

Before the School Ethics Commission
Docket No.: C73-20
Decision on Motion to Dismiss

Kathleen Donohue,
Complainant

v.

Eileen Shafer, Sandra Mickens, and Luis Rojas,
Paterson Board of Education, Passaic County,
Respondents

I. Procedural History

This matter arises from a Complaint that was filed on November 13, 2020, by Kathleen Donohue (Complainant), alleging that Eileen Shafer (Respondent Shafer), Sandra Mickens (Respondent Mickens), and Luis Rojas (Respondent Rojas) (collectively referred to as Respondents), administrators employed by the Paterson Board of Education (Board), violated the School Ethics Act (Act), *N.J.S.A.* 18A:12-21 *et seq.* By correspondence dated November 16, 2020, Complainant was notified that the Complaint was deficient, and required amendment before the School Ethics Commission (Commission) could accept her filing. On January 15, 2021, 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).

On January 22, 2021, the Complaint was served on Respondents, via electronic 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.¹ On March 11, 2021, Respondents filed a Motion to Dismiss in Lieu of Answer (Motion to Dismiss), and also alleged that the Complaint is frivolous. On April 6, 2021, Complainant filed a response to the Motion to Dismiss and allegation of frivolous filing.

The parties were subsequently notified by correspondence dated April 19, 2021, that this matter would be placed on the Commission's agenda for its meeting on April 27, 2021, in order to make a determination regarding the Motion to Dismiss and allegation of frivolous filing. At its meeting on April 27, 2021, the Commission considered the filings in this matter and, at its meeting on May 25, 2021, the Commission voted to grant the Motion to Dismiss in its entirety because the Complaint was not timely filed. The Commission also voted to find that the Complaint is not frivolous, and to deny Respondents' request for sanctions.

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

II. Summary of the Pleadings

A. *The Complaint*

Complainant states she was a teacher in the Paterson Public School District (District) for 30 years and, “during most of those years,” the District employed individuals to serve as “support teachers.” According to Complainant, Respondent Mickens was Complainant’s building principal from approximately 1998 to 2016, and she used the support teachers, who Complainant refers to as “Friends of [the] Principal [(FsOP)],” to do everything *except* support the teachers. More specifically, Complainant asserts that Respondent Mickens used the support teachers to make coffee, plan parties, and to collect picture money and, in return, they were “treated with favoritism.” According to Complainant, if she complained that the support teachers were not assisting her (Complainant) in her classroom, then she would receive a “fake” corrective action plan (CAP) and a “bogus evaluation” that reflected the CAP. Complainant asserts that, despite not providing any support within Complainant’s classroom, the support teachers were given “exemplary” evaluations and received a paycheck, which Complainant alleges is “fraud.”

After she retired, and because she was told there “would be retribution if [she] had requested it when [she] was still working,” Complainant submitted an Open Public Records Act (OPRA) request to Respondent Rojas, Assistant Superintendent of Schools, for the evaluation of Christine Shadiack, one of the support teachers who received “great evaluations without doing her job.” Respondent Rojas subsequently emailed a copy of Ms. Shadiack’s “EXEMPLARY EVALUATION, that is, of course, **completely fake!!**” Receiving the evaluation confirmed for Complainant what she already knew – Ms. Shadiack received exemplary reviews for doing nothing because she was an FOP. This fraud and corruption, according to Complainant, “was orchestrated by the principal [Respondent Mickens] and other administrators [Respondent Rojas and Respondent Shafer].” Complainant later requested, by way of OPRA requests, additional evaluations for other FsOP, but was advised by the OPRA custodian (on June 4, 2020), that such evaluations were confidential and would not be disclosed.

With the above in mind, Complainant asserts that Respondents violated *N.J.S.A. 18A:12-24(b)* because Respondent Mickens submitted “FAKE evaluations” for certain support teachers for over 20 years, namely, Ms. Shadiack, and she provided Ms. Shadiack with “unwarranted privileges and advantages,” such as higher paychecks and pensions.

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

Following receipt of the Complaint, Respondents filed a Motion to Dismiss and allegation of frivolous filing and argue that the Complaint must be dismissed as untimely because it was not filed within 180 days of notice of the events which form the basis of the alleged violations; there are no factual allegations asserted against Respondent Shafer; Respondent Rojas’ response to Complainant’s OPRA request in 2018 is not a cognizable violation of *N.J.S.A. 18A:12-24(b)*; Respondent Mickens is not a school employee and, therefore, is not subject to the Act (she retired in 2019); and the “favoritism” that Respondent Mickens allegedly bestowed on certain District staff members prior to 2015 is not a cognizable violation of *N.J.S.A. 18A:12-24(b)*. As such, Respondents request that the Commission find the Complaint frivolous, and impose the maximum monetary sanction allowable.

Regarding the untimeliness of the Complaint, Respondents note that “[t]he pleaded ethical violations are premised on Complainant’s allegation that[,] prior to her retirement in 2015, her former building principal (Respondent ... Mickens) showed ‘favoritism’ toward other teachers.” Of note, Complainant filed similar claims in multiple petitions with the Commissioner of Education following her retirement, all of which were dismissed in May 2017. Despite the substance of her allegations, Complainant claims that the alleged violation(s) of the Act occurred in “June 2020.” However, “the **only** event allegedly occurring in June 2020 was the District’s denial of an [OPRA] request made by Complainant for certain staff members’ evaluations on June 4, 2020.” Furthermore, it was “the District’s Assistant General Counsel,” and not any named Respondent, who denied Complainant’s OPRA request.

Instead, Respondents argue that “the substance of Complainant’s allegations far predate June 2020,” and actually occurred while Complainant was employed in the District. Because Complainant retired from the District in **December 2015**, and even if the Complaint included any cognizable violation of the Act (which it does not), Respondents submit that the Complaint is untimely by “**many** years,” and should be dismissed.

Furthermore, Respondents maintain that the Complaint should be dismissed because Complainant failed to “allege any cognizable violation of *N.J.S.A.* 18A:12-24(b) by any of the Respondents.” More specifically, although Respondent Shafer is named as a Respondent, the Complaint “does not include any specific factual allegation” against her, she is “not identified or referenced on a single page of the Complaint or its attachments,” and there is “no allegation that [Respondent] Shafer did anything, let alone that she used or attempted to use her position to secure an unwarranted privilege, advantage, or employment for any individual” in violation of *N.J.S.A.* 18A:12-24(b). As for Respondent Rojas, the only facts attributed to him are that Complainant submitted an OPRA request to him on February 14, 2018, and he later replied to her request (and provided Ms. Shadiack’s evaluation). Although Respondent Rojas submits that District staff replied to Complainant on his behalf, neither “receipt of Complainant’s OPRA request nor the District’s response to the OPRA request constitutes [Respondent] Rojas using or attempting to use his official position to secure any unwarranted privileges, advantages or employment for himself” or others.

Regarding Respondent Mickens, Respondents submit that she (Respondent Mickens) is retired and, therefore, no longer subject to the Act. Moreover, Complainant asserts that Ms. Shadiack’s October 2017 evaluation, which Complainant obtained through an OPRA request, shows that Respondent Mickens “favored” Ms. Shadiack; however, Complainant was retired at that time and, therefore, would not have any personal or direct knowledge about “Ms. Shadiack’s performance during such evaluation.” In addition, the October 2017 evaluation confirms that Respondent Mickens did not conduct the evaluation; instead, it was conducted by another administrator, Vice Principal Michelle Flagg. Therefore, even if Respondent Mickens was still employed by the District, the allegations in the Complaint would not support a finding that Respondent Mickens provided any “unwarranted privileges and advantages” to Ms. Shadiack.

Finally, Respondents assert the Complaint is **frivolous** because Complainant filed it to “facilitate [a] personal grievance[] ... given its complete lack of merit, the history between Complainant and the District, and its untimeliness.” Respondents note, “This is especially true with respect to [Respondent] Shafer,” because Complainant did not allege any wrongdoing by her (Respondent Shafer). Respondents maintain this Complaint, coupled with Complainant’s previous unsuccessful Complaint filed with the Commissioner of Education, “can only be

construed as a bad faith effort by a disgruntled former District employee to harass and attempt malicious injury against” Respondents. Respondents further maintain that it is “unfortunate” that Complainant is using the Commission to continue to perpetuate “a grudge” that she has against the District and the administration, and it is “clear from Complainant’s allegations that she was and remains unhappy with the unfavorable evaluation(s) she received from [Respondent] Mickens and her perceived belief that others were treated more favorably than her.” According to Respondents, the Complaint is “simply frivolous [and] the Commission should impose the maximum fine permissible to deter yet more future frivolous filings by Complainant.”

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

In her response to the Motion to Dismiss and allegation of frivolous filing, Complainant reaffirms that Respondent Mickens “**did show** favoritism towards her [FsOP],” and Complainant’s “comments are factual.” Complainant argues, contrary to Respondent’s assertions, which are “not true,” she was employed “long before 1998.” In addition, although she requested information on Ms. Shadiack in 2018, including her evaluations/observations spanning several years, Respondent Rojas only provided Complainant with Ms. Shadiack’s 2017 observation, which was “fake.” Complainant also denies that she filed “**multiple** petitions in 2016,” and denies that she received “unfavorable” evaluations/observations. As for her Complaint being untimely, Complainant reiterates that, after receiving Ms. Shadiack’s “dishonest” evaluation, she requested evaluations/observations in June 2020 and was *then* informed that such evaluations were “private and confidential”; therefore, Complainant believes she is “within the 180-day limitation because it [was] then, that [she] knew of the events.” Complainant maintains that she is offended by Respondent’s accusations that she is “disgruntled,” and insists the Complaint is not frivolous because she does not have a “grudge” against the District. She further claims she is not “harming or harassing anyone,” and it is the District that has harmed and harassed her (Complainant).

Complainant continues, “The [D]istrict would rather defend the lies and falsehoods of the former Principal ... , then [sic] to act on the fact that her bias, prejudice, and favoritism ran rampant.” Complainant further asserts, “in [her] opinion,” based on Respondents’ positions, all three are “complicit in this regard.”

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)*.

B. *Alleged Untimeliness*

In their Motion to Dismiss, Respondents preliminarily argue that the Complaint must be dismissed as untimely because it was not filed within 180 days of notice of the events, which form the basis of the alleged violations. More specifically, because “[t]he pleaded ethical

violations are premised on Complainant's allegation that[,] prior to her retirement in 2015, her former building principal (Respondent ... Mickens) showed 'favoritism' toward other teachers," the Complaint is untimely by "**many** years." To the extent Complainant claims that the date of violation was "June 2020," Respondents submit that "the **only** event allegedly occurring in June 2020 was the District's denial of an [OPRA] request," and none of the named Respondents were involved in that denial.

In response to Respondents' allegation of untimeliness, Complainant counters that she requested information on Ms. Shadiack in 2018, including her evaluations/observations spanning several years, but was only provided with Ms. Shadiack's observation from 2017, and it was "fake." After receiving Ms. Shadiack's "dishonest" evaluation, she requested evaluations/observations in June 2020 and was *then* informed that such evaluations were "private and confidential"; therefore, Complainant believes she is "within the 180-day limitation because it [was] then [i.e., June 2020], that [she] knew of the events."

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).

As an initial matter, although Complainant did not file a Complaint that was deemed compliant with the Commission's regulations (*N.J.A.C. 6A:28-6.3*) until January 15, 2021, she filed her first deficient Complaint on November 13, 2020; therefore, and because Complainant's amendments relate back to the date her Complaint was *first* received by the Commission, the filing date in this matter is **November 13, 2020**. See *N.J.A.C. 6A:28-6.7(b)*.

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, and in construing the facts in the light most favorable to Complainant, the Commission finds that Complainant has not offered any reasonable basis upon which to believe that she (Complainant) was unaware of the facts which form the basis for her Complaint until her OPRA request was denied in "June 2020." Instead, and by Complainant's own admission, her (Complainant's) belief that Respondent Mickens used the "support teachers," or FsOP, to do everything except support the teachers, and in exchange they (the FsOP) received favorable, unwarranted, and fraudulent evaluations, was predicated on her firsthand observations of the work actually performed by the support teachers, with same occurring while Complainant was employed in the District. In essence, and because Complainant retired in 2015, her firsthand observations all had to have occurred prior to her last day of employment in 2015. As such, her filing on November 13, 2020, was nearly half a decade late.

Complainant additionally submits that, fearing retaliation and/or retribution from District administration, she was unwilling to pursue her claims until after her employment with the

District ended. Even if the Commission accepted this representation as true, Complainant received Ms. Shadiack's evaluation in 2018 and, in her (Complainant's) estimation, the evaluation was "fake." Consequently, the Commission finds that it was *at that time* that Complainant had the evidence that she needed to support her firsthand observations. Instead, and inexplicably, Complainant claims it was only after her second OPRA request was denied in June 2020, which was two years later, that she purportedly "knew" of the events which form the basis for her Complaint. In its review, and in the absence of any other reasonable or colorable explanation, the Commission determines that Complainant knew of the events that form the basis of her Complaint in 2018, which is when she received Ms. Shadiack's evaluation.

Because Complainant filed her first deficient Complaint on November 13, 2020, one hundred eighty (180) days prior thereto would be **May 15, 2020**.² Because Complainant received Ms. Shadiack's evaluation in 2018, and because there is no reasonable basis upon which the Commission should relax the time period for filing to account for the significant time lag between receipt of Ms. Shadiack's evaluation and the filing of Complainant's first deficient Complaint, the Commission finds that the Complaint was untimely filed by several years.

Even assuming, *arguendo*, that the Complaint was timely filed, and even assuming that the facts as asserted in the Complaint were proven true by sufficient credible evidence, the Commission finds the facts would not support a finding that any of the named Respondents violated *N.J.S.A. 18A:12-24(b)*. In this regard, the Commission finds that, as argued by Respondents, the Complaint does not aver that Respondent Shafer engaged in any single action, much less any specific action that could possibly be construed as a violation of the Act. In addition, the only alleged action undertaken by Respondent Rojas was providing Complainant with documents that were responsive to her OPRA request in 2018. It is inconceivable how Respondent Rojas's actions could possibly violate the Act, be perceived as unethical, and/or constitute use of his position to secure an unwarranted privilege, advantage, or employment for himself or anyone else, including the FsOP. Finally, and with regard to Respondent Mickens, the only evaluation provided by Complainant in support of her claims (regarding the FsOP) indicates that it was completed by an individual *other than* Respondent Mickens. In order to prove that the evaluations of the FsOP were "fake" and without merit as claimed, Complainant would have needed to present specific facts with corroborating evidence based on something more than her conjecture and observations. In short, even if the Complaint was timely filed, there are insufficient facts pled in the Complaint to establish that the named Respondents, either individually or collectively, violated *N.J.S.A. 18A:12-24(b)*.

Accordingly, and for the reasons set forth above, the Commission finds that the Complaint was not timely filed pursuant to *N.J.A.C. 6A:28-6.5*.

Notwithstanding the Commission's determination as set forth herein, the Commission is compelled to respond to Respondents' argument that because Respondent Mickens is no longer a "school employee," she is not subject to the Act. Although Respondent Mickens may be retired, if the Commission had found that the actions giving rise to the Complaint were timely filed, and therefore, occurred at a time when Respondent Mickens was a District administrator, her present status as a retired employee would be of no consequence. Stated differently, it is an employee's

² Technically, one hundred eighty (180) days prior to November 13, 2020, is Sunday, May 17, 2020. Therefore, and construing the facts in the light most favorable to Complainant, the Commission finds that Friday, May 15, 2020, is the appropriate date to be used in this matter.

status at the time an alleged violation of the Act occurred, and not their present employment status, that determines whether the Act applies to their conduct. While Respondent Mickens' conduct beyond 2019 may not be subject to the Act, any and all conduct that occurred prior thereto is, without equivocation, subject to the Act.

IV. Request for Sanctions

At its meeting on April 27, 2021, 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 May 25, 2021, 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 the Complaint was not timely filed. 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: May 25, 2021

***Resolution Adopting Decision
in Connection with C73-20***

Whereas, at its meeting on April 27, 2021, 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 meeting on April 27, 2021, the Commission discussed granting the Motion to Dismiss in its entirety because the Complaint was not timely filed; and

Whereas, at its meeting on April 27, 2021, the Commission discussed finding the Complaint not frivolous, and denying Respondents' request for sanctions; and

Whereas, at its meeting on May 25, 2021, the Commission reviewed and voted to approve the within decision as accurately memorializing its actions/findings from its meeting on April 27, 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 May 25, 2021.

Kathryn A. Whalen, Director
School Ethics Commission