

***Before the School Ethics Commission
Docket No.: C48-20
Decision on Motion to Dismiss***

**Leena Saini,
Complainant**

v.

**Peter Tufano,
Monroe Township Board of Education, Middlesex County,
Respondent**

I. Procedural History

This matter arises from a Complaint that was filed on August 17, 2020, by Leena Saini (Complainant), alleging that Peter Tufano (Respondent), a member of the Monroe Township 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(b).

On August 20, 2020, the Complaint was served on Respondent, via electronic 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.¹ On September 25, 2020, Respondent filed a Motion to Dismiss in Lieu of Answer (Motion to Dismiss), and on October 13, 2020, Complainant filed a response to the Motion to Dismiss.

The parties were notified by correspondence dated November 16, 2020, that this matter would be placed on the Commission's agenda for its meeting on November 24, 2020, in order to make a determination regarding the Motion to Dismiss. At its meeting on November 24, 2020, the Commission considered the filings in this matter and, at its meeting on December 22, 2020, the Commission voted to grant the Motion to Dismiss in its entirety because, even if timely filed and within the Commission's jurisdiction to adjudicate, Complainant failed to plead sufficient, credible facts to support a finding that Respondent violated *N.J.S.A.* 18A:12-24.1(b) as contended in the Complaint.

II. Summary of the Pleadings

A. The Complaint

Complainant states that "on or about June 9, 2020," an article was published about Respondent "highlight[ing] the ongoing racist, sexist and misogynistic comments" that he (Respondent) regularly posts on social media. More specifically, and by way of example,

¹ Due to the ongoing Coronavirus (COVID-19) pandemic, service of process was effectuated by the Commission through electronic transmission only.

Respondent has referred to the State Attorney General as “turban man,” and has stated, in response to the “Black Lives Matter” movement, “[Y]ou should teach kids to remain silent on their opinions and views for the future.” Complainant notes, “There are hundreds of statements made by [Respondent] on social media, too many to reference here,” but the tenor of his remarks is usually “vulgar, racist sexist and beyond unprofessional for” a Board member. According to Complainant, Respondent “does not deny engaging in this type of language when interacting with others.” In addition, at a Board meeting on July 22, 2020, Respondent admitted to using unprofessional language on social media, but refused to apologize for his “behavior and beliefs, and refused to accept responsibility for his “racist, vulgar and hurtful language.” Although the Board President reprimanded Respondent, he refused to resign from the Board.

Based on these facts, Complainant contends that Respondent violated (and continues to violate) *N.J.S.A.* 18A:12-24.1(b) because his “outright racist attitude” prohibits him from making decisions for the “educational welfare of children ... regardless of race, creed, sex or social standing.” Although she (Complainant) acknowledges that everyone enjoys the right to free speech, Complainant contends that “there are limits” on free speech as “[h]ate speech, bullying, [and] words that incite violence are not protected by the First Amendment.” Therefore, Complainant requests that the Commission find that Respondent violated the Act, and “subject [him] to such penalty as provided by the Act.”

B. Motion to Dismiss

Following receipt of the Complaint, Respondent filed a Motion to Dismiss and notes, “It is axiomatic that a person must be a school board member to violate the [Act].” Respondent, who was sworn-in as a Board member on January 3, 2019, argues that at the July 22, 2020, Board meeting, he acknowledged that he was “not proud of the words [he] used,” but his comments were made *prior* to his election to the Board. Respondent further argues that the “turban man” comment was made several years prior to his election to the Board, and even if he could be held accountable for comments he made before he was a Board member, the 180-day statute of limitations has passed. Furthermore, Respondent notes his comment about “...teach kids to remain silent” was also made *prior* to his election to the Board and, therefore, “is not actionable.”

Even if action can be taken against Respondent for comments he made *before* he was a school official, he (Respondent) argues that Complainant did not provide any evidence that Respondent took any action or voted “contrary to the educational welfare of children.” According to Respondent, Complainant just makes assertions that Respondent’s comments, which were made prior to his election to the Board, violate the Act because they are “vulgar, racist, sexist, or unprofessional”; however, Complainant did not provide “any specific decision or action, such as a motion, directive, disclosure, or other [Board] deed that impacted or could have impacted the educational welfare of children.” Respondent further maintains that Complainant did not provide any evidence to support that Respondent “acted on behalf of a special interest or for his personal or familial interest as opposed to the general educational welfare of children.”

Respondent argues that his comments, when viewed in their full context, were made during “heated exchanges regarding political issues.” Furthermore, his comments, “even if disagreeable and offensive ... were articulations of political speech entitled to the greatest

protection under the Constitution.” Respondent further argues he posted his statements in response to other negative comments made by individuals that he was engaged with on social media, and neither the statements nor the exchange involved “Board employees, students or other Board members as has been the case where social media posts have been found to violate the [Act].” Respondent asserts that he “should certainly not be punished on an ex post facto basis” because his “First Amendment protected speech” occurred prior to his election to the Board. Respondent further asserts that although Complainant believes Respondent is “unfit to serve” on the Board because of his beliefs, he was “lawfully elected” *even* after he made the complained-of statements, and there is nothing in the Complaint which takes issue with Respondent’s actions (or comments) while he was a Board member. Therefore, Respondent “respectfully requests that the Commission” grant his Motion to Dismiss.

C. Response to Motion to Dismiss

In response to the Motion to Dismiss, Complainant notes, “It is unnerving that Respondent explains away his racist comments by asserting that it was his First Amendment right to do so.” Complainant maintains that although Respondent has the right to free speech, “that right is not absolute.” Complainant argues, contrary to Respondent’s assertion that he made the inappropriate statements before he was a member of the Board, Respondent’s “racist attitudes are alive and well, even as of this writing.” According to Complainant, “this past week alone, Respondent referred to an African-American woman as a ‘rat.’” Complainant further argues, “how can a [Board] member with racist attitudes be competent or trustworthy when it comes to making decisions for a school district that is half full of minorities?” Complainant maintains that the Act was “put in place to combat the very behavior and speech Respondent has engaged in and continues to engage in.” According to Complainant, “[t]here is no reasonable argument in the law or otherwise that continued bullying, racial and hateful speech is ethical for any [Board] member.” Complainant asserts that Board members “must not act in a way that violates the public trust and/or compromises their ability to equally apply school standards to all students.” Complainant further asserts Respondent’s “hateful speech” is unethical and, therefore, the Motion to Dismiss should be denied.

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(b)* as asserted in the Complaint.

B. Alleged Untimeliness

In his Motion to Dismiss, Respondent preliminarily argues that the Complaint is time barred because the social media posts/comments in question were made “3-4 years ago,” which was prior to the time he was elected to the Board. Complainant counters that Respondent’s “racist attitudes are alive and well, even as of this writing,” and “this past week alone, Respondent referred to an African-American woman as a ‘rat.’”

The Commission’s regulations provide a one hundred eighty (180) day limitation period for filing a complaint. More specifically, *N.J.A.C. 6A:28-6.5(a)* provides, in relevant part:

- 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* (emphasis added).

Pursuant to *N.J.A.C. 6A:28-6.5(a)*, the Commission must determine when Complainant knew of the events which form the basis of her Complaint, or when such events were made public so that one using reasonable diligence would know, or should have known, of such events. In its review of the pleadings, the Commission finds that Complainant knew of the events that form the basis of her Complaint on the date/day that New Jersey Advance Media published a news article about Respondent, which was on June 9, 2020. Importantly, although the Exhibits/evidence offered by the parties show the alleged month(s) and numerical day(s) that the posts/comments were made, e.g., July 26, there are no years associated with the posts/comments. Therefore, the Commission is unable to determine whether the posts occurred in 2020, or “3-4 years ago” as argued by Respondent.

With the above in mind, and because Complainant filed her Complaint on August 17, 2020, one hundred eighty (180) days prior thereto is **February 19, 2020**. Because the news article discussing Respondent was posted/made public on June 9, 2020, and there is no evidence in the current record which would support Respondent’s argument that the posts/comments were made several years prior to the filing of the Complaint, the Commission finds that the Complaint was timely filed on August 17, 2020. However, and of note, to the extent that Respondent could prove that the complained of posts/comments on social media actually occurred “3-4 years ago” and were common/public knowledge, a fact which is presently disputed based on the current record, it would agree that the allegations in the Complaint were untimely filed and, on that basis, should be dismissed. In addition, to the extent that Respondent could prove that *all* of the complained of posts/comments on social media occurred before he was elected to serve as a member of the Board, a fact which is not clear based on the current record, it would also agree that it would not have jurisdiction over the claims set forth in the Complaint.

C. Alleged Code Violations

In her Complaint, Complainant argues that Respondent violated *N.J.S.A.* 18A:12-24.1(b). This provision of the Code provides:

- b. I will make decisions in terms of the educational welfare of children and will seek to develop and maintain public schools that meet the individual needs of all children regardless of their ability, race, creed, sex, or social standing.

According to Complainant, Respondent's "racist, vulgar and hurtful" posts/comments on social media violate *N.J.S.A.* 18A:12-24.1(b) because his "outright racist attitude" prohibits him from making decisions for the "educational welfare of children ... regardless of race, creed, sex or social standing." Respondent counters that Complainant did not provide any evidence that Respondent took any action or voted "contrary to the educational welfare of children." More specifically, Complainant did not provide "any specific decision or action, such as a motion, directive, disclosure, or other [Board] deed that impacted or could have impacted the educational welfare of children."

Pursuant to *N.J.A.C.* 6A:28-6.4(a)(2), factual evidence of a violation of *N.J.S.A.* 18A:12-24.1(b) shall include evidence that Respondent willfully made a decision contrary to the educational welfare of children, or evidence that Respondent took deliberate action to obstruct the programs and policies designed to meet the individual needs of all children, regardless of their ability, race, color, creed or social standing.

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(b). Even if Respondent's posts/comments on social media were made in his capacity as a Board member, his posts/comments do not constitute a *decision(s)* related to the Board and/or the business of the Board or the Monroe Township School District (District), and/or *action* that obstructed the District's programs and policies. In this regard, Complainant does not cite to a particular decision(s) that Respondent made which was contrary to the educational welfare of children, and does not refer to a specific action(s) that obstructed policies or programs; instead, Complainant submits that Respondent's "outright racist attitude" prohibits him, *generally*, from making decisions and taking actions, which will benefit the entire student body. However, absent the establishment of a nexus between Respondent's posts/comments on social media and an actual - not theoretical - decision(s) or action(s), the Commission finds that the alleged violation of *N.J.S.A.* 18A:12-24.1(b) 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(b) as contended in the Complaint.

Although the Commission is constrained to dismiss the above-captioned matter, it would be remiss if it did not address the completely offensive, callous, insensitive, and wholly inappropriate language used by Respondent, a publicly elected school official. Assuming Respondent's statements were made in his capacity as a Board member, and regardless of whether Respondent was "defending" himself or exchanging in-kind insults with other members

of the public, Respondent is still a publicly elected school official who is charged with serving, among other things, the educational needs of a diverse, dynamic, and multifaceted student population. Public words, which derogate from the mission of a board of education serve no purpose, create unnecessary hostility and animosity within a community, and ultimately have the greatest detrimental impact on the very people that Respondent is tasked to serve – the students. Although the Commission acknowledges the sanctity of the First Amendment, words that deliberately cause divisiveness should have no place in the educational setting.

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, even if timely filed and within the Commission’s jurisdiction to adjudicate, Complainant failed to plead sufficient, credible facts to support a finding that Respondent violated *N.J.S.A.* 18A:12-24.1(b) as asserted in the Complaint.

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 22, 2020

***Resolution Adopting Decision
in Connection with C48-20***

Whereas, at its meeting on November 24, 2020, 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 November 24, 2020, the Commission discussed granting the Motion to Dismiss in its entirety because, even if timely filed and within the Commission's jurisdiction to adjudicate, Complainant failed to plead sufficient, credible facts to support the allegations that Respondent violated *N.J.S.A.* 18A:12-24.1(b) as argued in the Complaint; and

Whereas, at its meeting on December 22, 2020, the Commission reviewed and voted to approve the within decision as accurately memorializing its actions/findings from its meeting on November 24, 2020; 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 22, 2020.

Kathryn A. Whalen, Director
School Ethics Commission