
VICTOR FANELLI

v.

KIM TEREKUSH
BRICK TOWNSHIP BOARD OF
EDUCATION
OCEAN COUNTY

: **BEFORE THE SCHOOL**
: **ETHICS COMMISSION**
:
:
:
: **Dkt. No. C08-11**
: **DECISION ON**
: **MOTION TO DISMISS**
:

PROCEDURAL HISTORY

This matter arises from a complaint filed on February 28, 2011 by Victor Fanelli alleging that Kim Terebush, President of the Brick Township Board of Education (“Board”), violated the School Ethics Act (“Act”), N.J.S.A. 18A:12-21 et seq. Specifically, the complainant alleges that the respondent violated N.J.S.A. 18A:12-24.1(c), (e) and (g) of the Code of Ethics for School Board Members by changing the way the Board conducts its public sessions.

On March 17, 2011 a Motion to Dismiss in Lieu of Answer was filed on behalf of the respondent. A responsive statement was filed by the complainant on April 4, 2011 in accordance with N.J.A.C. 6A:28-8.2(a). The parties were notified by letter dated March 28, 2011 that this matter would be placed on the agenda for the Commission’s meeting on April 26, 2011 in order to make a determination regarding the respondent’s Motions to Dismiss. At its meeting on April 26, 2011, the Commission voted to grant the respondent’s Motions to Dismiss the complaint. The Commission further found that the complaint was not frivolous in accordance with the standard set forth at N.J.A.C. 6A:28-1.2.

SUMMARY OF THE PLEADINGS

The complainant asserts that on December 16, 2010, the respondent changed the way the Board’s meetings are conducted in order to limit the amount of public understanding and input. The complainant alleges that the public must ask their questions about agenda items before they are presented and discussed and that comment time is limited, which violates the Board’s Bylaws. The complainant provides a copy of the respondent’s statement read at the meeting and asserts this to be a violation of N.J.S.A. 18A:12-24.1(c), (e), and (g).

ANALYSIS

In determining whether to grant a Motion to Dismiss, the Commission shall review the facts in the light most favorable to the complainant and determine whether the allegation(s), if true, could establish a violation of the Act. Unless the parties are otherwise notified, Motions to Dismiss and any responses thereto are reviewed by the Commission on a summary basis. N.J.A.C. 6A:28-8.3.

Because the complainant has the burden to factually establish a violation of the Code of Ethics for School Board Members in accordance with the standards set forth at N.J.A.C. 6A:28-6.4(a), in order to prevail on a Motion to Dismiss, the complaint must allege facts, which if true,

would be sufficient to support a finding that the respondent violated N.J.S.A. 18A:12-24.1(c), (e) and (g) of the Code of Ethics for School Board Members.

In her Motion to Dismiss, the respondent does not deny that she read the statement appended to the within complaint (Statement of Undisputed Facts at p. 1), but nevertheless asserts that the complainant's claims are without any merit. Pointing to the standards which the complainant must meet as set forth under N.J.A.C. 6A:28-6.4, the respondent argues that this matter involves allegations of procedural aspects of Board policy concerning the scheduling of meetings and other Board governance matters and are, therefore, not reviewable by the Commission. (Motion to Dismiss at p. 4)

As noted above, in order to prevail on this motion, the complainant must allege facts, which if true, would be sufficient to support a finding that the respondent violated N.J.S.A. 18A:12-24.1(c), (e) and (g). As a threshold matter, the Commission notes that it may not receive, hear or consider any pleadings, motion papers or documents of any kind relating to any matter that does not arise under the Act. N.J.A.C. 6A:28-1.4. Consequently, to the extent that the complainant's claims touch on matters implicating the Open Public Meetings Act or local Board policy, the Commission is without jurisdiction to resolve such claims.

The Commission first considers the allegation that the respondent violated N.J.S.A. 18A:12-24.1(c), which provides:

I will confine my board action to policy making, planning, and appraisal, and I will help to frame policies and plans only after the board has consulted those who will be affected by them.

The Commission's regulations require that:

Factual evidence of a violation of N.J.S.A. 18A:12-24.1(c) shall include evidence that the respondent(s) took board action to effectuate policies and plans without consulting those affected by such policies and plans, or took action that was unrelated to the respondent's duty to:

- i. Develop the general rules and principles that guide the management of the school district or charter school;
- ii. Formulate the programs and methods to effectuate the goals of the school district or charter school; or
- iii. Ascertain the value or liability of a policy. N.J.A.C. 6A:28-6.4(a)3.

The respondent does not deny that she made the public statement appended to the complaint at the December 16, 2010 Board meeting. The statement essentially proposes a new agenda format. With respect to the public comment portion of the meeting, the statement reads:

One of the biggest changes that will take place, is in regards to public comment. One public comment section has been placed in the beginning of the agenda for the sole purpose of permitting the public to make comments on the items that are on tonights' [sic]

agenda. Each individual will be given an opportunity to visit the podium once for a 5 minute session, to make your comments. This particular session will last for no more than a 30 minute period.

A second public comment section has still be [sic] retained at the end of the agenda for the sole purpose of the individual approaching the podium with their suggestions as to what items they would like to see on next months' [sic] agenda. The time frame is 5 minutes each, with one visit to the podium, for a total of 30 minutes for the session. (Complaint/Statement at pp. 1-2)

Additionally, the text reads, “[t]his new agenda format will be up for discussion. I’m certain that it will still need to be tweaked and adjusted, but it is a format that is long in the making.” (*Id.* at p. 2) As President of the Board, the Commission cannot find that this action was outside of the scope of her duties. Additionally, even assuming that this reflected a change in how the Board conducts its meetings, the statement itself demonstrates that she was “consulting” with the Board as she anticipated that it will be “up for discussion” and may need to be adjusted. Therefore, even granting all inferences to the complainant, the Commission finds that the facts set forth in the complaint, if true, would not establish that the respondent took board action to effectuate policies and plans without consulting those affected by such policies and plans, or took action that was unrelated to her policy, planning and appraisal functions so as to violate N.J.S.A. 18A:12-24.1(c).¹

The Commission next considers the complainant’s allegation that the respondent violated N.J.S.A. 18A:12-24.1(e), which provides:

I will recognize that authority rests with the board of education and will make no personal promises nor take any private action that may compromise the board.

The Commission’s regulations require that:

Factual evidence of a violation of N.J.S.A. 18A:12-24.1(e) shall include evidence that the respondent made personal promises or took action beyond the scope of his or her duties such that, by its nature, had the potential to compromise the board. N.J.A.C. 6A:28-6.4(a)5.

¹ Contrast, I/M/O Marlene Polinik, Wayne Twp Bd. of Ed., Passaic County C45-06 (January 22, 2008), Commissioner of Education Decision No.112-08SEC, decided March 10, 2008, wherein the Commission found that a board member violated N.J.S.A. 18A:12-24.1(c) when she went beyond policy making, planning and appraisal by actively attempting to locate candidate resumes while she was at the district office when the chief school administrator was absent; Jennifer Dericks et al., v. Michael Schiavoni, Sparta Township Board of Education, Sussex County, C45-07 (April 28, 2009), Commissioner of Education Decision No. 294-09SEC, decided September 15, 2009, where the Commission found the respondent violated N.J.S.A. 18A:12-24.1(c) and (d) when he took candidate resumes for the position of Principal home to review over the weekend and then passed the resumes on to another Board member for her review.

The Commission finds that the within complaint sets forth no factual allegations which, if true, could establish that the respondent failed to recognize that authority rests with the Board and made personal promises or took action beyond the scope of her duties such that, by its nature, had the potential to compromise the board. Indeed, because the respondent's action appears to be "board action," as set forth above, it cannot also be "private action."² Thus, even granting all inferences to the complainant, the Commission finds that the facts set forth in the complaint, if true, would not establish that the respondent violated N.J.S.A. 18A:12-24.1(e).

The Commission next considers the complainant's allegation that the respondent violated N.J.S.A. 18A:12-24.1(g), which provides:

I will hold confidential all matters pertaining to the schools which, if disclosed, would needlessly injure individuals or the schools. In all other matters, I will provide accurate information and, in concert with my fellow board members, interpret to the staff the aspirations of the community for its school.

The Commission's regulations require that:

Factual evidence of a violation of the confidentiality provision of N.J.S.A. 18A:12-24.1(g) shall include evidence that the respondent(s) took action to make public, reveal or disclose information that was not public under any laws, regulations or court orders of this State, or information that was otherwise confidential in accordance with board policies, procedures or practices. Factual evidence that the respondent violated the inaccurate information provision of N.J.S.A. 18A:12-24.1(g) shall include evidence that substantiates the inaccuracy of the information provided by the respondent(s) and evidence that establishes that the inaccuracy was other than reasonable mistake or personal opinion or was not attributable to developing circumstances. N.J.A.C. 6A:28-6.4(a)7.

The within complaint sets forth no claim that the respondent violated the "confidentiality" portion of N.J.S.A. 18A:12-24.1(g). Neither does the complainant allege that the respondent violated the "inaccurate information" provision of N.J.S.A. 18A:12-24.1(g). Rather, it appears that the complainant contends that the respondent "is in violation of this [provision] because she most certainly did not act 'in concert with her fellow board members.'" (Complainant's Reply to Motion at p. 3). Although the Commission is not persuaded that the statute should be parsed in the manner suggested by the complainant, it nevertheless finds, for the reasons set forth in the analyses of N.J.S.A. 18A:12-24.1(c) and (e), that even accepting as true all facts alleged in the complaint, such facts would not support a finding that the respondent violated N.J.S.A. 18A:12-24.1(g).

² In Marc Sovelove v. Paul Breda, Mine Hill Twp. Bd. of Ed., Morris County, C49-05 (September 26, 2006), the Commission found that a Board member's action cannot be both board action *and* private action.

REQUEST FOR SANCTIONS

At its meeting on April 26, 2011, the Commission considered the respondent's request that the Commission find that the complaint was frivolous and impose sanctions pursuant to N.J.S.A. 18A:12-29(e). The Commission does not find that the complainant "[c]ommenced, used or continued [this matter] in bad faith, solely for the purpose of harassment, delay or malicious injury;" or that the complainant "knew, or should have known," that the matter "was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law." N.J.A.C. 6A:28-1.2. For the foregoing reasons, the Commission finds that the complaint is not frivolous and denies the respondent's request for sanctions against the complainant.

DECISION

Based on the foregoing, the Commission grants the respondent's 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).

Robert W. Bender
Chairperson

Mailing Date: May 25, 2011

Resolution Adopting Decision – C08-11

Whereas, the School Ethics Commission has considered the complaint and the Motion to Dismiss filed on behalf of the respondent and the reply thereto; and

Whereas, at its meeting on April 26, 2011, the Commission determined to grant the respondent’s Motion to Dismiss the complaint; and

Whereas, the Commission found that the complaint was not frivolous in accordance with the standard set forth at N.J.A.C. 6A:28-1.2; and

Whereas, the Commission has reviewed and approved the decision memorializing said action;

Now Therefore Be It Resolved, that the Commission hereby adopts the decision and directs its staff to notify all parties to this action of its decision herein.

Robert W. Bender, Chairperson

I hereby certify that the Resolution was duly adopted by the School Ethics Commission at its public meeting on May 24, 2011.

Joanne Boyle
Executive Director