

Before the School Ethics Commission
Docket No.: C52-19
Decision on Motion to Dismiss

Juan Allende,
Complainant

v.

Calvin Lofton,
Hillside Board of Education, Union County,
Respondent

I. Procedural History

This matter arises from a Complaint that was filed on July 23, 2019, by Juan Allende (Complainant), alleging that Calvin Lofton (Respondent), a member of the Hillside Board of Education (Board), violated the School Ethics Act (Act), *N.J.S.A.* 18A:12-21 *et seq.* More specifically, the Complaint alleges that Respondent violated *N.J.S.A.* 18A:12-24.1(g) of the Code of Ethics for School Board Members (Code) in Count 1, and violated *N.J.S.A.* 18A:12-24.1(d) of the Code in Count 2.

On July 24, 2019, the Complaint was served on Respondent, via regular and certified mail, notifying him that charges were filed against him with the School Ethics Commission (Commission), and advising that he had twenty (20) days to file a responsive pleading. On August 12, 2019, Respondent filed a Motion to Dismiss in Lieu of Answer (Motion to Dismiss), and also alleged that the Complaint is frivolous. As of the date of this decision, and even though the Commission sent correspondence to Complainant dated September 11, 2019, and September 27, 2019, advising him of the need to file a response, Complainant failed to file a response to the Motion to Dismiss and allegation of frivolous filing.

The parties were notified by correspondence dated October 11, 2019, that this matter would be placed on the Commission's agenda for its meeting on October 21, 2019, in order to make a determination regarding the Motion to Dismiss and allegation of frivolous filing. Unfortunately, the Commission did not have a quorum for its meeting on October 21, 2019, and, therefore, the parties were advised that the above-captioned matter would be re-docketed for the Commission's meeting on November 19, 2019. At its meeting on November 19, 2019, the Commission considered the filings in this matter and, at its meeting on December 17, 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 Respondent violated *N.J.S.A.* 18A:12-24.1(g) as alleged in Count 1 and/or violated *N.J.S.A.* 18A:12-24.1(d) as argued in Count 2. The Commission also voted to find the Complaint not frivolous, and to deny Respondent's request for sanctions.

II. Summary of the Pleadings

A. *The Complaint*

In **Count 1**, Complainant states that on March 13, 2019, Respondent sent “a sworn statement of privileged information relating to an open litigation matter” to the attorney representing the Petitioner in that matter, and who is a “direct adversary to the Board.” Complainant contends that Respondent “had specific and direct knowledge of the lawsuit filed by the Petitioner and that he was represented,” as “this was information provided directly to all Board members.” According to Complainant, “[a]ny communications that a Board member has with an adversary or an adversary’s Counsel with regard to open litigation matters is strictly prohibited and is in direct conflict with holding all matters confidential which pertain to the school, that if disclosed, would injure the schools or individuals in the school community.” Based on these facts, Complainant alleges that Respondent violated *N.J.S.A. 18A:12-24.1(g)* because he was aware of the litigation, knew that the Petitioner was represented by counsel, and was “fully aware that the contents of the communication that he provided [to counsel] was information that he could only possess as a Board member.” Complainant further argues that, “Board members as individuals, do not have the right to waive confidentiality and privileged items, as such privilege runs with the Board, and not any one individual Board member.” Complainant additionally notes that, because Respondent has a relative employed in the Hillside School District (District), he has a conflict of interest in all matters involving the Superintendent (the Petitioner in the litigation). Therefore, “any admission stemming from his March 13, 2019, sworn statement regarding the specifics of the underlying litigation...is an ethical violation, even if he abstained from a vote related to this topic.”

In **Count 2**, Complainant asserts that Respondent “excuses himself from both executive session and the public portion of meetings prior to the conclusion of executive session and the voting in the public portion of the meetings.” According to Complainant, in doing so, Respondent is “not carrying out his duties as a Board [m]ember to remain present for the [B]oard meetings and complete each meeting until the end and cast his votes.” Complainant further asserts excusing himself “is not in line with either the spirit or the letter of the rules for [B]oard members and leaves his remaining [B]oard members to complete the task of conducting and carrying out [B]oard business.” Based on these facts, Complainant asserts Respondent violated *N.J.S.A. 18A:12-24.1(d)* because the schools cannot “be well run if the [B]oard members are not committed to conducting the [B]oard business diligently and consistently.”

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

Following receipt of the Complaint, Respondent filed a Motion to Dismiss and allegation of frivolous filing. Respondent denies communicating with or sending the letter to counsel, and states that the sworn statement referenced by Complainant was prepared in connection with “separate ethics charges and litigation,” and contained public information from the Board’s meeting on November 29, 2018. At the meeting on November 29, 2018, the following facts were “stated verbally and on the Agenda”: 1. Respondent was a member of the Board; 2. Under the labor relations committee, there was a resolution to approve a new employment

contract for the Superintendent; 3. The proposed contract was previously reviewed and approved by the Interim Executive County Superintendent (ECS); 4. The ECS communicated with the Board through the Board's attorney; 5. Once the final authorization was received from the ECS, it was presented to the Board for consideration; and 6. Respondent abstained from the vote.

In January 2019, "separate ethics charges and litigation" were brought with respect to the November 29, 2018, actions, specifically with respect to the new contract for the Superintendent. To memorialize the Board's recollection of the actions that occurred on November 29, 2018, Board members – including Respondent – prepared sworn statements. The sworn statement prepared by Respondent contained information "straight from the November 29, 2018, public agenda/meeting." When comparing the sworn statement to the Board's agenda (from the November 29, 2018, meeting), "it is obvious that [Respondent] never divulged privileged or confidential information," and the public agenda "demonstrates that there could be no ethical violation based on the sworn statement." As such, there are no facts offered in the Complaint to support the allegation that Respondent somehow compromised the Board by reciting known public facts.

Respondent did not address the factual assertions in Count 2 and/or the alleged violation of *N.J.S.A.* 18A:12-24.1(d) as part of his Motion to Dismiss.

Finally, Respondent asserts the Complaint is frivolous because "Complainant's bad faith and knowledge that the complaint was without any reasonable bases in law or equity are evident by his manipulation of the facts in an effort to allege violations under the [Act]," and Complainant should have known that the allegations were without any reasonable basis in law or equity. Therefore, Respondent requests sanctions be imposed on Complainant.

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

As of the date of this decision, and even though the Commission sent correspondence to Complainant dated September 11, 2019, and September 27, 2019, advising him of the need to file a response, Complainant failed to file a response to the Motion to Dismiss and allegation of frivolous filing.

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 Respondent violated *N.J.S.A.* 18A:12-24.1(g) as alleged in Count 1 and/or violated *N.J.S.A.* 18A:12-24.1(d) as argued in Count 2.

B. *Alleged Code Violations*

In the Complaint, Complainant alleges that Respondent violated *N.J.S.A.* 18A:12-24.1(g) in Count 1, and violated *N.J.S.A.* 18A:12-24.1(d) in Count 2. These provisions of the Code provide:

d. 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.

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.

Count 1

In **Count 1**, Complainant alleges that Respondent violated *N.J.S.A.* 18A:12-24.1(g) because he sent “a sworn statement of privileged information relating to an open litigation matter” to the attorney representing the Petitioner in that matter, and who is a “direct adversary to the Board.” Complainant continues, “[a]ny communications that a Board member has with an adversary or an adversary’s Counsel with regard to open litigation matters is strictly prohibited and is in direct conflict with holding all matters confidential which pertain to the school, that if disclosed, would injure the schools or individuals in the school community.”

Respondent denies communicating with or sending the letter to counsel, represents that the sworn statement was prepared in connection with “separate ethics charges and litigation,” and states that the sworn statement contained public information from the Board’s “open public meeting” on November 29, 2018. As such, Respondent denies divulging privileged or confidential information in violation of *N.J.S.A.* 18A:12-24.1(g).

As set forth in *N.J.A.C.* 6A:28-6.4(a)(7), factual evidence of a violation of the confidentiality provision of *N.J.S.A.* 18A:12-24.1(g) shall include evidence that 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. Factual evidence that Respondent violated the inaccurate information provision of *N.J.S.A.* 18A:12-24.1(g) shall include evidence that substantiates the inaccuracy of the information provided by Respondent and evidence that establishes that the inaccuracy was other than reasonable mistake or personal opinion or was not attributable to developing circumstances.

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 Respondent violated *N.J.S.A.* 18A:12-24.1(g). Although Complainant claims that Respondent disclosed confidential information (“a sworn statement of privileged information” relating to “an open litigation matter”), he did not specifically explain which part(s) of the “sworn statement” was confidential, or the authority for his position that the information was, as asserted, actually

confidential. Moreover, while Complainant claims that the “sworn statement” was sent directly to an attorney representing an adversary to the Board, and that the “sworn statement” was “specifically addressed” to the attorney, a review of the letter does not corroborate these assertions. In fact, there is no reference to an attorney, to any extent, in Respondent’s “sworn statement.” Finally, there is nothing in the Complaint which contends, or insinuates, that the information provided by Respondent was inaccurate. Therefore, the Commission finds that the alleged violation of *N.J.S.A.* 18A:12-24.1(g) in Count 1 should be dismissed.

Count 2

In **Count 2**, Complainant argues that because Respondent “excuses himself from both executive session and the public portion of meetings prior to the conclusion of executive session and the voting in the public portion of the meetings,” he is “not carrying out his duties as a Board [m]ember to remain present for the [B]oard meetings and complete each meeting until the end and cast his votes.” As a result, Complainant argues that Respondent violated, and continues to violate, *N.J.S.A.* 18A:12-24.1(d) because the schools cannot “be well run if the [B]oard members are not committed to conducting the [B]oard business diligently and consistently.”

Respondent did not address the factual assertions in Count 2 and/or the alleged violation of *N.J.S.A.* 18A:12-24.1(d) as part of his Motion to Dismiss.

Pursuant to *N.J.A.C.* 6A:28-6.4(a)(4), factual evidence of a violation of *N.J.S.A.* 18A:12-24.1(d) shall include, but not be limited to, evidence that Respondent 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 or charter school.

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 Respondent violated *N.J.S.A.* 18A:12-24.1(d). In connection with this Count, and despite being required by *N.J.A.C.* 6A:28-6.4(a)(4), Complainant has not offered any facts which establish, or imply, that Respondent gave a direct order to school personnel, or that he became directly involved in (a) activities or functions that are the responsibility of school person (b) the day-to-day administration of the school district. Instead, the facts suggest that Respondent, for reasons which are unclear, is not fulfilling the full breadth of his duties and responsibilities as a Board member. Although such actions are lamentable, if true, they are insufficient to serve as a basis for an ethics violation. As a result, the Commission finds that the alleged violation of *N.J.S.A.* 18A:12-24.1(d) in Count 2 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 Respondent violated *N.J.S.A.* 18A:12-24.1(g) as alleged in Count 1 and/or violated *N.J.S.A.* 18A:12-24.1(d) as argued in Count 2.

IV. Request for Sanctions

At its meeting on November 19, 2019, the Commission considered Respondent's request that the Commission find the Complaint frivolous, and impose sanctions pursuant to *N.J.S.A.* 18A:12-29(e). Despite Respondent's 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 December 17, 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 Respondent violated *N.J.S.A.* 18A:12-24.1(g) as alleged in Count 1 and/or violated *N.J.S.A.* 18A:12-24.1(d) as argued in Count 2. The Commission also voted to find that the Complaint is not frivolous, and to deny Respondent's request for sanctions.

Pursuant to *N.J.S.A.* 18A:12-29(b), the Commission hereby notifies Complainant and Respondent 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: December 18, 2019

***Resolution Adopting Decision
in Connection with C52-19***

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

Whereas, at its meeting on November 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 Respondent violated *N.J.S.A.* 18A:12-24.1(g) as alleged in Count 1 and/or violated *N.J.S.A.* 18A:12-24.1(d) as argued in Count 2; and

Whereas, at its meeting on November 19, 2019, the Commission discussed finding the Complaint not frivolous, and denying Respondent's request for sanctions; and

Whereas, at its meeting on December 17, 2019, the Commission reviewed and voted to approve the within decision as accurately memorializing its actions/findings from its meeting on November 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 December 17, 2019.

Kathryn A. Whalen, Director
School Ethics Commission