
GLORIA SCOTT

V.

BERGSON LENEUS, JENABU WILLIAMS,
TERRY SWANSON TUCKER AND
JOY TOLLIVER,
EAST ORANGE BOARD OF EDUCATION,
ESSEX COUNTY

BEFORE THE SCHOOL
ETHICS COMMISSION

DOCKET NO. C37-16

DECISION ON
MOTION TO DISMISS

PROCEDURAL HISTORY

This matter arises from a Complaint filed on September 30, 2016 by Gloria Scott, alleging that Bergson Leneus, Jenabu Williams, Terry Swanson Tucker and Joy Tolliver, members of the East Orange Board of Education (Board), violated the School Ethics Act (Act), N.J.S.A. 18A:12-21 et seq. By correspondence dated October 6, 2016, and subsequent correspondence dated October 19, 2016, Complainant was notified that her Complaint was deficient and required amendment. On October 27, 2016, Complainant cured all defects and filed an amended Complaint (Complaint) that was deemed compliant with the requirements detailed in N.J.A.C. 6A:38-6.7. The Complaint alleges that Respondent Leneus violated N.J.S.A. 18A:12-24.1(a) of the Code of Ethics for School Board Members (Code) in Count 1, Respondent Leneus violated N.J.S.A. 18A:12-24.1(a) and (e) of the Code in Count 2, and that all Respondents violated N.J.S.A. 18A:12-24.1(a) of the Code in Counts 3 and 4.

On October 31, 2016, the Complaint was sent to Respondents, notifying them that charges were filed against them with the School Ethics Commission (Commission), and advising that they had twenty (20) days to answer the Complaint. Upon request, Respondents were provided with an extension of time to file a responsive pleading. Respondents ultimately filed a Motion to Dismiss in Lieu of Answer (Motion to Dismiss) on December 19, 2016, and also alleged that the Complaint was frivolous. After being provided with an extension of time, Complainant filed a response to the Motion to Dismiss, and to the allegation of a frivolous Complaint, on February 10, 2017.

The parties were notified by correspondence dated February 17, 2017, that this matter would be placed on the Commission's agenda for its meeting on February 28, 2017 in order to make a determination regarding the Motion to Dismiss. At its meeting on February 28, 2017, the Commission discussed granting Respondents' Motion to Dismiss based on untimeliness, and discussed finding the Complaint not frivolous. At its meeting on March 28, 2017, the Commission voted to adopt a decision memorializing its discussion from February 28, 2017.

SUMMARY OF THE PLEADINGS

A. The Complaint

Complainant (the former Superintendent) asserts that Respondent Leneus (the Board President), along with the other named Respondents and with the sanction of the Board attorney, placed her on administrative leave in violation of N.J.S.A. 10:4-6 and N.J.S.A. 18A:12-24.1, and denied her the opportunity to exercise her legal rights.

In Count 1, Complainant alleges that she was served by the Business Administrator with a Rice notice at 1:00 p.m. on March 7, 2016, for a Board meeting to take place the following day, March 8, 2016, at 6:00 p.m. According to Complainant, the Rice notice did not “state the nature of the change in employment status that was to be discussed.” Based on these facts, Complainant asserts that Respondent Leneus violated N.J.S.A. 18A:12-24.1(a) of the Code because the issuance of the Rice notice violated N.J.S.A. 10:4-6 et seq., as it was issued less than forty-eight (48) hours prior to the Board meeting, and the reason for the change in employment was not provided.

In Count 2, Complainant asserts that also on March 7, 2016, Respondent Leneus and the Board attorney verbally conveyed to her that as of 4:00 p.m., she was placed on administrative leave until her retirement (April 30, 2016). Complainant was directed to remove all of her belongings from the building, and to return her keys by close of business on March 7, 2016. Based on these facts, Complainant alleges that Respondent Leneus violated N.J.S.A. 18A:12-24.1(a) of the Code because she was placed on administrative leave in violation of N.J.S.A. 10:4-6 et seq. More specifically, she was placed on administrative leave (i) without adequate notice (48 hours); (ii) prior to the Board discussing her employment status at its meeting on March 8, 2016; (iii) prior to her having the right to request that the matter be discussed in public; and (iv) prior to the Board’s vote on whether to place her on administrative leave. Complainant further alleges that Respondent Leneus violated N.J.S.A. 18A:12-24.1(e) of the Code because he acted in his individual/personal capacity, and did not inform or consult with the Board before making this decision.

In Count 3, Complainant asserts that on March 8, 2016, all Respondents voted to approve her placement on administrative leave even though they knew that the Rice notice issued to her was illegal and defective. Based on these facts, Complainant argues that all Respondents violated N.J.S.A. 18A:12-24.1(a) of the Code because, at the time of the vote, they all knew that the Superintendent had already been placed on “illegal” and “unethical” administrative leave in violation of N.J.S.A. 10:4-6 et seq.

In Count 4, Complainant asserts that on March 8, 2016, she spoke with the Interim Executive County Superintendent, and he was unaware that the Board intended to place her on administrative leave and to appoint an Acting Superintendent. Based on these facts, Complainant argues that all Respondents violated N.J.S.A. 18A:12-24.1(a) of the Code because the Board’s action, in placing her on administrative leave and appointing an Acting Superintendent without approval from the Interim Executive County Superintendent, was in violation of N.J.A.C. 6A:23A-3.1.

Based on the above, Complainant alleges that Respondent Leneus violated N.J.S.A. 18A:12-24.1(a) of the Code in Count 1; Respondent Leneus violated N.J.S.A. 18A:12-24.1(a) and (e) of the Code in Count 2; and all Respondents violated N.J.S.A. 18A:12-24.1(a) of the Code in Counts 3 and 4.

B. Motion to Dismiss and Allegation of Frivolous Filing

Following receipt of the Complaint, Respondents filed a Motion to Dismiss, and also alleged that the Complaint was frivolous. Factually, Respondents supplemented the Complaint and indicated that on October 13, 2015, the Board approved the retirement of Complainant (to be effective April 30, 2016). After that time, Respondents allege that Complainant “was frequently absent from work” and “no longer effective in her position as Superintendent.”

As for the substantive arguments in their Motion to Dismiss, Respondents first argue that the Complaint is untimely because it was not filed within one hundred eighty (180) days of the events which formed the basis for the alleged violations. More specifically, Respondents argue that the alleged violations of the Code relate to “an action that was prospectively notified to the Complainant on March 7, 2016; and actually occurred at the Board’s meeting on March 8, 2016.” Therefore, Respondents argue that Complainant knew or should have known about the events giving rise to her allegations on March 7, 2016 or March 8, 2016 “at the latest.” By filing her Complaint on October 27, 2016, which was two hundred thirty-three (233) days after March 7, 2016 and two hundred thirty-four (234) days after March 8, 2016, Respondents argue that, without an explanation as to why “the Complainant was dilatory in filing,” the Complaint is untimely and should be dismissed.

Second, Respondents argue that the Commission does not have jurisdiction over this matter and cannot “second guess” the Board’s decision to place the Superintendent on administrative leave, and also cannot decide whether the Board’s actions violated the Open Public Meetings Act (N.J.S.A. 10:4-6 et seq.) or N.J.A.C. 6A:23A-3.1. According to Respondents, the authority for such determinations rests with the Commissioner of Education. Finally, Respondents argue that the alleged facts do not support a violation of N.J.S.A. 18A:12-24.1(a) or (e) of the Code as Complainant did not file an action with the Commissioner of Education and/or argue that the Board’s actions violated the Open Public Meetings Act (N.J.S.A. 10:4-6 et seq.) or N.J.A.C. 6A:23A-3.1 in the appropriate venue. With the time period for filing an action with the Commissioner of Education having expired, Respondents argue that Complainant cannot legally or factually substantiate any alleged violations of the Open Public Meetings Act (N.J.S.A. 10:4-6 et seq.) or N.J.A.C. 6A:23A-3.1.

In further support of their Motion to Dismiss, Respondents note that, with respect to all of the N.J.S.A. 18A:12-24.1(a) claims, Complainant failed to proffer the factual evidence required by N.J.A.C. 6A:28-6.4(a)(1). With regard to the N.J.S.A. 18A:12-24.1(e) allegation against Respondent Leneus, Respondents assert the action taken was not private action, but rather Board action.

Finally, Respondents argue that the Complaint is frivolous, and that it was filed in bad faith solely for the purpose of harassment, delay or malicious injury. In support of this argument, Respondents maintain that not only were Complainant's claims untimely, but she also failed to meet her burden of proof. Therefore, Respondents argue that the Commission should find the Complaint frivolous and impose sanctions, including the payment of attorney's fees.

Based on the above, Respondents argue that the Complaint should be dismissed, and the allegations found to be frivolous.

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

In response to the Motion to Dismiss and the allegation of a frivolous filing, Complainant reasserts that her claims are based on allegations that Respondents (not the Board as a whole) violated procedural laws, rules and regulations when they passed resolutions to place her on administrative leave (i.e., because (i) she was placed on administrative leave *before* the Board actually approved the placement, (ii) Respondents approved her placement on administrative leave after it had already occurred and even though she was provided with inadequate notice, and (iii) Respondents/the Board did not have approval from the Interim Executive County Superintendent to place her on administrative leave or to appoint an Acting Superintendent). Complainant additionally reaffirms that, despite Respondents' arguments, the Commission does have jurisdiction over her claims, and that N.J.A.C. 6A:28-6.4(a)(1) permits her to prove her claims (N.J.S.A. 18A:12-24.1(a)) by demonstrating that "respondent brought about changes through *illegal* or unethical procedures," and that a court order is not required.

Finally, Complainant reasserts that her Complaint was timely filed, as it was first received by the Commission on September 30, 2016, which was one hundred fifty-three (153) days after April 30, 2016, the date she "*knew or understood* that the individuals named in the Complaint took actions in direct violation of N.J.S.A. 18A:12-24.1 et seq." (emphasis added). Even if the Commission finds her Complaint untimely, Complainant argues that the Commission has the authority, in its discretion, to relax the regulatory time period when strict adherence may be "deemed inappropriate or unnecessary or may result in injustice." According to Complainant, based on the nature of the allegations detailed in her Complaint, it would be inappropriate, unnecessary and an injustice if the Commission dismisses her Complaint on this basis.

Consequently, Complainant maintains that Respondent Leneus violated N.J.S.A. 18A:12-24.1(a) of the Code in Count 1; Respondent Leneus violated N.J.S.A. 18A:12-24.1(a) and (e) of the Code in Count 2; all Respondents violated N.J.S.A. 18A:12-24.1(a) of the Code in Counts 3 and 4; and that her Complaint is not frivolous.

ANALYSIS

A. 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 and/or the Code. Unless the

parties are otherwise notified, a Motion to Dismiss and any response thereto, is reviewed by the Commission on a summary basis. N.J.A.C. 6A:28-8.3. Thus, the question before the Commission is whether Complainant has alleged facts which, if true, could support a finding that Respondent Leneus violated N.J.S.A. 18A:12-24.1(a) of the Code in Count 1; Respondent Leneus violated N.J.S.A. 18A:12-24.1(a) and (e) of the Code in Count 2; and all Respondents violated N.J.S.A. 18A:12-24.1(a) of the Code in Counts 3 and 4.

Timeliness Issue / Statute of Limitations

In their Motion to Dismiss, Respondents preliminarily argue that because the Complaint was filed on October 27, 2016, and the events which formed the basis for the alleged violations in the Complaint occurred on March 7, 2016 or March 8, 2016 “at the latest,” the Complaint is untimely and should be dismissed.

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 applied here, Complainant’s first deficient Complaint was received by the Commission on September 30, 2016. Upon review, it was determined that the Complaint failed to comply with the requirements set forth in N.J.A.C. 6A:28-6.3. Consequently, Complainant was advised, by correspondence dated October 6, 2016, that her Complaint was deficient and required amendment.¹ Complainant’s second deficient Complaint was received by the Commission on October 18, 2016. Upon review, it was again determined that the Complaint remained deficient and still did not comply with the requirements enumerated in N.J.A.C. 6A:28-6.3. As a result, Complainant was advised, by correspondence dated October 19, 2016, that her Complaint still required amendment.² On October 27, 2016, Complainant filed an amended Complaint that complied with the requirements detailed in N.J.A.C. 6A:28-6.3. The amended Complaint was mailed to Respondents on October 31, 2016.

Although it was not until October 27, 2016 that Complainant filed a Complaint that was deemed compliant with the Commission’s statutes and regulations, N.J.A.C. 6A:28-6.7(b) provides, “A complainant may amend a complaint to cure technical defects, clarify or amplify allegations made in the original complaint and such amendments will *relate back to the date the complaint was first received by the Commission for the purposes of determining timeliness*

¹ Pursuant to N.J.A.C. 6A:28-6.7(a), “[t]he Commission may order the amendment of any complaint in order to comply with the requirements set forth at N.J.A.C. 6A:28-6.3.”

² Pursuant to N.J.A.C. 6A:28-6.7(a), “[t]he Commission may order the amendment of any complaint in order to comply with the requirements set forth at N.J.A.C. 6A:28-6.3.”

pursuant to N.J.A.C. 6A:28-6.5" (emphasis added). Because the Complaint was first received by the Commission on September 30, 2016, the Commission finds that September 30, 2016 is the initial filing date for the Complaint.

Respondents argue that the events which form the basis for the alleged violations of the Code occurred on March 7, 2016 or March 8, 2016 "at the latest." Complainant counters that it was not until April 30, 2016 that she "*knew or understood* that the individuals named in the Complaint" violated the Code. In its review of the pleadings, the Commission determines that, as of March 8, 2016, Complainant had notice of the events which formed the basis for the alleged violations of the Code as detailed in her Complaint. Although Complainant would instead like to rely upon the date she "*knew or understood*" that Respondents violated the Code, the date of "knowledge" or "understanding" of a violation(s) is not the legal standard by which timeliness is determined. The Commission also notes that it was not until after Respondents filed their Motion to Dismiss that Complainant ever cited to or attempted to rely upon a date other than March 7, 2016 and March 8, 2016. Therefore, the Commission finds that March 8, 2016 is the date that Complainant had notice of the events which formed the basis for the alleged violations of the Code in her Complaint.

With March 8, 2016 as the starting point, Complainant had one hundred eighty (180) days, or until September 4, 2016, to file her Complaint with the Commission. Because the Complaint was not received by the Commission until September 30, 2016, more than three (3) weeks beyond the one hundred eighty (180) day limitation period, the Commission finds that the Complaint is untimely, and time barred.

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 it 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).

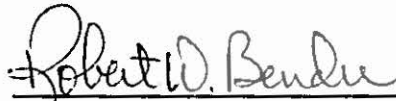
As noted above, "A complainant shall be deemed to be notified of events which form the basis of the alleged violation(s) when he or she knew of such events or when such events were made public so that one using reasonable diligence would know or should have known." N.J.A.C. 28-6.5. Further, although the Commission recognizes that the regulatory time period may be relaxed, in its discretion, in any case where a strict adherence thereto may be deemed inappropriate or unnecessary or may result in injustice, it finds no extraordinary circumstances in this matter that would compel relaxation. Accordingly, the Complaint is dismissed as untimely, and time barred.

REQUEST FOR SANCTIONS

Respondents assert that the Complaint is frivolous. At its meeting on February 28, 2017, the Commission considered Respondents' request that the Commission find the Complaint frivolous and to impose sanctions, pursuant to N.J.S.A. 18A:12-29(e), including the payment of attorney's fees. After review, the Commission can find no evidence which might show that the Complainant filed the Complaint in bad faith solely for the purpose of harassment, delay or malicious injury. The Commission also has no information to suggest that Complainant 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. Complainant's representation that she believed the one hundred eighty (180) day timeframe within which to file a complaint did not begin until April 30, 2016, the date she "*knew or understood* that the individuals named in the Complaint" violated the Code, while misplaced and erroneous, is sufficient for the Commission to find, without more, that the filing of the Complaint was not motivated by an unlawful motive or purpose. Therefore, the Commission finds that the Complaint is not frivolous, and denies the Respondents' request for sanctions against Complainant.

DECISION

Pursuant to N.J.S.A. 18A:12-29(b), the Commission hereby notifies the Complainant and Respondents that it finds the Complaint was filed out of time and is, therefore, dismissed in its entirety. The Commission also hereby notifies the Complainant and Respondents that it finds the Complaint is not frivolous. 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: March 29, 2017

Resolution Adopting Decision – C37-16

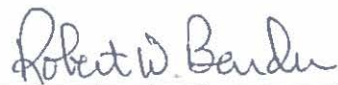
Whereas, the School Ethics Commission (Commission) considered the Complaint, the Motion to Dismiss and the allegation of frivolous filing, and the Response to Motion to Dismiss and allegation of frivolous filing; and

Whereas, at its meeting on February 28, 2017, the Commission discussed finding the Complaint untimely, and time barred; and

Whereas, at its meeting on February 28, 2017, the Commission discussed finding the Complaint not frivolous; and

Whereas, at its meeting on March 28, 2017, the Commission reviewed and approved the within decision memorializing its discussion from February 28, 2017; 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.



Robert W. Bender, Chairperson

I hereby certify that the Resolution was duly adopted by the School Ethics Commission at its public meeting on March 28, 2017.



Kathryn A. Whalen, Director
School Ethics Commission