

Before the School Ethics Commission
Docket No.: C31-19
Decision on Motion to Dismiss

Michael Melham,
Complainant

v.

Michael Sheldon,
Belleville Board of Education, Essex County,
Respondent

I. Procedural History

This matter arises from a Complaint that was filed on April 24, 2019, by Michael Melham (Complainant), the Mayor of the Township of Belleville, alleging that Michael Sheldon (Respondent), a member of the Belleville Board of Education (Board), violated the School Ethics Act (Act), *N.J.S.A.* 18A:12-21 *et seq.* By correspondence dated April 26, 2019, Complainant was notified that the Complaint was deficient, and required amendment before the School Ethics Commission (Commission) could accept his filing. On May 23, 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 Respondent violated *N.J.S.A.* 18A:12-24.1(e) of the Code of Ethics for School Board Members (Code) in Count 1, and violated *N.J.S.A.* 18A:12-24.1(g) of the Code in Count 2.

On May 28, 2019, the Complaint was served on Respondent, via regular and certified mail, notifying him that charges were filed against him with the Commission, and advising that he had twenty (20) days to file a responsive pleading. On June 18, 2019, Respondent filed a Motion to Dismiss in Lieu of Answer (Motion to Dismiss), and also alleged that the Complaint is frivolous. On July 5, 2019, Complainant filed a response to the Motion to Dismiss and allegation of frivolous filing.

The parties were notified by correspondence dated July 16, 2019, that this matter would be placed on the Commission's agenda for its meeting on July 23, 2019, in order to make a determination regarding the Motion to Dismiss and allegation of frivolous filing. At its meeting on July 23, 2019, the Commission considered the filings in this matter and, at its special meeting on August 30, 2019, the Commission voted to find that the Complaint was timely filed but to, nonetheless, grant the Motion to Dismiss in its entirety because Complainant failed to plead sufficient, credible facts to support a finding that Respondent violated *N.J.S.A.* 18A:12-24.1(e) as alleged in Count 1 and/or violated *N.J.S.A.* 18A:12-24.1(g) as argued in Count 2. The Commission also voted to find the Complaint not frivolous, and to deny Respondent's request for sanctions.

II. Summary of the Pleadings

A. The Complaint

In Count 1, Complainant asserts that on November 23, 2018, Respondent made an “outrageous” and “inflammatory” comment on Complainant’s social media post (Facebook), and did not provide a disclaimer that he was speaking as a private citizen, and not as a Board member; therefore, Complainant contends that it is to be “assumed” that Respondent was speaking on behalf of the Board. Respondent’s comment accused Complainant of being involved in “bid rigging,” which could be damaging to Complainant both personally and professionally (Complainant is the Mayor and also owns a municipal government technology company which has several government contracts). Based on these facts, Complainant asserts that Respondent violated *N.J.S.A. 18A:12-24.1(e)* because his false and disparaging statements are damaging to Complainant, and also compromised the Board.

In Count 2, and regarding a comment that Respondent made on Complainant’s social media post (“.... Perhaps some day soon you should ask [Complainant] ... and a few other connected individuals what transpired when the [Board] Trustees circa 2013 effectively rigged a bid for Clarity Technologies, which wound up plunging our District into a multi-million dollar deficit and necessitating the appointment of a State monitor, who remains in place to this day”), Complainant notes that he is not a Board member, had nothing to do with the bidding process for the school security system that Respondent referred to in his comment, did not vote for the school security system in question, and had no involvement in the deficit that caused the appointment of a State monitor. As a result, Respondent’s comment instructing the public to contact him was “inaccurate” and “inappropriate,” and violated *N.J.S.A. 18A:12-24.1(g)*.

B. Motion to Dismiss and Allegation of Frivolous Filing

Following receipt of the Complaint, Respondent filed a Motion to Dismiss, and also alleged that the Complaint is frivolous. Respondent first argues that the Complaint is time barred because the post in question was made on November 23, 2018, which is more than 180 days prior to the filing of Complaint on May 23, 2019.

Even if not time barred, Respondent argues that his post on Complainant’s Facebook page did not state that Complainant participated in any wrongdoing, nor did it contain any personal promises, constitute any private action, disclose any confidential matters, or set forth any inaccurate information. Respondent’s post merely suggested that the public should ask Complainant for additional information. Moreover, Complainant did not provide any facts that would demonstrate that Respondent’s comment was anything more than an expression of his personal opinion, nor did he provide any facts to show how Respondent’s comment compromised the Board. Respondent maintains that he is entitled to express his opinion on social media, and his position as a Board member does not forfeit his freedom of speech. Therefore, Respondent contends he did not violate *N.J.S.A. 18A:12-24.1(e)* and/or *N.J.S.A. 18A:12-24.1(g)*, and the Complaint should be dismissed.

Finally, Respondent argues that the Complaint is frivolous because Complainant knew or should have known that the Complaint was without reasonable basis and was made in bad faith. Although Complainant asserts that Respondent's comment "actually" compromised the Board, he did not present any facts to support that assertion. Respondent contends that Complainant, as a political figure, was unhappy with Respondent's post, and used the Commission to address his displeasure. The Complaint is baseless and, therefore, Complainant should be fined.

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

In response to the Motion to Dismiss and allegation of frivolous filing, Complainant contends that his Complaint is not time barred because he filed his Complaint on April 14, 2019, and not May 23, 2019, as argued by Respondent. Complainant further argues that he does state a claim for violations of the Code, and that if Respondent was merely suggesting that the public should simply ask Complainant for information and was not suggesting that Complainant was involved in or had knowledge of an alleged bid rigging, then it would not have been necessary to state, "... ask Mr. Melham ...". Furthermore, Complainant argues that the Facebook post was started by him, as the Mayor of the town, for his audience, and Respondent, who is well known in the community as a Board member, made slanderous comments for the public to read. Complainant contends that the post was made "clearly" to disparage him, and to insinuate that Respondent has personal knowledge, due to his position as a Board member, about the rigging of a bid.

In addition to the arguments above, Complainant argues that Respondent was discussing Board business because there is no public knowledge of an allegation that involves bid rigging; therefore, it could be understood that Respondent's statement could only come from information that he obtained while serving on the Board, in private session. Consequently, this means that Respondent revealed confidential information to the public and, thereby, compromised the Board. Complainant also questions how Respondent can claim, that his comment – based on its content – could be considered his personal opinion, as opposed to that of a Board member/representative of the Board, especially since he did not provide a disclaimer.

Finally, Complainant argues his Complaint is not frivolous because Respondent posted a comment on social media about Complainant and referenced his (Respondent's) role as a Board member. The social media post "insinuated" that Complainant was involved in bid rigging by using the words "connected individuals," and since Complainant has never been accused of such actions, Respondent could not be offering his opinion. Complainant reasserts his claims that Respondent violated *N.J.S.A. 18A:12-24.1(e)* and *N.J.S.A. 18A:12-24.1(g)*.

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 Respondent violated *N.J.S.A.* 18A:12-24.1(e) as alleged in Count 1, and/or violated *N.J.S.A.* 18A:12-24.1(g) as argued in Count 2.

B. Alleged Untimeliness

In his Motion to Dismiss, Respondent preliminarily argues that the Complaint is time barred because the social media post in question was posted/made on November 23, 2018, but Complainant did not file his Complaint until May 23, 2019, which is beyond the one hundred eighty (180) day period of limitations. Complainant counters that his Complaint is not time barred because he first filed his Complaint on April 14, 2019, which was within the one hundred eighty (180) day statute of limitations.

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).

As applied here, although Complainant did not file a Complaint that was deemed compliant with the Commission's regulations (*N.J.A.C.* 6A:28-6.3) until May 23, 2019, he filed his first deficient Complaint on April 24, 2019 (not April 14, 2019, as argued); therefore, and because Complainant's amendments relate back to the date his Complaint was *first* received by the Commission, the filing date in this matter is **April 24, 2019**. See *N.J.A.C.* 6A:28-6.7(b).

Pursuant to *N.J.A.C.* 6A:28-6.5(a), the Commission must determine when Complainant knew of the events which form the basis of his Complaint, or when such events were made public so that one using reasonable diligence would know, or should have known, of such events. In its review of the pleadings, the Commission finds that Complainant has not argued, or indicated, that he did not have reason to know of the events that form the basis of his Complaint on a date/day other than when they originally occurred. Therefore, the Commission determines that Complainant knew of the events that form the basis of his Complaint on the date/day they occurred which, in this case, is November 23, 2018.

Because Complainant filed his first deficient Complaint on April 24, 2019, one hundred eighty (180) days prior thereto is **October 26, 2018**. Because the social media post in question was posted/made on November 23, 2018, the Commission finds that the Complaint was timely filed, and the allegations are not time barred.

C. Alleged Code Violations

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

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.

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.

Count 1

In Count 1, Complainant alleges that Respondent's "outrageous" and "inflammatory" comment on his (Complainant's) social media post was made in Respondent's capacity as a Board member and, in that post, he accused Complainant of being involved in "bid rigging," which could be damaging to Complainant both personally and professionally. As a result, Complainant alleges that Respondent violated *N.J.S.A.* 18A:12-24.1(e) because his false and disparaging statements are damaging to Complainant, and also compromised the Board. Respondent counters that his comment on Complainant's social media post did not state that Complainant participated in any wrongdoing, nor did it contain any personal promises nor constitute any private action. Moreover, Complainant did not provide any facts to establish that Respondent's comment was anything more than an expression of his personal opinion, nor did he provide any facts to show how Respondent's comment compromised the Board.

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 Respondent 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 the Complaint, the Commission finds that even if the facts as alleged are proven true by sufficient credible evidence, they would not support a finding that Respondent violated *N.J.S.A.* 18A:12-24.1(e). As an initial matter, the Commission notes that its authority is limited to enforcing the Act, *N.J.S.A.* 18A:12-21 *et seq.*, a set of minimum ethical standards by which all school officials must abide. The Commission has jurisdiction only over matters arising under the Act, and it may not receive, hear, or consider any matter that does not arise under the Act, *N.J.A.C.* 6A:28-1.4(a). Therefore, to the extent that Complainant seeks a determination from the Commission that Respondent's "accusations" were "false" and/or "derogatory," the Commission notes that such a determination falls outside the scope, authority, and jurisdiction of the Commission. Nonetheless, if Complainant can establish that the comments made by Respondent were false and/or derogatory, he may be able to pursue a claim of defamation in the appropriate venue.

With the jurisdiction of the Commission in mind, and based on its review, the crux of Complainant's claim is that because Respondent made defamatory comments about Complainant on his (Complainant's) Facebook post, Respondent potentially harmed Complainant as a publicly elected individual (the Mayor) and as a business owner with multiple government contracts. However, absent a judicial determination that Respondent's comments were in fact defamatory, and absent a finding that Respondent's comments were made in his capacity as a Board member and not as a private citizen (a question of fact that will not be based on the current record), Complainant cannot establish that Respondent's comments had the potential to compromise the Board. Without a finding that Respondent's comment was defamatory, and a finding that his comment was made in his capacity as a Board member, there is no potential compromise to the Board (if any). Therefore, and for these reasons, the Commission finds that the alleged violation of *N.J.S.A.* 18A:12-24.1(e) in Count 1 should be dismissed.

Count 2

In Count 2, Complainant argues that, regarding a comment that Respondent made on Complainant's social media post ("... Perhaps some day soon you should ask [Complainant] ... and a few other connected individuals what transpired when the [Board] Trustees circa 2013 effectively rigged a bid for Clarity Technologies..."), he (Complainant) is not a Board member, had nothing to do with the bidding process for the school security system that Respondent referred to in his comment, did not vote for the school security system in question, and had no involvement in the deficit that caused the appointment of a State monitor. As a result, Respondent's comment instructing the public to contact him was "inaccurate" and "inappropriate," and violated *N.J.S.A.* 18A:12-24.1(g). Respondent counters that his post on Complainant's Facebook page did not disclose any confidential matters or set forth any inaccurate information. Respondent's comment merely suggested that the public should ask Complainant for additional information.

As set forth in *N.J.A.C.* 6A:28-6.4(a)(7), factual evidence of a violation of the confidentiality provision of *N.J.S.A.* 18A:12-24.1(g) shall include evidence that Respondent 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 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 Respondent and evidence that establishes that the inaccuracy was other than reasonable mistake or personal opinion or was not attributable to developing circumstances.

Based on its review of the Complaint, the Commission finds that even if the facts as alleged are proven true by sufficient credible evidence, they would not support a finding that Respondent violated the inaccurate provision of *N.J.S.A.* 18A:12-24.1(g). There is nothing in Respondent's comment which claims that Complainant was a Board member, was involved with the bidding process for the school security system, voted for the school security system in question, or was otherwise directly involved in the deficit that caused the appointment of a State monitor. Instead, Respondent's comment, regardless of whether appropriate, simply encouraged the public to contact Complainant, who is the currently seated Mayor. Therefore, the

Commission finds that the alleged violation of *N.J.S.A.* 18A:12-24.1(g) in Count 2 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 Respondent violated *N.J.S.A.* 18A:12-24.1(e) as alleged in Count 1 and/or violated *N.J.S.A.* 18A:12-24.1(g) as argued in Count 2.

IV. Request for Sanctions

At its meeting on July 23, 2019, the Commission considered Respondent's request that the Commission find the Complaint frivolous, and impose sanctions pursuant to *N.J.S.A.* 18A:12-29(e). Despite Respondent's 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 special meeting on August 30, 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 find that the Complaint was timely filed but to, nonetheless, **grant** the Motion to Dismiss in its entirety because Complainant failed to plead sufficient, credible facts to support a finding that Respondent violated *N.J.S.A.* 18A:12-24.1(e) as alleged in Count 1 and/or violated *N.J.S.A.* 18A:12-24.1(g) as argued in Count 2. The Commission also voted to find that the Complaint is not frivolous, and to deny Respondent's request for sanctions.

Pursuant to *N.J.S.A.* 18A:12-29(b), the Commission hereby notifies Complainant and Respondent 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: August 30, 2019

**Resolution Adopting Decision
in Connection with C31-19**

Whereas, at its meeting on July 23, 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 meeting on July 23, 2019, the Commission discussed finding that the Complaint was timely filed; and

Whereas, at its meeting on July 23, 2019, and despite being timely filed, the Commission discussed granting the Motion to Dismiss in its entirety for failure to plead sufficient, credible facts to support the allegations that Respondent violated *N.J.S.A.* 18A:12-24.1(e) as alleged in Count 1 and/or violated *N.J.S.A.* 18A:12-24.1(g) as argued in Count 2; and

Whereas, at its meeting on July 23, 2019, the Commission discussed finding the Complaint not frivolous, and denying Respondent's request for sanctions; and

Whereas, at its special meeting on August 30, 2019, the Commission reviewed and voted to approve the within decision as accurately memorializing its actions/findings from its meeting on July 23, 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.

Robert W. Bender, Chairperson

I hereby certify that the Resolution was duly adopted by the School Ethics Commission at its special meeting on August 30, 2019.

Kathryn A. Whalen, Director
School Ethics Commission