

Board engaged in activities that were illegal in the 2007-2008 school year. The complainants allege this is a violation of N.J.S.A. 18A:12-24.1(e). (Complaint at paragraph 1)

The complainants next assert, with respect to the April 1, 2009 letter, that the respondent stated that the 2008-2009 Board stopped the practice of conducting Board business by email. The complainants refer to this as an “allegation of illegality” which is not substantiated with facts or examples and in violation of N.J.S.A. 18A:12-24.1(g). The complainants further contend that the respondent “is well aware” that committee meetings, public board work sessions and regular monthly meetings were not a tactic “to wait them (the public) out” as the respondent stated in his letter. (Id. at paragraph 2)

The complainants assert that the respondent also violated N.J.S.A. 18A:12-24.1(g) when he “makes claims of actions by the board under his leadership that were instituted in the year prior.” (Id. at paragraph 3)

Acknowledging that the respondent’s letter to the editor includes “the requisite disclaimer,” the complainants nonetheless assert that the letter makes claims that have not been reviewed, considered or approved by the Board. In this connection, the complainants allege:

By stating in the beginning, end and in signing the letter, that he is the president of the Sparta Township Board of Education, the respondent willfully seeks to attribute greater authority to his statements than they warrant. With these statements he subverts the prohibition expressed by the commission in several earlier rulings that a board member may not present personal viewpoints as board positions. By twice identifying himself and signing the letter as president of the board he cloaks his opinions with a false mantle of authority which would confuse the reader of his letter. (Id. at paragraph 4)

The complainants allege this is a violation of N.J.S.A. 18A:12-24.1(e). (Id. at paragraph 4)

The complainants next contend that the respondent falsely claims that the 2008-2009 Board became “more open and transparent” and kept “the citizens apprised of district issues—especially [regarding] the high school construction.” (Id. at paragraph 5) However, the complainants assert that under respondent’s leadership: there was reduced visibility with respect to the performance of the hired contractors, etc. for the Board’s high school construction project; the Board eliminated a committee that previously reported on the progress of the construction project; the Board refused the request from its members for an audit of the change orders and bills for added work by contractors; the Board removed updates of information from its website; and the Board denied a member’s request to have the construction manager appear before the Board to provide a status report. The complainants allege this is a violation of N.J.S.A. 18A:12-24.1(g).

Finally, the complainants assert that, contrary to the letter and intent of Board Policy, the Board agreed to action taken by the respondent to appoint members of the administration as

chairpersons of the Board's standing committees, thus minimizing the ability of the Board to direct the actions of the subcommittees and in violation of N.J.S.A. 18A:12-24.1(c) and (d).

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.

Thus, the question before the Commission was whether the complainants alleged facts which, if true, could support a finding that the respondent violated N.J.S.A. 18A:12-24.1(c), (d), (e) and (g) of the Code of Ethics for School Board Members. In so doing, the Commission notes that, for complaints alleging a violation of the Code of Ethics for School Board Members, the complainants have the burden to factually establish a violation in accordance with the standards set forth at N.J.A.C. 6A:28-6.4(a). Granting all inferences to the complainants, and even assuming all facts to be true, the Commission finds that the complainants failed to meet this standard.

The Commission first considers the complainants' allegations that the respondent violated N.J.S.A. 18A:12-24.1(c) and (d) of the Code of Ethics for School Board members, as set forth in paragraph six of the complaint. The complainants assert that, contrary to the letter and intent of Board Policy, the Board agreed to action taken by the respondent to appoint members of the administration as chairpersons of the Board's standing committees, thus minimizing the ability of the Board to direct the actions of the subcommittees in violation of N.J.S.A. 18A:12-24.1(c) and (d). The Commission initially notes that this allegation does not include the date of the occurrence of the potential violation, as required by N.J.A.C. 6A:28-6.3(b)4. Next, the Commission notes that the complainants state that "the Board agreed to action taken by the respondent," which suggests that they seek a review of Board procedures, rather than specific actions taken by the respondent.¹ Further, the complainants allude to violations of local Board policy, which are not within the jurisdiction of the Commission.

Notwithstanding these deficiencies and granting all inferences to the complainants, to the extent the complainants suggest that the respondent's actions render him in violation of N.J.S.A. 18A:12-24.1(c) and (d), the complaint is devoid of any particular factual allegations that would support findings of violation. Specifically:

- (1) The complainants have set forth no specific facts that could demonstrate 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 the respondent's duty to: (i) develop the general rules and principles that guide the management of the

¹ The Commission has recently affirmed that it does not have the authority to review decisions rendered by local boards of education, as opposed to allegations that *individually-named school officials* violated the School Ethics Act. See, Dericks et al. v. Johnson et al., Sparta Board of Education, Sussex County C01-08, (October 27, 2009).

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, as is required to demonstrate a violation of N.J.S.A. 18A:12-24.1(c) (N.J.A.C. 6A:28-6.4(a)3); and

- (2) The complainants have set forth no specific facts that could demonstrate that the respondent gave a direct order to school personnel or 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 charter school as is required to demonstrate a violation of N.J.S.A. 18A:12-24.1(d). (N.J.A.C. 6A:28-6.4(a)4).

Accordingly, even accepting as true all facts alleged by the complainants, the Commission determines that these facts would not constitute a violation under N.J.S.A. 18A:12-24.1(c) and (d).

The Commission next considers the complainants' allegations that the respondent violated N.J.S.A. 18A:12-24.1(e) when he: (1) wrote the letter to the editor which "alleges that the board of education in the year 2007-2008 engaged in activities which were illegal, detrimental to public understanding of the actions of the board and counter to the proper operation of the board, district and schools," (Complaint at paragraph 1) and (2) made claims in the letter that were not "reviewed, considered or approved by the board, although he inserted the requisite disclaimer to create a defense." (Id. at paragraph 4) N.J.S.A. 18A:12-24.1(e) 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.

Pursuant to the Commission's regulations,

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.

In this connection, it is specifically noted that the respondent's letter includes the following statement:

I am the President of the Sparta Township Board of Education. This letter is based on my personal opinion. This letter was neither authorized by the board nor written on behalf of the board. The information is accurate to the best of my ability and is not confidential. (Complaint at Exhibit A)

There is no allegation in the complaint that the respondent "made personal promises" of any kind. Presumably, the complainants contend that the respondent's letter to the editor constitutes

“action beyond the scope of his or her duties such that, by its nature, had the potential to compromise the board.” In this regard, the Commission has advised that a Board member would not violate the Act by sending a letter to the editor expressing his/her opinion about the budget as long as, in the letter, that person (1) identified himself/herself as a board member; (2) indicated that the letter is not authorized by or written on behalf of the board; (3) provided accurate information that is not confidential; (4) and ensured that his/her private action does not compromise the board. *Advisory Opinion A03-07* (April 2, 2007). The Commission has applied this standard to topics other than the school budget. See, Rubenstein v. Karp, Hopewell Valley Regional Bd. of Ed., C13-08 (July 22, 2008).

Applying the standard in *A03-07*, there can be no question that the respondent identified himself as a board member and specifically stated that the letter was not written on behalf of the Board. Further, there is no allegation that the respondent disclosed confidential information. Neither do paragraphs one and four of the complaint set forth any specific claims of inaccuracies, although the complainants so allege in other paragraphs of the complaint, as discussed below. In this regard, the Commission notes the respondent’s assertion that “[a] careful examination of the [c]omplainants’ allegations, however, reveals that [the] [c]omplainants’ assertions are premised upon their disagreement with [r]espondent’s personal opinions regarding certain policies and practices of past and present Boards.” (Respondent’s Motion to Dismiss at page 9) Finally, while it appears that the respondent’s letter is critical of past Board practices, the Commission finds this to be insufficient to defeat a Motion to Dismiss where the complaint fails to include any facts that, if true, would suggest that that the respondent’s letter was of such a nature that it might compromise the Board. See, Zukowski v. Delbury, Sussex Wantage Regional Bd. of Ed., C61-06 (June 26, 2007) where the Commission dismissed the allegation that a Board member’s letter to the editor violated N.J.S.A. 18A:12-24.1(e) because the letter was critical of the administration and somewhat critical of the Board. Accordingly, even accepting as true all facts alleged by the complainants, the Commission determines that these facts would not constitute a violation under N.J.S.A. 18A:12-24.1(e).

The complainants also allege that the respondent violated N.J.S.A. 18A:12-24.1(g) citing the following as examples of inaccurate information included in the respondent’s letter to the editor: (1) Respondent’s statement that “We (the 2008-2009 board) stopped the practice of conducting board business by e-mail.” (Complaint at paragraph 2); (2) Respondent “is well aware” that committee meetings, public board work sessions and regular monthly meetings were not a tactic “to wait them (the public) out” as the respondent stated in his letter. (*Id.* at paragraph 2); (3) Respondent made claims of actions by the Board under his leadership that were instituted in the year prior, including “[w]e published committee minutes and board meeting agenda on the district website,” and “[w]e came into compliance with the Open Public Meetings Act.” (*Id.* at paragraph 3); (4) Respondent falsely claims that the 2008-2009 Board became “more open and transparent” and kept “the citizens apprised of district issues—especially [regarding] the high school construction.” (*Id.* at paragraph 5) N.J.S.A. 18A:12-24.1(g) 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.

Pursuant to the Commission's regulations,

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 complainants do not assert that the respondent disclosed confidential information. Thus, their allegations as to violations of N.J.S.A. 18A:12-24.1(g) must be measured against the "inaccurate information" provisions set forth in the above standard. In this connection, the Commission again reflects on respondent's statement that "[t]his letter is based on my personal opinion." Indeed, the respondent states, "Gone are closed sessions lasting into the early morning hours (usually with an attorney present) when official action would be taken with no residents left in attendance. *I consider this* "wait them out" tactic offensive to openness and transparency." (Complaint at Exhibit A, emphasis added) The Commission further notes that there *are no specific facts* set forth by the complainants which, if true, would establish that the respondent was inaccurate when he stated:

We stopped the practice of conducting board business by e-mail. We halted daily contacts with attorneys, eliminating many unnecessary legal expenses. We came into compliance with the Open Public Meetings Act. We published committee minutes and board meeting agendas on the district Web site. Drafts of all Board minutes are posted quickly. (Id.)

Rather, it appears that the complainants disagree with the respondent's conclusion that the steps taken by the 2008-2009 Board have created a more open and transparent Board. Similarly, the Commission finds that the allegations as to the respondent's statements regarding the high school reconstruction project point to a fundamental disagreement with how the 2008-2009 Board has managed the project rather than *factual errors* contained in the letter itself. Accordingly, 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.).

REQUEST FOR SANCTIONS

The respondent alleged in his Motion to Dismiss that the complaint herein is frivolous. Thus, at its meeting on December 15, 2009, 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

Resolution Adopting Decision – C39-09

Whereas, the School Ethics Commission has considered the complaint, the Motion to Dismiss filed on behalf of the respondent, together with the response filed by the complainants; and

Whereas, at its meeting on December 15, 2009, the Commission determined to accept the complaint as timely and found the complaint was not frivolous, but granted the respondent's Motion to Dismiss the allegations that he violated N.J.S.A. 18A:12-24.1(c), (d), (e) and (g) of the Code of Ethics for School Board Members; 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 January 26, 2010.

Joanne Boyle
Executive Director