

Before the School Ethics Commission
Docket No.: C27-21
Decision on Motion to Dismiss

Todd Najarian,
Complainant

v.

Michael D'Aquila,
Berkeley Heights Board of Education, Union County,
Respondent

I. Procedural History

This matter arises from an amended Complaint that was filed on July 26, 2021, by Todd Najarian, (Complainant), alleging that Michael D'Aquila (Respondent), a member of the Berkeley Heights Board of Education (Board), violated the School Ethics Act (Act), *N.J.S.A. 18A:12-21 et seq.* The Complaint avers that Respondent violated *N.J.S.A. 18A:12-24.1(c)* and *N.J.S.A. 18A:12-24.1(d)* of the Code of Ethics for School Board Members (Code).

On July 26, 2021, the Complaint was served on Respondent, by electronic mail, notifying Respondent that charges were filed with the School Ethics Commission (Commission), and advising that Respondent had twenty (20) days to file a responsive pleading.¹ On August 19, 2021, Respondent filed a Motion to Dismiss in Lieu of Answer (Motion to Dismiss), and on September 8, 2021, Complainant filed a response to the Motion to Dismiss.

On November 9, 2021, the parties were subsequently notified that this matter would be placed on the Commission's agenda for its meeting on November 16, 2021, to decide Respondent's Motion to Dismiss. At its meeting on November 16, 2021, the Commission considered the filings in this matter, including whether Complainant has pleaded sufficient, credible facts to support a finding that Respondent violated *N.J.S.A. 18A:12-24.1(c)* and *N.J.S.A. 18A:12-24.1(d)*.

A. *Alleged Code Violations*

In the Complaint, Complainant contends that Respondent violated *N.J.S.A. 18A:12-24.1(c)* and *N.J.S.A. 18A:12-24.1(d)*. The relevant provisions of the Code are as follows:

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

c. 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.

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.

B. *Jurisdiction of the Commission*

In reviewing the allegations in this matter, the Commission notes that its authority is limited to enforcing the Act, *N.J.S.A.* 18A:12-21 *et seq.*, a set of minimum ethical standards by which all school officials must abide. In this regard, the Commission has jurisdiction only over matters arising under the Act, and it may not receive, hear, or consider any matter that does not arise under the Act, *N.J.A.C.* 6A:28-1.4(a).

II. Summary of the Pleadings

A. *The Complaint*

Complainant alleges Respondent violated certain provisions of the School Ethics Act given Respondent's role as a member of Board's Finance and Facilities Committee, which is charged with the planning of the District's construction projects. According to Complainant, Respondent emailed the District's Business Administrator (BA) during the day, copied two other Board members and requested the BA contact the District's architect regarding potential construction projects to be undertaken by the District, rather than discuss at a meeting of the full Board. Complainant contends that Respondent violated the Act because Respondent's actions were not limited to policy making and attempted to administer the schools rather than seeing that they are well run.

B. *Motion to Dismiss*

Following receipt of the Complaint, Respondent filed a Motion to Dismiss and stated that he is a member of the Board's Finance and Facilities Committee (Committee), which is tasked with planning District construction projects. Respondent also stated that he sent the email in question at the Superintendent's request given his role as a member of the Committee but also due to his experience and knowledge of facility construction. Respondent also stated that he sent the email in question to the BA one day before the Committee was scheduled to meet to among other things, discuss and plan for District construction projects that were delayed due to the COVID-19 pandemic.

C. *Response to Motion to Dismiss*

In response to the Motion to Dismiss, Complainant alleged there was no evidence that the Superintendent authorized Respondent to send his email to the BA and that the email to the BA, concerning contact with the District's architect, should have come from the Superintendent. Further, Complainant argues Respondent should have discussed the contents of his email –

planning for upcoming construction projects – at a public meeting of the Board because the public was not previously aware of plans to reconfigure a District school building for full-day Kindergarten.

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 asserted sufficient facts which, if true, could support a finding that Respondent violated *N.J.S.A. 18A:12-24.1(c)* and *N.J.S.A. 18A:12-24.1(d)*.

As set forth in *N.J.A.C. 6A:28-6.4(a)(3)*, 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.

Here, Complainant claims that when Respondent emailed the BA on February 8, 2021, with two other Board members copied, Respondent requested that the BA contact “the architect to get a preliminary schedule” to begin construction in the District. According to Complainant, Respondent’s actions went beyond policy making, planning, and appraisal. Specifically, Complainant argues the email to the BA requesting or directing the BA to communicate with the District’s architect on planned or pending construction projects should have come from the Superintendent, not Respondent. Additionally, Complainant argues Respondent should have discussed the matter of communication with the BA, and subsequent communication with the District’s architect, at a Board meeting rather than in an email. As such, Complainant argues Respondent’s actions were in violation of *N.J.S.A. 18A:12-24.1(c)*.

In response and as part of the Motion to Dismiss, Respondent argues he is a member of the Board’s Finance and Facilities Committee, which is tasked with the planning of the District’s construction projects. Respondent also states that he has “relevant experience and knowledge” concerning facility construction, and emailed the BA at the request of the Superintendent. Respondent contends that he made the suggestions in the email, based on his “experience and knowledge, of the construction and design components of the Board’s planning” and he was acting “in concert with the wishes of his fellow Board members.” Respondent argues the “entirety of the email pertains to planning and the suggested acquisition of information that

would assist the Board and the Administration with its planning”; and “indisputably represents an effort at assisting with the framing of plans, and nothing more.” As such, Respondent contends his actions were not in violation of *N.J.S.A.* 18A:12-24.1(c).

After a review of this alleged violation as pled in the Complaint, the Commission determines that even if the facts as argued are proven true by sufficient credible evidence, they would not support a finding that Respondent’s email to the BA – emailed during the day and not during a meeting of the Board – requesting the BA communicate with the District’s architect to “get a preliminary schedule” of District construction projects violated *N.J.S.A.* 18A:12-24.1(c). Therefore, the alleged violation of *N.J.S.A.* 18A:12-24.1(c) should be dismissed.

As set forth in *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 the respondent(s) 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.

Here, Complainant contends that Respondent violated this provision of the Act because his direction to the BA is an attempt to administer the schools instead of seeing that they are well run. Complainant contends that because Respondent sent the email during the day, which “did not take place during a Board meeting ... where he could have gained the consent of the other Board members.” and, therefore, pursuant to/as it relates to *N.J.S.A.* 18A:12-24.1(d) “together with my fellow board members” “can be interpreted to mean that actions taken outside a Board meeting are not allowed when giving directions to a school administrator” as opposed to during a Board meeting when Respondent could have discussed the matter with and obtained consent from his fellow Board members.

In response and as part of the Motion to Dismiss, Respondent contends that given the District’s construction project planning and attendant delays as a result of COVID-19, combined with Respondent’s role on the District’s Facilities Committee and the BA’s role as liaison between the Board and the architect, “no reasonable fact finder could construe the language of the email as in any way directing the BA or administering the schools.” Respondent further argues his email to the BA was “clearly made in the context of helping the BA develop a plan...” and was “formulated and forwarded to help in the development of plans in accordance with the goals and participation of his fellow [B]oard members.”

After a review of this alleged violation as pled in the Complaint, the Commission determines that even if the facts as argued are proven true by sufficient credible evidence, they would not support a finding that Respondent acted in violation of *N.J.S.A.* 18A:12-24.1(d). Therefore, the alleged violation of *N.J.S.A.* 18A:12-24.1(d) should be dismissed.

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 Respondent violated *N.J.S.A.* 18A:12-24.1(c) and *N.J.S.A.* 18A:12-24.1(d).

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 14, 2021

***Resolution Adopting Decision
in Connection with C27-21***

Whereas, at its meeting on November 16, 2021, 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 16, 2021, 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(c) and *N.J.S.A.* 18A:12-24.1(d); and

Whereas, at its meeting on December 14, 2021, the Commission reviewed and voted to approve the within decision as accurately memorializing its actions/findings from its meeting on November 16, 2021; 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 14, 2021.

Salma T. Chand, Executive Director
School Ethics Commission