to Dismiss, the complainant alleges that Board members were conducting public Board business when they evaluated him by email without notifying him.

¹ “Rice” refers to the case *Rice v. Union City Reg. H. Sch. Dist. Bd. of Educ.*, 155 N.J. Super. 64 (App. Div. 1977) *certif. den.* 76 N.J. 238 (1978), which established the right of employees to have notice when they will be discussed by the Board of Education.

There are three emails attached to the complaint; the first one, dated October 4, 2007, is from the respondent to several people including the Board vice president and what appears to be other Board members describing a conversation the respondent and the Board vice president had with the complainant regarding the Board's concerns with the complainant's attendance. The second email, dated October 5, 2007, is from the Board vice president to the respondent and several people who appear to be other Board members concurring with the respondent's assessment of the meeting with the complainant. The third email is not dated and is from a board member to the respondent and several people who appear to be other Board members indicating concern with the emails.

ANALYSIS

In considering a Motion to Dismiss, the Commission considers the facts in the light most favorable to the non-moving party. The question before the Commission was whether the complainant alleged facts which, if true, could support a finding that the respondent violated N.J.S.A. 18A:12-24.1(a) thru (j) of the Code of Ethics for School Board Members. Granting all inferences to the complainant, and even assuming all facts to be true, the Commission finds that the complainant has failed to meet this standard.

The Commission initially notes that N.J.S.A. 18A:12-24.1(a) requires that school board members uphold and enforce all laws, rules and regulations of the State Board of Education, and court orders pertaining to schools. Additionally, N.J.S.A. 18A:12-24.1(a) requires that desired changes be brought through legal and ethical procedures. The Commission's regulations require that, in order to prove factually a violation of N.J.S.A. 18A:12-24.1(a), a complainant:

shall include a copy of a final decision from any court of law or administrative agency of this State that finds the respondent(s) failed to enforce all laws, rules and regulations of the State Board of Education, and/or court orders pertaining to schools or that the respondent[s] brought about changes through illegal or unethical means. N.J.A.C. 6A:28-6.9(b).

At no time does the complainant allege that a final decision has been rendered with respect to the respondent from any court of law or administrative agency of this State finding that the respondent failed to enforce all laws, rules and regulations of the State Board of Education, and/or court orders pertaining to schools or that the respondent brought about changes through illegal or unethical means as is the complainant's burden when bringing forth an allegation under N.J.S.A. 18A:12-24.1(a). Therefore, even accepting as true all facts alleged by the complainant, the Commission determines that these facts would not constitute a violation under N.J.S.A. 18A:12-24.1(a) and its implementing regulation at N.J.A.C. 6A:28-6.9(b).

As to N.J.S.A. 18A:12-24.1(b), which requires board members to make decisions in terms of the educational welfare of children and seek to develop and maintain public schools that meet the individual needs of all children regardless of their ability, race, creed, sex, or social standing, the Commission finds that the complainant has alleged no facts which would render this provision applicable. Here the complainant does not allege that the respondent made any decision that was not in terms of the educational welfare of children or that the respondent failed to develop and maintain public schools that meet the individual needs of all children regardless of their ability, race, creed, sex, or social standing. Therefore, even accepting as true all facts alleged by the complainant, the Commission determines that these facts would not constitute a violation under N.J.S.A. 18A:12-24.1(b).

N.J.S.A. 18A:12-24.1(c) requires board members to confine their board action to policy making, planning and appraisal and help frame policies and plans only after the board has consulted those who will be affected by them. The October 4, 2007 email from the respondent shows that the respondent and the Board vice president met with the complainant regarding the Board's concerns that the complainant "...was out of the district frequently..." The respondent's decision to do so falls squarely within his "planning and appraisal" duties. Moreover, the pleadings and exhibits show that the respondent consulted with the complainant regarding the Board's concerns prior to taking any action with respect to the complainant. Therefore, even accepting as true all facts alleged by the complainant, the Commission determines that these facts would not constitute a violation under N.J.S.A. 18A:12-24.1(c).

N.J.S.A. 18A:12-24.1(d) requires the respondent to carry out his responsibility, not to administer the schools, but, together with his fellow board members, to see that they are well run. Pursuant to N.J.A.C. 6A:28-7.1, "administer the schools" means that a board member "...has become directly involved in activities or functions that are the responsibility of school personnel or the day to day administration of the school district...or has given a direct order to school personnel." The complainant alleges that the respondent met with the complainant to discuss the Board's concerns with the complainant's attendance and then shared the results of that meeting with the Board via email. These allegations, even if true, do not show that the respondent became directly involved in activities or functions that are the responsibility of school personnel or the day to day administration of the school district, or that the respondent gave a direct order to school personnel. Therefore, even accepting as true all facts alleged by the complainant, the Commission determines that these facts would not constitute a violation under N.J.S.A. 18A:12-24.1(d).

N.J.S.A. 18A:12-24.1(e) requires the respondent to recognize that authority rests with the board of education and requires that the respondent make no personal promises nor take any private action that may compromise the board. Here, the complainant offers emails which show that the respondent consulted with the Board prior to meeting with the complainant, thus demonstrating that the respondent recognized that authority rested with the Board and that the respondent did not take private action. These emails also show that the respondent was acting as Board president when he met with the complainant and

when he sent the October 4, 2007 email. Therefore, even accepting as true all facts alleged by the complainant, the Commission determines that these facts would not constitute a violation under N.J.S.A. 18A:12-24.1(e).

Regarding N.J.S.A. 18A:12-24.1(f), which requires that the respondent refuse to surrender his independent judgment to special interest or partisan political groups or to use the schools for personal gain or for the gain of friends, the Commission finds that the complainant has alleged no facts which would render this provision applicable. The complainant has not alleged facts which show any involvement on the part of special interest or partisan political groups. The complainant has also failed to allege any facts which show that the respondent used the schools for personal gain or for the gain of friends. Therefore, even accepting as true all facts alleged by the complainant, the Commission determines that these facts would not constitute a violation under N.J.S.A. 18A:12-24.1(f).

N.J.S.A. 18A:12-24.1(g) requires the respondent to hold confidential all matters pertaining to the schools which, if disclosed, would needlessly injure individuals or the schools, to provide accurate information and, in concert with his fellow board members, to interpret to the staff the aspirations of the community for its school. The complainant alleges no facts to show that the respondent disclosed confidential information or failed to provide accurate information. Here, the alleged facts show that the respondent worked with his fellow Board members to communicate to the complainant the concerns of the Board. Therefore, even accepting as true all facts alleged by the complainant, the Commission determines that these facts would not constitute a violation under N.J.S.A. 18A:12-24.1(g).

Regarding N.J.S.A. 18A:12-24.1(h), which requires the respondent to vote to appoint the best qualified personnel available after consideration of the recommendation of the chief school administrator, the Commission finds that the complainant has alleged no facts which would render this provision applicable. Therefore, even accepting as true all facts alleged by the complainant, the Commission determines that these facts would not constitute a violation under N.J.S.A. 18A:12-24.1(h).

N.J.S.A. 18A:12-24.1(i) requires the respondent to support and protect school personnel in proper performance of their duties. Previously, the Commission has found that “[it] does not believe that the purpose of section (i) of the Code of Ethics was to allow the Commission to become involved in every dispute between a board president and the chief school administrator.” (Lauren Spicer v. John Della Vecchia, C13-04 (February 22, 2005) at page 5) The Commission noted that “...then, any time a board president 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.” (Id. at page 5) The Commission similarly finds in this instance that the facts as alleged, even if true, would not rise to the level of establishing a violation of N.J.S.A. 18A:12-24.1(i). The Board directed the respondent to share its concerns with the complainant regarding the complainant’s attendance. While the Commission notes that there were subsequent email exchanges discussing the meeting between the respondent and the complainant without

the prior issuance of a *Rice* notice, the Commission has no jurisdiction to determine whether a *Rice* notice should have issued. Therefore, even accepting as true all facts alleged by the complainant, the Commission determines that these facts would not constitute a violation under N.J.S.A. 18A:12-24.1(i).

N.J.S.A. 18A:12-24.1(j) requires the respondent to refer all complaints to the chief school administrative officer and to act on the complaints at public meetings only after failure of an administrative solution. N.J.A.C. 6A:28-6.9 defines a “complaint” as “...a concern, issue or dissatisfaction that a member of the public or a member of the school personnel has brought to the attention of a...” board member. Here, the emails offered by the complainant show that the Board as a whole was concerned about the complainant’s performance and the respondent met with the complainant regarding the Board’s concerns prior to taking any action. Therefore, even accepting as true all facts alleged by the complainant, the Commission determines that these facts would not constitute a violation under N.J.S.A. 18A:12-24.1(j).

DECISION

Based on the foregoing, the Commission grants the respondents’ Motion to Dismiss the complaint. This is a final decision of an administrative agency, appealable to the Superior Court, Appellate Division. See, New Jersey Court Rule 2:2-3(a).

Paul C. Garbarini
Chairperson

Resolution Adopting Decision – C09-08

Whereas, the School Ethics Commission has considered the pleadings filed by the parties and the Motion to Dismiss filed by the respondent, together with the documents submitted in support thereof; and

Whereas, the Commission granted the respondent's Motion to Dismiss the complainant's allegation that the respondent violated N.J.S.A. 18A:12-24.1(a) thru (j) of the Code of Ethics for School Board Members within the School Ethics Act; and

Whereas, the Commission has reviewed the proposed decision of its staff; and

Whereas, the Commission agrees with the proposed decision;

Now Therefore Be It Resolved that the Commission hereby adopts the proposed decision granting the respondent's Motion to Dismiss as the final decision of an administrative agency and directs its staff to notify all parties to this action of its decision herein.

Paul C. Garbarini, Chairperson

I hereby certify that the Resolution
was duly adopted by the School
Ethics Commission at its public meeting
on July 22, 2008.

Joanne Boyle
Executive Director