

Before the School Ethics Commission
Docket No.: C55-21
Decision on Motion to Dismiss

Susan Morgan, Jacqueline McAlister, and Cecelia Gallelli-Keyes,
Complainants

v.

Joseph S. Clark, Jr.,
Ocean City Board of Education, Cape May County,
Respondent

I. Procedural History

The above-captioned matter arises from a Complaint that was filed on October 10, 2021, by Susan Morgan, Jacqueline McAlister, and Cecelia Gallelli-Keyes (collectively referred to as Complainants), alleging that Joseph S. Clark, Jr. (Respondent), a member of the Ocean City Board of Education (Board), violated the School Ethics Act (Act), *N.J.S.A.* 18A:12-21 *et seq.* By correspondence dated October 15, 2021, and October 28, 2021, Complainants were notified that the Complaint was deficient, and required amendment before the School Ethics Commission (Commission) could accept their filing. On November 9, 2021, Complainants 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 avers that Respondent violated *N.J.S.A.* 18A:12-24.1(a), *N.J.S.A.* 18A:12-24.1(c), *N.J.S.A.* 18A:12-24.1(d), *N.J.S.A.* 18A:12-24.1(e), and *N.J.S.A.* 18A:12-24.1(f) of the Code of Ethics for School Board Members (Code).

On November 10, 2021, the Complaint was served on Respondent via electronic mail, notifying him that charges were filed against him with the Commission, and advising that he had twenty (20) days to file a responsive pleading.¹ On December 7, 2021, Respondent filed a Motion to Dismiss in Lieu of Answer (Motion to Dismiss), and also alleged that the Complaint is frivolous. When Complainants failed to file a response to the Motion to Dismiss and allegation of frivolous filing within twenty (20) days of receipt of Respondent's filing, they were advised, by initial correspondence dated January 10, 2022, and then by subsequent correspondence dated February 4, 2022, that, in the absence of a filing, the Commission would rule on the Motion to Dismiss and allegation of frivolous filing without considering any written submission or opposition from them. Despite the Commission's efforts, Complainants never filed a response to the Motion to Dismiss and/or the allegation of frivolous filing.

¹ As a result of the ongoing Coronavirus (COVID-19) pandemic, and the implementation of electronic filing, service of process was effectuated by the Commission through electronic transmission only.

The parties were notified by correspondence dated March 14, 2022, that this matter would be discussed by the Commission at its meeting on March 22, 2022, in order to make a determination regarding the Motion to Dismiss and allegation of frivolous filing. Following its discussion on March 22, 2022, the Commission adopted a decision at its meeting on April 26, 2022, granting the Motion to Dismiss in its entirety because Complainants failed to plead sufficient, credible facts to support a finding that Respondent violated *N.J.S.A. 18A:12-24.1(a)*, *N.J.S.A. 18A:12-24.1(c)*, *N.J.S.A. 18A:12-24.1(d)*, *N.J.S.A. 18A:12-24.1(e)*, and/or *N.J.S.A. 18A:12-24.1(f)*. The Commission also adopted a decision finding the Complaint not frivolous, and denying Respondent’s request for sanctions.

II. Summary of the Pleadings

A. *The Complaint*

Complainants state that Respondent’s behavior during executive session on September 22, 2021, violated the following provisions of the Code:

- ❖ *N.J.S.A. 18A:12-24.1(a)* because, when he read a text from a Board member indicating that she could not attend a meeting, he remarked, “she’s done.” According to Complainants, this “is not a legal or ethical procedure.”
- ❖ *N.J.S.A. 18A:12-24.1(c)* because he allowed the Interim Superintendent to distribute “a list of grievances against 3 [B]oard members to the entire [B]oard; threaten[ed] [the] same [B]oard members with ethics charges; and question[ed] their earlier votes during the regular [B]oard meeting.” Per Complainants, such conduct is “outside the scope of confining board action to policy making, planning and appraisal.”
- ❖ *N.J.S.A. 18A:12-24.1(d)* because he allowed the Interim Superintendent “to accuse the 3 [B]oard members of giving ‘secret’ information to the prior [S]uperintendent,” and such conduct is outside the scope of working together with fellow Board members.
- ❖ *N.J.S.A. 18A:12-24.1(e)* because he allowed the Interim Superintendent “to complain about [Complainants] asking questions at the [B]oard meetings because he feels like he is being attacked.” Complainants submit that the Interim Superintendent “has issued an order” which prevents Board members from speaking to him directly and, as a result, they can only ask questions at Board meetings. According to Complainants, this behavior compromises the Board.
- ❖ *N.J.S.A. 18A:12-24.1(f)* because he *Rice’d* the Interim Superintendent and allowed him (the Interim Superintendent) to demand that all Board members and attorneys be present for executive session. Respondent then allowed the Interim Superintendent “to use executive session improperly for personal attacks against 3 [B]oard members, making one of them cry as he attacked her by threatening ethics charges against her.” Per Complainants, this “is allowing the use of the executive session for the personal gain of the” Interim Superintendent.

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 and argues Complainants have failed to “articulate how [Respondent] is responsible for the allegedly unethical conduct of the Interim Superintendent, a third party who is unnamed in the Complaint.”

As for the alleged violation of *N.J.S.A.* 18A:12-24.1(a), Respondent contends Complainants failed to include a copy of the required final decision and also failed to “identify any alleged failure by [Respondent] to uphold any law, rule, regulation, court order, or any alleged use of illegal or unethical procedures.” Despite Complainants’ personal view that Respondent’s comment upon reading a text message was generally inappropriate, it does not violate a specific legal or ethical procedure and, therefore, does not violate *N.J.S.A.* 18A:12-24.1(a).

Before more specifically addressing the remaining allegations, Respondent notes that they (the remaining allegations) do not allege any active or affirmative conduct by Respondent, and instead suggest that Respondent violated the Code because he “allowed” the Interim Superintendent to engage in certain behavior. However, Complainants have not articulated “any legal basis for finding an ethical violation by [Respondent] solely due to his alleged inaction to stop or control the alleged conduct” of another school official. For this reason alone, the remaining allegations in the Complaint should be dismissed.

Notwithstanding the above, and regarding the purported violation of *N.J.S.A.* 18A:12-24.1(c), Respondent argues Complainants failed to provide any evidence that Respondent “effectuated any policies or plans without consulting those affected by them.” Furthermore, Complainants failed to provide any facts that Respondent “engaged in any conduct wherein he failed to confine his Board action to policy making, planning, and appraisal.”

As for the alleged violation of *N.J.S.A.* 18A:12-24.1(d), Complainants have not provided any evidence to show Respondent “administered or attempted to administer the schools,” or that he “gave a direct order to school personnel” or otherwise became involved in the administration of the schools.

Regarding the purported violation of *N.J.S.A.* 18A:12-24.1(e), although Complainants may not agree with his conduct during executive session, “or believed it was not an appropriate means of handling their concerns,” Complainants did not demonstrate that Respondent “made any personal promises or took action beyond the scope of his duties” that had the potential to compromise the Board.

As for the alleged violation of *N.J.S.A.* 18A:12-24.1(f), Respondent maintains that Complainants “merely” assert that Respondent *Rice’d* the Interim Superintendent and thereby “allow[ed] the use of the executive session for the personal gain of the [I]nterim [S]uperintendent.” Respondent notes, even if that is true, Complainants have not demonstrated how Respondent “used an executive session Board meeting to attempt to obtain a type of ‘personal gain’ or benefit for the Interim Superintendent.”

Finally, Respondent contends the Complaint is frivolous because it satisfies both prongs of the frivolous definition. Respondent asserts the Complaint “was clearly commenced in bad faith, solely for the purpose of harassing and/or causing malicious injury to [Respondent], in an attempt to draw negative public attention to and increase the credibility and legitimacy (though unsuccessfully) of Complainants’ ongoing disagreement with the criticism of [Respondent’s] performance as Board President, as well as his handling and execution of his responsibilities as a Board member generally.” Furthermore, Respondent maintains that Complainants did not provide any evidence to support any of their allegations, and they “knew, or should have known that the Complaint lacked any reasonable basis ...” Therefore, Respondent asserts the Complaint should be dismissed, it should be found to be frivolous and sanctions should be imposed on Complainants.

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

Despite being served with the Motion to Dismiss and allegation of frivolous filing on or about December 7, 2021, and even though the Commission sent two letters to Complainants advising that, in the absence of a filing, the Commission would rule on the Motion to Dismiss and allegation of frivolous filing without considering a response from them, Complainants never filed a response.

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 (Complainants), and determine whether the allegation(s), if true, could establish a violation(s) 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 Complainants have pled sufficient facts which, if true, could support a finding that Respondent violated *N.J.S.A. 18A:12-24.1(a)*, *N.J.S.A. 18A:12-24.1(c)*, *N.J.S.A. 18A:12-24.1(d)*, *N.J.S.A. 18A:12-24.1(e)*, and/or *N.J.S.A. 18A:12-24.1(f)*.

B. *Alleged Code Violations*

Complainants submit that, based on the conduct more fully detailed above, Respondent violated *N.J.S.A. 18A:12-24.1(a)*, *N.J.S.A. 18A:12-24.1(c)*, *N.J.S.A. 18A:12-24.1(d)*, *N.J.S.A. 18A:12-24.1(e)*, and *N.J.S.A. 18A:12-24.1(f)*, and 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.

- 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.
- e. I will recognize that authority rests with the board of education and will make no personal promises nor take any private action that may compromise the board.
- f. I will refuse to surrender my independent judgment to special interest or partisan political groups or to use the schools for personal gain or for the gain of friends.

As set forth in *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 Respondent failed to enforce all laws, rules and regulations of the State Board of Education, and/or court orders pertaining to schools or that Respondent brought about changes through illegal or unethical procedures.

Following its review of the Complaint, the Commission finds that even if the facts as stated are proven true by sufficient credible evidence, they would not support a finding that Respondent violated *N.J.S.A. 18A:12-24.1(a)*. Despite being required by *N.J.A.C. 6A:28-6.4(a)(1)*, the Commission finds that Complainants have not provided **a copy of a final decision(s)** from any court of law or other administrative agency demonstrating or specifically finding that Respondent violated a specific law, rule, or regulation when he engaged in any of the acts/conduct set forth in the Complaint. Absent such a final decision, the Commission is constrained to find that the stated violation of *N.J.S.A. 18A:12-24.1(a)* should be dismissed.

Pursuant to *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 Respondent took board action to effectuate policies and plans without consulting those affected by such policies and plans, or took action that was unrelated to 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.

After review of the Complaint, the Commission finds that even if the facts as argued are proven true by sufficient credible evidence, they would not support a finding that Respondent violated *N.J.S.A. 18A:12-24.1(c)*. Even if Respondent "allowed" the Interim Superintendent to distribute "a list of grievances," "allowed" the Interim Superintendent to threaten certain Board members, and "allowed" the Interim Superintendent to question the votes of certain Board members, there are absolutely no facts or evidence indicating that Respondent *himself* engaged in any affirmative Board action. Moreover, despite Complainants' belief, Respondent is not responsible for regulating the conduct or actions of another school official, and if Complainants believe that the Interim Superintendent acted inappropriately or unethically, they can file ethics charges against him for his actions. Therefore, the Commission finds that the argued 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 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 this regard, there is not a scintilla of evidence which suggests, or could possibly demonstrate, that *Respondent* gave a direct order to school personnel, or that *Respondent* became directly involved in the administration of the Township of Ocean School District. As a result, the Commission finds that the alleged violation of *N.J.S.A.* 18A:12-24.1(d) should be dismissed.

As set forth in *N.J.A.C.* 6A:28-6.4(a)(5), factual evidence of a violation of *N.J.S.A.* **18A:12-24.1(e)** shall include evidence that Respondent made personal promises or took action beyond the scope of his duties such that, by its nature, had the potential to compromise the board.

Following its review of the Complaint, the Commission finds that even if the facts as contended are proven true by sufficient credible evidence, they would not support a finding that Respondent violated *N.J.S.A.* 18A:12-24.1(e). Despite being required, Complainants have not pled any factual averments evidencing that Respondent made any personal promise or took any action. Instead, Complainants cite to perceived inappropriate conduct by the Interim Superintendent and then insinuate that Respondent should not have “allowed” him (the Interim Superintendent) to engage in the complained of conduct; however, in order to find a violation of the Act, it is *Respondent*, and not some other school official, who must have engaged in unethical conduct. As such, the Commission is constrained to find that the contended violation of *N.J.S.A.* 18A:12-24.1(e) should be dismissed.

Pursuant to *N.J.A.C.* 6A:28-6.4(a)(6), factual evidence of a violation of *N.J.S.A.* **18A:12-24.1(f)** shall include evidence that Respondent took action on behalf of, or at the request of, a special interest group or persons organized and voluntarily united in opinion and who adhere to a particular political party or cause; or evidence that Respondent used the schools in order to acquire some benefit for himself, a member of his immediate family or a friend.

After review of the Complaint, the Commission finds that even if the facts as asserted are proven true by sufficient credible evidence, they would not support a finding that Respondent violated *N.J.S.A.* 18A:12-24.1(f). Even if Respondent “allowed” the Interim Superintendent to use executive session to “personally attack” certain Board members, such “permission” could not possibly be construed as “action,” let alone action on behalf of a special interest group or persons organized and voluntarily united in opinion, or construed as his use of the schools to acquire a benefit for himself, a member of his immediate family, or a friend. Furthermore, there is no suggestion that Respondent and the Interim Superintendent are “friends,” or how the Interim Superintendent could have received a specific and identifiable benefit from being “allowed” to address the Board in executive session. Therefore, the Commission finds that the asserted violation of *N.J.S.A.* 18A:12-24.1(f) should be dismissed.

IV. Request for Sanctions

At its meeting on March 22, 2022, 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 Complainants 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 Complainants 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 April 26, 2022, 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 (Complainants), the Commission voted to **grant** the Motion to Dismiss in its entirety because Complainants failed to plead sufficient, credible facts to support a finding that Respondent violated *N.J.S.A.* 18A:12-24.1(a), *N.J.S.A.* 18A:12-24.1(c), *N.J.S.A.* 18A:12-24.1(d), *N.J.S.A.* 18A:12-24.1(e), and/or *N.J.S.A.* 18A:12-24.1(f). 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 Complainants 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: April 26, 2022

***Resolution Adopting Decision
in Connection with C55-21***

Whereas, at its meeting on March 22, 2022, 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 March 22, 2022, 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(a), *N.J.S.A.* 18A:12-24.1(c), *N.J.S.A.* 18A:12-24.1(d), *N.J.S.A.* 18A:12-24.1(e), and/or *N.J.S.A.* 18A:12-24.1(f); and

Whereas, at its meeting on March 22, 2022, the Commission discussed finding the Complaint not frivolous, and denying the request for sanctions; and

Whereas, at its meeting on April 26, 2022, the Commission reviewed and voted to approve the within decision as accurately memorializing its actions/findings from its meeting on March 22, 2022; 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 April 26, 2022.

Kathryn A. Whalen, Esq.
Director, School Ethics Commission