
RAFAEL FAJARDO

v.

JOSE RODRIGUEZ
ELIZABETH BOARD OF EDUCATION,
UNION COUNTY

**BEFORE THE SCHOOL
ETHICS COMMISSION**

DOCKET NO.: C09-16

**DECISION ON
PROBABLE CAUSE**

PROCEDURAL HISTORY

This matter arises from a Complaint filed on February 22, 2016 by Rafael Fajardo, alleging that Jose Rodriguez, a member of the Elizabeth Board of Education (Board), violated the School Ethics Act (Act), N.J.S.A. 18A:12-21 et seq. By letter dated February 26, 2016, Complainant was notified that his Complaint was deficient, and was given the opportunity to cure all defects. Complainant cured all defects, and filed an amended Complaint (Complaint) on April 27, 2016. The Complaint alleges that Respondent violated N.J.S.A. 18A:12-24(b), (c) and (e) of the Act.

On May 4, 2016, the Complaint was sent to Respondent, notifying him that charges were filed against him with the School Ethics Commission (Commission), and advising him that he had twenty (20) days to respond to the Complaint. Respondent was provided with an extension of time to file a responsive pleading. Ultimately, Respondent filed a Motion to Dismiss in Lieu of Answer (Motion to Dismiss) on June 9, 2016, and also asserted that the Complaint was frivolous. By notice dated June 10, 2016, Complainant was advised that he had twenty (20) days to file a response to the Motion to Dismiss and to the allegation of a frivolous Complaint. Complainant did not file a reply to the Motion to Dismiss, or to the frivolous allegation.

The parties were notified by letter dated July 11, 2016, that this matter would be placed on the Commission's agenda for its meeting on July 26, 2016 in order to make a determination regarding the Motion to Dismiss. At its meeting, the Commission voted to deny the Motion to Dismiss, and to direct the Respondent to file an Answer within twenty (20) days of the decision. The Commission also voted to reserve its determination on Respondent's allegation of a frivolous Complaint. Respondent's "Answer to Amended Complaint" (Answer) was received by the Commission on September 30, 2016, and it again alleged that the Complaint was frivolous.

By correspondence dated October 18, 2016, the Parties were notified that the Commission would review this matter at its meeting on October 24, 2016 in order to make a probable cause determination in accordance with the procedures set forth in N.J.A.C. 6A:28-10.7, and also to make a determination, previously reserved by the Commission, on Respondent's allegation of a frivolous Complaint. At its meeting on October 24, 2016, the Commission found no probable cause to credit the allegations that Respondent violated N.J.S.A. 18A:12-24(b), (c), and (e) of the Act, and dismissed the matter on the grounds that the Complaint was frivolous. At its meetings on October 24, 2016 and November 22, 2016, the Commission also voted to impose a penalty of \$500.00 on Complainant for his frivolous filing.

SUMMARY OF THE PLEADINGS

A. The Complaint

Complainant alleges that at the Board's reorganization meeting on January 7, 2016, Respondent voted to appoint a law firm to serve as the Board's special legal counsel and that, at the time of the vote, this same law firm represented Respondent "personally" in a matter pending before the Commissioner of Education. Complainant alleges Respondent's affirmative vote/action is a violation of N.J.S.A. 18A:12-24(c) because Respondent maintained a personal involvement with counsel and his firm, and that this created a benefit to him (Respondent) through his receipt of personal legal services and representation. Complainant further alleges that Respondent's relationship with the law firm created an indirect financial involvement that could reasonably be expected to impair his objectivity and independence of judgment.

Complainant also argues Respondent's affirmative vote/action is a violation of N.J.S.A. 18A:12-24(b) because he improperly used and attempted to use his official position to secure unwarranted privileges for himself (personal legal services). Finally, Complainant contends Respondent's affirmative vote/action is a violation of N.J.S.A. 18A:12-24(e) because he accepted personal legal services with the understanding that this service was offered to influence him, and to gain his support in appointing the firm to serve as the Board's special legal counsel.

B. Answer to Amended Complaint

According to Respondent, he neither voted on nor participated in the discussion of the appointment of the Board's special legal counsel. He also asserts that the minutes from the January 7, 2016 reorganization meeting confirm he was not present for the discussion of or the vote on this issue. With regard to the special legal counsel, Respondent admits that this same law firm did represent him, among other "taxpayer petitioners," "for a time," but denies that the law firm currently serves as counsel of record in that matter. Finally, Respondent argues that the Complaint fails to assert any facts which rise to the level of a violation of the Act.

ANALYSIS

This matter is before the Commission for a determination of probable cause pursuant to N.J.A.C. 6A:28-10.7. That is, the Commission must determine, based on the evidence before it, whether probable cause exists to credit the allegations in the Complaint. A finding of probable cause is not an adjudication on the merits, but, rather, an initial review whereupon the Commission makes a preliminary determination whether the matter should proceed to an adjudication on the merits, or whether further review is not warranted.

Complainant alleges that Respondent violated N.J.S.A. 18A:12-24(b), (c) and (e) of the Act. Thus, the question before the Commission is whether there is a reasonable ground of suspicion supported by facts and circumstances strong enough in themselves to warrant a reasonable person to believe that the Act has been violated. N.J.A.C. 6A:28-10.7(b).

Allegations of Prohibited Acts

Complainant asserts that Respondent violated N.J.S.A. 18A:12-24(b), (c) and (e) of the Act, and these provisions provide, respectively:

b. No school official shall use or attempt to use his official position to secure unwarranted privileges, advantages or employment for himself, members of his immediate family or others;

c. No school official shall act in his official capacity in any matter where he, a member of his immediate family, or a business organization in which he has an interest, has a direct or indirect financial involvement that might reasonably be expected to impair his objectivity or independence of judgment. No school official shall act in his official capacity in any matter where he or a member of his immediate family has a personal involvement that is or creates some benefit to the school official or member of his immediate family;

e. No school official, or member of his immediate family, or business organization in which he has an interest, shall solicit or accept any gift, favor, loan, political contribution, service, promise of future employment, or other thing of value based upon an understanding that the gift, favor, loan, contribution, service, promise, or other thing of value was given or offered for the purpose of influencing him, directly or indirectly, in the discharge of his official duties. This provision shall not apply to the solicitation or acceptance of contributions to the campaign of an announced candidate for elective public office, if the school official has no knowledge or reason to believe that the campaign contribution, if accepted, was given with the intent to influence the school official in the discharge of his official duties;

First, in order to credit the allegation of a violation of N.J.S.A. 18A:12-24(b), the Commission must find evidence that Respondent used, or attempted to use, his official position to secure unwarranted privileges, advantages or employment for himself, members of his immediate family or others. Complainant alleges that by affirmatively voting to appoint the law firm that represented him (Respondent) in a "personal matter" to serve as the Board's special legal counsel, Respondent improperly used and attempted to use his official position to secure unwarranted privileges for himself (personal legal services). Respondent denies that he participated in the discussion of and/or the vote on the appointment of the Board's special legal counsel. Respondent submitted the minutes from the January 7, 2016 reorganization meeting in support of his position.

Based on the foregoing, the Commission finds, after review, that there is no information or allegation in the Complaint, or in any other documentation submitted by or relied upon by

Complainant, that Respondent used, or attempted to use, his official position to secure unwarranted privileges, advantages or employment for himself, members of his immediate family or others. The minutes from the Board's January 7, 2016 reorganization meeting confirm that Respondent "excused" himself from the discussion of and the vote on the appointment of the Board's special legal counsel and, therefore, he did not use his official position to secure any unwarranted privilege, advantage or employment as alleged. As a result, the Commission finds no probable cause to credit the allegation that Respondent violated N.J.S.A. 18A:12-24(b) of the Act.

Second, in order to credit the allegation of a violation of N.J.S.A. 18A:12-24(c), the Commission must find evidence that Respondent acted in his official capacity in a matter where he, a member of immediate family, or a business organization in which he has an interest, has a direct or indirect financial involvement that might reasonably be expected to impair his objectivity or independence of judgment, or it must find evidence that Respondent acted in his official capacity in a matter where he or a member of his immediate family had a personal involvement that created some benefit to him or to a member of his immediately family. Complainant alleges that Respondent's affirmative vote/action violated N.J.S.A. 18A:12-24(c) because Respondent maintained a personal involvement with counsel and his firm, and this created a benefit to him (Respondent) through his receipt of personal legal services and representation. Complainant further alleges that Respondent's relationship with the law firm created an indirect financial involvement that could reasonably be expected to impair his objectivity and independence of judgment. Respondent again denies that he was present for the discussion of and/or the vote on the appointment of the Board's special legal counsel, and submitted the minutes from the Board's meeting to corroborate his argument.

Based on the foregoing, the Commission finds, after review, that there is no information or allegation in the Complaint, or in any other documentation submitted by or relied upon by Complainant, that Respondent acted in his official capacity in a matter where he, a member of immediate family, or a business organization in which he has an interest, has a direct or indirect financial involvement that might reasonably be expected to impair his objectivity or independence of judgment, or that Respondent acted in his official capacity in a matter where he or a member of his immediate family had a personal involvement that created some benefit to him or to a member of his immediately family. The minutes from the Board's January 7, 2016 reorganization meeting are clear that Respondent was not present for the discussion of and/or the vote on the appointment of the Board's special legal counsel. In light of the uncontroverted fact that Respondent did not participate in the discussion of and/or the vote on this issue, Respondent did not act in his official capacity in a matter where he had an interest, or a direct or indirect financial involvement. Accordingly, the Commission finds no probable cause to credit the allegation that Respondent violated N.J.S.A. 18A:12-24(c) of the Act.

Finally, in order to credit the allegation of a violation of N.J.S.A. 18A:12-24(e), the Commission must find evidence that Respondent, or a member of his immediate family, or business organization in which he has an interest, solicited or accepted a gift, favor, loan, political contribution, service, promise of future employment, or other thing of value based upon an understanding that the gift, favor, loan, contribution, service, promise, or other thing of value was given or offered for the purpose of influencing him, directly or indirectly, in the discharge of his official duties. Complainant alleges that Respondent's affirmative vote/action violates

N.J.S.A. 18A:12-24(e) because he accepted personal legal services with the understanding that this service was offered to influence him, and to gain his support in appointing the firm to serve as the Board's special legal counsel. As indicated in the Board's minutes, Respondent denies that he participated in the discussion of and the appointment of the Board's special legal counsel.

Based on the foregoing, the Commission finds, after review, that there is no information or allegation in the Complaint, or in any other documentation submitted by or relied upon by Complainant, that Respondent or a member of his immediate family, or business organization in which he has an interest, solicited or accepted a gift, favor, loan, political contribution, service, promise of future employment, or other thing of value based upon an understanding that the gift, favor, loan, contribution, service, promise, or other thing of value was given or offered for the purpose of influencing him, directly or indirectly, in the discharge of his official duties. The record is devoid of any evidence that Respondent accepted a service, i.e., legal services, with the understanding that it would influence him to appoint the law firm to serve as the Board's special legal counsel. Moreover, the fact that Respondent was not present for the discussion of and/or the vote on this issue belies Complainant's argument. As a result, the Commission finds no probable cause to credit the allegation that Respondent violated N.J.S.A. 18A:12-24(e) of the Act.¹

REQUEST FOR SANCTIONS

Respondent's Motion to Dismiss included an allegation that the Complaint was frivolous, and requested that the Commission "levy against Complainant the maximum penalty of \$500." Complainant did not file a response to Respondent's allegation of frivolous filing.

The Commission's regulations provide the Complainant with an opportunity to respond to an allegation that a complaint is frivolous. More specifically, N.J.A.C. 6A:28-8.2, "Process for Responding to a Motion to Dismiss," provides:

(a) ...

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.

As noted above, by notice dated June 10, 2016, Complainant was advised that he had twenty (20) days to file a response to the Motion to Dismiss and to Respondent's allegation that his Complaint was frivolous. However, Complainant failed to submit a response to the Motion to Dismiss, and to the allegation that his Complaint was frivolous. Although the Commission initially considered the frivolous allegation at its meeting on July 26, 2016, it reserved its

¹ Notwithstanding the Commission's findings, the Commission notes that the reason Respondent left the room for the discussion of and vote on the appointment of the Board's special legal counsel is absent from the Board's minutes. To the extent that Respondent left the room due to a conflict arising under the Act such that he could not participate in the discussion of and the vote on this issue, the Commission reminds Respondent that, in the interest of transparency to the public, the basis for a recusal should be appropriately reflected in the Board's minutes by the Board's Secretary.

determination until after receipt of Respondent's Answer. Therefore, the Commission reexamined this issue at its meetings on October 24, 2016 and November 22, 2016.

Pursuant to N.J.A.C. 6A:28-10.4, following the expiration of the time for filing a response to an allegation of a frivolous Complaint, the Commission shall determine, by majority vote, whether a complaint is frivolous. The regulation further states:

(a) ...

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.

A "frivolous complaint" is defined in N.J.A.C. 6A:28-1.2 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 is clear that the Commission need only find that one prong is satisfied in order to find that a complaint is frivolous. In rendering its decision, the Commission considers the totality of the circumstances in determining whether a complaint meets the above standard. 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 satisfies both prongs of the definition of a "frivolous complaint."

In support of his argument that the Complaint is frivolous, Respondent argues that: (1) the minutes from the Board's reorganization meeting on January 7, 2016, reflect that Respondent "excused" himself prior to the discussion of and the vote on the appointment of special legal counsel, and that he returned following the vote on the issue; (2) Complainant was physically present at the reorganization meeting on January 7, 2016, and was aware that Respondent did not participate in the discussion of and the vote on the appointment of the Board's special legal counsel; (3) following a lost bid for reelection to the Board in November, 2014, and a failed attempt at internal reappointment in January, 2015, Complainant "unlawfully" remained on the Board until a legal action was initiated by citizens, including Respondent, to remove him; (4) following Complainant's removal, he commenced a "campaign of harassment" against Respondent because he blames Respondent for his (Complainant's) removal from the Board; and (5) Complainant is aware that Respondent is up for reelection in November, 2016, and has

“devoted his efforts,” including the filing of the Complaint, “to...bring about Respondent’s defeat.”

As detailed above, Complainant’s allegations are not supported by probable cause. In contrast, and to support his position that the Complaint is frivolous, Respondent produced the minutes from the Board’s reorganization meeting on January 7, 2016, which unequivocally demonstrate that Respondent “excused” himself from the meeting during the discussion of and vote on the appointment of special legal counsel. Equally concerning is the fact that, according to Respondent, Complainant was physically present for the meeting on January 7, 2016 and actually observed Respondent leave the room for the discussion and vote on the very issue that forms the basis for the Complaint. Complainant never denied being present at the meeting, and never denied observing Respondent leave the room.

Respondent also alleges that the Complaint was filed by Complainant as a means of harassment and in retaliation for Respondent’s actions in having Complainant removed from the Board. Complainant never denied Respondent’s assertions, never countered that his Complaint was filed for laudable purposes, and never challenged the authenticity of the record of the reorganization meeting on January 7, 2016, which showed that Respondent did not participate in or vote on the appointment of special legal counsel. Instead, in the face of Respondent’s allegations, Complainant remained silent and, thereby, allowed Respondent’s allegations to shed light on the impetus for Complainant’s Complaint. Together, these facts demonstrate that the Complaint was filed in bad faith, and solely for the purpose of harassment, delay or malicious injury.

Furthermore, the Complainant knew, or should have known, that his Complaint was without any reasonable basis in law or equity because the Board’s minutes clearly indicate that Respondent “excused” himself from the meeting prior to the discussion of and the vote on the appointment of special legal counsel, and that he returned at the conclusion of the vote. Moreover, it is unrefuted that Complainant was physically present for the meeting, and personally observed Respondent leave the meeting during the discussion of and the vote on the appointment of special legal counsel.

Finally, even if Complainant was not physically present for the reorganization meeting on January 7, 2016, he received a copy of Respondent’s Motion to Dismiss, along with Exhibits, clearly indicating that Respondent “excused” himself from the meeting during the discussion and vote on the issue of appointment of special legal counsel. Giving Complainant the benefit of the doubt, if receipt of these materials was the “first” he learned of Respondent’s non-involvement in the discussion and vote on the appointment of special legal counsel, he could have voluntarily withdrawn the Complaint when he realized his claims were without merit. Moreover, if Complainant disagreed with the Board’s minutes and/or Respondent’s representation that Complainant was physically present for the meeting and observed Respondent leave the meeting for the discussion and vote on the appointment of special legal counsel, he could have filed a response vigorously denying same. However, he did not. Accordingly, Complainant knew or should have known that the Complaint was without any *reasonable* basis in law or equity.

Based on the foregoing, the Commission finds that the Complaint is frivolous for the following reasons. First, Complainant represented that Respondent took affirmative action at a

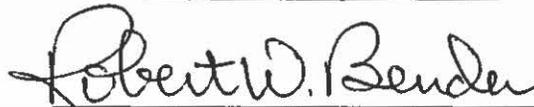
meeting when, in fact, the minutes from the meeting reflect that Respondent was not physically present in the room. In short, Complainant's allegations are contradicted by irrefutable evidence. Second, Complainant was physically present at the meeting and knew that Respondent did not vote on the issue as he asserted in his Complaint. For Complainant to allege, under oath, that Respondent affirmatively voted on an issue when, in fact, Complainant knew that Respondent was not present in the room for the discussion and vote on that issue, is the epitome of bad faith. Third, Respondent alleged, and Complaint did not deny, that the Complaint was actually filed because of a vendetta following Complainant's removal from the Board. Without any denial from Complainant, it is reasonable for the Commission to conclude that the Complaint was instituted for the purpose of harassment, delay or malicious injury. Finally, even if Complainant was not present for the reorganization meeting on January 7, 2016, Complainant received a copy of the minutes demonstrating Respondent's non-involvement with the discussion and vote on the appointment of special legal counsel as part of both Respondent's Motion to Dismiss and his Answer. Despite receipt of this evidence – evidence that completely undermined his claims - Complainant persisted in prosecuting his baseless claims. Based on this evidence, Complainant knew, or should have known, that his Complaint was without any reasonable basis in law or equity.

Recognizing its duty to the public, the Commission acknowledges its responsibility to hear litigants with legitimate claims of unethical conduct of a school official. The Commission is not a forum where parties can seek recourse for personal vendettas or other impermissible purposes. The Commission cannot, and will not, allow itself to become an instrument for the community to file baseless, false, and/or unfounded claims against school officials. For the foregoing reasons, the Commission finds the Complaint to be frivolous, and orders that the Complainant pay a fine in the amount of \$500.00.

NOTICE

Pursuant to N.J.S.A. 18A:12-29(b), the Commission hereby notifies Complainant and Respondent that it finds no probable cause to credit the allegation that Respondent violated N.J.S.A. 18A:12-24(b), (c) or (e) of the Act, and dismisses the matter because the Complaint is frivolous. In accordance with the standard set forth in N.J.A.C. 6A:28-1.2, the Commission also imposes a penalty of \$500.00 on the Complainant for the frivolous filing.

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: November 23, 2016

Resolution Adopting Decision – C09-16

Whereas, the School Ethics Commission (Commission) has considered the Complaint and the documents filed in support thereof, as well as the Answer to Amended Complaint along with its supporting documentation; and

Whereas, at its meeting on October 24, 2016, the Commission reviewed the matter and found no probable cause to credit the allegation that Respondent violated N.J.S.A. 18A:12-24(b), (c) or (e) of the Act, and dismissed the matter on the grounds that the Complaint is frivolous; and

Whereas, at its meetings on October 24, 2016 and November 22, 2016, and in accordance with the standard set forth in N.J.A.C. 6A:28-1.2, the Commission voted to impose a penalty of \$500.00 on Complainant for his frivolous filing; and

Whereas, at its meeting on November 22, 2016, the Commission agreed that the within decision accurately memorializes its findings; and

Now Therefore Be It Resolved, that the Commission hereby adopts the within 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 November 22, 2016.



Kathryn A. Whalen
Acting Executive Director
School Ethics Commission