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| GEORGE W. FISHER | : | BEFORE THE SCHOOL |
| | : | ETHICS COMMISSION |
| v. | : | |
| | : | |
| ERIC HAMILTON, | : | |
| <i>HAMILTON TOWNSHIP</i> | : | |
| <i>BOARD OF EDUCATION</i> | : | Docket No. C50-11 |
| <i>MERCER COUNTY</i> | : | DECISION ON MOTION |
| | : | TO DISMISS |

PROCEDURAL HISTORY

This matter arises from a complaint filed on December 5, 2011 by George W. Fisher alleging that Eric Hamilton, a member of the Hamilton Township Board of Education (“Board”), violated the School Ethics Act (“Act”), N.J.S.A. 18A:12-21 et seq. By notice dated December 5, 2012, the complainant was advised that the complaint required clarification before it could be accepted. On December 9, 2011, the complainant submitted an amended complaint alleging that the respondent violated N.J.S.A. 18A:12-24(b) and N.J.S.A. 18A:12-24.1(e) of the Code of Ethics for School Board Members.

After obtaining an extension for good cause shown, on January 17, 2012, a Motion to Dismiss was filed on behalf of the respondent, which included an allegation that the complaint was frivolous. On February 6, 2012, the complainant filed a reply to the Motion to Dismiss and the allegation of frivolousness. N.J.A.C. 6A:28-8.2(a).¹ By letter dated January 25, 2012, the Commission notified the complainant and respondent that this matter was scheduled for discussion by the Commission at its meeting on February 28, 2012 in order to make a determination regarding the respondent’s Motion to Dismiss and allegation of frivolousness. At its meeting on February 28, 2012, the Commission voted to grant the respondent’s Motion to Dismiss the complaint and further found that the complaint is not frivolous, in accordance with the standard set forth at N.J.A.C. 6A:28-1.2.

SUMMARY OF THE PLEADINGS

The complainant alleges that, in June 2011, as a result of a failed effort to appoint a permanent Superintendent to replace the departing one, the Board determined to search for, and appoint, an Interim Superintendent to serve until the Board was able to select and appoint a permanent Superintendent. According to the complainant, the Board set the process for the selection of an Interim Superintendent at its June 15, 2011 meeting. That process did not provide for or permit private contact between a board member and a candidate. (Complaint at pp. 1-2)

¹ Therein, the complainant questions the basis on which the Commission may accept respondent’s Motion to Dismiss and, accordingly, the complainant cross-moves for summary judgment in this matter. The Commission notes that N.J.A.C. 6A:28-8.1(a) expressly provides that “[a] respondent may file a motion to dismiss in lieu of answer for any complaint before the Commission.” Thus, the Commission reviews this matter pursuant to N.J.A.C. 6A:28-8.1 et seq. and does not consider the cross-motion for summary judgment.

The Board held a special meeting on June 20, 2011, the sole purpose of which was to conduct public interviews of four finalists for the position of Interim Superintendent. Respondent Hamilton was not present at the June 20th meeting. The complainant alleges that, among the four finalists being interviewed was the retiring, but still-in-place, Superintendent of the Perth Amboy School District. During his interview, the candidate from Perth Amboy disclosed to the Board and the public that someone in the District suggested that the candidate call Respondent Hamilton to discuss the opening for the Interim Superintendent. The candidate acted on the suggestion; he telephoned the respondent and engaged in a conversation with him. According to the complainant, the informal consensus of the Board on June 20th was to appoint the candidate from Perth Amboy as the Interim Superintendent, although no formal vote was taken that evening. Subsequently, the candidate from Perth Amboy withdrew his name from consideration. (Id. at pp. 2-3)

At a special meeting on June 27, 2011, after a closed session, the Board selected an Interim Superintendent from among the other three finalists. The complainant alleges that the respondent was present for the June 27th meeting and appears to have participated in the closed session discussion on the topic of the Interim Superintendent. The respondent remained seated during the vote to appoint the Interim Superintendent, but abstained from the vote. (Id. at p. 3)

The complainant further contends that the respondent's conduct in accepting private contact and engaging in a private conversation with the candidate from Perth Amboy before the Board's interview, when no other candidates had that opportunity, was a violation of N.J.S.A. 18A:12-24(b), as well as N.J.S.A. 18A:12-24.1(e).

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 complainant alleged facts which, if true, could support a finding that the respondent violated N.J.S.A. 18A:12-24(b) and N.J.S.A. 18A:12-24.1(e) of the Code of Ethics for School Board Members, which are set forth below:

No school official shall use or attempt to use his official position to secure unwarranted privileges, advantages or employment for himself, members of his immediate family or others. N.J.S.A. 18A:12-24(b)

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. N.J.S.A. 18A:12-24.1(e)

The Commission notes that the respondent does not dispute that on June 20, 2011, the Board held a special meeting, the sole purpose of which was to conduct interviews for the four finalists for the position of Interim Superintendent. It is undisputed that Mr. Hamilton did not

attend the meeting during which the then-retiring Superintendent of Perth Amboy Public Schools, was interviewed by the Board. The respondent also does not dispute that during his interview with the Board, the candidate disclosed that a personal friend of the respondent, who is an employee of Perth Amboy School District, suggested that the candidate contact Mr. Hamilton to discuss the position of Interim Superintendent. The candidate then contacted the respondent by telephone sometime on June 20, 2011 to ask questions about the District. The respondent acknowledges that he spoke with the candidate by telephone, answering his questions and providing general background information. (Respondent's Statement of Facts at pp. 2-3) Thereafter, the candidate withdrew his name from consideration.

The Commission acknowledges the respondent's argument that there might be ethical concerns with the aforementioned phone call *if* there was an allegation that he used his position to exert pressure on another party for his advantage or the advantage of another. (Motion to Dismiss at p. 6) However, here, "there is no allegation that the respondent sought to influence the Board, much less receive a benefit for himself or another." (*Id.* at p. 7) Indeed, there is no allegation in the complaint that the respondent made any promises to the candidate and there is no dispute that the respondent *did not* attend the Board meeting on June 20, 2011 so as to exert any potential influence over the Board. Additionally, there is no dispute that the candidate withdrew his name from consideration *prior* to the Board's selection of an Interim Superintendent on June 27, 2011.

The Commission also notes that there is no dispute that the telephone call at issue herein was initiated by the candidate. In this connection, the respondent argues that:

Fisher has made bald assertions based on a telephone conversation between [himself] and another individual, the substance of which he has no personal knowledge. Complainant Fisher admits that he was not involved in the telephone conversation about which he complains, nor has he presented any affidavits from those who participated that would help to establish the sum and substance of the conversation. Instead, Mr. Fisher claims that the mere happening of the telephone call, regardless of its substance, is tantamount to a violation of the School Ethics Act and the Code of Ethics for School Board Members. (*Id.* at pp. 4-5)

Therefore, even assuming the facts set forth by the complainant are true, the Commission cannot find that the respondent's conversation with the candidate is sufficient to support a finding that he used, or attempted to use, his official position to secure unwarranted privileges, advantages or employment for himself, members of his immediate family or others so as to support a finding that the respondent violated N.J.S.A. 18A:12-24(b).²

² Contrast, where the Commission has found that a school official used his/her position in violation of N.J.S.A. 18A:12-24(b) when a Board member released staff email addresses in his campaign literature before the Board discussed and approved releasing them to the public (I/M/O Raymond Bonker, Lenape Valley Regional Bd. of Ed., Sussex County, C11-97 (March 30, 1998), Commissioner of Education Decision No. 225-98SEC, decided May 22, 1998); when a Board member asked the Business Administrator to try to obtain an unsecured loan from the bank that the board used as its depository (I/M/O Lawrence James, Chesilhurst Bd. of Ed., Camden County, C10-98

Similarly, the Commission also finds that, even granting that the respondent, by agreeing to speak with the candidate, *may* have taken action outside the scope of his duties as a Board member, the complainant failed to provide a sufficient factual basis in his complaint from which the Commission could find that the respondent's action was of such a nature that it had the potential to compromise the Board. (See, K.S.M. v. Chris Haley, Manasquan Bd. of Ed., Monmouth County, C27-10 (March 23, 2011). Accordingly, the allegation that that respondent violated N.J.S.A. 18A:12-24.1(e) is properly dismissed.

REQUEST FOR SANCTIONS

The respondent alleged that the complaint herein is frivolous. At its meeting on February 28, 2012, 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 can find no evidence which might show that the complainant filed the complaint in bad faith solely for the purpose of harassment, delay or malicious injury. The Commission also has no information to suggest that the complainant should have known that the complaint was without any reasonable basis in law or equity or that it 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. Therefore, 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: March 28, 2012

(December 15, 1998), Commissioner of Education Decision No. 30-99SEC decided February 9, 1999); when a Board member acquired mailing labels containing student information that were used to send mailings for her campaign, (I/M/O Michele Russo, Hoboken Bd. of Ed., Hudson County, C18-01 (February 26, 2002) Commissioner of Education Decision No. 167-02SEC, decided April 18, 2002); when a Board member endorsed a candidate for the municipal council through a mailing of letters to the community where the letterhead, envelope and contents of the letter could mislead recipients to believe that the endorsement was made in the board member's official capacity as board president (I/M/O Alphonse A. DeMao, Belleville Board of Education, Warren County, C09-04, (September 30, 2004), Commissioner Decision No. 464-04SEC, decided November 17, 2004); and where a Board member posted online information about monies owed by a parent to the school district, where the parent was also a political opponent (I/M/O Jose Ybarra, Passaic City Bd. of Ed., Passaic County, C20-09 (October 27, 2009), Commissioner of Education Decision No. 410-09, decided December 14, 2009).

Resolution Adopting Decision – C50-11

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

Whereas, at its meeting on February 28, 2012, the Commission determined to grant the respondent’s Motion to Dismiss and also found that the complaint was not frivolous; 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 March 27, 2012.

Joanne Boyle
Executive Director