

Before the School Ethics Commission
Docket No.: C40-19
Decision on Motion to Dismiss

Naomi Johnson-Lafleur,
Complainant

v.

Gene Bouie, James Rolle, and Jayne Howard,
Trenton Board of Education, Mercer County,
Respondents

I. Procedural History

This matter arises from a Complaint that was filed on May 28, 2019, by Naomi Johnson-Lafleur (Complainant), alleging that Gene Bouie (Respondent Bouie), James Rolle (Respondent Rolle), and Jayne Howard (Respondent Howard) (collectively referred to as Respondents), school officials who serve on, or behalf of, the Trenton Board of Education (Board), violated the School Ethics Act (Act), *N.J.S.A.* 18A:12-21 *et seq.* By correspondence dated May 30, 2019, June 5, 2019, and June 11, 2019, Complainant was notified that the Complaint was deficient, and required amendment before the School Ethics Commission (Commission) could accept her filing. On July 2, 2019, Complainant cured all defects and filed an Amended Complaint (Complaint) that was deemed compliant with the requirements detailed in *N.J.A.C.* 6A:28-6.3. The Complaint alleges that Respondents violated *N.J.S.A.* 18A:12-24(b) in Counts 1-3, violated *N.J.S.A.* 18A:12-24.1(a) of the Code of Ethics for School Board Members (Code) in Counts 1-3, and violated *N.J.S.A.* 18A:12-24.1(j) of the Code in Counts 1-3.

On July 3, 2019, the Complaint was served on Respondents, via regular and certified mail, notifying them that charges were filed against them with the Commission, and advising that they had twenty (20) days to file a responsive pleading. On July 26, 2019, Respondents filed a Motion to Dismiss in Lieu of Answer (Motion to Dismiss). On September 4, 2019, and after she initially failed to file a response within the statutory timeframe, Complainant filed a response to the Motion to Dismiss.

The parties were notified by correspondence dated September 16, 2019, that this matter would be placed on the Commission's agenda for its meeting on September 24, 2019, in order to make a determination regarding the Motion to Dismiss. At its meeting on September 24, 2019, the Commission considered the filings in this matter and, at its meeting on October 25, 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(b), *N.J.S.A.* 18A:12-24.1(a), and *N.J.S.A.* 18A:12-24.1(j) as alleged in Count 1, violated *N.J.S.A.* 18A:12-24(b), *N.J.S.A.* 18A:12-24.1(a), and *N.J.S.A.* 18A:12-24.1(j) as argued in Count

2, and/or violated *N.J.S.A.* 18A:12-24(b), *N.J.S.A.* 18A:12-24.1(a), and *N.J.S.A.* 18A:12-24.1(j) as contended in Count 3.

II. Summary of the Pleadings

A. *The Complaint*

In Count 1, Complainant states that on May 16, 2019, and after being sworn in by the Mayor to serve as new members of the Board (filling two vacant seats), the Board members were informed that they could not sit on the dais until their background checks were completed. Based on these facts, Complainant alleges that Respondents violated *N.J.S.A.* 18A:12-24(b), *N.J.S.A.* 18A:12-24.1(a), and *N.J.S.A.* 18A:12-24.1(j) because they would not allow the new Board members to sit on the dais. According to Complainant, the relevant “statute states that new board members must submit fingerprints for background checks within 30 days of the appointment,” but “does not prohibit them from being seated until clearance is granted.”

In Count 2, Complainant states that, despite not being allowed to sit on the dais during the public session of the May 16, 2019, Board meeting (because their background checks were not complete), the two new Board members were invited into Executive Session following the public session. Based on these facts, Complainant asserts that Respondents violated *N.J.S.A.* 18A:12-24(b), *N.J.S.A.* 18A:12-24.1(a), and *N.J.S.A.* 18A:12-24.1(j) because Respondents denied the new Board members “their right to sit on the dais and act as Board members during the public session, but were then granted access to the confidential discussion in Executive Session.”

In Count 3, Complainant states that, during the Board reorganization meeting on May 16, 2019, the two new Board members “were restricted from voting for the [B]oard [P]resident and [V]ice [P]resident.” According to Complainant, the “denial to allow [the two new Board members] to vote, kept the perceived past majority in control.” In addition, the two new Board members were “denied their right to ask questions following two (2) presentations,” and were not permitted to vote on “all other agenda items including HR, Curriculum, and Finance Recommendations that included employee appointments, approval of new programs, awarding of contracts, RFPs, etc.” Complainant contends that, historically, “previously sworn in board members have been seated and permitted to vote at [Board] Reorganization Meeting Elections and on all agenda items prior to having fingerprint clearance.” Based on these facts, Complainant argues that Respondents violated *N.J.S.A.* 18A:12-24(b), *N.J.S.A.* 18A:12-24.1(a), and *N.J.S.A.* 18A:12-24.1(j) because the “newly appointed Board President and other Board [m]ember Respondents may have secured an unwarranted advantage and privilege by denying the new [B]oard members the right to vote in the reorganization election.”

B. *Motion to Dismiss*

Following receipt of the Complaint, Respondents filed a Motion to Dismiss and maintain they did not use their official positions to secure any unwarranted privileges, advantages or employment. Respondents assert that the New Jersey Department of Education (NJDOE) and the New Jersey School Boards Association (NJSBA) have issued “clear and unambiguous guidance”

regarding criminal history record checks. Although, prior to 2017, board members were permitted to take the oath pending results of their criminal history background check (CHBC), effective March 6, 2017, this is no longer permissible. Now, *in order to take the oath*, “a [CHBC] must be completed within thirty (30) days of the election or appointment” and “board members elect may not be sworn into office while the results of their criminal history records are pending.” Therefore, and because the two new Board members informed the Board that they had “not yet initiated the criminal background check process,” the Board attorney suggested that the two new members not be “seated” at the May 16, 2019, meeting. In addition, the two new Board members were invited to attend executive session, the “sole purpose of the invitation was to explain in detail to [the two new Board members] why each could not have been seated and why each could not participate in executive session.” When executive session “officially convened,” the two new Board members exited the meeting; in this way, Respondents maintain that the two new Board members were not “privy to any confidential information.” Respondents argue that because they complied with the law and guidance from the NJDOE and the NJSBA, the alleged violations of *N.J.S.A.* 18A:12-24(b) in Counts 1-3 should be dismissed.

As to the alleged violations of *N.J.S.A.* 18A:12-24.1(a), Respondents argue that Complainant “has not identified any 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.” Furthermore, Complainant has not presented any evidence that Respondents “brought about changes through illegal or unethical procedures.” As stated above, Respondents maintain that they complied with State law and with the guidance issued from both the NJDOE and the NJSBA, when the new Board members were not permitted to sit on the dais and/or participate in executive session at the May 16, 2019, meeting without their CHBC. Therefore, Respondents assert that the alleged violations of *N.J.S.A.* 18A:12-24.1(a) in Counts 1-3 should be dismissed.

Regarding the alleged violations of *N.J.S.A.* 18A:12-24.1(j), Respondents argue that Complainant “has not set forth any allegations that [Respondent]s acted on or attempted to resolve a complaint, or conducted an investigation or inquiry related to a complaint.” Therefore, Respondents counter that the alleged violations of *N.J.S.A.* 18A:12-24.1(j) in Counts 1-3 should also be dismissed.

C. *Response to Motion to Dismiss*

In response to the Motion to Dismiss, Complainant reasserts her allegations, and argues that Respondents were aware that the two new Board members were appointed by the Mayor. Complainant further argues that Respondents “attempt to use guidance documents from the [NJDOE] and the [NJSBA]. These documents do not supersede the statute and do not support their actions that restricted [the two new Board members] from being seated on the [Board] on May 16, 2019.” Complainant asserts that “these documents are irrelevant” to this matter and cites the Commissioner’s decision in *Board of Education of the Township of Ocean, Monmouth County v. Board of Education of the Village of Loch Arbour, Monmouth County, Dr. Lester Richens and David Joye, OAL Dkt. No. EDU 16799-17, Agency Dkt. No. 213-9/17, (#28-19), 1/25/19*, which states “a school board member’s only requirement prior to assuming office is to take an oath swearing he/she is not disqualified due to a conviction of a disqualifying crime.”

Complainant reaffirms that the “statute does not prohibit board members from serving once appointed and taking an oath.” Therefore, Complainant reasserts that Respondents violated *N.J.S.A.* 18A:12-24(b), *N.J.S.A.* 18A:12-24.1(a), and *N.J.S.A.* 18A:12-24.1(j) as set forth in Counts 1-3.

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(b), *N.J.S.A.* 18A:12-24.1(a), and *N.J.S.A.* 18A:12-24.1(j) as alleged in Count 1, violated *N.J.S.A.* 18A:12-24(b), *N.J.S.A.* 18A:12-24.1(a), and *N.J.S.A.* 18A:12-24.1(j) as argued in Count 2, and/or violated *N.J.S.A.* 18A:12-24(b), *N.J.S.A.* 18A:12-24.1(a), and *N.J.S.A.* 18A:12-24.1(j) as contended in Count 3.

B. *Alleged Prohibited Acts*

In the Complaint, Complainant alleges that Respondents violated *N.J.S.A.* 18A:12-24(b) in Counts 1-3. This provision of the Act provides:

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;

In order to credit the alleged violation of *N.J.S.A.* 18A:12-24(b), the Commission must find evidence that Respondents used or attempted to use their official position to secure an unwarranted privilege, advantage or employment for themselves, members of their immediate family, or “others.”

In **Count 1**, Complainant alleges Respondents violated *N.J.S.A.* 18A:12-24(b) because they denied two newly sworn-in Board members from being able to serve as new Board members (and sitting on the dais). According to Complainant, the relevant statute for criminal history background checks “states that new board members must submit fingerprints for background checks within 30 days of the appointment,” but “does not prohibit them from being seated until clearance is granted.”

In **Count 2**, Complainant argues that Respondents violated *N.J.S.A.* 18A:12-24(b) because they denied the new Board members “their right to sit on the dais and act as Board members during the public session, but were then granted access to the confidential discussion in Executive Session.”

In **Count 3**, Complainant contends that Respondents violated *N.J.S.A. 18A:12-24(b)* because, by denying the newly sworn-in Board members from voting on officers and voting on all other agenda items (including personnel, finance, and curriculum recommendations) the “newly appointed Board President and other Board [m]ember Respondents may have secured an unwarranted advantage and privilege by denying the new [B]oard members the right to vote in the reorganization election.”

In response to the alleged violations of *N.J.S.A. 18A:12-24(b)* in Counts 1-3, Respondents maintain they did not use their official positions to secure any unwarranted privileges, advantages or employment for themselves or for others. Respondents further note that, in advising the two newly sworn-in Board members that they could not be “seated” at the May 16, 2019, Board meeting, Respondents were complying with the law, guidance from the NJDOE, and guidance from NJSBA. As such, Respondents argue that the alleged violations of *N.J.S.A. 18A:12-24(b)* should be dismissed.

Based on its review of the Complaint, the Commission finds that even if the facts as alleged are proven true by sufficient credible evidence, they would not support a finding that Respondents violated *N.J.S.A. 18A:12-24(b)* as set forth in Counts 1-3. Absent the articulation of specific facts demonstrating how Respondents – either individually or collectively – used their position to secure a specific unwarranted privilege, advantage or employment for themselves or some other person or entity, which has not been alleged, a violation of *N.J.S.A. 18A:12-24(b)* cannot be substantiated. In the Complaint, Complainant seemingly acknowledges her inability to factually establish that Respondents – either individually or collectively – actually received an unwarranted privilege, advantage or employment, as she notes (in Count 3) that Respondents “*may have* secured an unwarranted privilege and advantage” by denying the newly sworn-in Board members from serving as new Board members (and sitting on the dais, electing officers, and voting on Board members). As such, the Commission finds that the alleged violations of *N.J.S.A. 18A:12-24(b)* in Counts 1-3 should be dismissed.

C. Alleged Code Violations

In the Complaint, Complainant also alleges that Respondents violated *N.J.S.A. 18A:12-24.1(a)* in Counts 1-3, and also violated *N.J.S.A. 18A:12-24.1(j)* in Counts 1-3. These provisions of the Code provide:

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.

j. I will refer all complaints to the chief administrative officer and will act on the complaints at public meetings only after failure of an administrative solution.

1. Alleged violations of N.J.S.A. 18A:12-24.1(a)
(Counts 1-3)

Pursuant to *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.

In **Count 1**, Complainant asserts that Respondents violated *N.J.S.A.* 18A:12-24.1(a) because they denied two newly sworn-in Board members from being able to serve as new Board members (and sitting on the dais). According to Complainant, the relevant statute for criminal history background checks “states that new board members must submit fingerprints for background checks within 30 days of the appointment,” but “does not prohibit them from being seated until clearance is granted.”

In **Count 2**, Complainant claims that Respondents violated *N.J.S.A.* 18A:12-24.1(a) because they denied the new Board members “their right to sit on the dais and act as Board members during the public session, but were then granted access to the confidential discussion in Executive Session.”

In **Count 3**, Complainant alleges that Respondents violated *N.J.S.A.* 18A:12-24.1(a) because, by denying the newly sworn-in Board members from voting on officers and voting on all other agenda items (including personnel, finance, and curriculum recommendations) the “newly appointed Board President and other Board [m]ember Respondents may have secured an unwarranted advantage and privilege by denying the new [B]oard members the right to vote in the reorganization election.”

In response to the alleged violations of *N.J.S.A.* 18A:12-24.1(a) in Counts 1-3, Respondents counter that Complainant “has not identified any 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.” Furthermore, Complainant has not presented any evidence that Respondents “brought about changes through illegal or unethical procedures.” Therefore, Respondents assert that the alleged violations of *N.J.S.A.* 18A:12-24.1(a) in Counts 1-3 should be dismissed.

After review of the Complaint, the Commission finds that even if the facts as alleged 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 set forth in Counts 1-3. More specifically, the Commission finds that, despite being required by *N.J.A.C.* 6A:28-6.4(a)(1), Complainant has not provided a **copy of a final decision(s)** from any court of law or other administrative agency demonstrating that Respondents violated a specific law, rule, or regulation when they (i) advised the newly sworn-in Board members that they could not be seated on the dais (Count 1), (ii) permitted the newly sworn-in Board members to participate in Executive Session (Count 2), and/or (iii) prohibited the newly sworn-in Board members from voting on the selection of Board officers and voting on other Board matters (Count 3) because they had “not yet initiated the criminal

background check process.” Absent such final decisions, and because the Commission does not have the jurisdiction to determine whether the exclusion of the newly sworn-in Board members violated *N.J.S.A.* 18A:12-1.2 (but such an allegation may be actionable in another forum), the Commission finds that there is insufficient credible evidence to support a finding that Respondents violated *N.J.S.A.* 18A:12-24.1(a). Therefore, the Commission finds that the alleged violations of *N.J.S.A.* 18A:12-24.1(a) in Counts 1-3 should be dismissed.

**2. Alleged violations of *N.J.S.A.* 18A:12-24.1(j)
(Counts 1-3)**

As set forth in *N.J.A.C.* 6A:28-6.4(a)(10), factual evidence of a violation of *N.J.S.A.* 18A:12-24.1(j) shall include evidence that Respondents acted on or attempted to resolve a complaint, or conducted an investigation or inquiry related to a complaint (i) prior to referral to the chief administrative officer, or (ii) at a time or place other than a public meeting and prior to the failure of an administrative solution.

In **Count 1**, Complainant argues that Respondents violated *N.J.S.A.* 18A:12-24.1(j) because they denied two newly sworn-in Board members from being able to serve as new Board members (and sitting on the dais). According to Complainant, the relevant statute for criminal history background checks “states that new board members must submit fingerprints for background checks within 30 days of the appointment,” but “does not prohibit them from being seated until clearance is granted.”

In **Count 2**, Complainant contends that Respondents violated *N.J.S.A.* 18A:12-24.1(j) because they denied the new Board members “their right to sit on the dais and act as Board members during the public session, but were then granted access to the confidential discussion in Executive Session.”

In **Count 3**, Complainant asserts that Respondents violated 18A:12-24.1(j) because, by denying the newly sworn-in Board members from voting on officers and voting on all other agenda items (including personnel, finance, and curriculum recommendations) the “newly appointed Board President and other Board [m]ember Respondents may have secured an unwarranted advantage and privilege by denying the new [B]oard members the right to vote in the reorganization election.”

In response to the alleged violations of *N.J.S.A.* 18A:12-24.1(j) in Counts 1-3, Respondents argue that Complainant “has not set forth any allegations that [Respondents] acted on or attempted to resolve a complaint, or conducted an investigation or inquiry related to a complaint.” Therefore, Respondents state that the alleged violations of *N.J.S.A.* 18A:12-24.1(j) in Counts 1-3 should also be dismissed.

Based on its review of the Complaint, the Commission finds that even if the facts as alleged are proven true by sufficient credible evidence, they would not support a finding that Respondents violated *N.J.S.A.* 18A:12-24.1(j). Because Complainant did not provide factual evidence, as required by *N.J.A.C.* 6A:28-6.4(a)(10), that Respondents took, or attempted to take, unilateral action to resolve a complaint, Complainant cannot sustain her burden of proof.

Instead, the Complaint is clear that there was a legal question as to whether the newly sworn-in Board members could be seated because they had not yet initiated the criminal history background check process. Importantly, it does not appear, based on the facts as pled, that there was a “formal complaint” before the Board, or filed with any individual Respondent, *at the time* the decision not to permit the newly sworn-in Board members to be seated was made. It also does not appear, based on the facts as pled, that there was a “formal complaint” before the Board, or filed with any individual Respondent, that the decision made was inappropriate and/or that other measures should be taken. As such, the Commission finds that the alleged violations of *N.J.S.A.* 18A:12-24.1(j) in Counts 1-3 should be dismissed.

3. *Alleged Code Violations Against Respondent Rolle and Respondent Howard*

As to the alleged violations of the Code filed by Complainant against Respondent Rolle and Respondent Howard in Counts 1-3, the Commission feels compelled to note that the provisions of the Code only regulate the conduct of Board members, and do not apply to the conduct of other school officials. In this regard, the preliminary statement of *N.J.S.A.* 18A:12-24.1 (“*Code of Ethics for School Board Members*”) states, “*A school board member shall abide by the following Code of Ethics for School Board Members*” (emphasis added). Neither the title of the statute, nor its substantive provisions, indicate that the provisions of the Code apply to anyone other than Board members. In addition, the regulations implementing the provisions of the School Ethics Act, and *N.J.A.C.* 6A:28-6.3(c) in particular, specifically provide that, “A complaint alleging solely a violation of the code of ethics for school board members *shall name only school board members as respondents...*” (emphasis added). Consequently, there is no statutory or regulatory authority to support Complainant’s position that the provisions of the Code apply to school officials who are not Board members.

Because neither Respondent Rolle nor Respondent Howard are Board members, the alleged violations of the Code were not properly filed against Respondent Rolle and Respondent Howard.

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(b), *N.J.S.A.* 18A:12-24.1(a), and *N.J.S.A.* 18A:12-24.1(j) as alleged in Count 1, violated *N.J.S.A.* 18A:12-24(b), *N.J.S.A.* 18A:12-24.1(a), and *N.J.S.A.* 18A:12-24.1(j) as argued in Count 2, and/or violated *N.J.S.A.* 18A:12-24(b), *N.J.S.A.* 18A:12-24.1(a), and *N.J.S.A.* 18A:12-24.1(j) as contended in Count 3.

IV. **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(b), *N.J.S.A.* 18A:12-24.1(a), and *N.J.S.A.* 18A:12-24.1(j) as alleged in Count 1, violated *N.J.S.A.* 18A:12-24(b), *N.J.S.A.* 18A:12-24.1(a), and

N.J.S.A. 18A:12-24.1(j) as argued in Count 2, and/or violated *N.J.S.A.* 18A:12-24(b), *N.J.S.A.* 18A:12-24.1(a), and *N.J.S.A.* 18A:12-24.1(j) as contended in Count 3.

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: October 25, 2019

**Resolution Adopting Decision
in Connection with C40-19**

Whereas, at its meeting on September 24, 2019, the School Ethics Commission (Commission) considered the Complaint, the Motion to Dismiss in Lieu of Answer (Motion to Dismiss, and the response to the Motion to Dismiss submitted in connection with the above-referenced matter; and

Whereas, at its meeting on September 24, 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(b)*, *N.J.S.A. 18A:12-24.1(a)*, and *N.J.S.A. 18A:12-24.1(j)* as alleged in Count 1, violated *N.J.S.A. 18A:12-24(b)*, *N.J.S.A. 18A:12-24.1(a)*, and *N.J.S.A. 18A:12-24.1(j)* as argued in Count 2, and/or violated *N.J.S.A. 18A:12-24(b)*, *N.J.S.A. 18A:12-24.1(a)*, and *N.J.S.A. 18A:12-24.1(j)* as contended in Count 3; and

Whereas, at its meeting on October 25, 2019, the Commission reviewed and voted to approve the within decision as accurately memorializing its actions/findings from its meeting on September 24, 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 October 25, 2019.

Kathryn A. Whalen, Director
School Ethics Commission