
MARIE HAKIM

**BEFORE THE SCHOOL
ETHICS COMMISSION**

v.

MICHAEL PAITCHELL
CLIFTON BOARD OF EDUCATION
PASSAIC COUNTY

v.

Docket No. C17-07 and C17A-07

**MICHAEL C. URCIUOLI, KIM
RENTA, JOHN M. TRAIER,
NORMAN A. TAHAN and
LIZZ GAGNON**
CLIFTON BOARD OF EDUCATION
PASSAIC COUNTY

**DECISION ON MOTION
TO AMEND COMPLAINT**

PROCEDURAL HISTORY

This matter arises from a complaint filed on April 9, 2007 by Marie L. Hakim, former President of the Clifton Board of Education (Board) alleging that Michael Paitchell, also a member of the Clifton Board of Education violated the School Ethics Act (Act), N.J.S.A. 18A:12-21 et seq. The complainant specifically alleges that the respondent violated N.J.S.A. 18A:12-24.1(d), (e) and (g) of the Code of Ethics for School Board Members.

Pursuant to N.J.A.C. 6A:28-6.5(e), and after having been granted an extension of time to submit a response, on September 21, 2007, the respondent filed a Motion to Dismiss and For Sanctions, with supporting certifications and brief, in lieu of filing an Answer.¹ On October 4, 2007, the respondent filed a counterclaim against Marie Hakim and a third-party complaint against Board Members Michael C. Urciuoli, Kim Renta, John M. Traier, Norman A. Tahan and Lizz M. Gagnon. The counterclaim/third-party complaint was docketed as C17A-07.

On November 20, 2007, the attorney representing the complainant, Ms. Hakim, and the third-party respondents, Mr. Urciuoli, Ms. Renta, Mr. Traier, Mr. Tahan and Ms. Gagnon, filed a response to the Motion to Dismiss the matter docketed as C17-07, as well as an answer to the counterclaim/third-party complaint.

By letter dated December 3, 2007, the parties were notified that, based upon recent clarification from the Commission, the Board, as an entity, could not join the complaint as a

¹ In June 2007 and again in December 2007, the parties informed the Commission that they were working toward a resolution and, accordingly, requested that the matter be held from the Commission's review.

complainant, although it may *authorize* the filing of the complaint by one of its members or, in the alternative, board members *may individually* join the complaint as complainants. The parties were further notified that because the only certification that was included with the complaint was Ms. Hakim's, the complaint docketed as C17-07 would be captioned as Marie Hakim v. Michael Paitchell. To the extent additional board members wished to join the complaint as named individuals, they were provided an opportunity to amend the complaint and submit the required certifications under oath. The complaint was never amended.

As of April 2008, the complainant, Ms. Hakim, was no longer on the Board. Because there was a question about her standing to prosecute the complaint, by letter dated April 21, 2008, the Commission informed the parties that both statute and code provide that "any person may file a complaint with the School Ethics Commission" and there is no requirement that a complainant be serving on a board of education. (Commission Letter, April 21, 2008)

At its meeting on April 22, 2008, the Commission considered the complaint, the Motion to Dismiss and For Sanctions and the complainant's response to the motion.² The Commission granted the respondent's motion to dismiss counts Four, Five and Six that respondent violated N.J.S.A. 18A:12-24.1(e) and denied the respondent's Motion to Dismiss the allegation that the respondent violated N.J.S.A. 18A:12-24.1(d), (e) and (g) as set forth in Counts One, Two, Three and Seven of the complaint. The two matters were consolidated. Respondent Paitchell filed an answer to the complaint on June 17, 2008.

Upon attempting to schedule the matter for hearing in the Fall of 2008, the Commission learned that Respondent Paitchell had filed an action in May 2008 before the Commissioner of Education demanding indemnification for the legal fees in connection with the action(s) before the Commission. Consequently, on October 27, 2008, the Commission placed both matters in abeyance, pursuant to N.J.S.A. 18A:12-32. There does not appear to be any dispute that the matter before the Commissioner was settled on or about January 9, 2009.

By letter dated December 17, 2008, the attorney for the complainant informed the Commission that the sole complainant in C17-07 was deceased. By letter dated December 18, 2008, the Commission notified the parties that, under the circumstances, it would appear that the complaint and counterclaim should be dismissed by the Commission. The letter further stated, "To the extent counsel in these matters take a contrary position, this office should be notified immediately." (Commission Letter, December 18, 2008)

By letter dated December 23, 2008, counsel for Paitchell objected to the dismissal of the counterclaim/third party complaint. Based on this objection, the Commission accorded the parties "an opportunity to brief the issue as to why the matter docketed as C17A-07 should not be dismissed as a matter of law." (Commission Letter, January 9, 2009) A briefing schedule was established relative thereto.

²The Commission did not review the counterclaim and third-party complaint docketed as C17A-07.

At its meeting on February 24, 2009, the Commission considered the parties' primary and reply briefs, as summarized below, and determined to dismiss both the complaint docketed as C17-07 and the counterclaim/third-party complaint docketed as C17A-07 *without prejudice* to any right to refile the claims raised therein, in accordance with this decision.

SUMMARY OF POSITIONS

On February 13, 2009, counsel for the deceased complainant filed a Notice of Motion to Amend Ethics Complaint and Relate Back, together with an accompanying letter brief in support of the Motion to Amend the Complaint and to Dismiss the Counterclaim. Counsel also filed a proposed Amended Complaint. Counsel requested that the Commission permit Norman A. Tahan, currently a member of the Board, to substitute as the complainant in this matter. In his papers, counsel cites to N.J.A.C. 1:1-6.3 which provides:

When any public officer who is a party to a contested case, whether or not mentioned by name in the pleadings, dies, resigns or for any reason ceases to hold office, his or her successor in office shall be deemed to have been substituted in his or her place. However, on motion, the judge may otherwise order or may specifically order the retention as a party of the predecessor in office.

Counsel argues that Ms. Hakim was a public officer and member of the Clifton Board of Education when she filed the complaint docketed as C17-07 against the respondent in April of 2007; on or about April 15, 2008, she ceased being a member of the Clifton Board of Education and a public officer. Counsel reasons that Mr. Norman Tahan, who is a current member of the Board, should be permitted to make application to the Commission to succeed Ms. Hakim as the complainant in that he is aware of the facts in this matter and is also a named third-party respondent. (Murphy Primary Brief at page 4)

Counsel further argues that the dismissal of the complaint based on the complainant's death would be internally inconsistent with its decision pursuant to the Motion to Dismiss, as set forth above, because the Commission found that the complaint raised viable claims. As to the reason why the complaint was never previously amended to include additional complainants, counsel contends that there was never a reason to do so until the death of Ms. Hakim. (*Id.* at pages 4-5). Counsel further argues that, pursuant to N.J.A.C. 6A:28-6.1(b), it is within the Commission's discretion to relax the one-year filing requirement so as to permit the application of Mr. Tahan. (*Id.* at p. 7)

To the extent the respondent (below) relies on Hassmiller, Executrix on Behalf of Horace Lockard v. President Container, Inc. OAL Dkt. No. CRT 11672-96 to argue that the complaint should be dismissed, counsel for the deceased complainant contends the administrative law judge (ALJ) therein permitted the complaint to move forward by Barbara Hassmiller, the daughter of Horace Lockard who filed the complaint of discrimination but died during the investigation of the complaint. Thus, counsel argues that the Hassmiller case does not support the respondent's request for dismissal of the complaint. (Murphy Reply Brief at page 5). Counsel also reminds

the Commission that this matter was placed in abeyance in October 2008, prior to the complainant's death. (Id. at page 4)

Finally, counsel for the deceased complainant argues that while the within complaint should be continued with a new complainant, the counterclaim/third-party complaint should be dismissed in that the contention that Ms. Hakim and the third-party respondents violated confidentiality, which forms the basis of the counterclaim, is not a violation of the School Ethics Act. (Murphy Primary Brief at page 8)

Respondent Paitechell argues that the complaint should be dismissed and should not survive the death of the complainant. In this connection, the respondent instructs that the Clifton Board of Education is not a party to this matter, as the Commission advised in its letter dated December 3, 2007. Respondent reasons that, if the Board is not a proper party, "[i]t cannot be used as the basis for the substitution of a non-party on Hakim's behalf." (Respondent's Primary Brief at page 4) The respondent cites to Hassmiller wherein the executrix of the decedent's estate was permitted to continue to prosecute the deceased complainant's claim which arose under the Law Against Discrimination before the Division of Civil Rights. (Id. at page 5) Here, however, the respondent argues that Norman Tahan lacks standing to present any application to the Commission, since he is neither a party to the complaint nor a personal representative of Ms. Hakim. According to the respondent, the only party that could possibly substitute for Ms. Hakim is a representative of her estate, pursuant to applicable Court rules. (Respondent's Reply Brief at page 3) As such, the respondent reasons that the School Ethics Commission is without jurisdiction to declare Ms. Hakim's "successor in interest" as the same must be determined by a court of competent jurisdiction. (Id. at page 4)

The respondent further raises the question of the one-year regulatory timeline for filing a complaint before the Commission in that the most recent alleged violation occurred on March 5, 2007. In this connection, the respondent notes that no other person or Board member filed a complaint during the limitations period, notwithstanding that the parties were advised by the Commission that this matter could not be brought by the Board itself. (Id. at page 5)

With respect to counsel's argument that Mr. Tahan should be permitted to substitute for the deceased complaint pursuant to N.J.A.C. 1:1-6.3, the respondent contends:

This regulation has no application here for the reasons presented in [my] initial brief of February 12, 2009, because it applies only to cases where the public officer who dies or leaves office is the target of the suit in his or her official capacity. It cannot apply to cases where, as here, the public officer brought a complaint in an individual capacity. In fact, the complaint was pursued by Hakim as an individual, because by April 2008, she was no longer a member of the [Board]. ... Tahan did not oppose the Commission's decision to permit Hakim to continue prosecuting the complaint in her individual capacity after she ceased to hold office in April 2008. ... If Tahan really believed that N.J.A.C. 1:1-6.3 applied to this case, he should have sought to substitute in as Hakim's "successor" the day she left office, as the regulation

provides. But of course this could not have been the case, because the regulation did not apply to Hakim's private complaint. (Id. at page 7) (emphasis in text)

The respondent argues that dismissing the within complaint cannot be viewed as an abandonment of the Commission's obligations, since both statute and regulation require that a complaint be filed by a person. (Id. At page 8) The respondent reasons that he has vigorously defended his rights, while Mr. Tahan has slept on his rights. Mr. Tahan or any other Board member could have filed a complaint during the relevant statute of limitations period but since none chose to do so, no other Board member should be allowed to substitute on behalf of Ms. Hakim. (Id.)

Finally, with respect to the counterclaim/third-party complaint, the respondent asserts that, upon dismissal of the within complaint with prejudice, he will stipulate to a dismissal of the counterclaims and third-party claims. (Id. at page 9) However, absent such dismissal, the respondent maintains that the allegations in the counterclaim and third-party complaint are legally sufficient to withstand counsel's motion to dismiss as set forth in his primary brief. (Id. at 10).

ANALYSIS

The Commission begins this analysis with the statutory and regulatory requirement that a complaint must be filed by a *person*. N.J.S.A. 18A:12-29; N.J.A.C. 6A:28-6.1(a). Thus, while the original complaint herein was captioned as Marie Hakim o/b/o Clifton Board of Education v. Michael Paitchell, the Commission informed the parties by letter dated December 3, 2007 that, because the only certification that was included with the complaint was Ms. Hakim's, the complaint docketed as C17-07 shall be captioned as Marie Hakim v. Michael Paitchell. The Commission therein provided the opportunity for additional board members to join the complaint as named individuals, provided that an amended complaint was properly filed. The complaint was never amended. Notably, although the Commission accepted the counterclaim/third-party complaint, there are no regulations governing the submission or the review of such filings.

As of April 2008, Ms. Hakim was no longer a member of the Board. Because there was a question about her standing to prosecute the complaint, by letter dated April 21, 2008, the Commission informed the parties that both statute and code provide that any person may file a complaint with the School Ethics Commission and there is no requirement that a complainant be serving on a board of education. Thus, while the parties were fairly on notice that there was no procedural bar to moving forward with Ms. Hakim as a citizen complainant, the Commission takes the position that counsel for the complainant was in the best position to know who *should* prosecute this complaint and carry the burden of factually proving any violations of the Code of Ethics for School Board Members pursuant to N.J.S.A. 18A:12-29b.

The Commission further acknowledges that in hearing matters such as this, it is governed by the rules of the OAL, as well as its own regulations. (N.J.A.C. 6A:28-6.9(c)). The Commission's regulations do not provide guidance on how it must proceed when a complainant is deceased. Moreover, while counsel for the deceased complainant contends that N.J.A.C. 1:1-

6.3 is dispositive in this matter, the Commission does not agree. The language of that regulation, as set forth above, contemplates that at the time of the triggering event (*i.e.*, the death or resignation), the party to the complaint is a public officer. Here, Ms. Hakim was not a public officer at the time of her death in December 2008. Further, the Commission is troubled by the apparent inconsistency of permitting Mr. Tahan to submit an amended complaint (wherein he substitutes for Ms. Hakim) when he has no standing in this complaint.

Moreover, the Hassmiller case relied upon by both parties presents additional concerns for the Commission. While it appears that the ALJ permitted the Hassmiller matter to move forward after the death of the original complainant, Horace Lockard, the complaint was prosecuted by the complainant's executrix, Barbara Hassmiller. In this connection, the Commission acknowledges the respondent's arguments that Norman Tahan is not a personal representative of Ms. Hakim and the Commission is without the authority to declare that he is. In point of fact, the only relationship between the two is their once concurrent membership on the Board. Thus, the Commission can find no legal authority that would require it to permit Mr. Tahan, at this stage of the proceedings, to substitute as the complainant in this matter. As such, the Commission finds that the dismissal of this complaint is within its discretion.

Having fully considered the arguments of counsel, as well as the Commission's obligations pursuant to the School Ethics Act, the Commission determines that the most equitable course herein is to dismiss the within complaint *without prejudice* to the right to re-file the specific claims originally raised in the matter docketed as C17-07. Having so determined, the Commission finds no compelling reason or independent cause to move forward with the counterclaim/third party complaint. Consequently, the Commission dismisses without prejudice, the matter docketed as C17A-07, without reaching to counsel's arguments in his primary brief that such claims are insufficient, as a matter of law, to move forward.³

DECISION

At its meeting on February 24, 2009, the Commission denied the Notice of Motion to Amend Ethics Complaint and Relate Back and determined to dismiss both the complaint docketed as C17-07 and the counterclaim/third-party complaint docketed as C17A-07 without prejudice to any right to refile the claims raised therein.

Robert W. Bender,
Acting Chairperson

³ If the claims as contained in C17-07 or C17A-07 are raised in the future through a properly-filed complaint in accordance with applicable rules, the complainant(s) may request that the Commission relax the one-year filing requirement in accordance with N.J.A.C. 6A:28-6.1(b)1 and present all arguments in support of that request. In this connection, it is noted that the Department of Education has proposed significant amendments to the Commission's regulations, as set forth at N.J.A.C. 6A:28-1. et seq. The State Board of Education is expected to conduct its Adoption Level review of the Department's proposed changes on April 15, 2009. See, <http://www.state.nj.us/education/code/proposed/>. To the extent a complaint is filed after the adoption and effective date of such amendments, it must comply with newly-adopted standards, notwithstanding that the complainant(s) may request relaxation of the filing timeline.

Resolution Adopting Decision – C17-07 and C17A-07

Whereas, the School Ethics Commission has considered the papers filed on February 13, 2009 and February 20, 2009 by counsel in these matters, together with the documents submitted in support thereof; and

Whereas, the Commission denied the Notice of Motion to Amend Ethics Complaint and Relate Back and determined to dismiss both the complaint docketed as C17-07 and the counterclaim/third-party complaint docketed as C17A-07 *without prejudice* to any right to refile the claims raised therein; and

Whereas, the Commission has reviewed the proposed decision of its staff; and

Whereas, the Commission agrees with the proposed decision;

Now Therefore Be It Resolved that the Commission hereby adopts the proposed decision as the final decision of an administrative agency and directs its staff to notify all parties to this action of its decision herein.

Robert W. Bender, Acting Chairperson

I hereby certify that the Resolution was duly adopted by the School Ethics Commission at its public meeting on March 24, 2009.

Joanne Boyle
Executive Director