



## Count 2

The Complainant explains that at the December 14, 2015 meeting, the Board acted to rescind the Superintendent's existing contract, ending on June 18, 2018, in favor of a new contract commencing December 15, 2015 through June 30, 2020. This rescission and adoption was done with the Superintendent's support. The Complainant alleges that by distributing the letter on October 29, 2015, the Respondent used his official position to interfere with the Board's election by specifically naming and focusing on the two candidates who had the potential to affect the approval of his new 5-year contract when the prior contract was only 10-months into the term. The Complainant asserts this to be a violation of N.J.S.A. 18A:12-24(b).

In his Motion to Dismiss, the Respondent states that the Complaint fails to allege sufficient facts to establish a violation of N.J.S.A. 18A:12-24(b), that the Commission lacks subject matter jurisdiction to consider the allegations related to the rescission of the Superintendent's contract, and that the Complainant should be sanctioned for filing a frivolous Complaint.

In her response to the Notice of Motion, the Complainant restated the same arguments she made in support of her Complaint. She also contends that there was public sentiment to postpone the vote on the Superintendent's new five year contract until after the newly elected Board members were sworn in at the January 2016 meeting. She further asserts that the Board attorney contacted the County Superintendent on behalf of the Belleville Superintendent and not at the request of the Board. Finally, she argues that the Complaint is not frivolous as she asserts that she has provided adequate support for each of her arguments and that the filing of the Complaint was reasonable and responsible.

## **ANALYSIS**

In determining whether to grant a Motion to Dismiss, the Commission shall review the alleged facts in the light most favorable to the Complainant and determine whether the allegation(s) set forth in the Complaint, 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 Complaint alleged facts, which, if true, could support a finding that Respondent Tomko violated N.J.S.A. 18A:12-24(b) of the Act

In Count 1 of the Complaint, the Complainant asserts that the Respondent violated N.J.S.A. 18A:12-24(b), which provides:

- b. 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;

The Complainant alleges that on October 27, 2015, Respondent Tomko published a statement on the "Essex Watch" blog and then distributed a letter to teachers, staff, parents, and posted it on the District's website on October 29, 2015. Written on the Respondent's official letterhead, in advance of the November 3, 2015 election, the letter addressed comments made by two political candidates in an attempt to clarify alleged misstatements about the Respondent's

administration made by these candidates. . The Complainant states that at a forum on October 21, 2015, five candidates for election to the Board were asked the same questions regarding the School District, and two of the candidates responded negatively regarding the Respondent’s management of the District. The Respondent singled out those two individuals on the Blog and in the letter sent to staff, teachers, and given to the children to bring home to their parents on October 29, 2016. The Complainant asserts that Respondent’s conduct violated N.J.S.A. 18A:12-24(b).

For a violation of N.J.S.A. 18A:12-24(b) to exist, the Complainant must demonstrate that the Respondent used his official position to secure unwarranted privileges, advantages or employment for himself, members of his immediate family, or others. While it appears that the Respondent may have used his official position to exceed the limits of his authority by expressing his views on the Blog and by using his official letterhead and school children to contact parents in an effort to defend his administration, the Complainant has not provided sufficient facts to support a conclusion that the Respondent, his immediate family or another received a benefit or privilege from his unilateral actions. Redress for this conduct may have to be reviewed in another forum. The Commission finds, therefore, that there are no facts set forth in this Count that would support a conclusion that Respondent violated the Act under this subsection. Consequently, even accepting as true all facts alleged by the Complainant in Count 1, such facts are insufficient to support a finding that the Respondent violated N.J.S.A. 18A:12-24(b) of the Act, and, accordingly, the allegation in Count 1 is dismissed in its entirety.

In Count 2, the Complainant alleges that Respondent Tomko violated N.J.S.A. 18A:12-24(b) when he used his official letterhead to address statements made by two candidates running for election to the Board and in which he admonished them on the Blog and in the letter for their negative views of his administration. In doing so, the Complainant argues that the Respondent attempted to prevent his detractors from winning the election and possibly interfering with his attempt to have his existing contract rescinded and replaced with a new, longer contract which was ultimately approved, after the election but before the new Board was seated, granting him a five-year commitment rather than the remaining three years under the old contract. The Complainant suggests that Respondent’s actions secured a better position for himself.

In its review of the Complainant’s allegations, the Commission notes that it was the Board’s decision to rescind the Superintendent’s contract, that it was the Board’s decision to offer the Superintendent a new five-year contract, and it was the Board’s decision to vote on the contract in the “lame duck” session before the new Board was seated in January. As such, the Board acted as a whole, conducting business as Boards normally do.<sup>1</sup> While it may have been more prudent to wait for the newly configured Board after the reorganization in January 2016, that decision is within the ambit of the Board’s power, and the Commission cannot undermine its authority. Moreover, neither of the candidates discussed in Respondent’s letter and on the Blog could have voted at the December meeting even if successful<sup>2</sup> in their bid for a seat on the Board, since they would not have been sworn in until January 2016.

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<sup>1</sup>The Complainant in her response to the Motion to Dismiss cites Nowak v. Manville Bd. of Ed., 1976 S.L.D. 43, as precedent in which Boards of Education are not to “appoint administrators or other employees to positions in which no known vacancies occur” in a “lame duck” session prior to a new reorganization meeting. The Commission notes that the question of whether the vote itself was proper is not before it.

<sup>2</sup> Only one of the mentioned candidates succeeded.

The Commission finds, therefore, that there are no facts set forth in this Count that would support a conclusion that the Respondent violated this subsection of the Act. Consequently, even accepting as true all facts alleged by the Complainant in Count 2, such facts are insufficient to support a finding that the Respondent violated N.J.S.A. 18A:12-24(b) of the Act, and, accordingly, the allegation in Count 2 is dismissed in its entirety.

## **REQUEST FOR SANCTIONS**

The Respondent asserts that the Complaint herein is frivolous. At its meeting on April 26, 2016, the Commission considered the Respondent's request that the Commission find the Complaint frivolous and to 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 and in reviewing the facts in the light most favorable to the Complainant, the Commission determines the Complaint not frivolous, and votes to grant the Motion to Dismiss in its entirety for failure to state a claim upon which relief could be granted. N.J.A.C. 6A:28-10.2(a)7; N.J.A.C. 6A:28-10.8(a)5. 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).

The Commission finds it necessary to comment that even though this tribunal did not determine there to be a violation based on facts before it, and under N.J.S.A. 18A:12-24(b), the only subsection of the Act alleged to have been violated, it does find that the conduct of Respondent Tomko was inappropriate and exceeded the scope of his authority. As the Chief School Administrator, the Respondent is charged with a duty to set the best example of a school official for staff, his teachers, his students and their parents. Taking to social media or using the children to carry a personal note home to correct remarks made by Board candidates who challenged his management of the schools goes beyond the proper role of the CSA and diminishes the very excellence he is trying to defend.

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Robert W. Bender  
Chairperson

Mailing Date: May 25, 2016

## Resolution Adopting Decision – C04-16

**Whereas**, the School Ethics Commission has considered the Complaint, the Motion to Dismiss with a frivolous allegation filed on behalf of the Respondent, and the Complainant's reply to the Motion to Dismiss and to the frivolous allegation; and

**Whereas**, the Commission determined the Complaint not frivolous; and

**Whereas**, at its meeting on April 26, 2016, the Commission voted to grant the Respondent's Motion to Dismiss the Complaint in its entirety for failure to state a claim upon which relief could be granted. N.J.A.C. 6A:28-10.2(a)7; N.J.A.C. 6A:28-10.8(a)5; and

**Whereas**, at its meeting on May 24, 2016, 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.

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Robert W. Bender, Chairperson

I hereby certify that the Resolution was duly adopted by the School Ethics Commission at its public meeting May 24, 2016.

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Joanne M. Restivo  
Acting Executive Director