

***State of New Jersey***

OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**

**SUMMARY DECISION**

OAL DKT. NO. EEC13637-12

AGENCY DKT. NO. C29-12

**JANINE WALKER CAFFREY,**

Complainant,

v.

**OBDULIA GONZALEZ, 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 a school board member Obdulia Gonzalez (Gonzalez) by the 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. The complainant accuses Gonzalez of having violated the Code of Ethics for School Board Members (Code) promulgated at N.J.S.A. 18A:12-24.1. The complainant alleges that Gonzalez: 1) voiced her disagreement with the complainant at a parent meeting regarding the issue of eighth-grade graduation and 2) met with the personnel committee in the Board counsel's office regarding potentially terminating the superintendent. Complainant alleges that Gonzalez violated subsection (e) of the Code (N.J.S.A. 18A:12-24.1(e)), which requires school board members to make no personal promises nor take any private action that may compromise the board and that respondent violated subsection (d) of the Code (N.J.S.A. 18A:12-24.1(d)), which requires school board members to carry out their responsibilities, not to administer the schools, but together with fellow board members, to see that they are well run.

Presently, 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 6, 2012, complainant filed a written complaint against respondent Gonzalez with the School Ethics Commission (Commission). Thereafter, on August 15, 2012, Gonzalez filed an answer and frivolous-charge counterclaim. At its scheduled meeting on August 28, 2012, the Commission decided to refer the matter to the OAL, where it was filed on October 2, 2012, for an administrative hearing after finding that the complaint was not frivolous.

While the matter was pending before the OAL on the motion to dismiss, Gonzalez 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 stating that she opposed any motions to dismiss and that there continues to be interference in personnel and educational matters on February 12, 2013. Accordingly, Caffrey insisted that these cases 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 a 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**:

On January 18, 2012, the principal of the McGinnis Middle School held a parent meeting to discuss issues related to end-of-year events for students moving on to high school. The meeting was to provide a forum for discussion of the practice of the traditional cap and gown ceremonies, school dances, etc. The principal invited the superintendent to the meeting. On the day of the meeting, the principal sent an e-mail to the members of the Board of Education

since the issues at the meeting had been discussed among the Board members separately. All nine Board members were in attendance for at least part of the meeting.

A parent in the audience began speaking in Spanish about wanting the graduation ceremony for her child. The principal attempted to translate into English what the parent said. The principal's translation included a statement that the parent felt that middle school graduation might be the only graduation her child would experience. At this point, Gonzalez stated that the principal was translating incorrectly and thus the principal invited Gonzalez to come up to the microphone and translate. However, instead of translating, Gonzalez talked about how important the ceremony was to the community and that she disagreed with the superintendent. After the meeting, Gonzalez stated to the superintendent that the superintendent should not speak to the parents about important topics without checking with the Board first.

On April 11, 2012, Gonzalez called Jahaira Rosario (Rosario) in the Perth Amboy Public School business office. During this time, the schools were closed for spring break and Rosario was answering the phones. Gonzalez stated that she needed to speak with Human Resources Manager Bernice Marshall, stating that it was urgent. Rosario e-mailed Marshall with this message. Marshall called Gonzalez at the number she provided, which was her personal cell phone number. Gonzalez asked Marshall to come on the following day, April 12, 2012, to the office of Isabel Machado, the Board of Education attorney, in order to discuss an urgent matter. Marshall was asked to keep this request confidential, including from the superintendent.

When Marshall arrived at the meeting on April 12, 2012, the following people were at the meeting: Machado, Gonzalez, Board President Samuel Lebreault, and Assistant Superintendent Vivian Rodriguez. Marshall was asked questions about the superintendent and was told that the Board was seeking to terminate the superintendent. The questions centered around accusations that the superintendent was perhaps stealing money from the district.

### CONCLUSIONS OF LAW

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

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 Ref. 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.

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). See 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.

Specifically, the present matter involves a complaint brought by Caffrey charging that Gonzalez violated N.J.S.A. 18A:12-24.1(e) and N.J.S.A. 18A:12-24.1(d), requiring that a school board member shall “make no personal promises nor take any private action that may compromise the board” and a “school board member will carry out their responsibility, not to administer the schools, but, together with fellow board members, see that they are well run.”

The allegations by Caffrey regarding the parent meeting on January 18, 2012, allege both violation of (d) and (e) of N.J.S.A. 18A:12-24.1. However, the School Ethics Commission has recognized that "board members do not surrender the rights that they have as citizens such as freedom of speech" due to their board membership, but the board member must adhere to the standards set forth in the School Ethics Act. See SEC Advisory Opinion, A02-06 (March 10, 2006). In this case, Gonzalez expressed her own personal view of disagreement with Caffrey's public comments at a public meeting. Nowhere in Caffrey's complaint form did she allege that Gonzalez stated or alleged that she spoke on behalf of the Board of Education. Accordingly, I **CONCLUDE** that the actions of Gonzalez did not violate N.J.S.A. 18A:12-24.1(e).

In the statute N.J.S.A. 18A:12-24.1(d), a board member must carry out her responsibility, not to administer the schools, but, together with her fellow board members, to see that the schools are well run. N.J.A.C. 6A:28-6.4(a)(4) defines "administer the schools" to mean that a board member "gave a direct order to school personnel or became directly involved in activities or function that are the responsibility of school personnel or the day-to-day administration of the school district or charter school." However, conducting a special parent's meeting is not a day-to-day administrative function of the superintendent. In addition, graduation is an issue that falls within the Board of Education's purview. Accordingly, when Gonzalez spoke at the parent meeting she did not become involved in a function which was the responsibility of school personnel.

Furthermore, when Gonzalez made the statement to Caffrey not to speak with the parents without first speaking to the Board, I **FIND** that such a statement was an expression of her concern that the Board should be involved in discussions when the topic is a subject within the Board's policy. Accordingly, I **CONCLUDE** that the actions of Gonzalez did not violate N.J.S.A. 18A:12-24.1(d).

The allegations by Caffrey regarding the calling of Marshall and meeting at Attorney Machado's office on April 11 and 12, 2012, alleges both a violation of (d) and (e) of N.J.S.A. 18A:12-24.1. However, I **FIND** that the meeting of the Board members at Machado's office was the Personnel Committee, with Gonzalez as the chair of that Committee. Samuel Lebreault (Lebreault) (who is also a member of the Committee) was also present at the meeting. Also present at the meeting were the remaining Personnel Committee members Kenneth Puccio and Mark Carvajal. Caffrey does not allege that the individuals she named are the only people

who attended the meeting and does not deny the attendance of Puccio and Carvajal; thus there is no dispute of material fact. As such, it was a meeting of the Personnel Committee held in the office of the Board Counsel at which time the potential termination of the superintendent's employment was discussed. It makes sense to include in the meeting Marshall, the human resources manager, and Rodriguez, appointed interim superintendent, in the event the superintendent was placed on leave or terminated. From all facts alleged, it appears that the Board held a meeting on April 12, 2012. As such, Gonzalez was acting in her capacity as a Board member at the meeting and I **CONCLUDE** that the actions of Gonzalez did not violate N.J.S.A. 18A:12-24.1(e) as it only prohibits board members from acting as private citizens. The New Jersey School Ethics Commission has held that board members, who are acting in their capacity as board members, and not as private citizens, do not violate N.J.S.A. 18A:12-24.1(e). See Sophie LaPorte v. Rashum Stewart and Cornell Davis, C26-05 (September 27, 2005), <<http://www.state.nj.us/education/legal/ethics/>>; see also H. Gordon Pethick and Jacqueline R. Attinello v. Kevin DeGerolamo, C51-06 (March 27, 2007), <<http://www.state.nj.us/education/legal/ethics/>>; Marc Soveleove v. Paul Breda, C49-05 (September 26, 2006), <<http://www.state.nj.us/education/legal/ethics/>>.

In statute N.J.S.A. 18A:12-24.1(d), a board member is required to carry out her responsibility, not to administer the schools, but, together with her fellow board members, to see that they are well run. In accepting the allegations as presented by Caffrey regarding Marshall's hearsay statements regarding the questions presented to her at the meeting, no violation of the statute can be found. Gonzalez is the Chairperson of the Personnel Committee. She was well within her rights to assemble the Personnel Committee (as was done) and investigate any allegations of theft by Caffrey. See IMO John F. Kroschwitz, II and Wendy Strugeon, C29-03 (November 25, 2003), <<http://www.state.nj.us/education/legal/ethics/>>. Accordingly, I **CONCLUDE** that the actions of Gonzalez did not violate N.J.S.A. 18A:12-24.1(d).

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 Obdulia Gonzalez 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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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 the complaint is ripe for summary dismissal.<sup>1</sup> 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's public comment, which disagreed with the Superintendent's position violated N.J.S.A. 18A:12-24.1(e) (see, N.J.A.C. 6A:28-6.4(a)5); (2) respondent's involvement comprised activities or functions that were the responsibility of school personnel so as to violate N.J.S.A. 18A:12-24.1(d) (see, N.J.A.C. 6A:28-6.4(a)4); or (3) respondent's convening of the Personnel Committee to investigate the certain allegations of theft violated N.J.S.A. 18A:12-24.1(d) (see, N.J.A.C. 6A:28-6.4(a)4).

## DECISION

The Commission determines to adopt the ALJ's Initial Decision, granting summary decision to the respondent and dismissing both Counts 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).

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Robert W. Bender, Chairperson

Mailing Date: July 31, 2013

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<sup>1</sup> 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 – C29-11**

**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 as the Final Decision; 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.

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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.

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Joanne M. Restivo  
Interim Executive Director  
School Ethics Commission