
GEORGE W. FISHER

v.

RONALD F. TOLA, ERIC HAMILTON
and RICHARD KANKA
*HAMILTON TOWNSHIP BOARD OF
EDUCATION
MERCER COUNTY*

: BEFORE THE SCHOOL
: ETHICS COMMISSION
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Docket No. C57-11
DECISION ON
MOTION TO DISMISS

PROCEDURAL HISTORY

This matter arises from a complaint filed on December 22, 2011 by George W. Fisher alleging that Ronald F. Tola, Eric Hamilton and Richard Kanka, members of the Hamilton Township Board of Education (“Board”), violated the School Ethics Act (“Act”), N.J.S.A. 18A:12-21 et seq. By notice dated December 27, 2011, the complainant was advised that the complaint required clarification before it could be accepted. On January 4, 2012, the complainant submitted an amended complaint alleging that the respondents violated N.J.S.A. 18A:12-24.1(c), (d), (e), (i) and (j) of the Code of Ethics for School Board Members.

After being granted an extension for good cause shown, on February 27, 2012, a Motion to Dismiss in Lieu of Answer was filed on behalf of the respondents. On March 20, 2012, the complainant filed a reply to the Motion to Dismiss. N.J.A.C. 6A:28-8.2(a). By letter dated March 13, 2012, the Commission notified the complainant and respondent that this matter was scheduled for discussion by the Commission at its meeting on March 27, 2012 in order to make a determination regarding the respondents’ Motion to Dismiss. At its meeting on March 27, 2012, the Commission voted to grant the respondents’ Motion to Dismiss the complaint, as set forth below.

SUMMARY OF THE PLEADINGS

The complainant asserts that the respondents, members of the Board’s Facilities Committee, began critiquing and evaluating the performance of the Manager of Plant Engineering and Operations (hereinafter, “the Manager”)¹, a non-tenured employee, at the meetings of the Facilities Committee. Specifically, at the March 3, 2011 meeting, Respondent Tola criticized the Manager’s performance on a specific project and questioned his continued employment in the District. According to the complainant, the outgoing Superintendent recommended continued employment for the Manager through December 31, 2011 and the Board approved the Manager’s contract renewal on June 15, 2011 for a shortened term. Thereafter, the Manager was told by the Business Administrator that Respondent Tola did not want to renew the contract at all and the Facilities Committee was not happy with the Manager’s performance. (Complaint at pp. 1-5)

¹ At no time does the complainant identify “the Manager” by name in the complaint.

According to the complainant, on or about June 21, 2011, the Business Administrator delivered to the Manager a professional improvement plan (PIP) which was impossible to fulfill and “designed to produce failure not improvement in performance.” The complainant asserts that “upon information and belief,” the Facilities Committee had discussed the PIP on June 20, 2011, at which time Respondent Tola questioned the Manager about calculations for the Manager’s cost estimates for operating pools. The complainant alleges that at the meeting, Respondent Tola warned the Manager that if he wanted to keep his job, he needed to meet all aspects of the PIP. (Id. at p. 6)

The complainant alleges that on September 8, 2011, the Business Administrator met with the Manager and a union representative at which time he informed him that the Facilities Committee was not happy with his performance. According to the complainant, at the October 3, 2011 Facilities Committee meeting, the respondents continued their criticism. The Manager learned at this meeting that it was Respondent Tola who had completed the PIP. The complainant further asserts that, “upon information and belief,” at the October 3, 2011 meeting of the Facilities Committee, the Manager asked why his performance was being critiqued by the Committee, to which Respondent Tola declared “that ‘Manager’ should be happy to have [his] advice.” (Complaint at pp. 6-7) Additionally, “upon information and belief,” the complainant contends that, at this meeting, Respondent Hamilton questioned the Manager’s performance pursuant to the PIP. (Id. at p. 7)

The complainant contends that the respondents each participated in and/or encouraged “de facto supervision” of the Manager and ongoing criticism of his work performance from March 2011 through November 2011. The Manager sought to have his employment continued and negotiated with the Board’s attorney to have his employment continued through April 2013. (Id. at pp. 7-8) The Board voted 5-4 to authorize a settlement with the Manager allowing him to retain employment through April 2013. The respondents participated in the discussion and vote.

The complainant contends that each respondent violated:

- (1) N.J.S.A. 18A:12-24.1(c), (d), (e), (i) and (j) by engaging in the supervision of the Manager; and
- (2) N.J.S.A. 18A:12-24.1(c), (d) and (e) by participating in the full board discussion and vote regarding the Manager’s settlement with the Board.

ANALYSIS

The Commission initially acknowledges the respondents’ argument that the complaint is partially time-barred because the complaint herein was filed on December 22, 2011 and, therefore, any allegations as to events occurring before June 23, 2011 are untimely, pursuant to N.J.A.C. 28-6.5(a), which requires that complaints are filed within 180 days of notice of the events which form the basis of the alleged violation(s). The complainant counters that the complaint was timely filed in that he did not have knowledge of the events which form the basis of these allegations until September of 2011. He provides an affidavit in his reply to the Motion to Dismiss and assumes for the purpose of this calculation that knowledge of these events “came to him as early as September 1, 2011.” (Complainant’s Reply at p. 25) Under these

circumstances, the Commission shall grant all inferences to the complainant and review the entire complaint.

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. Thus, a Motion to Dismiss considers the adequacy of the complaint, which is governed by the reviewing agency's specific requirements. Here, the Commission's rules require, *inter alia*, that a complaint shall include: "[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." N.J.A.C. 6A:28-6.3(a)3 (emphasis added). 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 each of these provisions.

Allegations that the Respondents violated N.J.S.A. 18A:12-24.1(c), (d), (e), (i) and (j) by
Engaging in the Supervision of the Manager

The complainant alleges that the respondents violated N.J.S.A. 18A:12-24.1(c), (d), (e), (i) and (j) of the Code of Ethics for School Board Members by engaging in the supervision, criticism and evaluation of a Board employee (*i.e.*, the Manager). (Complaint at p. 10) The respondents counter that the complainant "has made bald assertions based on speculation and hearsay, without personal knowledge" inasmuch as he was not present during any of the meetings of the Facilities Committee where the actions that form the basis of this complaint allegedly occurred. Neither has the complainant presented any affidavits from those persons who did attend the Facilities Committee. (Motion to Dismiss at pp. 4-5) The respondents also reason that the complainant was not privy to concerns raised in the Committee, to the PIP referenced in the complaint or to the referenced settlement negotiations. "The absence of the foregoing precludes [the complainant] from establishing that a violation has occurred, and such violations simply cannot be established through hearsay, rumors, speculation, and hyperbole." (*Id.* at p. 5) The respondents note that the Commission dismissed a complaint under similar circumstances in Laura Danis v. Dr. Donna Koch, Garfield Board of Education, Bergen County, C37-10, January 25, 2011. (*Id.* at p. 4)

While the complainant argues in his reply to the Motion to Dismiss that neither statute nor regulation requires first-hand knowledge to support a complaint (complainant's reply at p. 10), the Commission is compelled to note that the enabling statute places on the complainant the burden to *factually establish* a violation of the Code of Ethics for School Board Members. N.J.S.A. 18A:12-29b. The Commission's regulations further provide that complaints alleging a violation of the Code of Ethics for School Board Members must factually establish a violation in accordance with the standards set forth at N.J.A.C. 6A:28-6.4, as set forth above. The Courts have established that "[a]n administrative agency has broad authority to adopt rules and mold its procedures in a manner best suited to perform its statutory responsibilities, Sloan ex rel. Sloan v.

Klagholtz, 342 N.J.Super. 385, 394 (App. Div. 2001).² Thus, the Commission finds that it may fairly establish a threshold below which it cannot reasonably draw an inference of violation. Here, the Commission finds that this complaint *fails to provide reasonable and sufficient factual support* for the allegations that the respondents violated N.J.S.A. 18A:12-24.1(c), (d), (e), (i) and (j) of the Code of Ethics for School Board Members by engaging in the supervision, criticism and evaluation of a Board employee (i.e., the Manager).

Allegations that the Respondents violated N.J.S.A. 18A:12-24.1(c), (d) and (e) by participating in the Board Discussion and Vote regarding the Manager’s settlement.

The Commission next considers the allegations that the respondents violated N.J.S.A. 18A:12-24.1(c), (d) and (e), which provide, respectively:

I will confine my board action to policy making, planning, and appraisal, and I will help to frame policies and plans only after the board has consulted those who will be affected by them.

I will carry out my responsibility, not to administer the schools, but, together with my fellow board members, to see that they are well run.

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(c) shall include evidence that the respondent(s) took board action to effectuate policies and plans without consulting those affected by such policies and plans, or took action that was unrelated to the respondent’s duty to: i. Develop the general rules and principles that guide the management of the school district or charter school; ii. Formulate the programs and methods to effectuate the goals of the school district or charter school; or iii. Ascertain the value or liability of a policy. N.J.A.C. 6A:28-6.4(a)3.

Factual evidence of a violation of N.J.S.A. 18A:12-24.1(d) shall include, but not be limited to, evidence that the respondent(s) gave a direct order to school personnel or became directly involved in

²In Sloan, the Appellate Division determined that the Commissioner of Education properly dismissed a petition of appeal where the appellant school board and students challenged the amount of aid distributed to the District, yet failed to present any factual support for their contentions, as specifically requested by the Commissioner. Following a Motion to Dismiss filed by the Department of Education, the Court found that “it is within the Commissioner’s authority to treat a motion to dismiss on the ground that ‘no sufficient cause for determination has been advanced’ as encompassing not only a claim that the petition on its face fails to set forth a basis for relief, but also that petitioners have failed to provide any factual support for the general allegations in their petition.” Sloan, supra at 394.

activities or functions that are the responsibility of school personnel or the day-to-day administration of the school district or charter school. N.J.A.C. 6A:28-6.4(a)4.

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.

Here, the Commission finds that, even assuming that the respondents participated in the Board's discussion and vote regarding the settlement pertaining to the Manager, these facts are insufficient to support a finding that the respondents failed to confine their board action to policy making, planning, and appraisal so as to establish a violation of N.J.S.A. 18A:12-24.1(c), especially since the settlement agreement was before the entire Board for approval. Similarly, the Commission finds that these facts are insufficient to support a finding that the respondents gave a direct order to school personnel or became directly involved in activities or functions that are the responsibility of school personnel or the day-to-day administration of the school district so as to establish a violation of N.J.S.A. 18A:12-24.1(d). Finally, the Commission finds no support whatsoever in this complaint from which it may conclude that by participating in the Board's discussion and vote regarding the settlement pertaining to the Manager, the respondents made personal promises or took "private action" so as to implicate N.J.S.A. 18A:12-24.1(e). Accordingly, even assuming that the respondents participated in the Board's discussion regarding the settlement pertaining to the Manager and voted on the settlement, this action would not be a violation of N.J.S.A. 18A:12-24.1(c), (d), or (e).

DECISION

Based on the foregoing, the Commission grants the respondents' Motion to Dismiss the allegations that they violated N.J.S.A. 18A:12-24.1(c), (d) and (e) by participating in the full board discussion and vote regarding the Manager's settlement. As to the allegations that the respondents violated N.J.S.A. 18A:12-24.1(c), (d), (e), (i) and (j) by engaging in the supervision of the Manager, in accordance with its decision in Danis, supra, these allegations are dismissed without prejudice to the complainant's right to refile such claims through a subsequent complaint wherein the complainant provides the Commission with a reasonable basis for the allegations, through, but not necessarily limited to, a sworn affidavit or certification of someone who attended the Facilities Committee meetings which are at issue. Any such complaint must be filed in accordance with N.J.A.C. 6A:28-1.1 et seq.

Robert W. Bender
Chairperson

Mailing Date: April 25, 2012

Resolution Adopting Decision – C57-11

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

Whereas, at its meeting on March 27, 2012, the Commission determined to grant the respondents' Motion to Dismiss the allegations that the respondents violated N.J.S.A. 18A:12-24.1(c), (d) and (e) by participating in the full board discussion and vote regarding the Manager's settlement, but to dismiss without prejudice the allegations that the respondents violated N.J.S.A. 18A:12-24.1(c), (d), (e), (i) and (j) by engaging in the supervision of the Manager; 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 April 24, 2012.

Joanne Boyle
Executive Director