

Before the School Ethics Commission
Docket No.: C83-22
Decision on Motion to Dismiss

Martine Howe,
Complainant

v.

Dorothea Fernandez,
Neptune Township Board of Education, Monmouth County,
Respondent

I. Procedural History

The above-captioned matter arises from a Complaint that was filed on August 30, 2022, by Martine Howe (Complainant), alleging that Dorothea Fernandez (Respondent), a member of the Neptune Township Board of Education (Board), violated the School Ethics Act (Act), *N.J.S.A.* 18A:12-21 *et seq.* By correspondence dated August 31, 2022, Complainant was notified that the Complaint was deficient, and required amendment before the School Ethics Commission (Commission) could accept her filing. On September 8, 2022, 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. More specifically, the Complaint avers that Respondent violated *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 September 12, 2022, the Complaint was served on Respondent via electronic mail, notifying her that ethics charges had been filed against her with the Commission, and advising that she had twenty (20) days to file a responsive pleading.¹ On September 30, 2022, Respondent filed a Motion to Dismiss in Lieu of Answer (Motion to Dismiss), and also alleged that the Complaint is frivolous. On October 23, 2022, Complainant filed a response to the Motion to Dismiss and allegation of frivolous filing.

The parties were notified by correspondence dated November 14, 2022, that the above-captioned matter would be discussed by the Commission at its meeting on November 22, 2022, in order to make a determination regarding the Motion to Dismiss and allegation of frivolous filing. Following its discussion on November 22, 2022, the Commission adopted a decision at its meeting on December 20, 2022, granting the Motion to Dismiss in its entirety because Complainant failed to plead sufficient credible facts to support a finding that Respondent

¹ In order to conduct business during the Coronavirus (COVID-19) pandemic, the Commission implemented an electronic filing system, which remains a permissible method by which the Commission and parties can effectuate service of process. Consequently, service of process was effectuated by the Commission through electronic transmission only.

violated *N.J.S.A.* 18A:12-24.1(f) in Count 1, and because the alleged violation of *N.J.S.A.* 18A:12-24.1(e) in Count 2 is time barred. 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*

By way of background, Complainant states that at the Board's meeting in "January 2021," Complainant's spouse did not vote for Respondent to serve as Board President. Thereafter, and in late 2021, an "advisor" filed a Harassment, Intimidation, and Bullying (HIB) report against Respondent's child for what Respondent's child was doing to Complainant's child (because Complainant's child got a role in the school play that Respondent's child wanted). Respondent's child eventually apologized to Complainant's child, and the apology noted that the child's mother (Respondent) held a "grudge" against Complainant's spouse because he did not vote for her Respondent in January 2021.

In addition, during "the early months of 2022," Complainant was advised that "another HIB [report] was filed against [Respondent's child]" for things that were said about Complainant's child "via text messages with other students." A few months later, Complainant received another letter indicating that an HIB report was filed against Complainant's child (by Respondent's child) but, "as expected, it was unfounded."

It is Complainant's position that because her spouse did not vote for Respondent to serve as Board President, Respondent used her position as a Board member to "indirectly harass and bully [Complainant's child] for personal gain," and for the gain of her own child. By acting in this manner, Respondent is "in violation of her [B]oard duties to protect all the students of [the] ... [Neptune Township School District (District)]," and is using her child's actions "to try and hurt [Complainant's] family because [her spouse] did not vote for her to be [Board P]resident in 2021" Complainant contends that not only would Respondent's child benefit greatly if Complainant's child was not allowed to participate in certain after school activities, but Respondent would also "get her satisfaction" of hurting Complainant and her family.

With the above background in mind, Complainant asserts Respondent violated *N.J.S.A.* 18A:12-24.1(f) because, at the Board's meeting on April 27, 2022, she "refused to surrender her independent judgment for personal gain." According to Complainant, Respondent will "go against" Complainant's spouse any chance she gets, and it all "stems from" the fact that he did not vote for her to serve as Board President. Complainant states, "you can tell how much she hates him by the way she responded" to his motion at this meeting.

Complainant additionally asserts that Respondent violated *N.J.S.A.* 18A:12-24.1(e) in "October 2021" because she "took private action that may compromise the [B]oard." Per Complainant, "in the fall of 2021," a parent organization (of which Complainant is a member) sent an e-mail to the Superintendent and to the Board explaining why the parent organization "felt that [Respondent] was using her position as a [B]oard member to target and bully" the

parent organization. According to Complainant, Respondent did not receive any consequences for her behavior solely because she is a Board member.

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 that, “None of these allegations are supported by evidence, and are based on mere conjecture that wholly unrelated events, some of which did not involve Respondent directly, resulted in unethical conduct.”

According to Respondent, Complainant alleges that Respondent violated *N.J.S.A.* 18A:12-24.1(e) for making personal promises that compromised the Board, and by using her power as a Board member to indirectly harass and bully Complainant’s child for personal gain. However, none of the cases in which the Commission has found a violation of *N.J.S.A.* 18A:12-24.1(e) “come close” to the facts at issue in this matter. In those matters where the Commission has found a violation, the Board members’ actions related to Board business or “made steps to compromise a function of the Board as a whole.” In this case, Complainant alleges a violation based on a “confidential matter between the parties’ [children],” and there are “no allegations referencing direct action by Respondent.” Instead, the communication at issue was private and unrelated to Board business. In addition, even if an HIB complaint was filed by Respondent’s child, it was filed in her child’s capacity as a student, and not because her parent is a member of the Board. Accordingly, the claims against Respondent for allegedly violating *N.J.S.A.* 18A:12-24.1(e) must be dismissed.

As for the violation of *N.J.S.A.* 18A:12-24.1(f) that occurred on April 27, 2022, Respondent notes that, at this Board meeting, Complainant’s spouse read a prepared statement that related to ongoing labor negotiations, but it was not shared with or approved by the Personnel Committee before it was read. As a result, Respondent and another Board member voted against the motion which related to his public statement; importantly, the motion was “completely unrelated to the [children’s] argument and sentiments shared in a private conversation.” Although Respondent concedes to animosity between the families, she notes “the disagreements and disputes are unrelated to the Respondent’s service, roles and responsibilities on the Board.” Consequently, Respondent denies that she has used her “position to compromise the integrity of the Board’s action or to thwart chain of command.”

Finally, Respondent asserts the Complaint is frivolous because instead of alleging facts that could substantiate a violation(s) of the Act, “Complainant refers to ... Respondent’s proper conduct – namely, voting in a committee meeting and erroneously alleges that violations occurred simply because fellow Board member’s children are involved.” Furthermore, the Complaint “references issues that are outside the 180 days of an [e]thics [c]omplaint.” Therefore, Respondent maintains the Complaint is frivolous and “a fine should be levied against [Complainant] to offset the costs, borne by the taxpayers, in defending Respondent.”

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

In response to the Motion to Dismiss and allegation of frivolous filing, Complainant maintains that she has provided adequate evidence, namely a text from Respondent's child, two HIB reports filed against Respondent's child, the false HIB report filed against Complainant's child, Respondent's emails that were sent to the parent organization, the email from the parent organization related to Respondent's conduct, and Complainant's emails to the Board. Taken together, this evidence clearly shows that Respondent took "private action which could compromise the [B]oard and provide personal benefit to her family." According to Complainant, she has provided "competent and based in fact relevant evidence" to show Respondent's pattern of "unethical acts" and to "accept this as frivolous is like giving [Respondent] a license to continue operating as a [B]oard member in the same manner she has without any repercussions." Complainant reasserts that Respondent "continues to find ways to harass" Complainant's family, and the "chain of events" provided is "enough evidence" to support violations of *N.J.S.A.* 18A:12-24.1(e) and *N.J.S.A.* 18A:12-24.1(f).

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(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 Complainant has pled sufficient facts which, if true, could support a finding that Respondent violated *N.J.S.A.* 18A:12-24.1(e) and/or *N.J.S.A.* 18A:12-24.1(f).

B. *Untimeliness*

As part of her Motion to Dismiss, and in connection with her argument that the Complaint is frivolous, Respondent notes that the Complaint "references issues that are outside ... 180 days" and, therefore, those issues should be dismissed. Complainant did not directly respond to Respondent's untimeliness argument in her response to the Motion to Dismiss and allegation of frivolous filing.

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).

In this case, Complainant did not file a Complaint that was deemed compliant with the Commission's regulations (*N.J.A.C.* 6A:28-6.3) until September 8, 2022; however, she filed her first deficient Complaint on August 30, 2022. 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 regarded as **August 30, 2022**. See *N.J.A.C.* 6A:28-6.7(b). One hundred eighty (180) days prior to August 30, 2022, is March 3, 2022.

With the above in mind, and 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.

The Commission recognizes that limitation periods of this type serve to discourage dilatoriness and provide a measure of repose in the conduct of school affairs. *Kaprow v. Berkley Township Bd. of Educ.*, 131 *N.J.* 571, 587 (1993). Thus, "notice of the alleged violation" must be interpreted in a manner that anticipates the reasonable diligence of complainant(s). In addressing potential violations of the Act, the Commission must balance the public's interest in knowing of potential violations against the important policy of repose and a respondent's right to fairness. The time limitations set forth in the regulations must be enforced if the Commission is to operate in a fair and consistent manner. *Phillips v. Streckenbein et al., Edgewater Park Bd. of Educ., Burlington County*, C19-03 (June 24, 2003).

After review, the Commission finds that there is not a credible basis upon which to find that Complainant was unaware of Respondent's actions/conduct until a date(s) other than when they occurred. Although the Commission recognizes that the regulatory time period may be relaxed, in its discretion, in any case where strict adherence may be deemed inappropriate or unnecessary or may result in injustice, it finds no extraordinary circumstances in the within matter that would compel relaxation. Consequently, any violation of the Act related to conduct that occurred prior to March 3, 2022, namely the alleged violation of *N.J.S.A.* 18A:12-24.1(e) in Count 2 (from "10/2021"), is time barred and *dismissed*.

C. *Alleged Violations of the Act*

In the remaining Count of the Complaint (Count 1), Complainant submits that, based on the conduct more fully detailed above, Respondent violated *N.J.S.A.* 18A:12-24.1(f), and this provision of the Code provides:

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.

Pursuant to *N.J.A.C.* 6A:28-6.4(a)(6), a 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 herself, a member of her immediate family or a friend.

Following its review of the Complaint, the Commission finds that even if the facts as pled in Count 1 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, during a public Board meeting, Respondent publicly opposed and disagreed with the motion made by Complainant's spouse regarding contract negotiations with the local education association, and even if the impetus for Respondent's opposition was because Complainant's spouse did not vote for her (Respondent) – a year earlier – to serve as Board President, there is absolutely no factual evidence that Respondent's public opposition and disagreement was taken on behalf of, or at the request of, a special interest group or persons organized and voluntarily united in opinion, and a complete absence of factual evidence that Respondent's public opposition and disagreement was made to acquire some benefit for herself, a member of her immediate family, or a friend. In short, there is no nexus between Respondent's public opposition and disagreement with the motion made by Complainant's spouse, and any clear or discernible gain to Respondent, a member of her immediate family, or a friend.

Although much superfluous information is mentioned in the Complaint regarding animosity and discord between Complainant and Respondent, as well as between their children, there is still nothing in the Complaint evidencing how Respondent and/or her child may have benefitted because Respondent publicly opposed and disagreed with how Complainant's spouse believed information regarding contract negotiations should be shared with the community. Accordingly, the Commission finds that the alleged violation of *N.J.S.A.* 18A:12-24.1(f) in Count 1 should be dismissed.

IV. Request for Sanctions

At its meeting on November 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 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 20, 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 (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(f) in Count 1, and because the alleged violation of

N.J.S.A. 18A:12-24.1(e) in Count 2 is time barred. The Commission also adopted a decision finding the Complaint not frivolous, and denying 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 20, 2022

**Resolution Adopting Decision
in Connection with C83-22**

Whereas, at its meeting on November 22, 2022, 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 November 22, 2022, the Commission discussed granting 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(f) in Count 1, and because the alleged violation of *N.J.S.A.* 18A:12-24.1(e) in Count 2 is time barred; and

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

Whereas, at its meeting on December 20, 2022, the Commission reviewed and voted to approve the within decision as accurately memorializing its actions/findings from its meeting on November 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 December 20, 2022.

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