

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. EEC13633-12

AGENCY DKT. NO. C27-12

JANINE WALKER CAFFREY,

Complainant,

v.

SAMUEL LEBREAULT, PERTH AMBOY

BOARD OF EDUCATION, MIDDLESEX

COUNTY,

Respondent.

Janine Walker Caffrey, complainant, pro se

Rita F. Barone, Esq., for respondent (Purcell, Mulcahy, O'Neill & Hawkins, attorneys)

Record Closed: April 25, 2013 Decided: May 30, 2013

BEFORE MICHAEL ANTONIEWICZ, ALJ,

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This is a complaint brought against school board member Samuel Lebreault (Lebreault) by complainant Janine Walker Caffrey (Caffrey), who is the District's superintendent, under the School Ethics Act, N.J.S.A. 18A:12-21 to N.J.S.A. 18A:12-34. On August 28, 2012, the School Ethics Commission (Commission) voted to dismiss Counts Two and Three in their entirety. In Counts One and Four of the complaint, Caffrey accuses School Board Member Lebreault of engaging in discussions in executive session on June 28, 2012, regarding the termination of Principal Michelle Velez-Jonte (Velez) and Principal Alvaro Cores (Cores) reappointment as principals without a Rice notice being issued and directing another board member to add an agenda item to renew the annual contract of the board attorney under the heading "Recommendations of the Superintendent." The Complainant alleges that Lebreault violated N.J.S.A. 18A:12-21 et seq.

The matter comes before the Office of Administrative Law (OAL) on respondent's motion to dismiss the complaint. For the reasons that follow, the respondent's motion is granted.

On July 13, 2012, Caffrey filed a written complaint against respondent Lebreault with the Commission. Thereafter, on August 15, 2012, Lebreault filed an answer to the complaint. At its scheduled meeting on August 28, 2012, the Commission voted to dismiss Counts Two and Three in their entirety and decided to refer Counts One and Four to the OAL, where it was filed on October 2, 2012, for an administrative hearing after finding that the complaint was not frivolous in accordance with the standard set forth at N.J.A.C. 6A:28-1.2.

While the matter was pending before the OAL, Lebreault filed a motion for summary decision, together with supporting certifications, a statement of material facts and a legal brief, and a form of Order. Caffrey filed opposing papers, which was a one-page letter dated February 3, 2013, and received by the OAL on February 12, 2013, stating that she opposed any motions to dismiss and that there continues to be interference in personnel and educational matters. Accordingly, Caffrey insisted that this case move forward.

SUMMARY DECISION

Summary decision is the administrative counterpart to summary judgment in the judicial arena. N.J.A.C. 1:1-12.5 provides that summary decision should be rendered if the papers and discovery which have been filed, together with the affidavits or certifications, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law. Use of the summary procedure is aimed at the swift uncovering of the merits and either their effective disposition or their advancement toward prompt resolution by trial. Judson v. Peoples Bank and Trust Co., 17 N.J. 67, 74 (1954). While cautioning that a judge should not weigh the truth of the evidence or resolve factual disputes at this early stage of the proceedings, the New Jersey Supreme Court held that when the evidence is so one-sided that one party must prevail as a matter of law, the trial court should not hesitate to grant summary judgment. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995); accord Liberty Surplus Ins. Corp. v. Nowell Amoroso, P.A., 189 N.J. 436, 445–46 (2007).

On a motion for summary decision, a judge must treat all opposing papers indulgently and “grant all the favorable inferences to the non-movant.” Brill, supra, 142 N.J. at 536. That does not mean, however, that the judge must accept an unsubstantiated general denial as tantamount to a genuine issue of disputed fact. Even if the allegations of the pleadings, standing alone, appear to raise a factual dispute, summary decision ought not to be denied if other papers pertinent to the motion show palpably the absence of any issue of material fact. Summary-decision procedure “pierces the allegations of the pleadings to show that the facts are otherwise than as alleged.” Judson, supra, 17 N.J. at 75.

FINDINGS OF FACT

All of the material facts necessary for disposition of the motion may be derived from the pleadings, certifications, and exhibits. I FIND:

Lebreault, as the president of the Board of Education, led conversations on June 28, 2012, regarding the termination of Principals Cores and Velez, during executive sessions of the Board of Education. In addition, during the public portion of the meeting, Lebreault and other Board members voted “no” for the reappointment of Principals Cores and Velez, one day prior to the end of their contracts. This was done without issuing “Rice” notices, without a

recommendation from the superintendent, and without poor evaluations or due process.

During the regular meeting of the Board, Lebreault directed Board member Janelle Rodriguez (Rodriguez) to add an item to the agenda under the "Recommendations of the Superintendent" section. This recommendation was to renew the annual contract of the Board attorney, Isabel Machado (Machado). The minutes of the June 28, 2012, regular meeting reflect the approval of the Machado Law Group as the Board attorney placed under "Recommendations of the Superintendent of Schools"; however, that motion was withdrawn and the action was placed under "New Business."

CONCLUSIONS OF LAW

The first point of Lebreault's motion to dismiss addresses the claim that the Commission lacks the jurisdiction to determine the allegations raised in Counts One, Two, and Three of the complaint. In the Letter Decision dated September 26, 2012, entered by the Commission, paragraph (2) it states that "The Commission voted to dismiss Counts 2 and Count 3 in their entirety for lack of jurisdiction, pursuant to N.J.S.A. 18A:12-22 et seq. and N.J.A.C. 6A:28-1.4 (a). The Commission lacks jurisdiction to determine whether complainant was served with a Rice notice before the meetings at issue." Accordingly, Counts Two and Three have already been dismissed by the Commission. In addition, since the Commission has already determined that it lacks jurisdiction regarding the proper provisions of Rice notices (see also Albert A. Monillas v. John Gabauer, C09-08 (July 22, 2008) <<http://www.state.nj.us/education/legal/ethics/>>), any issues raised by Caffrey in Count One is dismissed.

Based on the foregoing facts and the applicable law, I **CONCLUDE** that Lebreault did not violate the Code of Ethics under either N.J.S.A. 18A:12-24.1(a), (c), (d), (f) or (i).

In establishing the School Ethics Act, the New Jersey Legislature declared that school board members "must avoid conduct which is in violation of their public trust or which creates a justifiable impression among the public that such trust is being violated." N.J.S.A. 18A:12-22 (a). Additionally, the Legislature determined that school board members "should have the benefit of specific standards to guide their conduct and of some disciplinary mechanism to ensure the uniform maintenance of those standards among them." N.J.S.A. 18A:12-22(b); Friends Ret. Concepts v. Bd. of Educ., 356 N.J. Super. 203, 212 (Law Div. 2002).

To accomplish its objectives, the Legislature promulgated a Code of Ethics by which all school board members must abide. N.J.S.A. 18A:12-24.1. Further, it established within the Department of Education a nine-member School Ethics Commission to hear complaints and make determinations regarding alleged violations of the Code of Ethics. N.J.S.A. 18A:12-27, -29. Where appropriate, the Commission is expressly authorized to refer matters within its jurisdiction to the OAL for hearing.

Violations alleged under N.J.S.A. 18A:12-24.1(a) in Counts One and Four

Specifically, the present matter involves a complaint brought by Caffrey charging that Lebreault violated N.J.S.A. 18A:12-24.1(a), requiring that a school board member “uphold and enforce all laws, rules and regulations of the State Board of Education, and court orders pertaining to schools.” This statute further requires that desired changes be brought about through legal and ethical procedures. The implementing regulations contained in N.J.A.C. 6A:28-6.4(a)(1) require that in order to prove a violation of N.J.S.A. 18A:12-24.1(a), a complainant

shall include a copy of a final decision from any court of law or administrative agency of this State demonstrating that the respondent(s) failed to enforce all laws, rules and regulations of the State Board of Education, and/or court order pertaining to schools or that the respondent brought about changes through illegal or unethical procedures.

In the present case, Caffrey failed to cite or include a copy of any law, rule, regulation, or court order pertaining to schools and thus failed to comply with the implementing regulation of the alleged violated statute. Accordingly, I **FIND** that the actions of Lebreault did not violate N.J.S.A. 18A:12-24.1(a).

Violations alleged under N.J.S.A. 18A:12-24.1(c) in Counts One and Four

This matter also involves a complaint brought by Caffrey charging that Lebreault violated N.J.S.A. 18A:12-24.1(c), which states that a school board member shall confine their board action to “policy making, planning, and appraisal” and “will help to frame policies and plans only after the board has consulted those who will be affected by them.”

In Count One, Caffrey alleges that Lebreault engaged in discussions regarding the termination of Cores and Velez without a Rice notices being issued in the executive session on June 28, 2012, and July 5, 2012. Both Cores and Velez were on the list of recommendations for reappointment made by Caffrey as superintendent. This list of recommendations was an item on the agenda for the Board meetings held on June 28, 2012, and July 5, 2012. Accordingly, Lebreault's conduct in discussing personnel matters on the agenda in the executive sessions was in furtherance of his Board member duties calling for policy making, planning and appraisal. Therefore, I **FIND** that the actions of Lebreault as set forth in Count One did not violate N.J.S.A. 18A:12-24.1(f).

In Count Four, Caffrey alleges that Lebreault directed another Board member to add an agenda item to renew the annual contract of the Board attorney under the heading "Recommendation of the Superintendent" at the Board meeting scheduled for June 28, 2012. Lebreault claims in his brief that this allegation distorts the actual events that occurred at the June 28, 2012, and that during the public portion of the meeting in which the Finance Committee addressed agenda items, Lebreault publicly raised the issue of the reappointment of the current Board attorney. Lebreault confirms that Caffrey stated that she was not recommending the renewal of the contract of the current Board attorney. Lebreault then requested advice from the Board attorney who was at the meeting and the Board attorney advised Lebreault to place the item on as New Business. The minutes of the meeting of June 28, 2012, reflect that after Caffrey asked for a point of order stating that the superintendent was making a different recommendation as she did not place this item on the agenda. Thereafter, Lebreault asked Ms. Lusk "if we can move this item out of Finance and move it under new business. This will enable us to vote on it without the recommendation of the superintendent, is that correct? Ms. Lusk stated yes, the motion can be withdrawn and it can be voted on under new business." Therefore, I **FIND** that the actions of Lebreault as set forth in Count Four did not violate N.J.S.A. 18A:12-24.1(c).

Violations alleged under N.J.S.A. 18A:12-24.1(d) in Count One

Pursuant to N.J.S.A. 18A:12-24.1(d), a Board member will carry out their responsibility, not to administer the schools, but, together with fellow board members, to see that they are well run. Pursuant to N.J.A.C. 6A:28-6.4(a)(4), the term "administer the schools" means that a board member "gave a direct order to school personnel or became directly involved in activities or

functions that are the responsibility of school personnel or day-to-day administration of the school district or charter school.”

The allegation made by Caffrey to support this violation is that Lebreault discussed the termination of Principals Cores and Velez in executive session on June 28, 2012, without providing Rice notices to Cores and Velez. Caffrey, as the superintendent, recommended a number of employees for reappointment, including Cores and Velez.

A Board of Education has the power not to renew the contract of a nontenured employee. Bd. of Educ. of City of Englewood v. Englewood Teacher's Ass'n, 150 N.J. Super. 265 (App. Div. 1977), certif. denied, 75 N.J. 525 (1977). As such, when Lebreault discussed the non-renewal of the contracts of Velez and Cores in the executive session with his fellow Board members prior to the vote, he was acting within his duties as a Board of Education member. Therefore, I **FIND** that the actions of Lebreault as set forth in Count One did not violate N.J.S.A. 18A:12-24.1(d).

Violations alleged under N.J.S.A. 18A:12-24.1(f) in Count Four

Caffrey further alleges that Lebreault violated N.J.S.A. 18A:12-24.1(f), which states that board members will “refuse to surrender their independent judgment to special interests or partisan political groups or to use the schools for personal gain or for the gain of friends.” The implementing regulation contained in N.J.A.C. 6A28-6.4(a)(6) states that a

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

Caffrey's allegations provide no factual basis that there was any involvement of special interest groups or partisan political groups. There is also no allegation by Caffrey that states that Lebreault used the schools for personal gain or for the gain of friends. Accordingly, I **FIND** that the actions of Lebreault in Count Four did not violate N.J.S.A. 18A:12-24.1(f).

Violations alleged under N.J.S.A. 18A:12-24.1(i) in Count One

Caffrey also alleges that Lebreault violated N.J.S.A. 18A:12-24.1(i), which provides that a Board member will support and protect school personnel in proper performance of their duties. Not every policy debate or difference of opinion among board members should be elevated to an ethics complaint. Cf. Kliszus v. Gardner, EEC 13510-10, Initial Decision (Sept. 15, 2011), <<http://njlaw.rutgers.edu/collections/oal/>>, adopted, Sch. Ethics Comm'n (Oct. 26, 2011), <<http://www.state.nj.us/education/legal/ethics/>> (it is not the intent of the Code of Ethics to allow the Commission to become involved every time a board member does not like what a school administrator is doing). Kliszus v. Bemby, C-45-10 (March 23, 2011), <http://www.state.nj.us/education/legal/ethics/>; see also Spicer v. Della Vecchia, C31-04 (February 22, 2005), <<http://www.state.nj.us/education/legal/ethics/>>. The Commission stated that it should not be involved in every dispute between a board member and chief school administrator because "then any time a board [member] said that he or she did not like what the administrator was doing and asked him or her to stop, a complaint would be filed with the Commission. The Commission does not believe that the Legislature intended to open that door." Id. at slip op. at 5.

In this case Caffrey has failed to make any allegations which would support such a violation. Caffrey's allegations are based on the fact that Lebreault discussed the termination of Cores and Velez in executive session without providing a Rice notice. As previously stated, the Commission has already determined that it lacks jurisdiction to determine whether a party was properly served with a Rice notice prior to a Board meeting. (See Letter Decision of School Ethics Commission (September 26, 2012)). Accordingly, I **FIND** that the actions of Lebreault did not violate N.J.S.A. 18A:12-24.1(i).

Implementing regulations adopted by the Department of Education prescribe that "the complainant has the burden to factually establish a violation" in accordance with the standards set forth in the regulations. N.J.A.C. 6A:28-6.4(a).

ORDER

It is **ORDERED** that respondent's motion for summary decision be **GRANTED**.

It is further **ORDERED** that the ethics complaint against Samuel Lebreault be **DISMISSED**.

I hereby **FILE** my Initial Decision with the **SCHOOL ETHICS COMMISSION**. Pursuant to N.J.S.A. 18A:12-29, the School Ethics Commission has jurisdiction to determine whether a violation of the School Ethics Act occurred. If it concludes that the conduct constitutes a violation of the School Ethics Act, it shall recommend an appropriate penalty to the Commissioner of Education. The Commissioner of Education shall issue the final decision in this matter.

The recommendations of this decision as to whether the conduct constitutes a violation of the School Ethics Act may be adopted, modified or rejected by the **SCHOOL ETHICS COMMISSION**. If the School Ethics Commission does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision.

If the School Ethics Commission determines that a violation has occurred, it shall issue a written decision recommending to the Commissioner of Education an appropriate penalty and shall forward the record, including this recommended decision and its decision, to the Commissioner of Education. The Commissioner of Education may subsequently render a final decision as to the appropriate penalty. If the Commissioner of Education does not render a final decision within forty-five days of its receipt of this initial decision, and unless such time period is otherwise extended, the recommended decision of the School Ethics Commission shall become the final decision.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **SCHOOL ETHICS COMMISSION, DEPARTMENT OF EDUCATION, P.O. Box 500, Trenton, NJ 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

May 30, 2013

DATE MICHAEL ANTONIEWICZ, ALJ

Date Received at Agency:

Date Mailed to Parties:

jb

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JANINE WALKER CAFFREY

BEFORE THE SCHOOL
ETHICS COMMISSION

v.

SAMUEL LEBREAULT
PERTH AMBOY BOARD OF
EDUCATION, MIDDLESEX COUNTY

SEC Docket No. 27-12
OAL Dkt. No. EEC 13633-12
FINAL DECISION

PROCEDURAL HISTORY

This matter arises from a complaint filed by Janine Walker Caffrey, Superintendent of the Perth Amboy Board of Education on July 6, 2012 and amended on July 13, 2012, alleging that the respondent violated N.J.S.A. 18A:12-24.1(a) (c) (d) (f) (g) (h) and (i) of the Code of Ethics for School Board Members. On August 15, 2012, the respondent filed an Answer, alleging that the complaint was frivolous. Pursuant to a predecision determination, at its meeting on August 28, 2012, the Commission voted to find that the above-captioned complaint was not frivolous, in accordance with the standard set forth at N.J.A.C. 6A:28-1.2 and voted to dismiss Count 2 and Count 3 in their entirety for lack of jurisdiction. In accordance with N.J.A.C. 6A:28-10.8(a), the Commission voted to transmit this complaint to the Office of Administrative Law (OAL) for a plenary hearing on Count 1 and Count 4 of the complaint. The complainant had the burden to prove factually any violations of N.J.S.A. 18A:12-24.1 (a), (c), (d), (f), and (i) under the Code of Ethics for School Board Members within the standards set forth at N.J.A.C. 6A:28-6.4.

The complaint was transmitted to the OAL on September 28, 2012.

While at the OAL, the respondent filed a Motion for Summary Decision, to which the complainant filed her opposition on February 12, 2013, pursuant to N.J.A.C. 1:1-12.5. The ALJ granted the Motion for Summary Decision and electronically transmitted the Initial Decision to the Commission on May 30, 2013 and mailed it to the parties the same day. On May 31, the Commission requested an extension of time to review the full record, including exceptions. The extension was granted until August 28, 2013. Neither party filed exceptions to the Initial Decision. At its meeting on June 25, 2013, the Commission adopted the findings and conclusions of the ALJ for the reasons expressed in the Initial Decision and dismissed the matter.

ANALYSIS

The complainant bears the burden of factually proving any violations of the Code of Ethics for School Board Members in accordance with the standards set forth at N.J.A.C. 6A:28-6.4(a). See also, N.J.S.A. 18A:12-29(b). The Commission recognizes that summary decision may be granted:

if the papers and discovery, which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law. When a motion for summary decision is made and supported, an adverse party in order to prevail must by responding affidavit set forth specific facts showing that there is a genuine issue, which can only be determined in an evidentiary proceeding. N.J.A.C. 1:1-12.5(b).

Upon careful and independent review, the Commission finds that the record supports the ALJ's conclusion that Count 1 and Count 4 are ripe for summary dismissal.¹ In so finding, the Commission concurs that the papers and discovery, together with the affidavits in this matter, show that there is no genuine issue as to any material fact and the respondent is entitled to prevail as a matter of law inasmuch as the facts fail to demonstrate that: 1) respondent violated any cited law, rule, regulation or court ruling as required by N.J.S.A. 18A:12-24.1(a) (see, N.J.A.C. 6A:28-6.4(a)1); (2) respondent discussed personnel matters not on the agenda in executive session or acted beyond the scope of his authority so as to violate N.J.S.A. 18A:12-24.1(c) (see, N.J.A.C. 6A:28-6.4(a)3); (3) respondent became involved in the activities or functions that are the responsibility of school personnel when he voted against the Superintendent's recommendation so as to violate N.J.S.A. 18A:12-24.1(d) (see, N.J.A.C. 6A:28-6.4(a)4); (4) respondent surrendered his independent judgment or used the schools for personal gain so as to violate N.J.S.A. 18A:12-24.1(f) (see, N.J.A.C. 6A:28-6.4(a)6); or (5) respondent failed to support and protect school personnel by having a difference of opinion so as to violate N.J.S.A. 18A:12-24.1(i) (see, N.J.A.C. 6A:28-6.4(a)9).

DECISION

The Commission determines to adopt the ALJ's Initial Decision, granting summary decision to the respondent and dismissing Count 1 and Count 4 of the complaint. This decision is a final decision of an administrative agency. 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: July 31, 2013

¹ The School Ethics Commission has recognized that the Commission lacks jurisdiction to consider *Rice* notice violations. To the extent that this issue arose during the pendency of this matter at the OAL, the Commission concurs with the ALJ that same is dismissed.

Resolution Adopting Decision – C27-11

Whereas, pursuant to N.J.A.C. 6A:28-10.8(a), the Commission voted to transmit this matter to the Office of Administrative Law for hearing; and

Whereas, the Administrative Law Judge concluded in his Initial Decision that summary decision should be granted to the respondent and the complaint should be dismissed; and

Whereas, neither party filed exceptions in response to the ALJ’s decision; and

Whereas, at its meeting of June 25, 2013, the Commission determined to adopt the Initial Decision of the ALJ; and

Whereas, the Commission finds that the within decision accurately memorializes its adoption of the Initial Decision;

Now Therefore Be It Resolved, the Commission hereby adopts the within decision as a Final Decision and directs it staff to notify all parties to this action of the decision.

Robert W. Bender, Chairperson

I hereby certify that this Resolution was duly adopted by the School Ethics Commission at it public meeting on July 30, 2013.

Joanne M. Restivo
Interim Executive Director
School Ethics Commission