

ALBERT DEMAREST, PAUL J. BIRCH ,	:	BEFORE THE SCHOOL
THOMAS F. X. MAGURA, WILLIAM	:	ETHICS COMMISSION
WILLEMSSEN AND STEPHEN MILLER	:	
	:	
v.	:	
	:	
JOSE PANTOJA AND	:	
ALEJANDO MAKINO	:	Docket No. C08-10
<i>PROSPECT PARK BOARD OF EDUCATION</i>	:	DECISION ON
<i>PASSAIC COUNTY</i>	:	MOTION TO DISMISS
	:	

PROCEDURAL HISTORY

This matter arises from a complaint filed on March 8, 2010 by Albert Demerest, Paul J. Birch, Thomas F.X. Magura, William Willemsen and Stephen Miller, members of the Prospect Park Board of Education (Board), alleging that Jose Pantoja and Alejandro Makino, also members of the Board, violated the School Ethics Act (Act), N.J.S.A. 18A:12-21 et seq. The complainants specifically allege that the respondents violated N.J.S.A. 18A:12-24.1(e), (i), (g) and (j) of the Code of Ethics for School Board Members when they approached the Executive County Superintendent and attempted to discuss the amendment to the Superintendent’s employment contract.

After being granted an extension for good cause shown, on April 19, 2010, a Motion to Dismiss in Lieu of Answer and Request for Sanctions for Filing a Frivolous Complaint was filed on behalf of the respondents. Pursuant to N.J.A.C. 6A:28-8.2(a), a responsive statement was filed on behalf of the complainants on May 5, 2010. The parties were notified by letter dated May 6, 2010 that this matter would be placed on the agenda for the Commission’s meeting on May 25, 2010 in order to make a determination regarding the respondent’s Motion to Dismiss the complaint, together with the respondents’ allegations of frivolousness. At its meeting on May 25, 2010, the Commission voted to grant the respondents’ Motion to Dismiss the complaint and further found that the complaint is not frivolous, in accordance with the standard set forth at N.J.A.C. 6A:28-1.2.

SUMMARY OF THE PLEADINGS

In Count I, the complainants initially state that at the Board’s meeting on September 8, 2009, the Board discussed amendments to the Superintendent’s contract, effective July 1, 2009; the Board voted to approve the recommendation of the Negotiations Committee and approved an amendment to the contract. Thereafter, the complainants allege that on October 28, 2009, the respondents attended the New Jersey School Boards Association’s (NJSBA) annual conference in Atlantic City. In correspondence dated December 28, 2009, the Executive County Superintendent informed Board counsel that the respondents approached him at the conference and expressed their disappointment with the change to the Superintendent’s contract and with the process used by the Board. In the letter, the Executive County Superintendent stated that the Superintendent’s contract was still under review by his office. The complainants further allege

that around early November 2009, the respondents approached the Executive County Superintendent and told him that there had been Board discussion about the contract. On or about November 12, 2009, the Executive County Superintendent notified Board counsel that the Superintendent's employment contract was approved. The complainants allege that the respondents took private action that may have compromised the Board in violation of N.J.S.A. 18A:12-24.1(e). (Complaint at pp. 2-3)

In Count II, the complainants assert that on September 8, 2009, the Board voted to approve the amendment to the Superintendent's contract. The vote was 4-0 with three abstentions; the respondents made up two of the three abstentions. Following the September 2009 Board meeting, according to the complainants, the Executive County Superintendent "verbally approved" the contract amendment. The complainants further allege that on October 28, 2009, after the Board voted to approve the amendment, the respondents approached the Executive County Superintendent and expressed their disappointment with the amendment to the Superintendent's employment contract. The complainants assert that at the time the respondents approached the Executive County Superintendent, the amendment to the Superintendent's contract had not been approved in writing and respondents' comments could have resulted in the Executive County Superintendent's rejection of the amendment. The complainants assert this is a violation of N.J.S.A. 18A:12-24.1(i). (Id. at pp. 4-5)

In Count III, the complainants assert that prior to the Board's receipt of the Executive County Superintendent's written approval of the amendment to the Superintendent's employment contract, on or about November 2009, the respondents approached the Executive County Superintendent in order to advise him that the Board had additional discussions regarding the contract. The complainants assert this is a violation of N.J.S.A. 18A:12-24.1(g). (Id. at p. 5)

In Count IV, the complainants assert that after the Board voted to approve the amendment to the Superintendent's contract, but before the Board received written approval from the Executive County Superintendent, on or about October 28, 2009, the respondents approached the Executive County Superintendent in order to express their disappointment with the change to the Superintendent's employment contract. The complainants assert that the respondents did not refer their complaints to the chief school administrator, in violation of N.J.S.A. 18A:12-24.1(j). (Id. at p. 5)

ANALYSIS

In determining whether to grant a Motion to Dismiss, the Commission shall review the facts in the light most favorable to the complainant and determine whether the allegation(s), 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.

Because the complainants have the burden to factually establish a violation of the Code of Ethics for School Board Members in accordance with the standards set forth at N.J.A.C. 6A:28-6.4(a), see, N.J.A.C. 6A:28-10.8(b), in order to prevail on a Motion to Dismiss, the complaint must allege facts, which if true, would be sufficient to meet those standards. Thus, the

question before the Commission was whether the complainants alleged facts which, if true, could support a finding that the respondent violated N.J.S.A. 18A:12-24.1(e), (i), (g) and (j) of the Code of Ethics for School Board Members. Each of those provisions is set forth below.

Count I

In Count I, the complainants allege that on October 28, 2009, at the NJSBA's conference, the respondents approached the Executive County Superintendent and expressed their disappointment with the change to the Superintendent's contract and with the process used by the Board, although the Superintendent's contract was still under review by Executive County Superintendent's office. The complainants further allege that around early November 2009, the respondents approached the Executive County Superintendent and told him that there had been Board discussion about the contract. On or about November 12, 2009, the Executive County Superintendent notified Board counsel that the Superintendent's employment contract was approved. The complainants provide a copy of the Executive County Superintendent's letter dated December 28, 2009, which states, in relevant part:

Also, I had a conversation with Jose Pantoja and Mr. Alex Makino, Board members, who approached me outside a restaurant in Atlantic City during the New Jersey School Board's Conference around October 28, 2009. They introduced themselves. I recall that Mr. Pantoja was the primary spokesperson and they expressed their disappointment with the change being made to the Superintendent's contract and the process used by the Board. I recall telling them that the contract was currently under review as submitted to me by the Board's attorney and there [sic] issues on how it was handled should be brought up at their Board meeting. I again saw Mr. Pantoja and Mr. Makino while leaving a Passaic County School Boards Association program in early November. Mr. Pantoja indicated at the time that there had been Board discussion about the contract and I recall indicating that the contract was still under review.*** (Complaint at Exhibit B)

The complainants allege that the respondents took private action that may have compromised the Board in violation of N.J.S.A. 18A:12-24.1(e). (Complaint at pp. 2-3) N.J.S.A. 18A:12-24.1(e) provides:

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.

The Commission's regulations require that:

5. Factual evidence of a violation of N.J.S.A. 18A:12-24.1(e) shall include evidence that the respondent made personal promises or took action beyond the scope of his or her duties such that, by its

nature, had the potential to compromise the board. N.J.A.C. 6A:28-6.4(a)5.

The Commission finds that even assuming the complainants can factually prove that the respondents made statements as set forth in the Executive County Superintendent's letter, these facts are insufficient to establish a violation of N.J.S.A. 18A:12-24.1(e). In this connection, the Commission finds that even if it accepts that the respondents were taking "private action" when they spoke with the Executive County Superintendent on October 28 and early November 2009, it does not find, under the facts alleged in this complaint, that this speech was of such a nature that it had the potential to compromise the Board. Here, respondents persuasively argue:

[They] did not give the Executive County Superintendent the impression that they were acting on behalf of the Board. To the contrary, their statement that they were disappointed in the Board's action obviously indicated that the Board as a whole had a contrary view. Compare In Re Zimmerman, School Ethics Commission C49-02, July 22, 2003, aff'd as to penalty, Commissioner of Education, August 21, 2003. ***

Respondents did not attempt to convince the Executive County Superintendent to disapprove the amendment to the Superintendent's contract or even suggest that such an action could or should be taken. Neither did they allege that any unlawful or unethical action occurred. They did not invite any inquiry at all. In short, the [c]omplaint does not allege that respondents took any affirmative action whatsoever. *** (Motion to Dismiss at pp. 6-7; 9)

Accordingly, even granting all inferences to the complainants, the Commission finds that the facts set forth in Count I, if true, would not establish a violation of N.J.S.A. 18A:12-24.1(e) and this count is, therefore, dismissed.

Count II

In Count II, the complainants assert that, following the September 2009 Board meeting where the Board approved the amendment to the Superintendent's contract, the Executive County Superintendent "verbally approved" the amendment. On October 28, 2009, the respondents approached the Executive County Superintendent and expressed their disappointment with the amendment to the Superintendent's employment contract. The complainants assert that at the time the respondents approached the Executive County Superintendent, the amendment to the Superintendent's contract had not been approved in writing and respondents' comments could have resulted in the Executive County Superintendent's rejection of the amendment. The complainants assert this is a violation of N.J.S.A. 18A:12-24.1(i). (Id. at pp. 4-5) N.J.S.A. 18A:12-24.1(i) states:

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

The Commission's regulations require that:

9. Factual evidence of a violation of N.J.S.A. 18A:12-24.1(i) shall include evidence that the respondent(s) took deliberate action which resulted in undermining, opposing, compromising or harming school personnel in the proper performance of their duties. N.J.A.C. 6A:28-6.4(a)9.

The Commission finds that even assuming the complainants can factually prove that the respondents made statements as set forth in the Executive County Superintendent's letter, these facts are insufficient to establish a violation of N.J.S.A. 18A:12-24.1(i). Respondents contend in this regard that "The [c]omplaint alleges only that the 'comments could have resulted in [the Executive County Superintendent's] written objection of the amendment;' it does not allege that the comments interfered with the performance of any of the Superintendent's duties." Moreover, they argue that they "are under no duty to support increased compensation for the Superintendent and/or remain silent about such compensation simply because the majority of the Board voted to give the Superintendent a raise." (Motion to Dismiss at pp. 10-11)

The Commission notes that it has found violations of N.J.S.A. 18A:12-24.1(i) where the comments made to or about the school employee were direct, confrontational and intimidating. (See, I/M/O Charles Fischer, Eatontown Bd. of Ed., Monmouth County, C30-03 (February 24, 2004), Commissioner of Education Decision No. 157-04, April 12, 2004; I/M/O David Kanaby, Hillsborough Bd. of Ed., Somerset County, C53-05 (July 24, 2007), Commissioner of Education Decision No. 350-07, September 10, 2007; Brown et al. v. David Matthews, City of Englewood Bd. of Ed., Bergen County, C13-07 (October 27, 2008), *aff'd*, Commissioner of Education Decision No. 123-09A, April 14, 2009). However, the Commission has stated that it does not believe that the purpose of the Code of Ethics was to "allow the Commission to become involved in every dispute between a [board member] and [District personnel]." Spicer v. Della Vecchia et al., Pleasantville Charter School for Academic Excellence, C31-04 (February 22, 2005).

Here, the Commission finds that the complaint does not allege specific facts, which if true, would establish that the respondents took deliberate action which resulted in undermining, opposing, compromising or harming school personnel in the proper performance of their duties, as would be required to establish a violation of N.J.S.A. 18A:12-24.1(i). Accordingly, even granting all inferences to the complainants, the Commission finds that the facts set forth in Count II, if true, would not establish a violation of N.J.S.A. 18A:12-24.1(i) and this count is, therefore, dismissed.

Count III

In Count III, the complainants assert that prior to the Board's receipt of the Executive County Superintendent's written approval of the amendment to the Superintendent's employment contract, in or about November 2009, the respondents approached the Executive

County Superintendent's in order to advise him that the Board had additional discussions regarding the contract, which was a violation of the "confidentiality provision" of N.J.S.A. 18A:12-24.1(g). (Id. at p. 5) N.J.S.A. 18A:12-24.1(g), states:

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.

The Commission's regulations require that:

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

In this count, complainants refer to that portion of the Executive County Superintendent's letter which states:

I again saw Mr. Pantoja and Mr. Makino while leaving a Passaic County School Boards Association program in early November. Mr. Pantoja indicated at the time that there had been Board discussion about the contract and I recall indicating that the contract was still under review.*** (Complaint at Exhibit B)

The Commission finds that even assuming the complainants can factually prove that the respondents made statements as set forth in the Executive County Superintendent's letter, these facts are insufficient to establish a violation of N.J.S.A. 18A:12-24.1(g).

Here, respondents assert that "the [c]omplaint is devoid of any factual allegations that Respondents disclosed confidential information or how, in so doing, the Superintendent or the Schools might have been needlessly injured." (Motion to Dismiss at p. 12) Respondents further distinguish this complaint from others wherein the Commission found violations of N.J.S.A. 18A:12-24.1(g), *i.e.*, where a respondent disclosed medical information (Jacobs v. Delbury, Sussex Wantage Regional Bd. of Ed. Sussex County, C44-07 (November 25, 2008) Commissioner of Education Decision No. 7-09SEC, decided January 9, 2009) or where a

respondent disclosed an employee's payroll records (I/M/O Frank Pizzichillo, Fairview Bd. of Ed., Bergen County, C17-02 (January 28, 2003), Commissioner of Education Decision No. 102-03SEC decided March 6, 2003). Respondents argue that they were merely commenting on public action taken by the Board at a public session.

The Commission agrees that the within complaint does not allege facts that, if true, would prove that the 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, as would be required to establish a violation of N.J.S.A. 18A:12-24.1(g). The Commission finds this deficiency critical, particularly in light of public notice requirements that favor accountability where a Board is proposing to alter a Superintendent's contract. N.J.S.A. 18A:11-11. Accordingly, even granting all inferences to the complainants, the Commission finds that the facts set forth in Count III, if true, would not establish a violation of N.J.S.A. 18A:12-24.1(g) and this count is, therefore, dismissed.

Count IV

In Count IV, the complainants assert that after the Board voted to approve the amendment to the Superintendent's contract, but before the Board received written approval from the Executive County Superintendent, on or about October 28, 2009, the respondents approached the Executive County Superintendent in order to express their disappointment with the change to the Superintendent's employment contract. The complainants assert that the respondents did not refer their complaints to the chief school administrator, in violation of N.J.S.A. 18A:12-24.1(j). (Id. at p. 5)

Finally, the Commission considers N.J.S.A. 18A:12-24.1(j), which states:

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.

The Commission's regulations require that:

10. Factual evidence of a violation of N.J.S.A. 18A:12-24.1(j) shall include evidence that the respondent(s) 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. N.J.A.C. 6A:28-6.4(a)10.

The Commission finds that even assuming the complainants can factually prove that the respondents made statements as set forth in the Executive County Superintendent's letter, these facts are insufficient to establish that respondents violated N.J.S.A. 18A:12-24.1(j).

Respondents charge, in this connection, that the complainants misunderstand this provision in the Code of Ethics for School Board Members in that it “precludes board members from interfering in school matters.” Yet, the complaint fails to allege any facts that would support a finding that the respondents attempted to resolve a complaint, or improperly conducted an investigation or inquiry related to a complaint. (Motion to Dismiss at p. 14)

The Commission agrees that the within complaint does not allege facts that, if true, would prove that the respondents acted on or attempted to resolve a complaint, or conducted an investigation or inquiry related to a complaint prior to referral to the chief administrative officer or at a time or place other than a public meeting and prior to the failure of an administrative solution, as would be required to establish a violation of N.J.S.A. 18A:12-24.1(j). Contrast, I/M/O William Lahn, Delsea Regional Bd. of Ed., Gloucester County, C25-05 (December 20, 2005) Commissioner of Education Decision No. 25-06SEC, decided January 23, 2006, where the respondent Board member admitted that he received a complaint from a parent and took that complaint directly to the Principal, instead of the Superintendent, which, the Commission found, created confusion in the administration of the school. Thus, the Commission found that Mr. Lahn violated N.J.S.A. 18A:12-24.1(j). Similarly, in Yafet v. Elbert Smith, Hillside Bd. of Ed., Union County, C24-07 (October 27, 2008) Commissioner of Education Decision No. 156-09A, decided May 15, 2009, the Commission found that the respondent violated N.J.S.A. 18A:12-24.1(j) when he failed to report concerns about how the administration handled a senior prank incident directly to the Superintendent but, instead, went to other administrators who took those complaints to the Superintendent. Accordingly, even granting all inferences to the complainants, the Commission finds that the facts set forth in Count IV, if true, would not establish a violation of N.J.S.A. 18A:12-24.1(j) and this count is, therefore, dismissed.

REQUEST FOR SANCTIONS

At its meeting on May 25, 2010, the Commission considered the respondents’ request that the Commission find that the complaint was frivolous and impose sanctions pursuant to N.J.S.A. 18A:12-29(e). The Commission does not find that the complainants “[c]ommenced, used or continued [this matter] in bad faith, solely for the purpose of harassment, delay or malicious injury;” or that the complainant “knew, or should have known,” that the matter “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. For the foregoing reasons, the Commission finds that the complaint is not frivolous and denies the respondents’ request for sanctions against the complainants.

DECISION

Based on the foregoing, the Commission grants the respondents’ Motion to Dismiss the complaint. 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).

Robert W. Bender
Chairperson

Mailing Date: June 23, 2010

Resolution Adopting Decision – C08-10

Whereas, the School Ethics Commission has considered the complaint and the Motion to Dismiss filed on behalf of the respondents and the reply thereto; and

Whereas, at its meeting on May 25, 2010, the Commission determined to grant the respondents' Motion to Dismiss the complaint; and

Whereas, at its meeting on May 25, 2010, the Commission found that the complaint was not frivolous, in accordance with the standard set forth at N.J.A.C. 6A:28-1.2; and

Whereas, 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.

Robert W. Bender, Chairperson

I hereby certify that the Resolution was duly adopted by the School Ethics Commission at its public meeting on June 22, 2010.

Joanne Boyle
Executive Director