

GEORGE DAPONTE	:	BEFORE THE SCHOOL
	:	ETHICS COMMISSION
v.	:	
	:	
LISA B. BECKER AND KEVIN SCULLY,	:	
<i>BARNEGAT TOWNSHIP BOARD OF</i>	:	Dkt. No. C42-10
<i>EDUCATION</i>	:	DECISION ON
<i>OCEAN COUNTY</i>	:	MOTION TO DISMISS
	:	

PROCEDURAL HISTORY

This matter arises from a complaint filed on December 1, 2010 by George DaPonte alleging that Lisa B. Becker and Kevin Scully, members of the Barnegat Township Board of Education (“Board”), violated the School Ethics Act (“Act”), N.J.S.A. 18A:12-21 et seq. By notice dated December 2, 2010, the complainant was notified that the complaint was deficient and, therefore, not accepted. On December 7, 2010, the complainant submitted an amended complaint which was accepted by the Commission. Therein, the complainant alleges that the respondent violated N.J.S.A. 18A:12-24.1(e), (f) and (i) of the Code of Ethics for School Board Members.

On January 3, 2011, a Motion to Dismiss in Lieu of Answer was filed on behalf of the respondents, which included an allegation that the complaint was frivolous. Pursuant to N.J.A.C. 6A:28-8.2(a), the complainant was accorded 20 days to submit a responsive statement. A responsive statement was filed with the Commission on January 24, 2011. The parties were notified by letter dated January 10, 2011 that this matter would be placed on the agenda for the Commission’s meeting on January 25, 2011 in order to make a determination regarding the respondents’ Motion to Dismiss, together with the allegation of frivolousness.

At its meeting on January 25, 2011, the Commission voted to grant the respondents’ Motion to Dismiss the complaint. The Commission further found that the complaint was not frivolous in accordance with the standard set forth at N.J.A.C. 6A:28-1.2.

SUMMARY OF THE PLEADINGS

The complainant, a former teacher in the District, asserts that Ms. Becker, as President of the Board and Mr. Scully, as Vice President of the Board:

- violated the School Ethics Act by failing to perform a “due diligence” investigation into the:
 - a) “*Harassment and bullying*” report brought by DaPonte against Barnegat Township School District (BTSD) high school administrator Principal Joseph Saxton at the June 15, 2010 BBOE meeting.
 - b) DaPonte’s “*immediate medical needs*” as documented in two letters of medical leave dated May 12, 2010 and June 4, 2010 respectively, and the FMLA filing dated June 4, 2010.

- c) Retaliatory “*reasons for termination*” action brought against DaPonte by BTSD Principal Joseph Saxton and Superintendent Jason Bing at the June 15, 2010 BBOE meeting.
- d) Retaliatory “*DECA stipend contract proration without cause,*” and why it had to be reapproved for payment at the August 18, 2010 BBOE meeting, *but remains unpaid.* (Complaint at page 1; emphasis in text.)

The complainant adds that the respondents have further violated the Act by:

- e) “*Secretly terminating DaPonte*” (no pre-notification letter of action sent to DaPonte) at the Tuesday June 15, 2010, 6:30 pm BBOE meeting, with an effective termination backdate of June 3, 2010. A 48 hour prior written notice was required, as well as DaPonte’s appearance with optional legal representation.
- f) “*Grossly failing their express delegation of authority*” by *not* adducing sufficient evidence to enable BBOE members from *not* complicity [sic] rubber stamping the Superintendent’s “retaliatory” recommendations at the June 15, 2010 and August 18, 2010 BBOE meetings. (Id., emphasis in text.)

The complainant asserts the respondents violated N.J.S.A. 18A:12-24.1(e), (f) and (i).

ANALYSIS

As a threshold matter, the respondents contend that the complaint should be dismissed as time-barred pursuant to N.J.A.C. 6A:28-6.5 in that the complaint was filed on December 7, 2010 and a review of the complaint and attachments “makes clear that the overwhelming majority of the events which form the basis of the alleged violations predate June 10, 2010 ***.” (Motion Brief at p. 1) On this issue, the Commission initially notes that the original complaint was filed on December 1, 2010. N.J.A.C. 6A:28-6.7(a) and (b) specifically state:

- (a) The Commission may order the amendment of any complaint in order to comply with the requirements set forth at N.J.A.C. 6A:28-6.3.
- (b) A complainant may amend a complaint to cure technical defects, clarify or amplify allegations made in the original complaint and **such amendments will relate back to the date the complaint was first received by the Commission for the purposes of determining timeliness pursuant to N.J.A.C. 6A:28-6.5.** (emphasis added)

Therefore, this complaint is deemed filed on December 1, 2010. Furthermore, for the purposes of this motion, the Commission finds that the respondent is fundamentally challenging the respondents’ action (or inaction, in this case) with respect to the June 15, 2010 and August 18, 2010 meetings. As such, the Commission finds that the complaint is not time-barred.

The respondents further argue as a preliminary matter that the resignation of Respondent Scully renders any and all claims against him to be moot. (Motion Brief at p. 3). As to this, the Commission finds that its decisions amply demonstrate that it focuses on the respondent's status at the time the alleged violation occurred; the Commission has adjudicated numerous complaints on their merits where the respondent was no longer in office when the matter was decided. Accordingly, it does not find the claims as to Respondent Scully to be moot.

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 complainant has 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), in order to prevail on a Motion to Dismiss, the complaint must allege facts, which if true, would be sufficient to support a finding that the respondent violated N.J.S.A. 18A:12-24.1(e), (f) and (i) of the Code of Ethics for School Board Members.

The Commission first considers the complainant's allegation that the respondents violated N.J.S.A. 18A:12-24.1(e), which 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:

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 the within complaint sets forth no factual allegations which, if true, could establish that the respondents made personal promises or took action beyond the scope of their duties such that, by its nature, had the potential to compromise the board. Indeed, on its face, the complaint challenges the *omissions* of the respondents as they predominantly relate to the June 15, 2010 and August 18, 2010 meetings. Specifically, the complainant asserts that the respondents violated the Act by: (1) failing to investigate the harassment and bullying report which the complainant brought against a school administrator at the June 15, 2010 Board meeting; (2) failing to investigate the complainant's immediate medical needs as documented in two letters dated May 12, 2010 and June 4, 2010 respectively, and the medical leave filing dated June 4, 2010; (3) failing to investigate the reasons for termination brought by the administration at the June 15, 2010 Board meeting; (4) failing to investigate the proration of a contract for stipend which was reapproved for payment at the August 18, 2010 Board meeting; (5) terminating the complainant at the June 15, 2010 Board meeting without, he alleges, proper notice; and (6) failing to adduce sufficient evidence to counter the Superintendent's "retaliatory"

recommendations at the June 15, 2010 and August 18, 2010 Board meetings (Complaint at page 1). Under these circumstances, the Commission cannot find that these omissions, even assuming they are accurately depicted by the complainant, suffice to constitute “action beyond the scope of” their duties; nor do any of these allegations, if true, suggest that the respondents in any way failed to recognize that authority rests with the Board. Therefore, even granting all inferences to the complainant, the Commission finds that the facts set forth in the complaint, if true, would not establish that the respondents violated N.J.S.A. 18A:12-24.1(e).

The Commission next considers the complainant’s allegation that the respondents violated N.J.S.A. 18A:12-24.1(f), which provides:

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.

The Commission’s regulations require that:

Factual evidence of a violation of N.J.S.A. 18A:12-24.1(f) shall include evidence that the respondent(s) 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 the respondent(s) used the schools in order to acquire some benefit for the respondent(s), a member of his or her immediate family or a friend. N.J.A.C. 6A:28-6.4(a)6.

The Commission finds that the within complaint sets forth no factual allegations which, if true, could establish that the respondents surrendered their independent judgment to a special interest or partisan political group. Nor is there any factual allegation which, if true, could establish that the respondents used the schools in order to acquire some benefit for themselves, a member of their immediate family or a friend. Rather, as set forth above, the complaint essentially contends that the respondents failed to properly investigate the circumstances surrounding the complainant’s termination and the Superintendent’s recommendation for the same. Accordingly, even granting all inferences to the complainant, the Commission finds that the facts set forth in the complaint, if true, would not establish that the respondent violated N.J.S.A. 18A:12-24.1(f).

Finally, the complainant alleges that the respondents violated N.J.S.A. 18A:12-24.1(i), which provides:

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

The Commission’s regulations require that:

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 the within complaint sets forth no factual allegations which, if true, could establish that the respondents took deliberate action which resulted in undermining, opposing, compromising or harming school personnel in the proper performance of their duties. Instead, as noted above, the complainant essentially charges that the respondents violated the School Ethics Act by failing to perform a “due diligence” investigation into the circumstances surrounding the Superintendent’s recommended termination.¹ 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). To the extent the complainant maintained that his termination was improper, a petition of appeal could have been filed before the Commissioner of Education, in accordance with N.J.A.C. 6A:3-1 et seq. Accordingly, even granting all inferences to the complainant, the Commission finds that the facts set forth in complaint, if true, would not establish the respondents violated N.J.S.A. 18A:12-24.1(i).

REQUEST FOR SANCTIONS

At its meeting on January 25, 2011, 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 complainant “[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 complainant.

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).

Acting Chairperson

Mailing Date: February 23, 2011

¹ Contrast, I/M/O Charles Fischer, Eatontown Bd. of Ed., Monmouth County, C30-03 (February 24, 2004), Commissioner of Education Decision No. 157-04SEC, April 12, 2004; I/M/O David Kanaby, Hillsborough Bd. of Ed., Somerset County, C53-05 (July 24, 2007), Commissioner of Education Decision No. 350-07SEC, 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.

Resolution Adopting Decision – C42-10

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 January 25, 2011, the Commission determined to grant the respondents' Motion to Dismiss the complaint; and

Whereas, 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.

Acting Chairperson

I hereby certify that the Resolution was duly adopted by the School Ethics Commission at its public meeting on February 22, 2011.

Joanne Boyle
Executive Director