

Before the School Ethics Commission
Docket No.: C37-19
Decision on Motion to Dismiss

Deborah Esposito,
Complainant

v.

Daniel Fishbein,
Ridgewood Board of Education, Bergen County,
Respondent

I. Procedural History

This matter arises from a Complaint that was filed on May 17, 2019, by Deborah Esposito (Complainant), alleging that Daniel Fishbein (Respondent), an administrator (the Superintendent) employed by the Ridgewood Board of Education (Board), violated the School Ethics Act (Act), *N.J.S.A.* 18A:12-21 *et seq.* By correspondence dated May 23, 2019, Complainant was notified that the Complaint was deficient, and required amendment before the School Ethics Commission (Commission) could accept her filing. On June 7, 2019, 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 Respondent violated *N.J.S.A.* 18A:12-24(a), *N.J.S.A.* 18A:12-24(b), and *N.J.S.A.* 18A:12-24(c) in Count 1, and violated *N.J.S.A.* 18A:12-24(a) and *N.J.S.A.* 18A:12-24(c) in Count 2.

On June 10, 2019, the Complaint was served on Respondent, via regular and certified 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. On June 28, 2019, Respondent filed a Motion to Dismiss in Lieu of Answer (Motion to Dismiss), and also alleged that the Complaint is frivolous. On July 22, 2019, Complainant filed a response to the Motion to Dismiss and allegation of frivolous filing.

The parties were notified by correspondence dated August 20, 2019, that this matter would be placed on the Commission's agenda for its meeting on August 27, 2019, in order to make a determination regarding the Motion to Dismiss and allegation of frivolous filing. At its meeting on August 27, 2019, the Commission considered the filings in this matter and, at its meeting on September 24, 2019, 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(a), *N.J.S.A.* 18A:12-24(b), or *N.J.S.A.* 18A:12-24(c) as alleged in Count 1, and/or violated *N.J.S.A.* 18A:12-24(a) or *N.J.S.A.* 18A:12-24(c) as argued in Count 2. The Commission also voted to find the Complaint not frivolous, and to deny Respondent's request for sanctions.

II. Summary of the Pleadings

A. *The Complaint*

By way of background, two relevant incidents occurred on January 8, 2019. The first involved Complainant's children and their refusal to go outside for recess. As a result of their refusal, the children were brought to the main office to speak with the principal, the principal reprimanded the children, and then called Complainant. Complainant then sent her spouse to school to get the children, which then led to the second incident in the main office of the school (involving Complainant's spouse, children and principal). The second incident, ultimately resulted in Respondent (the Superintendent) advising Complainant and her spouse that he was not permitted to be on Ridgewood School District (District) property (including school buildings, school property, athletic fields, etc.) unless Respondent provided advance consent. Subsequently, Complainant's attorney requested the District conduct a harassment, intimidation, and bullying (HIB) investigation based on the alleged mistreatment of Complainant's children by the principal, and also requested that Respondent provide all school records, incident reports, video evidence, and witness statements related to the HIB incident involving Complainant's children. Complainant was repeatedly advised that a video of the January 8, 2019, incident did not exist because there are no cameras in the main office; however, Complainant was afforded video from January 10, 2019, which documented Complainant and the drop-off of her children outside of the school building.

Based on the above, and in Count 1 of her Complaint, Complainant asserts that Respondent (the Superintendent) violated N.J.S.A. 18A:12-24(a), N.J.S.A. 18A:12-24(b), and N.J.S.A. 18A:12-24(c) because he "made false statements and used his position to withhold evidence," including the video of the events that transpired on January 8, 2019. Complainant contends that Respondent's actions were "in his own and the school[']s best interest" and this, in turn, impaired his objectivity and independent judgment. Furthermore, Respondent engaged in activities "which are in conflict with the trust given to him by the community" as he withheld "evidence until he thought he could utilize it to his advantage." Complainant argues that "the Superintendent[']s actions are in direct conflict with the duties he is entrusted to perform."

In Count 2, Complainant asserts that Respondent violated N.J.S.A. 18A:12-24(a) and N.J.S.A. 18A:12-24(c) because he ignored the January 8, 2019, incident and refused to investigate the matter until he was forced to do so. Thereafter, he did not conduct a thorough investigation because he did not speak to Complainant's children or to Complainant before taking action (and he only conducted an investigation that benefitted the school). Complainant contends Respondent only considered his own interests, which impaired his judgment and "fair mindedness" in handling the incident. Respondent's actions, according to Complainant, were "in direct conflict with his role and responsibility as Superintendent and the public interest."

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. Regarding Count 1, Respondent argues that "Complainant does not allege

facts, which if true, could establish” a violation of *N.J.S.A. 18A:12-24(a)*, *N.J.S.A. 18A:12-24(b)* and/or *N.J.S.A. 18A:12-24(c)*. Respondent maintains that Complainant “misconstrues facts to argue that violations occurred.” Respondent further argues that Complainant did not provide any facts that support the allegation that Respondent “acted in conflict with the proper discharge of his duties in the public interest, used his official position to secure unwarranted advantages for himself or his immediate family, or took private action that was of such a nature that it might compromise his objectivity or independence of judgment. Respondent maintains that he acted “appropriately,” and was truthful about the possession of the video surveillance because the school does not have cameras in the main office (January 8, 2019, incident) and Complainant did not request the surveillance relating to the January 10, 2019, drop off outside of the school building. Therefore, Respondent asserts Count 1 should be dismissed.

Regarding Count 2, Respondent argues that Complainant did not provide any facts to support a violation of *N.J.S.A. 18A:12-24(a)* and/or *N.J.S.A. 18A:12-24(c)*, because the allegations are false. Respondent appropriately (and timely) assigned the District’s HIB Coordinator to investigate the January 8, 2019, incident and followed proper procedures. In addition, several witnesses were interviewed, including Complainant and her children. Respondent asserts that Count 2 should be dismissed.

Finally, Respondent asserts that the Complaint is frivolous because Complainant’s “tortured misinterpretation of the facts” and “total lack of evidence” demonstrates that the Complaint is frivolous. Furthermore, Complainant’s bad faith and knowledge that the Complaint was without reasonable basis in law or equity is evidenced by her “manipulation of the facts” in an effort to allege violations of the Act.

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 her initial Complaint and “stand[s] by [her] previous assessment” that Respondent’s actions “were and continue to be in his own best interest as well as the schools,” moreover, this “impaired his objectivity and his independent judgment.” Complainant further argues that Respondent has “betrayed the trust of every student and parent in the Ridgewood community by withholding paramount and pertinent evidence.” Complainant also noted that Respondent’s response “contained many inaccuracies,” which she clarified and that if Respondent would have conducted a proper investigation, it would have “shed light on these discrepancies leading to a fair and balanced assessment.”

Furthermore, Complainant notes that counsel “has shown negligent and neglectful behavior as well as complete lack of attention to detail when serving the response documents” pertaining to this Complaint because counsel “served” Complainant’s neighbor with these documents and exposed her claim and Respondent’s response to the neighbor. This mistake “impacted” the family. As to Respondent’s allegation that the Complaint is frivolous, Complainant asserts the Complaint “has indisputable merit” and is not frivolous. Complainant defends her Complaint affirming that there is “no doubt” that the children were telling the truth.

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 Respondent violated *N.J.S.A. 18A:12-24(a)*, *N.J.S.A. 18A:12-24(b)*, and *N.J.S.A. 18A:12-24(c)* as alleged in Count 1, and/or violated *N.J.S.A. 18A:12-24(a)* and *N.J.S.A. 18A:12-24(c)* as argued in Count 2.

B. Allegations of Prohibited Acts

In the Complaint, Complainant alleges that Respondent violated *N.J.S.A. 18A:12-24(a)* (Counts 1-2), *N.J.S.A. 18A:12-24(b)* (Count 1), and *N.J.S.A. 18A:12-24(c)* (Count 1-2). These provisions of the Act provide:

a. No school official or member of his immediate family shall have an interest in a business organization or engage in any business, transaction, or professional activity, which is in substantial conflict with the proper discharge of his duties in the public interest;

b. No school official shall use or attempt to use his official position to secure unwarranted privileges, advantages or employment for himself, members of his immediate family or others;

c. No school official shall act in his official capacity in any matter where he, a member of his immediate family, or a business organization in which he has an interest, has a direct or indirect financial involvement that might reasonably be expected to impair his objectivity or independence of judgment. No school official shall act in his official capacity in any matter where he or a member of his immediate family has a personal involvement that is or creates some benefit to the school official or member of his immediate family;

Before more fully addressing the allegations in each Count, the Commission wishes to clarify that its jurisdiction is limited to enforcing the provisions of the Act, *N.J.S.A. 18A:12-21 et seq.*, a set of minimum ethical standards by which all school officials must abide. The Commission has jurisdiction only over matters arising under the Act, and it may not receive, hear, or consider any pleadings, motion papers, or documents of any kind relating to any matter that does not arise under the Act. *N.J.A.C. 6A:28-1.4(a)*.

With the above in mind, to the extent that Complainant seeks a determination from the Commission that (1) the District and/or Respondent violated or failed to comply with a specific

statute(s) or regulation(s) pertaining to the release of the documentary/video evidence and/or to the method (or timeliness) of how the HIB investigation was conducted; (2) that the District and/or Respondent violated or failed to comply with an applicable Board policy(ies) and/or regulation(s) relating to the issues set forth in the Complaint (including the HIB investigation and the banning of Mr. Esposito from District property); or (3) that the factual findings and/or conclusions rendered by the District with regard to the HIB investigation should be vacated or overturned, such determinations are outside the scope, authority, and jurisdiction of the Commission, but may be actionable in other venues.

Alleged Violations of N.J.S.A. 18A:12-24(a)

To credit the alleged violations of *N.J.S.A. 18A:12-24(a)* in Count 1 and/or Count 2, the Commission must find evidence that Respondent, or a member of his immediate family, has an interest in a business organization, or engaged in any business, transaction, or professional activity which was in substantial conflict with the proper discharge of his duties in the public interest.

In Count 1, Complainant alleges that Respondent violated *N.J.S.A. 18A:12-24(a)* because he made false statements and used his position as Superintendent to withhold evidence, including a video of the events that occurred in the main office on January 8, 2019. By withholding the video evidence “until he thought he could utilize it to his advantage,” Respondent engaged in actions which are in “direct conflict with the duties he is entrusted to perform” and in “conflict with the trust given to him by the community.” Respondent counters that Complainant did not provide any facts to support the allegation that he “acted in conflict with the proper discharge of his duties in the public interest,” and maintains that he acted “appropriately,” and was truthful about the possession of the video surveillance because the school does not maintain cameras in the area where the January 8, 2019, incident occurred.

In Count 2, Complainant argues that Respondent violated *N.J.S.A. 18A:12-24(a)* because by ignoring the January 8, 2019, incident and refusing to investigate the matter until he was forced to do so, his actions are “in direct conflict with his role and responsibility as Superintendent and the public interest.” Respondent counters that the allegations are false, and that Respondent appropriately (and timely) assigned the District’s HIB Coordinator to investigate the January 8, 2019, incident and followed proper procedures.

After review of the Complaint, and with the limited jurisdiction of the Commission in mind, 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(a)* as alleged in Count 1 and/or Count 2. As an initial matter, there are no facts offered in Count 1 and/or Count 2 which suggest, or establish, that Respondent or a member of his immediate family had an “interest” in a business organization.¹ With all allegations in Count 1 and Count 2 relating to duties and responsibilities within the purview of the Superintendent, there are no facts

¹ Pursuant to *N.J.S.A. 18A:12-23*, “interest” means the ownership or control of more than 10% of the profits, assets, or stock of a business but shall not include the control of assets in a labor union.

proffered in either Count indicating that Respondent engaged in a “business, transaction, or professional activity” that was in substantial conflict with the proper discharge of his duties as the Superintendent. Allegations that Respondent failed to properly, or effectively, perform his duties and responsibilities cannot serve as the basis for violations of *N.J.S.A. 18A:12-24(a)* as argued in Count 1 and Count 2.

Furthermore, although Complainant maintains (in Count 1) that Respondent failed to provide her with the video evidence that she requested, Respondent affirms (through counsel) that the requested video evidence does not exist. In addition, Complainant has not established that the video evidence does in fact exist, i.e., because she now has a copy of it, and instead argues that it must exist. Moreover, although Complainant asserts (in Count 2) that Respondent failed to conduct an investigation until he was forced to do so, an investigation was, by her own admission, conducted. Whether the investigation that was conducted was timely or may have violated an applicable HIB statute or regulation (or Board policy), is outside the scope and jurisdiction of the Commission.

Therefore, and for the reasons set forth above, the Commission finds that the alleged violations of *N.J.S.A. 18A:12-24(a)* in Count 1 and Count 2 should be dismissed.

Alleged Violations of N.J.S.A. 18A:12-24(b)

In order to credit the alleged violation of ***N.J.S.A. 18A:12-24(b)*** in Count 1, the Commission must find evidence that Respondent used or attempted to use his official position to secure an unwarranted privilege, advantage or employment for himself, members of his immediate family, or “others.”

In Count 1, Complainant contends that Respondent violated *N.J.S.A. 18A:12-24(b)* because he made false statements and used his position as Superintendent to withhold evidence, and did so “until he thought he could utilize [the evidence] to his advantage.” Respondent counters that Complainant did not provide any facts to support the allegation that he “used his official position to secure unwarranted advantages for himself or his immediate family,” and maintains that he acted “appropriately,” and was truthful about the possession of the video surveillance because the school does not maintain cameras in the area where the January 8, 2019, incident occurred.

Based on its review of the Complaint, and with the limited jurisdiction of the Commission in mind, 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(b)* as contended in Count 1. Complainant has not presented any facts which demonstrate that the video evidence exists and was, as argued by Complainant, improperly withheld. The Commission also notes that even if Complainant’s spouse was banned from District property and/or the investigation resulted in a finding that was not well-received by Complainant and/or her family, this does not mean, without more, that it resulted in Respondent, a member of his immediate family, or an “other” (including the building principal) receiving an *unwarranted* privilege, advantage, or employment. Challenges to the determination of the Superintendent (based on Board policy) and the investigation and/or its findings may,

nonetheless, be pursued in the appropriate venues. As such, the Commission finds that the alleged violation of *N.J.S.A. 18A:12-24(b)* in Count 1 should be dismissed.

Alleged Violations of N.J.S.A. 18A:12-24(c)

To credit the alleged violations of *N.J.S.A. 18A:12-24(c)* in Count 1 and/or Count 2, the Commission must find evidence that Respondent acted in his official capacity in a matter where he, or a member of his immediate family, had a direct or indirect financial involvement that might reasonably be expected to impair his objectivity, or in a matter where he had a personal involvement that created some benefit to him, a member of his immediate family, or to “others.”

In Count 1, Complainant asserts that Respondent violated *N.J.S.A. 18A:12-24(c)* because he made false statements and used his position as Superintendent to withhold evidence. By taking actions which were “in his own and the school[’s] best interest,” Respondent’s objectivity and independent judgment were impaired. Respondent counters that Complainant did not provide any facts to support the allegation that he “took private action that was of such a nature that it might compromise his objectivity or independence of judgment,” and maintains that he acted “appropriately,” and was truthful about the possession of the video surveillance because the school does not maintain cameras in the area where the January 8, 2019, incident occurred.

In Count 2, Complainant alleges that Respondent violated *N.J.S.A. 18A:12-24(c)* because he ignored the January 8, 2019, incident and refused to investigate the matter until he was forced to do so. In addition, when he investigated the incident, he did not conduct a thorough investigation before taking action, and instead only conducted an investigation that benefitted him and the school. Respondent counters that the allegations are false, and that Respondent appropriately (and timely) assigned the District’s HIB Coordinator to investigate the January 8, 2019, incident and followed proper procedures.

After review of the Complaint, and with the limited jurisdiction of the Commission in mind, 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(c)* as asserted in Count 1 and/or Count 2. There is nothing in either Count 1 or Count 2 which evidences that Respondent or a member of his immediate family had a direct or indirect financial involvement in the withholding of the alleged video evidence and/or the at-issue investigation. There is also nothing in either Count which establishes that Respondent had a “personal” involvement in the withholding of the alleged video evidence and/or the at-issue investigation that created some benefit to him or to others. Respondent, as the Superintendent, is charged with a breadth of duties and responsibilities, and this necessarily includes assigning investigations to the appropriate administrators, and rendering determinations regarding school-related matters as required by law. Without an articulation of how Respondent’s involvement in these issues was anything other than routine, how he had a personal (not professional) involvement or interest, or how he benefitted (personally), the Commission finds that the alleged violations of *N.J.S.A. 18A:12-24(c)* in Count 1 and Count 2 should be dismissed.

Accordingly, and granting all inferences in favor of the non-moving party (Complainant), the Commission has determined 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(a), *N.J.S.A.* 18A:12-24(b), or *N.J.S.A.* 18A:12-24(c) as alleged in Count 1, and/or violated *N.J.S.A.* 18A:12-24(a) or *N.J.S.A.* 18A:12-24(c) as argued in Count 2.

IV. Request for Sanctions

At its meeting on August 27, 2019, 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 September 24, 2019, 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(a), *N.J.S.A.* 18A:12-24(b), or *N.J.S.A.* 18A:12-24(c) as alleged in Count 1, and/or violated *N.J.S.A.* 18A:12-24(a) or *N.J.S.A.* 18A:12-24(c) as argued in Count 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: September 25, 2019

**Resolution Adopting Decision
in Connection with C37-19**

Whereas, at its meeting on August 27, 2019, 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 August 27, 2019, 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(a), *N.J.S.A.* 18A:12-24(b), or *N.J.S.A.* 18A:12-24(c) as alleged in Count 1, and/or violated *N.J.S.A.* 18A:12-24(a) or *N.J.S.A.* 18A:12-24(c) as argued in Count 2; and

Whereas, at its meeting on August 27, 2019, the Commission discussed finding the Complaint not frivolous, and denying Respondent's request for sanctions; and

Whereas, at its meeting on September 24, 2019, the Commission reviewed and voted to approve the within decision as accurately memorializing its actions/findings from its meeting on August 27, 2019; 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 September 24, 2019.

Kathryn A. Whalen, Director
School Ethics Commission