

Before the School Ethics Commission
Docket No.: C21-19
Decision on Motion to Dismiss

Frank Caraccio,
Complainant

v.

Daysi Gonzalez, Esllam Zakaria, Ashley Alba, Niaz Nadim, and Mohammed Hussain,
Prospect Park Board of Education, Passaic County,
Respondents

I. Procedural History

This matter arises from a Complaint that was filed on March 20, 2019, by Frank Caraccio (Complainant), a member of the Prospect Park Board of Education (Board), alleging that Daysi Gonzalez, Esllam Zakaria, Ashley Alba, Niaz Nadim, and Mohammed Hussain (Respondents), also members of the Board, violated the School Ethics Act (Act), *N.J.S.A. 18A:12-21 et seq.* More specifically, the Complaint alleges that Respondents violated *N.J.S.A. 18A:12-24.1(a)* of the Code of Ethics for School Board Members (Code).

On March 26, 2019, the Complaint was served on Respondents, via regular and certified mail, notifying them that charges were filed against them with the School Ethics Commission (Commission), and advising that they had twenty (20) days to file a responsive pleading. On April 30, 2019, Respondents filed a Motion to Dismiss in Lieu of Answer (Motion to Dismiss), and also alleged that the Complaint is frivolous. On May 22, 2019, Complainant filed a response to the Motion to Dismiss and allegation of frivolous filing.

The parties were notified by correspondence dated June 11, 2019, that this matter would be placed on the Commission's agenda for its special meeting on June 19, 2019, in order to make a determination regarding the Motion to Dismiss and allegation of frivolous filing. At its special meeting on June 19, 2019, the Commission considered the filings in this matter and, at its meeting on July 23, 2019, the Commission voted to grant the Motion to Dismiss in its entirety because Complainant failed to plead sufficient, credible facts to support a finding that Respondents violated *N.J.S.A. 18A:12-24.1(a)* as alleged in the Complaint. The Commission also voted to find the Complaint not frivolous, and to deny Respondents' request for sanctions.

II. Summary of the Pleadings

A. *The Complaint*

Complainant asserts that at a special meeting on February 8, 2019, a “vote was called” to reject proposals properly submitted for legal and auditing services, even after Board counsel advised that the action would be a violation of *N.J.S.A.* 18A-4.5(d) and *N.J.S.A.* 18A-22. The “item” passed on a vote of 5-2 in favor of rejecting the proposals. Complainant asserts Respondents violated *N.J.S.A.* 18A:12-24.1(a) because they were advised, by the standing board attorney, that “taking these actions would be in violation of the law.”

B. *Motion to Dismiss and Allegation of Frivolous Filing*

Following receipt of the Complaint, Respondents filed a Motion to Dismiss, and also alleged that the Complaint is frivolous. Respondents argue that Complainant did not mention that the Board attorney (now former Board attorney) was one of the proposing parties and his own legal services were at stake. In addition, Respondents assert that Complainant did not include any reference to or provide a copy of a final decision from any court of law or administrative agency of this State demonstrating that Respondents failed to enforce all laws, rules and regulations of the State Board of Education, although same is required to establish a violation of *N.J.S.A.* 18A:12-24.1(a). Even if such a decision existed, liability for a violation would fall on the Board as a whole, rather than on individual Board members. Respondents also argue that they have the right to vote as they “see fit.” It is not a violation simply because they did not agree with and vote the same as other members of the Board. Respondents maintain that Complainant did not provide proper evidence to establish a violation of *N.J.S.A.* 18A:12-24.1(a) and, therefore, the Complaint should be dismissed.

Finally, Respondents assert that Complainant knew, or should have known, that the Complaint was without reasonable basis and was made in bad faith because; Complainant filed this action without any regard for the “clear mandate” of *N.J.A.C.* 6A:28-6.4(a)(1); relied on the “self-serving” and legally incorrect conclusion of the former Board attorney (Merlino), who rendered his opinion on a matter in which he clearly had a financial interest; and endorsed the Board attorney’s opinion despite the fact that Complainant should have known that the competitive bidding provisions cited by the Board attorney did not apply under the circumstances presented. As such, Respondents contend the Complaint should be deemed frivolous, and sanctions imposed.

C. *Response to Motion to Dismiss and Allegation of Frivolous Filing*

In response to the Motion to Dismiss and allegation of frivolous filing, Complainant asserts that he filed the Complaint based on the information he received in an email from Board counsel, and on a good faith belief that the advice was an attempt to keep the Board “appraised” of the legality of the process. Complainant affirms he wants the Board to act as it should, independent of any and all influences.

III. Analysis

A. *Standard for 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 non-moving party (Complainant), and determine whether the allegation(s), if true, could establish a violation of the Act. Unless the parties are otherwise notified, a Motion to Dismiss and any response is reviewed by the Commission on a summary basis. *N.J.A.C. 6A:28-8.1 et seq.* Thus, the question before the Commission is whether Complainant has alleged sufficient facts which, if true, could support a finding that Respondents violated *N.J.S.A. 18A:12-24.1(a)* as alleged in the Complaint.

B. *Alleged Code Violation*

In the Complaint, Complainant alleges that Respondents violated *N.J.S.A. 18A:12-24.1(a)*. This provision of the Code provides:

a. I will uphold and enforce all laws, rules and regulations of the State Board of Education, and court orders pertaining to schools. Desired changes shall be brought about only through legal and ethical procedures.

As set forth in *N.J.A.C. 6A:28-6.4(a)(1)*, factual evidence of a violation of *N.J.S.A. 18A:12-24.1(a)* shall include a copy of a final decision from any court of law or administrative agency of this State demonstrating that Respondents failed to enforce all laws, rules and regulations of the State Board of Education, and/or court orders pertaining to schools or that Respondents brought about changes through illegal or unethical procedures.

Complainant argues that when Respondents voted in favor of a motion to reject all “Proposals submitted for both legal and auditing services” and to re-advertise, and did so when Board counsel specifically advised that such action was “illegal,” they violated *N.J.S.A. 18A:12-24.1(a)*. Respondents counter that Complainant did not include any reference to or provide a copy of a final decision from any court of law or administrative agency of this State demonstrating that Respondents failed to enforce all laws, rules and regulations of the State Board of Education. In addition, even if such a decision existed, liability for a violation would fall on the Board as a whole, rather than on the individually named Respondents in this matter.

Based on its review of Complainant’s allegations, the Commission finds that even if the facts as alleged in the Complaint are proven true by sufficient credible evidence, they would not support a finding that Respondents violated *N.J.S.A. 18A:12-24.1(a)* as alleged in the Complaint. More specifically, and as argued by Respondents, the Commission finds that Complainant has not provided a **copy of a final decision(s)** from any court of law or administrative agency of this State demonstrating that Respondents violated “*N.J.S.A. 18A-4.5(d)*” and/or “*N.J.S.A. 18A-22*” when they voted in favor (with a “yes” vote) of rejecting “Proposals submitted for both legal and auditing services” and re-advertising for those services. Absent such a final decision(s), the Commission finds that even if all the facts as alleged in the Complaint are true, there is insufficient credible evidence to support a finding that Respondents violated *N.J.S.A. 18A:12-*

24.1(a). In addition, and to the extent that Complainant seeks a determination from the Commission that Respondents violated “*N.J.S.A. 18A-4.5(d)*” and/or “*N.J.S.A. 18A-22*” in connection with their affirmative vote, the Commission notes that such determinations fall outside the scope, authority, and jurisdiction of the Commission. Therefore, the Commission finds that the alleged violation of *N.J.S.A. 18A:12-24.1(a)* should be dismissed.

Accordingly, and granting all inferences in favor of the non-moving party (Complainant), the Commission has determined to **grant** the Motion to Dismiss in its entirety because Complainant failed to plead sufficient, credible facts to support a finding that Respondents violated *N.J.S.A. 18A:12-24.1(a)* as alleged in the Complaint.

IV. Request for Sanctions

At its special meeting on June 19, 2019, the Commission considered Respondents’ request that the Commission find the Complaint frivolous, and impose sanctions pursuant to *N.J.S.A. 18A:12-29(e)*. Despite Respondents’ argument, the Commission cannot find evidence that might show that Complainant filed the Complaint in bad faith or solely for the purpose of harassment, delay, or malicious injury. The Commission also does not have information to suggest that Complainant knew or should have known that the Complaint was without any reasonable basis in law or equity, or that it 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*. Therefore, at its meeting on July 23, 2019, the Commission voted to find the Complaint not frivolous, and to deny the request for sanctions.

V. Decision

Based on the foregoing, and in reviewing the facts in the light most favorable to the non-moving party (Complainant), the Commission voted to **grant** the Motion to Dismiss in its entirety because Complainant failed to plead sufficient, credible facts to support a finding that Respondents violated *N.J.S.A. 18A:12-24.1(a)* as alleged in the Complaint. The Commission also voted to find that the Complaint is not frivolous, and to deny Respondents’ request for sanctions.

Pursuant to *N.J.S.A. 18A:12-29(b)*, the Commission hereby notifies Complainant and Respondents that, for the reasons set forth above, this matter is dismissed. 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: July 24, 2019

***Resolution Adopting Decision
in Connection with C21-19***

Whereas, at its special meeting on June 19, 2019, the School Ethics Commission (Commission) considered the Complaint, the Motion to Dismiss in Lieu of Answer (Motion to Dismiss) and allegation of frivolous filing, and the response to the Motion to Dismiss and allegation of frivolous filing submitted in connection with the above-referenced matter; and

Whereas, at its special meeting on June 19, 2019, the Commission discussed granting the Motion to Dismiss in its entirety for failure to plead sufficient, credible facts to support the allegations that Respondents violated *N.J.S.A.* 18A:12-24.1(a) as alleged in the Complaint; and

Whereas, at its special meeting on June 19, 2019, the Commission discussed finding the Complaint not frivolous, and denying Respondents' request for sanctions; and

Whereas, at its meeting on July 23, 2019, the Commission reviewed and voted to approve the within decision as accurately memorializing its actions/findings from its special meeting on June 19, 2019; and

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 July 23, 2019.

Kathryn A. Whalen, Director
School Ethics Commission