

LEANNE R. CHAMBERLIN	:	
	:	SCHOOL ETHICS COMMISSION
v.	:	
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NEIL A. BENCIVENGO, DR. LOIS BRAENDER, DR. ELRIC CHICCHETTI: CHICCHETTI, ERIC HAMILTON AND RONALD TOLA <i>HAMILTON TOWNSHIP BOARD OF EDUCATION MERCER COUNTY</i>	:	Docket No. C35-09
	:	DECISION ON MOTION TO DISMISS

PROCEDURAL HISTORY

This matter arises from a complaint filed on August 10, 2009 by Leanne R. Chamberlin alleging that Dr. Elric Chicchetti, Eric Hamilton and Ronald Tola, members of the Hamilton Township Board of Education (Board), and Neil A. Bencivengo and Dr. Lois Braender, school administrators, violated the School Ethics Act (Act), N.J.S.A. 18A:12-21 et seq. The complainant specifically alleges that the respondents violated N.J.S.A. 18A:12-24(a), (b) and (c).

On August 31, 2009, a Motion to Dismiss the complaint was filed on behalf of the respondents, pursuant to N.J.A.C. 6A:28-8. The complainant was accorded an opportunity to respond to the motion and submitted a reply on September 16, 2009. At its meeting on October 27, 2009, the Commission considered the motion, along with the complainant’s response to the motion. The Commission tabled the matter. At its meeting on November 24, 2009, the Commission determined to grant the Motion to Dismiss.

SUMMARY OF THE PLEADINGS

In Count I of the complaint, the complainant asserts that Respondents Chicchetti, Hamilton and Tola (Board members) violated N.J.S.A. 18A:12-24(c) when, on July 29, 2009, they “voted to change the nepotism policy that would directly affect the ability to promote family members and friends that are currently employed by the District and are directly related to said members.” (Complaint at page 2) The complainant asserts that these respondent Board members should have abstained from voting on the nepotism policy in that they had “immediate family members” employed in the District as of July 15, 2009. (Id.) Specifically, according to the complainant, the Board voted to eliminate the requirement to seek approval from the Executive County Superintendent when promoting employees who are relatives of Board members or the Superintendent of Schools. The complainant contends that Phase I of the Nepotism Policy required the Board to seek such approval from the Executive County Superintendent, but Phase II removed that requirement. According to the complaint, “[t]hey could have gone straight to Phase III and kept the language in, but it would not have permitted for said members to act in

conflict and act on immediate personal gain for family members.”¹ (Id.) The complainant asserts that by voting on the policy, the Board members violated N.J.S.A. 18A:12-24(c).

In Count II of the complaint, the complainant asserts that Dr. Braender, the Board’s “Policy Director,” “also has family members in the district which stand to benefit from this new version of the Nepotism Law.” (Id.) Specifically, the complainant alleges that Dr. Braender:

also had the option to write a policy or uphold a policy that would continue to keep the option of the above mentioned Phase III in place. However, she did nothing to advise the Board that taking the language out violates the Conflicts of Interest Law 18A:12-24. This was intentionally done so that her immediate family member employed in the district would be permitted to benefit from no accountability and no review of the County Superintendent. (Id. at pages 2-3).

Thus, the complainant asserts that Dr. Braender violated N.J.S.A. 18A:12-24(b) and (c).

In Count III of the complaint, the complainant asserts that Neil A. Bencivengo, the Superintendent of Schools, violated N.J.S.A. 18A:12-24(a), (b) and (c) when, on July 29, 2009, he presented to the Board a version of the Nepotism Policy which eliminated the requirement to seek approval from the Executive County Superintendent when promoting employees who are related to Board members or to himself. The complainant contends that by presenting Phase II instead of Phase III, “the Superintendent opened the door to promote family members who are already employed by the district, without review or accountability.” (Id. at page 4)

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. Thus, the question before the Commission was whether the complainant alleged facts which, if true, could support a finding that the respondents violated N.J.S.A.

¹ The respondents specifically challenge the facts set forth in the complaint with respect to phases identified in the complaint as Phases I, II and III. According to the respondents, these phases follow the development of the regulations known as the Fiscal Accountability, Efficiency and Budgeting Procedures which were initially adopted July 1, 2008. According to the respondents, Phase II of the regulations “does not prohibit existing relatives who are related to the Chief School Administrator or Board Members from being promoted.” (Motion to Dismiss at p. 5) Additionally, respondents continue, “[t]he only amendment proposed pursuant to Phase III that involves the County Superintendent deals specifically with new hires. The Hamilton Township Board of Education, decided during their July 29, 2009 meeting, not to include that proposed amendment, but to adopt a stricter Nepotism Policy than [sic] the State currently allows. Specifically, the Board of Education voted not to allow new hires to be relatives of the Chief School Administrator or sitting Board members, without exception.” (Id. at pp. 5-6) Thus, respondents argue that, contrary to the facts set forth in the complaint, on July 29, 2009, the Board adopted a Nepotism Policy which is consistent with the proposed regulations promulgated by the Department of Education and referred to as Phase III. (Id. At p. 6)

18A:12-24(a), (b) and (c). Granting all inferences to the complainant, and even assuming all facts to be true, the Commission finds that the respondent's motion must be granted.

Count I

The complainant asserts that Respondents Chicchetti, Hamilton and Tola violated N.J.S.A. 18A:12-24(c) because they voted to eliminate the requirement in the District's Nepotism Policy to seek approval from the Executive County Superintendent when promoting employees who are relatives of Board members or the Superintendent of Schools. N.J.S.A. 18A:12-24(c) provides:

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;

It is important to note in this analysis that the Commission, which has jurisdiction only to review matters that arise under the School Ethics Act, cannot review the policy that was adopted by the Board; nor can it speak to the appropriateness of the Board's adoption of any particular phase of the Nepotism Policy. Indeed, the Commission has recently affirmed:

The Commission does not view the scope of its authority to extend to the review of Board actions where the complainants are not alleging that Board members were conflicted when they voted, pursuant to N.J.S.A. 18A:12-24 et seq., but are alleging that the substance or subject matter of the action was in some manner inappropriate. If it were to accept otherwise, the Commission would be placed in the position of reviewing, or as counsel for the respondents proposes, "second guessing," potentially any and all Board action which a complainant (who need not, according to the Act, demonstrate interest in the matter) asserted was "unethical." The Commission finds that such an interpretation is not supported by the plain language or the legislative intent of the Act. Dericks et al. v. Johnson et. al., Sparta Board of Education, C01-08 (October 27, 2009)

Rather, the Commission can look only at the actions of these school officials in adopting the policy to determine whether such actions were prohibited, pursuant to N.J.S.A. 18A:12-24 et seq. In accordance with this analysis, even assuming that Board members Chicchetti, Hamilton and Tola had "immediate family members" employed in the District, as defined by the School Ethics

Act,² there are no facts set forth in this complaint that would show that these “immediate family members” were eligible for a promotion such that the Board members’ votes on July 29, 2009 could be viewed as conflicted.³ Rather, the complainant seems to contend that the mere possibility that the Board members’ relatives might benefit one day from the policy change was sufficient to demonstrate a present conflict of interest under the School Ethics Act. Thus, even assuming the facts set forth in Count I are true, the Commission finds that such facts are insufficient on which to base a finding of violations of N.J.S.A. 18A:12-24(c).

Count II

The complainant asserts that Respondent Braender violated N.J.S.A. 18A:12-24(b) and (c), as set forth above, by drafting a policy that eliminated the requirement to seek approval from the Executive County Superintendent when promoting employees who are relatives of Board members or the Superintendent of Schools and by failing to advise the Board that removing the approval requirement would violate the School Ethics Act. The Commission initially notes that N.J.S.A. 18A:12-24(b) provides:

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;

Even assuming that Dr. Braender serves in the role ascribed to her by the complainant⁴ and further assuming that she has a “relative” who is employed in the District, as defined by the School Ethics Act,⁵ Dr. Braender is neither a Board member nor the Superintendent. Thus, a review of the documents presented by the complainant shows that neither Dr. Braender nor her relative(s) would be affected by the policy change that gave rise to the within complaint. Quite simply, the complaint alleges no facts which, if true, would establish that Dr. Braender used, or attempted to use, her official position to secure unwarranted privileges, advantages or employment for herself, members of her immediate family or others in violation of N.J.S.A. 18A:12-24(b). Neither does the complaint allege any facts that would show that Dr. Braender acted in her official capacity in a matter where she, or a member of her immediate family (as defined in the Act) had a direct or indirect financial involvement that might reasonably be expected to impair her objectivity or independence of judgment, or where she, or a member of her immediate family had a personal involvement that is or created some benefit to the school

² The Act defines “member of the immediate family” as a spouse or dependent child of a school official residing in the same household.” N.J.S.A. 18:12-23.

³ The complainant ultimately conceded that Respondent Tola does not have a member of the immediate family, as defined by the Act, employed in the District, but maintains that Cicchetti has a daughter employed in the District. (Response to Motion at p. 2)

⁴ Respondents specifically assert that Dr. Braender is the Assistant Superintendent for Instructional Services for the District and also the administrative representative on the Board’s Policy Committee. As such, Dr. Braender coordinates the adoption and dissemination of proposed policies and regulations, but she is not responsible for writing such policies for the Board. (Motion to Dismiss at p. 8)

⁵ “Relative” is defined by the Act as spouse, natural or adopted child, parent or sibling of a school official. N.J.S.A. 18A:12-23.

official or member of her immediate family. Accordingly, even accepting as true all facts alleged by the complainant in Count II, the Commission determines that these facts would not constitute a violation under N.J.S.A. 18A:12-24(b) and (c).

Count III

The complainant asserts that Respondent Bencivengo, the Superintendent of Schools, violated N.J.S.A. 18A:12-24(a), (b) and (c), as set forth above, when he presented to the Board a version of the Nepotism Policy which eliminated the requirement to seek approval from the Executive County Superintendent when promoting employees who are related to Board members or to himself. N.J.S.A. 18A:12-24(a) provides:

No school official or member of his immediate family shall have an interest in a business organization or engage in any business, transaction, or professional activity, which is in substantial conflict with the proper discharge of his duties in the public interest;

The complainant asserts that the Superintendent “decided to vote on Phase II, making the way for additional family members and close friends to be hired and for already employed immediate family members to be promoted in between the two versions of the Nepotism Law.” (Complaint at p. 4) The complaint offers no specific facts that, if true, could show that the Superintendent, or a member of his immediate family, as defined by the Act, had an interest in a business organization or engaged in any business, transaction, or professional activity, which is in substantial conflict with the proper discharge of his duties so as to violate N.J.S.A. 18A:12-24(b). In this connection, the Commission notes that while the Superintendent has a seat on the board, he does not vote. N.J.S.A. 18A:17-20a.

Neither does the complaint allege any facts which, if true, would establish that the Superintendent used, or attempted to use, his official position to secure *unwarranted* privileges, advantages or employment for himself, members of his immediate family or others in violation of N.J.S.A. 18A:12-24(b). (See, I/M/O Doris Graves, Pleasantville Board of Education, C45-07 (May 27, 2008), Commissioner of Education Decision No. 301-08, decided July 10, 2008, rejecting a claim of violation of N.J.S.A. 18A:12-24(b) because the record did not demonstrate that the respondent Board member’s relative did not deserve the continued appointment to the position of head custodian.)

Finally, the complainant does not allege any specific facts that would show that the Superintendent acted in his official capacity in a matter where he, or a member of his immediate family (as defined in the Act) had a direct or indirect financial involvement that might reasonably be expected to impair his objectivity or independence of judgment, or where he, or a member of her immediate family had a personal involvement that is or creates some benefit to the school official or member of her immediate family. In this regard, by the complainant’s own description, the Superintendent presented to the Board for review on July 29, 2009 a version of the Nepotism Policy which was consistent with the Phase II language in the Fiscal Accountability, Efficiency and Budgeting Procedures Code, which the Board chose to adopt. Accordingly, even accepting as true all facts alleged by the complainant in Count III, the

Commission determines that these facts would not constitute a violation under N.J.S.A. 18A:12-24(a), (b) or (c).

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

Resolution Adopting Decision – C35-09

Whereas, the School Ethics Commission has considered the complaint, the Motion to Dismiss filed on behalf of the respondents, together with the response filed by the complainant; and

Whereas, at its meeting on November 24, 2009, Commission granted the respondents' Motion to Dismiss the allegations that they violated N.J.S.A. 18A:12-24(a), (b) and (c); 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 November 24, 2009.

Joanne Boyle
Executive Director