
CYNTHIA KERN

v.

STEVE WYNNE
NORTHFIELD BOARD OF EDUCATION
ATLANTIC COUNTY

: BEFORE THE SCHOOL
: ETHICS COMMISSION
:
:
:
:
: DOCKET NO. C47-11
: DECISION ON
: MOTION TO DISMISS
:

PROCEDURAL HISTORY

This matter arises from a complaint filed on November 18, 2011 by Cynthia Kern against Steve Wynne, a member of the Northfield Board of Education (“Board”), alleging violations of the School Ethics Act. (“Act”). By notice dated November 23, 2011, the complainant was notified that the complaint was deficient and, therefore, not accepted. On December 12, 2011, the complainant submitted an amended complaint, which was also deficient; by letter dated December 12, 2011, the complainant was so notified. On December 30, 2011, another amended complaint was filed, which was accepted by the Commission. Therein, the complainant alleges that the respondent violated N.J.S.A. 18A:12-24.1(f), (g), (i) and (h) of the Code of Ethics for School Board Members.

After being granted an extension for good cause shown, a Motion to Dismiss in Lieu of an Answer was filed on April 3, 2012 on behalf of the respondent.¹ The motion included an allegation that the complaint was frivolous, pursuant to N.J.S.A. 18A:12-29(e). Pursuant to N.J.A.C. 6A:28-8.2(a), the complainant was accorded an opportunity to submit a response to the motion, which she filed on April 18, 2012. The parties were notified by letter dated April 3, 2012 that this matter would be placed on the agenda for the Commission’s meeting on April 24, 2012 in order to make a determination regarding the respondent’s Motion to Dismiss the complaint, together with the allegation of frivolousness. At its meeting on April 24, 2012, the Commission voted to grant the respondent’s 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 complaint includes a letter signed by the complainant, dated October 25, 2011, with the following background: The complainant has been a member of the Northfield City Council since 2001. She has been a member of the Republican Club for 10 years. She was hired as a part-time secretary by the Board in 2003. She held the part-time secretarial position along with a substitute registrar’s position for seven years. She contends that the respondent became a member of the Republican Club three years ago. According to the complainant, the respondent wanted to run for her seat on the City Council, but the complainant would not vacate the seat.

¹ The respondent’s address, as provided in the complaint, was incorrect. After obtaining the correct address, the complaint was served on the respondent by notice dated February 15, 2012.

She states that the respondent then “became very vocal against what [the] council was doing.” The complainant further states that she received a Rice letter² from the Superintendent at the end of the 2009 school year.³ She was told that her part-time position was being eliminated. The complainant applied for another position. She states, “after much controversy,” the Superintendent recommended her for the job. She was approved for the position, although the respondent voted against her hiring and, therefore, against the Superintendent’s recommendation. The complainant states that the respondent started a “new” political party in their town and ran people against her in a primary race in June 2011. According to the complainant, the respondent posted “several things” about her on his Facebook page with respect to her current position. (Complainant’s Letter of October 25, 2011 at p. 1)

The complainant also states that the position of substitute registrar was eliminated in the summer of 2011 and the Board contracts with a company to provide services. The complainant asserts that the respondent is responsible for “taking the position” from her in retaliation. (Id. at p. 2)

In Count 1 of the complaint, the complainant contends that the respondent posted information on his Facebook page on May 13, 14, 15, and 16, 2011 in violation of N.J.S.A. 18A:12-24.1(f), (g) and (i). She attaches copies of Facebook postings.

In Count 2 of the complaint, the complainant asserts that the respondent made postings on his Facebook page on May 22, 2011 that were in violation of N.J.S.A. 18A:12-24.1(i). She attaches copies of Facebook postings.

In Count 3 of the complaint, the complainant asserts that on April 26, 2010, July 25, 2011 and September 26, 2011, the respondent violated N.J.S.A. 18A:12-24.1(f), (g), (i) and (h) when he voted against the Superintendent’s recommendation for her employment in a new position and voted for the elimination of the substitute registrar’s position. (Complaint at p. 1) The complainant appends CDs of the Board meetings on July 25, 2011 and September 26, 2011 to support this count. Additionally, in her original complaint, she appended portions of the minutes from the meetings on April 26, 2010, July 25, 2011 and September 26, 2011.

ANALYSIS

As a preliminary matter, the Commission finds that the allegations set forth in Count 1 of the complaint are time-barred, in that the Commission’s regulations provide a 180-day limitation period for filing a complaint. Even granting that the original complaint in this matter was filed on November 18, 2011, the complainant asserts that the respondent’s Facebook postings were on May 13, 14, 15 and 16, 2011. Each of these dates is outside of the 180-day regulatory filing period, which provides:

² Rice notice refers to the matter entitled, Rice v. Union County Regional High School Bd. of Ed., 155 N.J. Super. 64 (App. Div. 1977), certif. den. 76 N.J. 238 (1978) which established the right of employees to obtain notice when they will be discussed by the Board of Education.

³ Apparently, the elimination of the position was in the Spring of 2010.

(a) Complaints shall be filed within 180 days of notice of the events which form the basis of the alleged violation(s). A complainant shall be deemed to be notified of events which form the basis of the alleged violation(s) when he or she knew of such events or when such events were made public so that one using reasonable diligence would know or should have known.

1. For complaints alleging a violation of N.J.S.A. 18A:12-24.1(a), the complaint shall be filed within 180 days of the issuance of a final decision from any court of law or administrative agency of this State demonstrating that the respondent(s) failed to enforce all laws, rules and regulations of the State Board of Education, and/or court orders pertaining to schools or that the respondent brought about changes through illegal or unethical procedures. (N.J.A.C. 6A:28-6.5(a))

The Commission recognizes that limitation periods of the type herein serve to discourage dilatoriness and provide a measure of repose in the conduct of school affairs. Kaprow v. Berkley Township Bd. of Educ., 131 N.J. 571, 587 (1993). Thus, “notice of the alleged violation” must be interpreted in a manner that anticipates the reasonable diligence of the complainant(s). In addressing potential violations of the School Ethics Act, the Commission must balance the public’s interest in knowing of potential violations against the important policy of repose and a respondent’s right to fairness. The time limitations set forth in the regulations must be enforced if it is to operate in a fair and consistent manner. Phillips v. Streckenbein et al., Edgewater Park Bd. of Educ., Burlington County, C19-03 (June 24, 2003).

Further, although the Commission recognizes that this regulatory time period may be relaxed, in its discretion, in any case where a strict adherence thereto may be deemed inappropriate or unnecessary or may result in injustice, N.J.A.C. 6A:28-1.8, it finds no extraordinary circumstances in this matter that would compel relaxation. Accordingly, Count 1 is dismissed as untimely pursuant to N.J.A.C. 6A:28-6.5(a).

Motion to Dismiss

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) set forth in the complaint, 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.

Count 2

In Count 2 of the complaint, the complainant asserts that the respondent made postings on his Facebook page on May 22, 2011 which violated N.J.S.A. 18A:12-24.1(i). The complainant attaches several pages of Facebook postings from which the Commission concludes that the following are alleged to be violative statements:

Steve Wynne

Northfield parents and voters, they depend on your short memory. Don't forget that Cyndy Kern bumped Kandee out of her job at the school last year.

And also remember that she took a big pay increase in Kandee's job, didn't have the decency to attend the meetings, and complains about too much work now.

Steve Wynne

She's complaining that I crossed a line? Sorry, the facts are all in board minutes. You just hope the people forget. Not letting that happen.

It's a wonderful world where facts are "crossing a line". Your sense of irony is underdeveloped.

Steve Wynne

Q: So why are Cyndy Kern's signs blue?

A: Her unbroken history of tax increases even makes her signs sad.

The complainant asserts the postings were in violation of N.J.S.A. 18A:12-24.1(i), which states:

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

The Commission's regulations require:

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.

Initially, the Commission notes that the copies of the first two postings provided by the complainant do not appear to include a date from which the Commission may confirm the complainant's assertion that the comments were made by the respondent on May 22, 2011 so as to be considered timely allegations within this complaint.⁴ Nevertheless, granting all inferences to the complainant for the purpose of this analysis, the Commission finds that these postings, even if accurately attributed to the respondent, are not sufficient to rise to the level of violating N.J.S.A. 18A:12-24.1(i) consistent with the Commission's prior decisions. While the Commission has recently cautioned "that in using social media, the affirmative duties within the

⁴ May 22, 2011 is 180 days from November 18, 2011, the filing date of the complaint.

Code of Ethics for School Board Members may not be overlooked,” Susan Dunbar Bey v. Sean Brown, Camden Board of Education, Camden County, C25-11 (December 20, 2011), Commissioner of Education Decision No. 102-12SEC, decided March 20, 2012, it does not find that the respondent’s postings amount to a “public slur” sufficient to undermine the effectiveness of the complainant; (Bey, supra, Commissioner’s Decision at p. 2) nor does the Commission find that the comments made to or about the school employee were direct, confrontational and intimidating, so as to implicate this statutory provision. (See, for instance, 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 Board of Education, Bergen County, C13-07 (October 27, 2008), *aff’d*, Commissioner of Education Decision No. 123-09A, April 14, 2009) Thus, even accepting as true all facts alleged by the complainant in Count 2, the Commission determines that these facts would not constitute a violation under N.J.S.A. 18A:12-24.1(i). Accordingly, Count 2 is properly dismissed.

Count 3

In Count 3 of the complaint, the complainant asserts that on April 26, 2010, July 25, 2011 and September 26, 2011, the respondent violated N.J.S.A. 18A:12-24.1(f), (g), (i) and (h) when he voted against the Superintendent’s recommendation for her employment in a new position and, later, voted for the elimination of the substitute registrar’s position.

The Commission initially notes that it is difficult to ascertain the complainant’s factual allegations in this count. Aside from the background information included in the October 25, 2011 letter which is summarized above, as to this count, the complainant states:

Complaint #3 --- I have enclosed a CD to show all 3 ethics codes F, G and I were violations by Mr. Wynne. In the CD a citizen at the board of education meeting asks the question “Did Mrs. Kern take Kandee Lipkes job? The president of the board clearly states, Mrs. Kern was recommended for the position by the Superintendent. Mr. Wynne voted NOT to hire me for the position, I feel because of personal feelings for me. Violation H --- I will appoint the best qualified personnel available after consideration of the recommendation of the chief administrative officer. (the superintendent.) [sic] (Statement dated December 28, 2011 appended to amended complaint)

In this regard, the Commission underscores that a complaint must include:

1. The full name, home address and phone number of each complainant;
2. The full name and home address of each respondent;
3. **A brief statement, in individually numbered paragraphs, setting forth the specific allegation(s) and the facts**

supporting them which have given rise to the alleged violation(s) of the Act;

4. The date(s) of the occurrence(s) of each specific allegation;

5. The section(s) of the Act claimed to be violated for each specific allegation;

6. A statement giving all pertinent facts as to whether any other action has been instituted in the matter which is the subject of the complaint or is pending in any court of law or administrative agency of this State; and

7. A notarized signature and certification under oath for each complainant. (N.J.A.C. 6A:28-6.2; emphasis added)

All allegations must be written, clear and specific, so that a respondent may fairly answer the claims. That said, with respect to any allegation that the respondent violated the Code of Ethics on April 26, 2010 when he voted against the Superintendent's recommendation for her employment in a new position, this claim is untimely, pursuant to N.J.A.C. 6A:28-6.5(a). Even assuming the claim was timely, as the respondent notes, it is very likely a matter outside of the Commission's jurisdiction. (Motion to Dismiss at p. 11)

With respect to the July 25, 2011 meeting, the minutes appended to the complainant's original complaint show that the issue of the substitute registrar's position was discussed in the open public portion of the meeting, although the minutes attribute no comments to the respondent. The Board then voted to approve the purchase of an automated Substitute Caller Program for one year beginning July 26, 2011. (Board Minutes, July 25, 2011 at p. 7) Eight members, including the respondent, voted in favor of the motion; there was one abstention.

There is no documentation to support the complainant's claim that the respondent took any action on September 26, 2011 in his official capacity as a Board member. Even assuming, as alleged, that the respondent supported the elimination of the substitute registrar's position in favor of purchasing an automated Substitute Caller Program, this was a Board decision. As the respondent argues:

As such, this matter clearly does not implicate N.J.S.A. 18A:12-24.1, but rather involves other provisions of Title 18 of the New Jersey Statutes ***. As the Complainant's allegations clearly constitute a controversy and dispute arising under the school laws, the same are properly the subject of a Petition before the Commissioner of Education, pursuant to N.J.S.A. 18A:6-9, and not a School Ethics Complaint before the Commission. (Motion to Dismiss at p. 11)

The Commission concurs. It maintains that the School Ethics Act does not empower it to supplant the decisions of duly elected or appointed local board members when they are acting in their capacities as board members. Solar-Snyder v. Rose et al., Sussex-Wantage Board of

Education, Sussex County, C32-03 (December 16, 2003). See, also, Dericks et al. v. Johnson et al., Sparta Board of Education, Sussex County, C01-08 (October 27, 2009).

Thus, in Count 3, the complainant alleges that the respondent violated N.J.S.A. 18A:12-24.1(f), (g), (i) and (h), which provide:

f. 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.

g. 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.

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

h. I will vote to appoint the best qualified personnel available after consideration of the recommendation of the chief administrative officer.

The Commission finds that Count 3 is devoid of any particular factual allegations that would support findings of such violations. Specifically:

- The complainant has set forth no specific facts that, if proven true, could demonstrate that the respondent 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 he used the schools in order to acquire some benefit for himself, a member of his immediate family or a friend, as is required to demonstrate a violation of N.J.S.A. 18A:12-24.1(f). (N.J.A.C. 6A:28-6.4(a)6)
- The complainant has set forth no specific facts that, if proven true, could demonstrate that the respondent 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 or that the respondent failed to provide accurate information and, in concert with their fellow board members, interpret to the staff the aspirations of the community for its school as is required to demonstrate a violation of N.J.S.A. 18A:12-24.1(g). (N.J.A.C. 6A:28-6.4(a)7); and
- The complainant has set forth no specific facts that, if proven true, could demonstrate that the respondent took deliberate action which resulted in undermining, opposing, compromising or harming school personnel in the proper performance of her duties, as is required to demonstrate a violation of N.J.S.A. 18A:12-24.1(i). (N.J.A.C. 6A:28-6.4(a)9).

- The complainant has set forth no specific facts that, if proven true, could demonstrate that the respondent acted on a personnel matter without a recommendation of the chief administrative officer as is required to demonstrate a violation of N.J.S.A. 18A:12-24.1(h). N.J.A.C. 6A:28-6.4(a)8.

Thus, even accepting as true all facts alleged by the complainant in Count 3, the Commission determines that these facts would not constitute a violation of N.J.S.A. 18A:12-24.1(f), (g), (i) and (h). Count 3, therefore, is dismissed.

REQUEST FOR SANCTIONS

At its meeting on April 24, 2012, the Commission considered the respondent's 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 respondent's request for sanctions against the complainant.

DECISION

Based on the foregoing, the Commission grants the respondent's 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: May 30, 2012

Resolution Adopting Decision – C47-11

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

Whereas, at its meeting on April 24, 2012, the Commission determined to grant the respondent’s Motion to Dismiss; and

Whereas, the Commission also 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 May 29, 2012.

Joanne Boyle
Executive Director