

Before the School Ethics Commission
Docket No.: C64-19
Decision on Motion to Dismiss

Frank Verducci,
Complainant

v.

James Schalago,
Bloomington Board of Education, Passaic County,
Respondent

I. Procedural History

This matter arises from a Complaint that was filed on November 12, 2019, by Frank Verducci (Complainant), an administrator employed by the Bloomington Board of Education (Board), alleging that James Schalago (Respondent), a member of the Board, violated the School Ethics Act (Act), *N.J.S.A.* 18A:12-21 *et seq.* More specifically, the Complaint alleges that Respondent violated *N.J.S.A.* 18A:12-24.1(i), *N.J.S.A.* 18A:12-24.1(j), and *N.J.S.A.* 18A:12-24.1(f).

On November 14, 2019, the Complaint was served on Respondent, via regular and certified mail, notifying him that charges were filed against him with the School Ethics Commission (Commission), and advising that he had twenty (20) days to file a responsive pleading. On December 10, 2019, Respondent filed a Motion to Dismiss in Lieu of Answer (Motion to Dismiss), and also alleged that the Complaint is frivolous. On January 10, 2020, Complainant filed a response to the Motion to Dismiss and allegation of frivolous filing.

The parties were notified by correspondence dated January 13, 2020, that this matter would be placed on the Commission's agenda for its meeting on January 21, 2020, in order to make a determination regarding the Motion to Dismiss and allegation of frivolous filing. At its meeting on January 21, 2020, the Commission considered the filings in this matter and, at its meeting on February 25, 2020, the Commission voted to find that Complainant failed to plead sufficient, credible facts to support a finding that Respondent violated *N.J.S.A.* 18A:12-24.1(i), *N.J.S.A.* 18A:12-24.1(j), and/or *N.J.S.A.* 18A:12-24.1(f) as alleged in the Complaint. The Commission also voted to dismiss the matter on the grounds that the Complaint was frivolous, and to impose a fine in the amount of one hundred dollars (\$100.00).

II. Summary of the Pleadings

A. *The Complaint*

In his Complaint, Complainant (Principal/Acting Superintendent) asserts that, at a Board meeting on October 29, 2019, Respondent “attempted to discredit” Complainant and his “job performance, and [to] publicly embarrass and humiliate [him] during the public portion of the meeting.” More specifically, Complainant maintains that Respondent “put [him] on the spot by demanding” that Complainant provide him (Respondent) with “answers to an issue” that occurred in Spring 2019 (which was prior to his appointment as Acting Superintendent) relating to the National Junior Honor Society (NJHS). According to Complainant, Respondent “never discussed this matter” with him prior to the October 29, 2019, Board meeting. Complainant asserts Respondent’s conduct during the October 29, 2019, Board meeting violates *N.J.S.A.* 18A:12-24.1(i) and *N.J.S.A.* 18A:12-24.1(j).

Complainant additionally asserts that Respondent has made statements to members of the community, and “allegedly on social media,” that “his goal is to have [Complainant] removed from [his] positions as acting superintendent and principal and any other positions in the school district, and stated that [Complainant] should not be around children.” Complainant believes that Respondent’s “animosity” towards him stems from a matter that occurred nearly a decade ago when Complainant “refused to change a grade and allow [Respondent’s] child to be placed on ‘high honor roll’.” For these reasons, Complainant alleges that Respondent’s “antagonistic behavior” at the October 29, 2019, Board meeting and “past actions” demonstrate that he is “unable to act in an objective and impartial manner in the performance of his duties as a Board member” as is required by *N.J.S.A.* 18A:12-24.1(f).

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

Following receipt of the Complaint, Respondent filed a Motion to Dismiss and allegation of frivolous filing. Respondent denies that he violated *N.J.S.A.* 18A:12-24.1(i), and argues that Complainant did not explain how “asking a question” is “an attack against school personnel or somehow effects his performance.” In this regard, there is no case law which has found an ethics violation “for asking a question about the requirements for admission into a program like the National Honor Society.” Respondent maintains that the “question is innocuous and cannot in any way be interpreted as undermining school personnel.” According to Respondent, “[v]iewpoints that differ from administration, let alone, asking questions about programs, are permitted so long as they are expressed in an appropriate manner ... or without the goal of person[al] gain.” Respondent further argues that he has First Amendment rights, and arguably “a duty to ask questions on matters of public importance.” In addition, there is no requirement for Respondent to “vet” his questions with the Principal/Acting Superintendent before asking them at a public meeting.

Respondent also denies that he violated *N.J.S.A.* 18A:12-24.1(j), and maintains that Respondent simply asked a question; Complainant did not state what about the question was degrading or insulting; does not assert that Respondent acted on a complaint, only that he asked about a middle school program; and asking an “innocuous question without more” is not “acting” on a complaint. In short, Respondent argues that *N.J.S.A.* 18A:12-24.1(j) does “not apply to an inquiry (without more) that a Board member may have of an administrative official.”

Respondent also denies that he violated *N.J.S.A.* 18A:12-24.1(f), and argues that the Complaint is “devoid of any factual assertions showing (1) how it would be in the Respondent’s personal interest to ask the Complainant about [the NJHS] or (2) how it would be in the Respondent’s friends’ personal interests to ask the [C]omplainant about the [NJHS].” In this regard, asking a question about the NJHS “in no way benefits the Respondent or any other special interest group.” Respondent also argues that Complainant “falsely claims” that Respondent requested that he change his child’s grade “eight years ago.” Respondent maintains “[t]here is no reason for this to be in the Complaint other than to bully Respondent by having his child involved in this matter.” Furthermore, regarding Complainant’s allegation that Respondent said Complainant “should not be around children,” Complainant does not specify when Respondent “allegedly” made these statements, or to whom the statements were made. Without any specificity, general conclusory statements cannot satisfy the criteria for proving a violation of *N.J.S.A.* 18A:18A:12-24.1(f).

Finally, Respondent asserts the Complaint is frivolous and made in bad faith because “no interpretation of the law suggests that the Respondent committed an ethical violation by asking a question that the Complainant did not approve.” Respondent claims that he (Respondent) has asked other superintendents “similar questions” related to the NJHS.

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

In his reply to the Motion to Dismiss and allegation of frivolous filing, Complainant denies that his Complaint is frivolous, and reaffirms his allegations. More specifically, and regarding the first allegation in the Complaint, it is Complainant’s position that Respondent “attempted to discredit, embarrass, and humiliate him at a public board meeting by questioning [him] about a matter that predated [his] appointment as Acting Superintendent.” If Respondent “simply wanted information,” he could have asked Complainant his questions in a private setting at any time. Instead, Respondent chose to blindside Complainant at his first public Board meeting as Acting Superintendent. Of note, both before and after Complainant was unable to answer Respondent’s questions at this meeting (which had “an unusually large public turnout”), “several members of the public came to the podium to speak negatively about Complainant.”

As for the second allegation, Complainant reasserts that Respondent has advised community members both in person and through social media that Complainant is not fit to serve in any capacity in the district, and that he should not be around children. More specifically, Complainant maintains these statements were made to both current and former members of the Board, and he specifically named the individuals to whom the statements were made. Although Complainant acknowledges that Respondent has first amendment rights, he contends that those rights are not limitless. Further, and because there is no other basis for Respondent’s actions, it is not unreasonable for Complainant to believe it is related to his (Complainant’s) denial of Respondent’s child to “high honor roll.” Between his actions at the Board meeting on October 29, 2019, and Respondent’s negative comments about Complainant, and the fact that Respondent voted against his (Complainant’s) appointment to Acting Superintendent, Complainant maintains Respondent has violated *N.J.S.A.* 18A:12-24.1(f).

Finally, Complainant contends the Complaint is not frivolous and Respondent's request for sanctions should be denied. Complainant states he did not file this Complaint "in bad faith, solely for the purpose of harassment, delay or malicious injury," but rather to prevent "further harassment of him and the resultant hostile work environment it has created." Complainant maintains that he filed his Complaint prior to applying for the position of Superintendent and, therefore, Respondent's suggestion that Complainant filed this matter to disqualify his (Respondent's) "no" vote is inaccurate. For these reasons, Complainant requests the Commission deny Respondent's Motion to Dismiss the Complaint and request for sanctions.

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(i)*, *N.J.S.A. 18A:12-24.1(j)*, and/or *N.J.S.A. 18A:12-24.1(f)* as alleged in the Complaint.

B. Alleged Code Violations

In his Complaint, Complainant alleges that Respondent violated *N.J.S.A. 18A:12-24.1(i)*, *N.J.S.A. 18A:12-24.1(j)*, and *N.J.S.A. 18A:12-24.1(f)*. These provisions of the Code of Ethics for School Board Members (Code) provide:

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

j. I will refer all complaints to the chief administrative officer and will act on the complaints at public meetings only after failure of an administrative solution.

f. I will refuse to surrender my independent judgment to special interest or partisan political groups or to use the schools for personal gain or for the gain of friends.

According to Complainant, Respondent "attempted to discredit" him (Complainant) and his job performance, and to "publicly embarrass and humiliate [him]" when he (Respondent) "put [Complainant] on the spot" at a Board meeting on October 29, 2019, and "demanded" that Complainant provide him (Respondent) with "answers to an issue" that occurred prior to Complainant's appointment to the position of Acting Superintendent. By putting Complainant "on the spot," and not discussing his (Respondent's) question with Complainant prior to the

Board meeting, Complainant asserts that Respondent violated *N.J.S.A.* 18A:12-24.1(i) and *N.J.S.A.* 18A:12-24.1(j).

Respondent counters that, with regard to the alleged violation of *N.J.S.A.* 18A:12-24.1(i), Complainant did not explain how “asking a question” is “an attack against school personnel or somehow effects his performance.” Respondent maintains that the “question is innocuous and cannot in any way be interpreted as undermining school personnel.” As for the purported violation of *N.J.S.A.* 18A:12-24.1(j), Respondent asserts that Complainant did not state what about the question was degrading or insulting; does not assert that Respondent acted on a complaint, only that he asked about a middle school program; and asking an “innocuous question without more” is not “acting” on a complaint.

As set forth in *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 Respondent took deliberate action which resulted in undermining, opposing, compromising or harming school personnel in the proper performance of their duties.

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(i). The “deliberate action” purportedly undertaken by Respondent was “demanding” answers to an issue that occurred before Complainant was appointed to the position of Acting Superintendent. Although it is unclear how the complained-of question could possibly be construed as “deliberate action,” it is clear that Complainant was personally affronted by Respondent’s question, and that Complainant personally ascribes a larger meaning, and context, to the question than can reasonably be construed on the face of the Complaint. In this regard, there is no evidence that the asking of Respondent’s question actually resulted in Complainant and/or his position being undermined, opposed, compromised, or harmed. In fact, in Complainant’s response to the Motion to Dismiss, he acknowledges that “several members of the public came to the podium to speak negative about Complainant *before* ... he was unable to answer Respondent’s question about the [NJHS]” (emphasis added). In other words, and based on Complainant’s own submissions, the “negative” opinion that may have existed regarding his employment and/or role existed before the question was asked, and did not emanate from the mere asking of the question. As a result, the Commission finds that Complainant has failed to plead sufficient, credible facts to support a finding that Respondent violated *N.J.S.A.* 18A:12-24.1(i).

Pursuant to *N.J.A.C.* 6A:28-6.4(a)(10), factual evidence of a violation of *N.J.S.A.* **18A:12-24.1(j)** shall include evidence that Respondent acted on or attempted to resolve a complaint, or conducted an investigation or inquiry related to a complaint (i) prior to referral to the chief administrative officer, or (ii) at a time or place other than a public meeting and prior to the failure of an administrative solution.

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 *N.J.S.A.* 18A:12-24.1(j). Complainant has not pled any facts to establish, or even suggest, that Respondent acted on a complaint, attempted to resolve a complaint, or

conducted an investigation or inquiry related to a complaint. Instead, the Complaint merely alleges that Respondent asked a question. Asking a question, without any facts to suggest that the question was predicated on Respondent's receipt of a complaint, and that the complaint was the catalyst for the question, is wholly insufficient to establish a violation of *N.J.S.A.* 18A:12-24.1(j). Therefore, the Commission finds that Complainant has failed to plead sufficient, credible facts to support a finding that Respondent violated *N.J.S.A.* 18A:12-24.1(j).

Complainant additionally contends that, based on Respondent's behavior at the Board meeting on October 29, 2019, and the fact that Respondent has made statements to members of the community that "his goal is to have [Complainant] removed from [his] positions as acting superintendent and principal and any other positions in the school district" and that Complainant "should not be around children," Complainant believes that Respondent is "unable to act in an objective and impartial manner in the performance of his duties as a Board member" as is required by *N.J.S.A.* 18A:12-24.1(f).

Respondent counters that the Complaint is "devoid of any factual assertions showing (1) how it would be in the Respondent's personal interest to ask the Complainant about [the NJHS] or (2) how it would be in the Respondent's friends' personal interests to ask the [C]omplainant about the [NJHS]." In this regard, asking a question about the NJHS "in no way benefits the Respondent or any other special interest group." Furthermore, and regarding Complainant's allegation that Respondent said Complainant "should not be around children," Complainant does not specify when Respondent "allegedly" made these statements, or to whom the statements were made.

As set forth in *N.J.A.C.* 6A:28-6.4(a)(6), factual evidence of a violation of *N.J.S.A.* **18A:12-24.1(f)** shall include evidence that Respondent took action on behalf of, or at the request of, a special interest group or persons organized and voluntarily united in opinion and who adhere to a particular political party or cause; or evidence that Respondent used the schools in order to acquire some benefit for himself, a member of his immediate family or a friend.

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(f). As an initial matter, there is a dearth of factual support for the claim that Respondent made negative "statements to members of the community" about Complainant's fitness to serve, in any capacity, in the district; more specifically, there is no date for each alleged statement(s), there is no substance for each alleged statement(s), and until the response to the Motion to Dismiss, Complainant did not provide the name(s) of the individual(s) who purportedly heard the statement(s) made by Respondent.

Even with the provision of the names of the individual(s) who purportedly heard the statement(s) made by Respondent, there is no articulation of exactly what was said, when it was said, or any other evidence – including a certification – that the statement(s) was, in fact, made. Complainant seemingly recognizes this deficiency as it relates to the comments made on social media because he couches those statements as "alleged." In this way, the Complaint appears to be based on non-specific conjecture, not fact.

Assuming, *arguendo*, that more definitive and clear information had been provided regarding the nature of statement(s) ostensibly made by Respondent, there are no facts proffered to establish, or insinuate, that Respondent made those statements at the request of a special interest group, or persons organized and voluntarily united in opinion. There are also no facts in the Complaint explaining how Respondent “used the schools” in order to acquire a specific and tangible benefit for himself, a member of his immediate family, or a friend. Based on what is pled, it is clear that Complainant takes issues with the statements that Respondent allegedly made to others, but there are no facts linking Respondent’s claimed statements to his use of the schools, or his position as a Board member, to a specific and tangible benefit for himself, a member of his immediate family, or a friend. As such, the Commission finds that Complainant has failed to plead sufficient, credible facts to support a finding that Respondent violated *N.J.S.A.* 18A:12-24.1(f).

Accordingly, and granting all inferences in favor of the non-moving party (Complainant), the Commission determines that Complainant has failed to plead sufficient, credible facts to support a finding that Respondent violated *N.J.S.A.* 18A:12-24.1(i), *N.J.S.A.* 18A:12-24.1(j), and/or *N.J.S.A.* 18A:12-24.1(f) as alleged in the Complaint.

IV. Request for Sanctions

Respondent’s Motion to Dismiss included an allegation that the Complaint is frivolous and requested sanctions against Complainant. More specifically, Respondent asserts that the Complaint is frivolous and was made in bad faith because “no interpretation of the law suggests that the Respondent committed an ethical violation by asking a question that the Complainant did not approve.”

The Commission’s regulations state, in relevant part:

(a) Within 20 days from receipt of the motion to dismiss in lieu of an answer, the complainant shall file an original and two copies of a responsive brief ...

1. Where a motion to dismiss alleges that a complaint is frivolous pursuant to *N.J.S.A.* 18A:12-29(e), the complainant shall respond to that allegation within the responsive brief.

N.J.A.C. 6A:28-8.2.

In his response to the Motion to Dismiss, which was filed on January 10, 2020, Complainant addressed the allegation of frivolous filing by denying that his Complaint was filed “in bad faith, solely for the purpose of harassment, delay or malicious injury,” and instead argued it was filed to prevent “further harassment of him and the resultant hostile work environment it has created.”

When there is an allegation of frivolous filing, as here, the Commission’s regulations state:

(a) Upon receipt of the complainant's response to an allegation that the complaint is frivolous pursuant to *N.J.A.C.* 6A:28-7.2(b) or 8.2(a) or the expiration of the time for filing such a response, the Commission shall make a determination by majority vote as to whether a complaint is frivolous.

1. Where the Commission finds that a complaint is frivolous, such a finding shall constitute sole grounds for dismissal. Such dismissal shall constitute final agency action.

(b) Pursuant to *N.J.S.A.* 18A:12-29(e), the Commission may impose a fine not to exceed \$500.00.

N.J.A.C. 6A:28-10.4.

A "frivolous complaint" is defined as a complaint determined by the Commission to be *either*:

- 1) Commenced, used or continued in bad faith, solely for the purpose of harassment, delay or malicious injury; or
- 2) One which the complainant knew, or should have known, was without any reasonable basis in law or equity and 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.

In order to find a complaint frivolous, the Commission need only be satisfied that one of the two aforementioned prongs is satisfied. In rendering its determination, the Commission considers the totality of the circumstances. *See, Patricia Lee et al. v. Barri Beck, Union Township Bd. of Ed., Union County*, C01-05 (September 27, 2005). Here, and on the basis of the record before it, the Commission finds that the Complaint is frivolous because Complainant knew, or should have known, that his Complaint was without any reasonable basis in law or equity, and could not be supported by a good faith argument for an extension, modification, or reversal of existing law.

As discussed above, the Commission finds that, even when granting all inferences in favor of the non-moving party (Complainant), Complainant has failed to plead sufficient, credible facts to support a finding that Respondent violated *N.J.S.A.* 18A:12-24.1(i), *N.J.S.A.* 18A:12-24.1(j), and/or *N.J.S.A.* 18A:12-24.1(f).

The crux of the Complaint is that Respondent asked a question that Complainant was not prepared to answer. Based on the information pled in the Complaint, there was nothing nefarious, untoward, or seemingly improper with the nature of the question, and the only thing that was "wrong" with the question – perhaps with the knowledge of Respondent – is that Complainant did not know the answer. Although Complainant was not prepared to answer the question, it is Complainant's responsibility, as any other chief school

administrator/superintendent, to answer questions that are asked by the Board and/or the public, and it is Respondent's responsibility, as a Board member, to ask appropriate questions. No chief school administrator/superintendent can be expected to "always" know the answer to a question that may be posed, but one's inability to answer a question does not automatically mean that the question was an attempt to undermine, oppose, compromise, or harm the chief school administrator/superintendent. To be clear, the critically important role of the chief school administrator/superintendent cannot be overstated – however, any person in this position must be able to navigate education-related questions, both difficult and easy, that are asked. The fact that the question was not asked in the perfect set of circumstances, and was about an issue that may have arisen prior to his tenure, does not mean it violated the Act.

Complainant's argument that Respondent was speaking about him (Complainant) and his employment in a way that violated the Act is equally problematic for the Commission. The allegations made by Complainant are serious yet, despite their severity, there are no facts offered in the Complaint to support his allegations other than conclusory statements that lack a sufficient indicia of reliability and truth.

Although Complainant also references an "incident" that occurred nearly a decade ago between him and Respondent, and suggests that the previous incident is the genesis for Respondent's current actions and his overall inability to be objective, Complainant, once again, failed to offer any factual evidence in support of his claims. Although the Commission acknowledges its important responsibility to hear litigants with legitimate claims of unethical conduct by a school official, it will not be used as a forum for parties to seek recourse to create, or recreate, "personal" feuds that are unrelated to the Act. The Commission cannot, and will not, serve as a means through which baseless claims can be filed and which challenge the overall objectivity of another school official.

For the foregoing reasons, the Commission finds the Complaint to be frivolous pursuant to *N.J.S.A.* 18A:12-29(e), and orders Complainant to pay a fine in the amount of one hundred dollars (\$100.00).

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 Complainant failed to plead sufficient, credible facts to support a finding that Respondent violated *N.J.S.A.* 18A:12-24.1(i), *N.J.S.A.* 18A:12-24.1(j), and/or *N.J.S.A.* 18A:12-24.1(f) as alleged in the Complaint. The Commission also voted to dismiss the matter on the grounds that the Complaint was frivolous, and to impose a fine in the amount of one hundred dollars (\$100.00).

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: February 26, 2020

***Resolution Adopting Decision
in Connection with C64-19***

Whereas, at its meeting on January 21, 2020, 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 January 21, 2020, the Commission discussed finding that Complainant failed to plead sufficient, credible facts to support the allegations that Respondent violated *N.J.S.A.* 18A:12-24.1(i), *N.J.S.A.* 18A:12-24.1(j), and/or *N.J.S.A.* 18A:12-24.1(f) as alleged in the Complaint; and

Whereas, at its meeting on January 21, 2020, the Commission discussed finding that the Complaint was frivolous, and to impose a fine in the amount of one hundred dollars (\$100.00); and

Whereas, at its meeting on February 25, 2020, the Commission reviewed and voted to approve the within decision as accurately memorializing its actions/findings from its meeting on January 21, 2020; 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 public meeting on February 25, 2020.

Kathryn A. Whalen, Director
School Ethics Commission