
DARYL HALTER AND SHERRIE RIZZO

v.

**EDWARD KENNEDY, KAREN JOHNS,
SHARON CAMPBELL, MICHAEL GAIMARI,
AND JEFF KELLMYER,
HOPEWELL TOWNSHIP BOARD OF
EDUCATION,
CUMBERLAND COUNTY**

**BEFORE THE SCHOOL
ETHICS COMMISSION**

DOCKET NO.: C84-17

**DECISION ON
MOTION TO DISMISS**

I. PROCEDURAL HISTORY

This matter arises from a Complaint filed on November 16, 2017, by Daryl Halter and Sherrie Rizzo (Complainants), alleging that Edward Kennedy, Karen Johns, Sharon Campbell, Michael Gaimari, and Jeff Kellmyer (Respondents), members of the Hopewell Township Board of Education (Board), violated the School Ethics Act (Act), N.J.S.A. 18A:12-21 et seq. More specifically, the Complaint alleges that Respondents violated N.J.S.A. 18A:12-24.1(a), N.J.S.A. 18A:12-24.1(g), and N.J.S.A. 18A:12-24.1(i) of the Code of Ethics for School Board Members (Code).

On November 24, 2017, the Complaint was served on Respondents, via regular and certified mail, notifying them that charges were filed against them with the School Ethics Commission (Commission), and advising that they had twenty (20) days to file a responsive pleading. On December 18, 2017, Respondents filed a Motion to Dismiss in Lieu of Answer (Motion to Dismiss). On January 9, 2018, Complainants filed a Response to the Motion to Dismiss.

The parties were notified by correspondence dated January 16, 2018, that this matter would be placed on the Commission’s agenda for its meeting on January 23, 2018, in order to make a determination regarding the Motion to Dismiss. At its meeting on January 23, 2018, the Commission considered all of the filings, and at its meeting on February 27, 2018, the Commission voted to deny Respondents’ request to have the Complaint dismissed as untimely, but to grant the Motion to Dismiss in its entirety for failure to plead sufficient, credible facts to support a finding that Respondents violated N.J.S.A. 18A:12-24.1(a) (in Count 1 and Count 2), N.J.S.A. 18A:12-24.1(g) (in Count 3), or N.J.S.A. 18A:12-24.1(i) (in Count 4) for the reasons more fully discussed below. The Commission also voted to deny Complainants’ request to clarify and/or modify the allegations in their Complaint.

II. SUMMARY OF THE PLEADINGS

A. The Complaint

Complainants, the President and Grievance Chair of the Hopewell Township Educators Association (HEA), allege that on March 14, 2017, the Principal/Superintendent attended a child study team meeting with a teacher and parent. After the meeting was over, and the teacher left for the day, the parent “demanded to visit and observe the teacher’s classroom the next day.” The

teacher was advised of the parent's request via an e-mail at 9:00 p.m. that evening, but the teacher did not see it until the following morning. Complainants assert that, pursuant to the Hopewell Township School District's (District) policy (1250), the Superintendent must be provided with at least twenty-four (24) hours notice of a request to visit a classroom during the school day, and the teacher must be "consulted" regarding the convenience of the proposed visit. Notwithstanding the District's policy, Complainants allege that the Principal/Superintendent waived the twenty-four (24) hour notice requirement, and failed to consult with the teacher. Instead, the Principal/Superintendent, by and through her designee, simply advised the teacher that the parent would be visiting her classroom the next morning.

As a result of the Principal/Superintendent's failure to comply with the procedural requirements in the District's policy, the HEA filed a Level I Grievance with the Principal/Superintendent. On March 30, 2017, the Principal/Superintendent denied the grievance, and the HEA filed a Level II Grievance on April 4, 2017. When the Principal/Superintendent denied the grievance a second time, the HEA filed a Level III Grievance with the Board on April 28, 2017. At a Board meeting on May 8, 2017, Respondents considered the Level III Grievance in closed executive session, and ultimately denied it. Complainants argue that Respondents' decision to deny their Level III Grievance was based on Respondents' "confusion" about how the HEA interpreted language in the District's policy, and Respondents' "misplaced and disingenuous" reliance on an unrelated District policy (9314). Nevertheless, Complainants decided not to pursue the grievance any further.

In "June of 2017," Complainants assert that they "first became aware" that the Board "improperly permitted" an instructional aide, who is not part of the HEA and not directly involved in the subject matter of the Level III Grievance, to be present during the closed executive session on May 8, 2017, while Respondents discussed the HEA's Level III Grievance. As a result of the instructional aide's presence in closed executive session, Complainants assert she "became privy to closed session, private, and confidential matters regarding the terms and conditions of employment within the District that would not otherwise be available to the public."

Based on the facts as set forth above, Complainants allege four (4) violations of the Code. In Count 1, Complainants argue that Respondents violated N.J.S.A. 18A:12-24.1(a) because, in violation of the Open Public Meetings Act (OPMA), Respondents failed to exclude all members of the public, and the instructional aide in particular, in the discussion and deliberation of the HEA's Level III Grievance. In Count 2, Complainants assert that Respondents violated a District policy (9322) when they permitted the instructional aide to be present during a closed executive session discussion and deliberation of a matter that concerned "employment" and/or "terms and conditions of employment."

In Count 3, Complainants contend that Respondents violated N.J.S.A. 18A:12-24.1(g) because, by allowing the instructional aide to be present during a closed executive session which revealed "private and confidential information," the instructional aide "revealed and/or could have revealed, this information to the public, which resulted, and/or could have resulted, in needless injury to the reputation of the District's teachers, administrators, the HEA and/or the District itself." Finally, in Count 4, Complainants assert that by "not properly considering and interpreting" the Board's policies in their review of the HEA's Level III Grievance, Respondents

violated N.J.S.A. 18A:12-24.1(i) because they failed to support and protect school personnel in the proper performance of their duties.

B. Motion to Dismiss

Following receipt of the Complaint, Respondents filed a Motion to Dismiss and preliminarily argued that the Complaint should be dismissed because it was not filed within one hundred eighty (180) days of notice of the events which form the basis of the alleged violations of the Code. According to Respondents, the events which form the basis for the Complaint occurred on May 8, 2017, and Complainants “knew” the instructional aide was present in executive session on that date, or the next day at the latest. Therefore, Respondents contend Complainants should have filed their Complaint on or before November 6, 2017, but did not do so until November 16, 2017. As a result, Respondents argue the Complaint is time barred, and should be dismissed.

Regarding Count 1 and Count 2, and the alleged violations of N.J.S.A. 18A:12-24.1(a) based on purported OPMA and Board policy (9322) violations, Respondents argue that Complainants have not provided any factual evidence as required by N.J.A.C. 6A:28-6.4. Respondents also deny that they violated OPMA or Board policy (9322), because the instructional aide was a witness to the event/exchange which resulted in the filing of the HEA’s Grievance, and the Board’s policy permits it to invite “staff members or others” to closed executive session in its discretion.

As for Count 3, and the alleged violation of N.J.S.A. 18A:12-24.1(g), Respondents deny that they disclosed any confidential information, and instead argue that the instructional aide was present during closed executive session to provide testimony (as a witness), that she was not permitted to remain present during the closed executive session, and that she did not obtain any private or confidential information by attending the closed executive session. Respondents further argue that Complainants have not presented any facts to support their allegation that the instructional aide disclosed confidential material. Finally, and regarding Count 4, Respondents note that Complainants withdrew their Level III Grievance, and any allegation that Respondents violated N.J.S.A. 18A:12-24.1(i) is both moot and frivolous.

In summary, Respondents argue that the Complaint is time barred, and that Complainants have not produced any factual evidence to support their allegations.

C. Response to Motion to Dismiss

In their reply to Respondents’ Motion to Dismiss, Complainants counter that their Complaint is not time barred because they did not learn about the instructional aide’s presence in the Board’s May 8, 2017, closed executive session until “June of 2017.” Complainants also note that the instructional aide’s presence is not noted in the Board’s May 8, 2017, minutes and, even if it was, the Board did not approve those minutes until its meeting on June 12, 2017. Further, Complainants argue that the HEA was never “put on notice” that the instructional aide had been asked to testify about the HEA’s Level III Grievance. As a result, Complainants argue that their Complaint was filed timely, and the Motion to Dismiss must be denied on this basis.

Regarding Count 1 and Count 2, Complainants deny that they failed to allege sufficient facts to sustain a violation. Instead, they reiterate that because the Level III Grievance concerned “employment” and/or “terms and conditions of employment;” the discussion should have taken place outside the presence of the public. By failing to exclude the instructional aide, Complainants maintain Respondents violated OPMA and Board policy (9322). Respondents’ argument that they are permitted by Board policy (9322) to invite staff members to attend closed executive session is, according to Complainants, “not supported by any legal precedent and undermines the very purpose of OPMA in holding employment matters confidential.” Therefore, Complainants argue they have sufficient facts for Count 1 and Count 2, and the violation of N.J.S.A. 18A:12-24.1(a).

As for Count 3, Complainants reiterate they have properly asserted that Respondents violated N.J.S.A. 18A:12-24.1(g) by violating the OPMA and Board policy (9322) by allowing the instructional aide to be present in closed executive session on May 8, 2017, during which “private and confidential information” was disclosed. Regarding Count 4, Complainants restate their position, namely that Respondents took deliberate action in denying the HEA’s Level III Grievance by misinterpreting the Board’s policies and improperly approving the actions of the Principal/Superintendent. By engaging in such conduct, Complainants argue Respondents undermined, opposed, and compromised the teacher subject to the parental visit by denying her the rights she is afforded under the District’s policy and, thereby, violated N.J.S.A. 18A:12-24.1(i). Finally, to the extent any of the allegations in the Complaint are dismissed, Complainants seek leave from the Commission to clarify and/or modify their allegations.

III. ANALYSIS

A. Alleged Untimeliness

In their Motion to Dismiss, Respondents argue that the Complaint should be dismissed because it was not filed within one hundred eighty (180) days of notice of the events which form the basis of the alleged violations of the Code. More specifically, the Complaint was received by the Commission on November 16, 2017. Because the events which form the basis for the alleged violations occurred on May 8, 2017, Respondents argue the Complaint should have been filed on or before November 6, 2017; therefore, it was filed approximately ten (10) days late and should be dismissed. In their response to the Motion to Dismiss, Complainants argue that they did not learn or become aware of the instructional aide’s presence in the Board’s closed executive session on May 8, 2017, until “June of 2017”; as a result, Complainants argue the Complaint was filed timely.

The Commission’s regulations provide a one hundred eighty (180) day limitation period for filing a complaint. More specifically, N.J.A.C. 6A:28-6.5(a) provides, in relevant part:

- (a) Complaints shall be filed within 180 days of notice *of the events which form the basis of the alleged violation(s)*. A complainant shall be deemed to be notified of events which form the basis of the alleged violation(s) *when he or she knew of such events or when such events were made public so that one using reasonable diligence would know or should have known* (emphasis added).

Pursuant to N.J.A.C. 6A:28-6.5(a), the Commission must determine when Complainants knew or would have known, had they used due diligence, of the events which form the basis of their Complaint. In its review of the filings and exhibits, and for purposes of ruling on this Motion to Dismiss, the Commission accepts Complainants' representation that they did not learn of the instructional aide's presence in the Board's closed executive session on May 8, 2017, until "June of 2017." Because the executive session minutes from the May 8, 2017, Board meeting do not mention the instructional aide's presence, and the HEA was not advised that the instructional aide would be providing information/testimony on May 8, 2017, the Commission finds Complainants' representation reasonable. Although a specific date in "June 2017" was not specified, the Commission will further assume that Complainants learned of the instructional aide's presence on June 1, 2017.

With June 1, 2017, as the starting point, Complainants had one hundred eighty (180) days, or until November 28, 2017, to file a Complaint with the Commission. Because the Complaint was received by the Commission on November 16, 2017, which was twelve (12) days before the deadline, the Commission finds that the Complaint was timely filed, and is not time barred. Therefore, the Commission denies Respondents' request to have the Complaint dismissed as untimely.

B. Standard for Motion to Dismiss

In determining whether to grant a Motion to Dismiss, the Commission shall review the facts in the light most favorable to the non-moving party (Complainants) and determine whether the allegation(s), if true, could establish a violation of the Act. Unless the parties are otherwise notified, a Motion to Dismiss and any response is reviewed by the Commission on a summary basis. N.J.A.C. 6A:28-8.3. Thus, the question before the Commission is whether Complainants have alleged facts which, if true, could support a finding that Respondents violated N.J.S.A. 18A:12-24.1(a) (in Count 1 and Count 2), N.J.S.A. 18A:12-24.1(g) (in Count 3), or N.J.S.A. 18A:12-24.1(i) (in Count 4).

Alleged Code Violations

Complainants assert that Respondents violated N.J.S.A. 18A:12-24.1(a) (in Count 1 and Count 2), N.J.S.A. 18A:12-24.1(g) (in Count 3), and N.J.S.A. 18A:12-24.1(i) (in Count 4). These provisions provide:

a. I will uphold and enforce all laws, rules and regulations of the State Board of Education, and court orders pertaining to schools. Desired changes shall be brought about only through legal and ethical procedures;

g. 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.

- i. I will support and protect school personnel in proper performance of their duties.

Pursuant to N.J.A.C. 6A:28-6.4(a)(1), factual evidence of a violation of N.J.S.A. 18A:12-24.1(a) shall include a copy of a final decision from any court of law or administrative agency of this State demonstrating that Respondents failed to enforce all laws, rules and regulations of the State Board of Education, and/or court orders pertaining to schools, or that Respondents brought about changes through illegal or unethical procedures. After review, the Commission finds that Complainants have not provided a copy of a final decision from any court of law or other administrative agency demonstrating that Respondents, either individually or collectively, actually violated OPMA (as alleged in Count 1) or the Board's policy (9322) (as alleged in Count 2) by failing to exclude the instructional aide from the Board's closed executive session discussions. If Complainants had first secured a decision from a court of law or other administrative agency specifically finding that Respondents, as Complainants allege, violated the OPMA or the Board's policy, the Commission could have relied on such a determination in its review of Complainants' allegations. Absent such a final decision, and because the Commission does not have jurisdiction to determine whether Respondents, either individually or collectively, violated the OPMA or the Board's policy, the Commission finds that even if all of the facts as alleged in the Complaint are true, there is insufficient credible evidence to support a finding that Respondents violated N.J.S.A. 18A:12-24.1(a) as argued in Count 1 and Count 2.

As set forth in N.J.A.C. 6A:28-6.4(a)(7), factual evidence of a violation of N.J.S.A. 18A:12-24.1(g) shall include evidence that Respondents 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. After review, the Commission finds that Complainants have not articulated the specific nature of the confidential information that the instructional aide allegedly learned during closed executive session, and have not articulated how Respondents made this unspecified confidential information public. Complainants suggest that the instructional aide's presence, without more, resulted in her having access to confidential information. However, there is no articulation of what confidential information, if any, she received or learned by being present in closed executive session at the request of the Board. Therefore, the Commission finds that even if all of the facts as alleged in the Complaint are true, there is insufficient credible evidence to support a finding that Respondents violated N.J.S.A. 18A:12-24.1(g) as argued in Count 3.

Pursuant to N.J.A.C. 6A:28-6.4(a)(9), factual evidence of a violation of N.J.S.A. 18A:12-24.1(i) shall include evidence that Respondents took deliberate action which resulted in undermining, opposing, compromising or harming school personnel in the proper performance of their duties. Complainants argue that by denying their grievance, Respondents made a decision that was "misguided, disingenuous, and contrary to the spirit of the applicable district policies." The genesis for Complainants' allegation is, simply stated, their disagreement with the Respondents' decision to deny what Complainants believed to be a meritorious grievance. However, if Complainants disagreed with Respondents' decision, their recourse was to continue their appeal in the appropriate tribunal which they admittedly chose not to do. The Commission cannot find, absent sufficient credible evidence which is not present here, that Respondents' denial of the grievance is, in and of itself, tantamount to undermining, compromising or harming school personnel. Moreover, the Commission will not second guess the merits of Respondents' decision to deny a grievance because it does not have jurisdiction to determine whether, as

Complainants contend, Respondents did not “properly” consider and interpret the Board’s policies. Consequently, the Commission finds that even if all of the facts as alleged in the Complaint are true, there is insufficient credible evidence to support a finding that Respondents violated N.J.S.A. 18A:12-24.1(i) simply because the Board, and Respondents in particular, denied the Level III grievance.

Accordingly, and granting all inferences in favor of the non-moving party (Complainants), the Commission has determined that Complainants have not alleged any facts which, if true, could support a finding that Respondents violated N.J.S.A. 18A:12-24.1(a) (in Count 1 and Count 2), N.J.S.A. 18A:12-24.1(g) (in Count 3), or N.J.S.A. 18A:12-24.1(i) (in Count 4). Therefore, the Commission grants the Motion to Dismiss in its entirety.

C. Request to Clarify and/or Amend Complaint

In their reply to Respondents’ Motion to Dismiss, Complainants request that, to the extent the allegations in their Complaint were dismissed, the Commission provide them with the opportunity to clarify and/or modify their Complaint. As noted in Respondents’ reply, N.J.A.C. 6A:28-6.7(b) provides, “Once an answer or other responsive pleading is filed, an amendment to a complaint may be made by the complainant only with the consent of each respondent or by leave of the Commission upon written application.” In this matter, Complainants have not provided the Commission with proof of consent from each Respondent to amend the Complaint. Therefore, leave to amend may only be permitted by the Commission.

After review, and in the interests of efficiency, the Commission denies Complainants’ request to clarify and/or modify their Complaint. In order to prove a violation of N.J.S.A. 18A:12-24.1(a) in Count 1 and Count 2, Complainants need to secure a final decision from a court of law or the appropriate administrative agency regarding the alleged violations of OPMA and Board policy. Complainants have not provided proof of such a filing, or indicated an intention to do so. Therefore, allowing Complainants to clarify and/or modify Count 1 and/or Count 2 would be futile. As for Count 3, Complainants have no firsthand knowledge of what confidential information, if any, the instructional aide may have heard, or otherwise had access to, in closed executive session. Complainants also have no firsthand knowledge about the manner in which the instructional aide provided information to the Board. Permitting an individual to be present in closed executive session, which is the only fact that Complainants are aware of, does not equate to a failure to hold matters confidential. Finally, and as indicated above, the Commission does not have jurisdiction to determine whether Respondents, based on the information then available, resolved the grievance “appropriately,” and will not substitute its judgment for that of the Board. Nor will the Commission insert itself into labor disputes and find, as a matter of fact, that denial of a grievance results in the failure to support and protect school personnel.

For the above reasons, Complainants’ request to clarify and/or amend their Complaint is denied.

IV. DECISION

Based on the foregoing, and in reviewing the facts in the light most favorable to the non-moving party (Complainants), the Commission denies Respondents’ request to have the

Complaint dismissed as untimely, but nonetheless grants the Motion to Dismiss in its entirety for failure to plead sufficient, credible facts to support a finding that Respondents violated N.J.S.A. 18A:12-24.1(a) (in Count 1 and Count 2), N.J.S.A. 18A:12-24.1(g) (in Count 3), or N.J.S.A. 18A:12-24.1(i) (in Count 4). The Commission also denies Complainants' request to clarify and/or modify the allegations in their Complaint.

Pursuant to N.J.S.A. 18A:12-29(b), the Commission hereby notifies Complainants and Respondents that, for the reasons set forth above, this matter is dismissed. This decision is a final decision of an administrative agency and, therefore, it is appealable only to the Superior Court-Appellate Division. See, New Jersey Court Rule 2:2-3(a).

Robert W. Bender, Chairperson

Mailing Date: February 28, 2018

RESOLUTION ADOPTING DECISION – C84-17

WHEREAS, at its meeting on January 23, 2018, the School Ethics Commission (Commission) considered the Complaint, the Motion to Dismiss in Lieu of Answer (Motion to Dismiss), and the Response to Motion to Dismiss filed in connection with the above-referenced matter; and

WHEREAS, at its meeting on January 23, 2018, the Commission discussed denying Respondents’ request to have the Complaint dismissed as time barred; and

WHEREAS, at its meeting on January 23, 2018, the Commission discussed granting the Motion to Dismiss in its entirety for failure to plead sufficient, credible facts to support a finding that Respondents violated N.J.S.A. 18A:12-24.1(a) (in Count 1 and Count 2), N.J.S.A. 18A:12-24.1(g) (in Count 3), or N.J.S.A. 18A:12-24.1(i) (in Count 4), and dismissing this matter; and

WHEREAS, at its meeting on January 23, 2018, the Commission discussed denying Complainant’s request to clarify and/or modify the allegations in their Complaint; and

WHEREAS, at its meeting on February 27, 2018, the Commission voted to approve the within decision; and

NOW THEREFORE BE IT RESOLVED, that the Commission hereby adopts the decision and directs its staff to notify all parties of its decision.

Robert W. Bender, Chairperson

I hereby certify that the Resolution was duly adopted by the School Ethics Commission at its public meeting on February 27, 2018.

Kathryn A. Whalen, Director
School Ethics Commission