

Before the School Ethics Commission
Docket No.: C119-22
Decision on Motion to Dismiss

Daniel P. Kilgallon,
Complainant

v.

Thomas McQuillen,
Upper Township Board of Education, Cape May County,
Respondent

I. Procedural History

The above-captioned matter arises from a Complaint that was filed with the School Ethics Commission (Commission) on December 7, 2022, by Daniel P. Kilgallon (Complainant), alleging that Thomas McQuillen (Respondent), a member of the Upper Township Board of Education (Board), violated the School Ethics Act (Act), *N.J.S.A. 18A:12-21 et seq.* By correspondence dated December 7, 2022, Complainant was notified that the Complaint was deficient, and required amendment before the Commission could accept his filing. On December 13, 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(a)* (in Count 1), *N.J.S.A. 18A:12-24.1(b)* (in Count 2), *N.J.S.A. 18A:12-24.1(c)* (in Count 1), *N.J.S.A. 18A:12-24.1(d)* (in Count 1), *N.J.S.A. 18A:12-24.1(e)* (in Count 2), and *N.J.S.A. 18A:12-24.1(g)* (in Counts 1-2) of the Code of Ethics for School Board Members (Code).

On December 15, 2022, the Complaint was served on Respondent via electronic mail, notifying him that ethics charges had been filed against him with the Commission, and advising that he had twenty (20) days to file a responsive pleading.¹ On January 13, 2023, Respondent filed a Motion to Dismiss in Lieu of Answer (Motion to Dismiss), and also alleged that the Complaint is frivolous. On February 1, 2023, Complainant filed a response to the Motion to Dismiss and allegation of frivolous filing.

The parties were notified by correspondence dated March 13, 2023, that the above-captioned matter would be discussed by the Commission at its meeting on March 21, 2023, in order to make a determination regarding the Motion to Dismiss and allegation of frivolous filing. Following its discussion on March 21, 2023, the Commission adopted a decision at its meeting

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.

on April 25, 2023, 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(a) (in Count 1), *N.J.S.A.* 18A:12-24.1(b) (in Count 2), *N.J.S.A.* 18A:12-24.1(c) (in Count 1), *N.J.S.A.* 18A:12-24.1(d) (in Count 1), *N.J.S.A.* 18A:12-24.1(e) (in Count 2), and/or *N.J.S.A.* 18A:12-24.1(g) (in Counts 1-2). 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*

In Count 1, Complainant states that, after the Board meeting on September 19, 2022, he and his spouse approached Respondent “to ask him about his reasoning for a vote.” During this conversation, Complainant alleges that Respondent stated, “the sitting Superintendent should be terminated.” Per Complainant, Respondent also said that although he disagreed with previous administrators, “anything is better than that idiot,” gesturing toward the sitting Superintendent. On November 21, 2022, the Board and the Superintendent “entered into a ‘termination agreement.’” Based on his statements, Complainant contends that Respondent violated *N.J.S.A.* 18A:12-24.1(a) because by divulging this information to Complainant and his spouse, Respondent “is not upholding desired changes through legal proceedings”; *N.J.S.A.* 18A:12-24.1(c) because his statements “occurred two months before the [B]oard entered into the ‘termination agreement’ with the Superintendent”; *N.J.S.A.* 18A:12-24.1(d) because Respondent’s statements “puts [Respondent’s] own desires of getting rid of the Superintendent ahead of the needs of the [Upper Township School District (District)], especially with the mid-year departure of the Superintendent”; and *N.J.S.A.* 18A:12-24.1(g) because his statement “and how it relates to recent [B]oard action seems to be confidential and that it is information we might not be privy to.”

In Count 2, Complainant notes that “a community member” posted a picture of the ballot for the upcoming Board election on social media, and it was “coded with different color circles and a key.” At the time, Complainant was running for a position on the Board along with Kiernan Black (Black), and there were “red circles” next to their names which denoted: “Supports: Parental Bill of Rights ([i.e.,] ‘Don’t say gay’ legislation; parental interference over teachers; *Supported by the alt-Christians).” Other Board candidates were noted as supporting the District’s teachers and all students/kids. Per Complainant, Respondent “liked” this post. Because Respondent “liked” this post, Complainant argues that Respondent violated *N.J.S.A.* 18A:12-24.1(e) because Respondent took private action by endorsing libelous statements about Complainant and Black, and such statements are “harmful” to their personal and professional lives; *N.J.S.A.* 18A:12-24.1(g) because the statements are libelous, harmful to his and Black’s (and his spouse’s) personal and professional lives, have no basis in fact, and are “discriminatory toward perceived religious affiliations”; and *N.J.S.A.* 18A:12-24.1(b) because the statements endorsed by Respondent “are blatantly false ... and portray [Complainant’s] children as an extension of whatever these insinuated religious beliefs are,” and such falsehoods “could potentially put [Complainant’s] children, students in the District, at risk.”

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

In his Motion to Dismiss and allegation of frivolous filing, Respondent notes that, with respect to the conversation that allegedly took place on September 19, 2022 (Count 1), “there is nothing in the Complaint that suggests [Respondent] made these comments in his official capacity as a Board member, or that he was representing the opinions of the Board, as the Complaint clearly states that they were made after the Board meeting had been adjourned, as opposed to during the actual meeting itself.” Respondent notes he is “entitled to have opinions on matters affecting the District in his individual capacity as a taxpaying citizen.” Moreover, the allegations in the Complaint fail to show how Respondent brought about changes through illegal or unethical procedures by the alleged comments he made to Complainant and his spouse in violation of *N.J.S.A. 18A:12-24.1(a)*; “the alleged comments made by [Respondent] do not in any way demonstrate that he took Board action to effectuate policies and plans without consulting those affected by such policies and plans” in violation of *N.J.S.A. 18A:12-24.1(b)*; the Complaint fails to offer any 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 District in violation of *N.J.S.A. 18A:12-24.1(d)*; and the Complaint does not provide any specificity as to the nature of the “confidential” information allegedly provided to Complainant (and his spouse) in violation of *N.J.S.A. 18A:12-24.1(g)*. As such, Count 1 must be dismissed.

Regarding the claims in Count 2, Respondent argues the Complaint fails to offer any evidence that his “like” “constituted deliberate action to obstruct the programs and policies designed to meet the individual needs of all children, or that it had the potential to compromise the Board,” or even that Respondent was acting in his official capacity as a member of the Board when he “liked” the post. As a result, Complainant has failed to provide sufficient evidence to support a violation of *N.J.S.A. 18A:12-24.1(b)* and/or *N.J.S.A. 18A:12-24.1(e)*. Further, based on the substance of the post appended to the Complaint, there is nothing indicating that Respondent is a Board member, or that he liked the post in his capacity as a member of the Board (or in any other official capacity). Therefore, Complainant failed to establish “how ‘liking’ a post on Facebook means that [Respondent] ... actively and affirmatively disseminated inaccurate information” in violation of *N.J.S.A. 18A:12-24.1(g)*. Without any evidence that Respondent’s liking of the post was carried out in his official capacity or that he was representing himself as a Board member, the claims in Count 2 must also be dismissed.

Finally, Respondent asserts that the Complaint is frivolous because the Complaint “is nothing but an attempt by [Complainant] to use the [Act] as a vehicle for expressing his displeasure with the outcome of the November 2022 election.” Moreover, finding a violation of the Act based on the facts as asserted would unnecessarily infringe upon the First Amendment rights of sitting Board members. Although Respondent concedes that public officials “must always be mindful of how others may view or perceive the capacity in which they are speaking,” the speech at issue in Count 1 and Count 2 is wholly unrelated to the Board. Consequently, “the Commission must find the instant Complaint to be frivolous and brought for the sole purpose of harassing Respondent.”

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

In his response to the Motion to Dismiss and allegation of frivolous filing, Complainant maintains that “the statements of facts and evidence” submitted “prove” that Respondent violated *N.J.S.A.* 18A:12-24.1(b) and *N.J.S.A.* 18A:12-24.1(c). Complainant also disagrees that his Complaint is frivolous, and instead submits such an argument is being made “to intimidate members of the community from addressing” the Board and ensuring compliance with applicable policies and regulations.

Regarding Count 1, Complainant maintains that because Respondent mentioned another person “would be ‘better than’ the Superintendent,” and the Board and the Superintendent executed “a highly redacted termination agreement just months” after Respondent made this comment, it is clear that Respondent “is taking private action outside of legal procedures,” and that the Board and Respondent “are taking action to administer the schools.”

With respect to Count 2, Complainant argues that by liking/endorsing a “libelous” post, which suggested that Complainant and his spouse (and his running mate) are “anti-lgbt” and “anti-teacher,” Respondent endangered Complainant’s children who attend school in the District. Furthermore, by “supporting” the claim that Complainant and his spouse are “Alt-Christians,” Respondent “is supporting a discriminatory attack on perceived assigned religious beliefs all for the benefit of his friends who were also campaigning.”

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(a) (in Count 1), *N.J.S.A.* 18A:12-24.1(b) (in Count 2), *N.J.S.A.* 18A:12-24.1(c) (in Count 1), *N.J.S.A.* 18A:12-24.1(d) (in Count 1), *N.J.S.A.* 18A:12-24.1(e) (in Count 2), and/or *N.J.S.A.* 18A:12-24.1(g) (in Counts 1-2).

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).

With the jurisdiction of the Commission in mind, to the extent that Complainant seeks a determination from the Commission that Respondent’s comments/statements may have

constituted defamation, slander, and/or libel (or been “discriminatory”), the Commission advises that such determinations fall well beyond the scope, authority, and jurisdiction of the Commission. Although Complainant may be able to pursue a cause of action in the appropriate tribunal, the Commission is not the appropriate entity to adjudicate those claims. Accordingly, those allegations are *dismissed*.

C. *Alleged Violations of the Act*

Complainant submits that, based on the conduct more fully detailed above, Respondent violated *N.J.S.A.* 18A:12-24.1(a) (in Count 1), *N.J.S.A.* 18A:12-24.1(b) (in Count 2), *N.J.S.A.* 18A:12-24.1(c) (in Count 1), *N.J.S.A.* 18A:12-24.1(d) (in Count 1), *N.J.S.A.* 18A:12-24.1(e) (in Count 2), and *N.J.S.A.* 18A:12-24.1(g) (in Counts 1-2), 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.

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.

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.

g. I will hold confidential all matters pertaining to the schools which, if disclosed, would needlessly injure individuals or the schools. In all other matters, I will provide accurate information and, in concert with my fellow board members, interpret to the staff the aspirations of the community for its school.

Pursuant to *N.J.A.C.* 6A:28-6.4(a), a violation(s) of *N.J.S.A.* 18A:12-24.1(a), *N.J.S.A.* 18A:12-24.1(b), *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(g) needs to be supported by certain factual evidence, more specifically:

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.

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.

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.

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.

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.

7. Factual evidence of a violation of the confidentiality provision of *N.J.S.A.* 18A:12-24.1(g) shall include evidence that Respondent took action to make public, reveal or disclose information that was not public under any laws, regulations or court orders of this State, or information that was otherwise confidential in accordance with board policies, procedures or practices. Factual evidence that Respondent violated the inaccurate information provision of *N.J.S.A.* 18A:12-24.1(g) shall include evidence that substantiates the inaccuracy of the information provided by Respondent and evidence that establishes that the inaccuracy was other than reasonable mistake or personal opinion or was not attributable to developing circumstances.

After review, the Commission finds that even if the facts as averred in **Count 1** of the Complaint are proven true by sufficient credible evidence, they would not support a finding(s) 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), and/or *N.J.S.A.* 18A:12-24.1(g). First, with regard to the purported violation of *N.J.S.A.* 18A:12-24.1(a), and despite being required by *N.J.A.C.* 6A:28-6.4(a)(1), Complainant failed to provide **a copy of a final decision** from any court of law or other administrative agency

demonstrating or finding that Respondent violated any specific law(s), rule(s), or regulation(s) of the State Board of Education and/or court orders pertaining to schools, or that he brought about changes through illegal or unethical procedures, when he engaged in any of the actions/conduct set forth in the Complaint. To the extent that Complainant can provide, within the period of limitations, “a final decision from any court of law or administrative agency of this State” demonstrating that Respondent acted contrary to the laws, rules, and regulations promulgated by the State Board of Education, he could *then* be found in violation of *N.J.S.A. 18A:12-24.1(a)* for the conduct set forth in Count 1. Without the required final decision(s), and based on the current record, the Commission is compelled to dismiss this claim.

As to the remaining allegations in **Count 1**, even if, after being asked by Complainant and/or his spouse, Respondent offered his personal opinion or perspective on the Superintendent and/or his work performance to a member(s) of the public following a public Board meeting, Complainant has failed to establish how his comments, even if made in an official capacity, constituted action to effectuate a policy or plan without consulting those affected by such a policy or plan, or action that was unrelated to Respondent’s duty as a member of the Board (*N.J.S.A. 18A:12-24.1(c)*); constituted giving 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 (*N.J.S.A. 18A:12-24.1(d)*); and/or action to make public, reveal, or disclose information that was not public, or provided inaccurate information which was other than reasonable mistake or personal opinion, or not attributable to developing circumstances (*N.J.S.A. 18A:12-24.1(g)*). The mere fact that Respondent may have offered unflattering comments about the Superintendent to a member(s) of the public does not mean, without more, that he acted in contravention of his ethical duties and responsibilities. Therefore, the Commission finds that the stated violations of *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)*, and *N.J.S.A. 18A:12-24.1(g)* in Count 1 should be dismissed.

The Commission additionally finds that even if the facts as pled in **Count 2** of the Complaint are proven true by sufficient credible evidence, they would not support a determination(s) that Respondent violated *N.J.S.A. 18A:12-24.1(b)*, *N.J.S.A. 18A:12-24.1(e)*, and/or *N.J.S.A. 18A:12-24.1(g)*. More specifically, Complainant has not adequately explained how Respondent’s “like” of another person’s social media post constituted a “willful” decision contrary to the educational welfare of children, or deliberate action to obstruct the programs and policies designed to meet the individual needs of all children (*N.J.S.A. 18A:12-24.1(b)*); constituted a personal promise or action beyond the scope of Respondent’s duties as a Board member that had the potential to compromise the Board (*N.J.S.A. 18A:12-24.1(e)*); and/or constituted the disclosure of information that was not public or was confidential, or the disclosure of inaccurate information that was other than reasonable mistake or *personal opinion* (*N.J.S.A. 18A:12-24.1(g)*). Complainant has equally failed to prove that Respondent’s “like” was taken in his official capacity as a member of the Board, or pursuant to his official duties. As a result, the Commission finds that the purported violations of *N.J.S.A. 18A:12-24.1(b)*, *N.J.S.A. 18A:12-24.1(e)*, and/or *N.J.S.A. 18A:12-24.1(g)* in Count 2 should be dismissed.

IV. Request for Sanctions

At its meeting on March 21, 2023, 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 April 25, 2023, the Commission voted to find that the Complaint is 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(a) (in Count 1), *N.J.S.A.* 18A:12-24.1(b) (in Count 2), *N.J.S.A.* 18A:12-24.1(c) (in Count 1), *N.J.S.A.* 18A:12-24.1(d) (in Count 1), *N.J.S.A.* 18A:12-24.1(e) (in Count 2), and/or *N.J.S.A.* 18A:12-24.1(g) (in Counts 1-2). 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 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: April 25, 2023

**Resolution Adopting Decision
in Connection with C119-22**

Whereas, at its meeting on March 21, 2023, 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 March 21, 2023, 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) (in Count 1), *N.J.S.A.* 18A:12-24.1(b) (in Count 2), *N.J.S.A.* 18A:12-24.1(c) (in Count 1), *N.J.S.A.* 18A:12-24.1(d) (in Count 1), *N.J.S.A.* 18A:12-24.1(e) (in Count 2), and/or *N.J.S.A.* 18A:12-24.1(g) (in Counts 1-2); and

Whereas, at its meeting on March 21, 2023, the Commission discussed finding the Complaint not frivolous, and denying the request for sanctions; and

Whereas, at its meeting on April 25, 2023, the Commission reviewed and voted to approve the within decision as accurately memorializing its actions/findings from its meeting on March 21, 2023; 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 25, 2023.

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