

***Before the School Ethics Commission***  
***Docket No.: C14-19***  
***Decision on Motion to Dismiss***

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**Frank Caraccio,**  
***Complainant***

v.

**Ashley Alba, Niaz Nadim, and Mohammed Hussain,**  
**Prospect Park Board of Education, Passaic County,**  
***Respondents***

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**I. Procedural History**

This matter arises from a Complaint that was filed on March 5, 2019, by Frank Caraccio (Complainant), a member of the Prospect Park Board of Education (Board), alleging that Ashley Alba, Niaz Nadim, and Mohammed Hussain (Respondents), also members of the Board, violated the School Ethics Act (Act), *N.J.S.A.* 18A:12-21 *et seq.* By correspondence dated March 8, 2019, and March 20, 2019, Complainant was notified that the Complaint was deficient, and required amendment before the School Ethics Commission (Commission) could accept his filing. On April 10, 2019, Complainant cured all defects and filed an Amended Complaint (Complaint) that was deemed compliant with the requirements detailed in *N.J.A.C.* 6A:28-6.3. The Complaint alleges that Respondents violated *N.J.S.A.* 18A:12-24.1(c) of the Code of Ethics for School Board Members (Code) in Count 1 and Count 2, and also violated *N.J.S.A.* 18A:12-24.1(e) in Count 3.

On April 11, 2019, the Complaint was served on Respondents, via regular and certified mail, notifying them that charges were filed against them with the Commission, and advising that they had twenty (20) days to file a responsive pleading. On May 2, 2019, Respondents filed a Motion to Dismiss in Lieu of Answer (Motion to Dismiss), and also alleged that the Complaint is frivolous. On May 22, 2019, Complainant filed a response to the Motion to Dismiss and allegation of frivolous filing.

The parties were notified by correspondence dated June 11, 2019, that this matter would be placed on the Commission's agenda for its special meeting on June 19, 2019, in order to make a determination regarding the Motion to Dismiss and allegation of frivolous filing. At its special meeting on June 19, 2019, the Commission considered the filings in this matter and, at its meeting on July 23, 2019, the Commission voted to grant the Motion to Dismiss in its entirety because Complainant failed to plead sufficient, credible facts to support a finding that Respondents violated *N.J.S.A.* 18A:12-24.1(c) as alleged in Count 1, violated *N.J.S.A.* 18A:12-24.1(c) as argued in Count 2, and/or violated *N.J.S.A.* 18A:12-24.1(e) as contended in Count 3.

The Commission also voted to find the Complaint not frivolous, and to deny Respondents' request for sanctions.

## **II. Summary of the Pleadings**

### **A. *The Complaint***

In Count 1, Complainant asserts that Respondents held interviews with “auditing services” *without* the Business Administrator (BA) present, and then voted for the approval of those contracts. Complainant asserts that Respondents violated *N.J.S.A.* 18A:12-24.1(c) because, at the time of the interviews with the Request for Proposals (RFP) candidates, the BA was not involved in the process.

In Count 2, Complainant alleges that Respondents held interviews with “legal services applicants” *without* the Chief School Administrator (CSA) present, and then voted for the approval of those contracts. Complainant alleges Respondents violated *N.J.S.A.* 18A:12-24.1(c) because, at the time of the interviews with the RFP candidates, the CSA was not involved in the process.

In Count 3, Complainant contends that Respondents negotiated “contractual arrangements with Legal and Auditing services without” the BA and CSA present, and then voted to approve these contracts for amounts which were different from the information submitted in response to the RFP. Complainant contends Respondents violated *N.J.S.A.* 18A:12-24.1(e) because they took private action “by negotiating the submitted RFP fees to allow the subsequent awarded service providers (Legal & Auditing Firms) [an] unfair advantage against the other submitters.”

### **B. *Motion to Dismiss and Allegation of Frivolous Filing***

Following receipt of the Complaint, Respondents filed a Motion to Dismiss, and also alleged that the Complaint is frivolous. First, Respondents argue that Complainant did not provide any facts that would suggest that Respondents took any action “to effectuate policies and plans,” took any action that was “unrelated to [their] dut[ies],” made any “personal promises” or took any “private action ... beyond the scope of [their] duties ... that may compromise the board.” In addition, the vote to approve the legal and auditing providers was made by the entire Board, not solely by Respondents. Therefore, Respondents argue that the Complaint should be dismissed.

Second, Respondents argue that there is no requirement for the Board/Finance committee to include the BA and/or the CSA when interviewing and negotiating with prospective professional service providers. Respondents also argue that the Board is not required to obtain approvals from the BA and/or CSA in order to appoint a “board auditor” and/or a “board attorney.” Furthermore, when appointing professional service providers, such as auditing and legal firms, “competitive contracting” rules do not apply, and the Board is not required to appoint the lowest bidding firms, and instead can choose the firm/entity that offers the “highest quality service at a fair and competitive price.”

Third, Respondents argue that, as Board members, they had the right to vote as they saw fit, and the fact that they voted contrary to other Board members is not a basis for a violation of the Act. Therefore, Respondents assert that since the Complaint lacks factual evidence and the allegations fail as a matter of law, the Complaint should be dismissed.

Finally, Respondents argue Complainant knew or should have known that the Complaint was without reasonable basis and was made in bad faith. Complainant is a Board member and should know that the competitive bidding process does not apply to RFPs for professional services, and that Board members are free to vote on Board issues as they see fit. In addition, Respondents claim that Complainant is asserting “broad allegations of wrongdoing” without factual evidence and this is his third complaint arising from the same “essential disagreement.” Respondents maintain that Complainant “clearly harbors a gripe” against them over a difference of opinion regarding the selection of service providers and “now seeks retribution.” For these reasons, Respondents assert the Complaint is frivolous, and sanctions should be imposed.

### **C. *Response to Motion to Dismiss and Allegation of Frivolous Filing***

In response to the Motion to Dismiss and allegation of frivolous filing, Complainant maintains that it is his understanding that “no board member should take any private actions without conferring with all parties affected.” Complainant asserts that he believed that the CSA and the BA were not included in the interviews for the submitted RFPs. He requested the committee minutes and the questionnaire rubric and, to date, has not received them. Complainant also asked each “member what their qualifications were to negotiate contracts without guidance,” and he did not receive a response. Complainant notes he “would assume at the very least since any decision would involve finance at the very least the BA would be present to give information as to the viability of the contract so an informed decision could be made.” Complainant concludes, that he wishes “nothing more than for this board to act in the best interest of the children ... .”

## **III. Analysis**

### **A. *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 (Complainant), 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:28-8.1 et seq.* Thus, the question before the Commission is whether Complainant has alleged sufficient facts which, if true, could support a finding that Respondents violated *N.J.S.A. 18A:12-24.1(c)* as alleged in Count 1, violated *N.J.S.A. 18A:12-24.1(c)* as argued in Count 2, and/or violated *N.J.S.A. 18A:12-24.1(e)* as contended in Count 3.

## **B. *Alleged Code Violations***

In the Complaint, Complainant alleges that Respondents violated *N.J.S.A.* 18A:12-24.1(c) in Count 1 and Count 2, and violated *N.J.S.A.* 18A:12-24.1(e) in Count 3. These provisions of the Code provide:

c. 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.

e. 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.

### **Count 1**

In Count 1, Complainant alleges that because Respondents held interviews with “auditing services” *without* the BA present, and then voted for the approval of those contracts, Respondents violated *N.J.S.A.* 18A:12-24.1(c). Respondents counter that Complainant did not provide any facts that would suggest that Respondents took any action “to effectuate policies and plans,” took any action that was “unrelated to [their] dut[ies],” made any “personal promises” or took any “private action ... beyond the scope of [their] duties ... that may compromise the board.” Respondents also note that there is no requirement for the committee to include the BA when interviewing and negotiating with auditing firms.

Pursuant to *N.J.A.C.* 6A:28-6.4(a)(3), factual evidence of a violation of *N.J.S.A.* 18A:12-24.1(c) shall include evidence that Respondents took board action to effectuate policies and plans without consulting those affected by such policies and plans, or took action that was unrelated to Respondents’ 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.

After review of Complainant’s allegations, the Commission finds that even if the facts as alleged in the Complaint are proven true by sufficient credible evidence, they would not support a finding that Respondents violated *N.J.S.A.* 18A:12-24.1(c). Even if Respondents did not include the BA in the interviews of auditing firms, and regardless of whether the BA’s presence was “required” in the interview process, Complainant has not provided any facts to establish that Respondents effectuated policies and plans without consulting those affected by such policies or plans, or that they otherwise took action unrelated to their duties as Board members as set forth above. Therefore, the Commission finds that the alleged violation of *N.J.S.A.* 18A:12-24.1(c) in Count 1 should be dismissed.

### **Count 2**

In Count 2, Complainant argues that because Respondents held interviews with “legal services applicants” *without* the CSA present, and then voted for the approval of those contracts,

Respondents violated *N.J.S.A.* 18A:12-24.1(c). Respondents again counter that Complainant did not provide any facts that would suggest that Respondents took any action “to effectuate policies and plans,” took any action that was “unrelated to [their] dut[ies],” made any “personal promises” or took any “private action ... beyond the scope of [their] duties ... that may compromise the board.” Respondents also note that there is no requirement for the committee to include the CSA when interviewing and negotiating with law firms.

As set forth above, factual evidence of a violation of *N.J.S.A.* 18A:12-24.1(c) shall include evidence that Respondents took board action to effectuate policies and plans without consulting those affected by such policies and plans, or took action that was unrelated to Respondents’ 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).

Based on its review of Complainant’s allegations, the Commission finds that even if the facts as alleged in the Complaint are proven true by sufficient credible evidence, they would not support a finding that Respondents violated *N.J.S.A.* 18A:12-24.1(c). Once again, even if Respondents did not include the CSA in the interviews of law firms/counsel, and regardless of whether the CSA’s presence was “required” in the interview process, Complainant has not provided any facts to establish that Respondents effectuated policies and plans without consulting those affected by such policies or plans, or that they otherwise took action unrelated to their duties as Board members as set forth above. The Complaint merely provides conclusory allegations, but fails to provide the necessary facts in support of those allegations. Therefore, the Commission finds that the alleged violation of *N.J.S.A.* 18A:12-24.1(c) in Count 2 should be dismissed.

### **Count 3**

In Count 3, Complainant contends that because Respondents negotiated “contractual arrangements with Legal and Auditing services without” the BA and CSA present, and then voted to approve these contracts for amounts which were different from the information submitted in response to the RFP, Respondents violated *N.J.S.A.* 18A:12-24.1(e). Respondents counter that when appointing professional service providers, such as auditing and legal firms, “competitive contracting” rules do not apply, and the Board is not required to appoint the lowest bidding firms, and instead can choose the firm/entity that offers the “highest quality service at a fair and competitive price.” Moreover, the fact that Respondents voted contrary to other Board members does not mean that they violated *N.J.S.A.* 18A:12-24.1(e).

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

After review of Complainant’s allegations, the Commission finds that even if the facts as alleged in the Complaint are proven true by sufficient credible evidence, they would not support a finding that Respondents violated *N.J.S.A.* 18A:12-24.1(e). Even if Respondents voted to

approve contracts for auditing and law firms that were for amounts greater than what was detailed in their respective responses to the RFPs, Complainant has not provided factual support for his position that Respondents, in so acting, were not authorized to do so and that, consequently, their actions had the potential to compromise the Board. Therefore, the Commission finds that the alleged violation of *N.J.S.A.* 18A:12-24.1(e) in Count 3 should be dismissed.

Accordingly, and granting all inferences in favor of the non-moving party (Complainant), the Commission has determined to **grant** the Motion to Dismiss in its entirety because Complainant failed to plead sufficient, credible facts to support a finding that Respondents violated *N.J.S.A.* 18A:12-24.1(c) as alleged in Count 1, violated *N.J.S.A.* 18A:12-24.1(c) as argued in Count 2, and/or violated *N.J.S.A.* 18A:12-24.1(e) as contended in Count 3.

#### **IV. Request for Sanctions**

At its special meeting on June 19, 2019, the Commission considered Respondents' request that the Commission find the Complaint frivolous, and impose sanctions pursuant to *N.J.S.A.* 18A:12-29(e). Despite Respondents' argument, the Commission cannot find evidence that might show that Complainant filed the Complaint in bad faith or solely for the purpose of harassment, delay, or malicious injury. The Commission also does not have information to suggest that Complainant knew or 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, at its meeting on July 23, 2019, the Commission voted to find the Complaint not frivolous, and to deny the request for sanctions.

#### **V. Decision**

Based on the foregoing, and in reviewing the facts in the light most favorable to the non-moving party (Complainant), the Commission voted to **grant** the Motion to Dismiss in its entirety because Complainant failed to plead sufficient, credible facts to support a finding that Respondents violated *N.J.S.A.* 18A:12-24.1(c) as alleged in Count 1, violated *N.J.S.A.* 18A:12-24.1(c) as argued in Count 2, and/or violated *N.J.S.A.* 18A:12-24.1(e) as contended in Count 3. The Commission also voted to find that the Complaint is not frivolous, and to deny Respondents' request for sanctions.

Pursuant to *N.J.S.A.* 18A:12-29(b), the Commission hereby notifies Complainant 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).*

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Robert W. Bender, Chairperson

Mailing Date: July 24, 2019

***Resolution Adopting Decision  
in Connection with C14-19***

***Whereas***, at its special meeting on June 19, 2019, the School Ethics Commission (Commission) considered the Complaint, the Motion to Dismiss in Lieu of Answer (Motion to Dismiss) and allegation of frivolous filing, and the response to the Motion to Dismiss and allegation of frivolous filing submitted in connection with the above-referenced matter; and

***Whereas***, at its special meeting on June 19, 2019, the Commission discussed granting the Motion to Dismiss in its entirety for failure to plead sufficient, credible facts to support the allegations that Respondents violated *N.J.S.A.* 18A:12-24.1(c) as alleged in Count 1, violated *N.J.S.A.* 18A:12-24.1(c) as argued in Count 2, and/or violated *N.J.S.A.* 18A:12-24.1(e) as contended in Count 3; and

***Whereas***, at its special meeting on June 19, 2019, the Commission discussed finding the Complaint not frivolous, and denying Respondents' request for sanctions; and

***Whereas***, at its meeting on July 23, 2019, the Commission reviewed and voted to approve the within decision as accurately memorializing its actions/findings from its special meeting on June 19, 2019; and

***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 on July 23, 2019.

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Kathryn A. Whalen, Director  
School Ethics Commission