

GEORGE W. FISHER, Complainant-Appellant,
v.
ERIC HAMILTON, Member of the Hamilton Township Board of Education (Mercer County),
Respondent-Respondent.

No. A-4441-11T3.

Superior Court of New Jersey, Appellate Division.

Submitted February 6, 2013.

Decided July 17, 2013.

George W. Fisher, appellant pro se.

Methfessel & Werbel, attorneys for respondent Eric Hamilton (Adam S. Weiss, of counsel; Mr. Weiss, Boris Shapiro and Caitlin W. Lundquist, on the brief).

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for respondent School Ethics Commission (Christopher Huber, Deputy Attorney General, on the statement in lieu of brief).

Before Judges Sapp-Peterson and Haas.

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION

PER CURIAM.

Appellant George W. Fisher, as a citizen and taxpayer of Hamilton Township (Mercer County), appeals the final agency decision from the School Ethics Commission (Commission) dismissing his ethics complaint filed against Eric Hamilton, a member of the Hamilton Township Board of Education (Board).

According to the amended complaint, Hamilton, by "accepting private contact and engaging in private conversation" with the candidate for the Board's interim superintendent position, "when no other candidate had such opportunity with any board member, was in violation of N.J.S.A. 18A:12-24(b)," and was "inconsistent with the code of ethics binding school board members, especially N.J.S.A. 18A:12-24.1(e).]"

The underlying facts, as pled in the complaint, to support the alleged violations are as follows. On June 15, 2011, the Board commenced its search for and appointment of an interim superintendent. The selection process "did not provide for or permit private contact between a board and a candidate for the position." On June 20, 2011, the Board held a special meeting to interview four finalists for the position, including the soon-to-be retired superintendent of the Perth Amboy School District. During the candidate's interview, he disclosed to the Board that, earlier in the day, at the suggestion of someone from his district who knew Hamilton, he reached out to Hamilton and discussed the interim superintendent position.

Additionally, it is alleged that following the interviews of the four individuals, the Board reached an informal consensus to appoint the Perth Amboy candidate as the interim superintendent. However, subsequent to June 20, the Perth Amboy candidate withdrew his name. At a special meeting held one week later, the Board selected its interim superintendent from one of the three remaining finalists. Although Hamilton attended this meeting and appeared to have participated in the closed session discussion on the topic of the superintendent, he abstained from the vote itself.

In lieu of filing an answer to the complaint, Hamilton filed a motion to dismiss the amended complaint, which the

Commission, upon notice to all parties, placed on the agenda for discussion at its February 28, 2012 meeting. Fisher filed a cross-motion for summary judgment. The Commission voted to dismiss the amended complaint in its entirety and memorialized its decision in a written opinion issued March 27, 2012.

The Commission found no violation of N.J.S.A. 18A:12-24(b), accepting as true all of the allegations contained in the amended complaint:

The Commission acknowledges the respondent's argument that there might be ethical concerns with the aforementioned phone call *if* there was an allegation that he used his position to exert pressure on another party for his advantage or the advantage of another. . . . However, here, "there is no allegation that the respondent sought to influence the Board, much less receive a benefit for himself or another." . . . Indeed, there is no allegation in the complaint that the respondent made any promises to the candidate and there is no dispute that the respondent *did not* attend the Board meeting on June 20, 2010 so as to exert any potential influence over the Board. Additionally, there is no dispute that the candidate withdrew his name from consideration *prior* to the Board's selection of an Interim Superintendent on June 27, 2011.

The Commission also notes that there is no dispute that the telephone call at issue herein was initiated by the candidate.

The Commission additionally determined that "even granting that [Hamilton], by agreeing to speak with the candidate, *may* have taken action outside the scope of his duties as a Board member," it nonetheless concluded that Fisher "failed to provide a sufficient factual basis in his [amended] complaint from which the Commission could find that [Hamilton's] action was of such a nature that it had the potential to compromise the Board." Therefore, the Board found no violation of N.J.S.A. 18A:12-24.1(e).

Based upon these findings, the Commission dismissed the amended complaint in its entirety, except that it concluded Fisher's complaint was not frivolous and denied Hamilton's request for sanctions. The present appeal ensued.

We are not bound by an agency's interpretation of a statute. In re State Bd. of Educ.'s Denial of Petition to Adopt, 422 N.J. Super. 521, 530 (App. Div. 2011). Our review of legal questions is de novo. *Ibid.* We are nonetheless mindful of an "administrative agency's day-to-day role in interpreting statutes `within its implementing and enforcing responsibility.'" *Id.* at 531 (citing Wnuck v. N.J. Div. of Motor Vehicles, 337 N.J. Super. 52, 56 (App. Div. 2001) (internal citation and quotations omitted)). Consequently, we generally "give considerable weight to a state agency's interpretation of a statutory scheme that the [L]egislature has entrusted to the agency to administer." In re Election Law Enforcement Comm'n, Advisory Op. No. 01-2008, 201 N.J. 254, 262 (2010). Thus, our analysis is informed by these standards.

N.J.A.C. 6A:28-8.3 provides that "[i]n determining whether to grant a motion to dismiss, the Commission shall review the facts in the light most favorable to the complainant and determine whether the allegation(s), if true, could establish a violation of the Act." The language mirrors the standard for dismissal of a complaint pursuant to Rule 4:6-2(e), which the Commission has applied in considering dismissal motions, prior to the adoption of this regulation in 2009. See *In the Matter of Kessleman*, Docket No. CS38-95 (Sch. Ethics Comm'n October 22, 1996), www.njgov/education/legal/ethics/96-99/C3895.pdf. Thus, as in a Rule 4:6-2(e) motion, the Commission was required to "search[] the complaint in depth and with liberality to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim, opportunity being given to amend if necessary." Too Much Media, LLC v. Hale, 413 N.J. Super. 135, 164 (App. Div.) (quoting Di Cristofaro v. Laurel Grove Mem'l Park, 43 N.J. Super. 244, 252 (App. Div. 1957)), *aff'd in part, modified in part*, by 206 N.J. 209 (2010).

Fisher maintains the Commission (1) reached its decision by concluding the complaint was lacking in merit because he failed to allege Hamilton attempted to influence the Board or another person and failed to allege Hamilton's conduct had the potential to compromise the Board, and (2) deviated from the standard governing dismissal motions by considering facts provided by Hamilton in his affidavit submitted in support of the motion while, at the same time, ignoring facts Hamilton provided in the affidavit, which actually support the assertions contained in the complaint.

With the enactment of the School Ethics Act ("Act"), N.J.S.A. 18A:12-21 to-34, the Legislature has declared that school board members and administrators must conduct themselves so as to "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. To that end, the Legislature has also declared that public confidence in school members is preserved through "specific standards to guide their conduct[.]" Ibid.

N.J.S.A. 12-24 provides in pertinent part:

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;

....

e. No school official, or member of his immediate family, or business organization in which he has an interest, shall solicit or accept any gift, favor, loan, political contribution, service, promise of future employment, or other thing of value based upon an understanding that the gift, favor, loan, contribution, service, promise, or other thing of value was given or offered for the purpose of influencing him, directly or indirectly, in the discharge of his official duties.

N.J.S.A. 18A:12-24.1e provides:

A school board member shall abide by the following Code of Ethics for School Board Members:

....

e. I will recognize that authority rests with the board of education and will make no personal promises nor take any private action that may compromise the board.

Where the language in a statute is clear and unambiguous, "the interpretative process will end without resort to extrinsic sources." Jen Elec., Inc. v. Cnty. of Essex, 197 N.J. 627, 641 (2009) (internal citation and quotations omitted). Moreover, "it is not our function to rewrite a plainly-written enactment, or to presume that the drafter intended a meaning other than the one `expressed by way of the plain language.'" US Bank, N.A. v. Hough, 210 N.J. 187, 199 (2012) (quoting DiProspero v. Penn., 183 N.J. 477, 492 (2005)). "We cannot rearrange the wording of the [statute], if it is otherwise unambiguous, or engage in conjecture that will subvert its plain meaning." Ibid. Thus, we will generally defer to the agency as long as the interpretation falls "within the sphere of [its] authority, unless the interpretation is `plainly unreasonable.'" Id. at 200 (quoting In re Election Law Enforcement Comm'n Advisory Op. No. 01-2008, 201 N.J. 254, 262 (2010)).

Here, the Commissioner interpreted N.J.S.A. 18A:12-24(b) as requiring Hamilton to have actually used his position or attempted to use his position to influence the Board or to receive a benefit for himself or another before a violation occurs. The Commissioner interpreted N.J.S.A. 18A:12-24(e) as requiring that the effect of Hamilton's conduct must have had the potential to compromise the Board. In his amended complaint, Fisher alleged that Hamilton accepted private contact and engaged in a private conversation with the prospective candidate from Perth Amboy before the Board's interview of the candidate, "when no other candidate had such opportunity with any board member[.]" He further alleged that such conduct may have compromised the integrity of the Board's selection process.

The Commission concluded that because the pleadings neglected to include a specific allegation that Hamilton "sought to influence the Board, much less receive a benefit for himself or another" or that Hamilton made "any promises to the candidate[.]" they were insufficient to find a violation of the statute. We disagree.

A liberal reading of the pleadings, as we are required to do at this stage, establishes that the Board created a process for selection of its interim superintendent that "did not provide for or permit private contact between a board member and a candidate for the position." Notwithstanding this no-contact process, Hamilton accepted a telephone call from a prospective candidate who was referred to him by someone who had a relationship with Hamilton. The candidate

telephoned Hamilton and "engaged in [a] conversation about the interim superintendent position." The candidate was interviewed by the Board later that day and, in response to an inquiry about whether he had a relationship with any board member, the candidate disclosed that he had engaged in a conversation with Hamilton earlier that day. Following the interview, the informal consensus of the Board was to offer the position to this candidate.

From these facts as pled, it can reasonably be inferred that Hamilton's conversation provided an advantage to the candidate, an advantage not offered to any of the other prospective candidates. The fact that the candidate subsequently withdrew his name from the process, as the Commission noted, is of no consequence, because it is the actions or intended actions of Hamilton, as a member of the Board, that are at issue. Nor need the pleadings be so specific to actually allege that promises were made or Hamilton's position was used to create an advantage on behalf of the candidate. It is sufficient if such a result may be inferred from the pleadings. As the Court stated more than twenty years ago in Printing Mart-Morristown v. Sharp Electronics Corp., 116 N.J. 739, 746 (1989):

[A] reviewing court searches the complaint in depth and with liberality to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim, opportunity being given to amend if necessary. At this preliminary stage of the litigation the Court is not concerned with the ability of plaintiffs to prove the allegation contained in the complaint. For purposes of analysis plaintiffs are entitled to every reasonable inference of fact. The examination of a complaint's allegations of fact required by the aforestated principles should be one that is at once painstaking and undertaken with a generous and hospitable approach.

[(internal citations and quotations omitted).]

In enacting the School Ethics Act, the Legislature has made clear that the statute is not only aimed at preventing the actual violation of the public trust by school board members but also ensuring that board members will avoid conduct "which creates a justifiable impression among the public that such trust is being violated." N.J.S.A. 18A:12-22. In our de novo review of the pleadings, we are satisfied that a fundament of a cause of action has been pled in the complaint. In doing so, we take no position as to the merits of the allegations contained in the complaint. Rather, we merely reinstate the complaint and leave plaintiff to the opportunity to pursue his claim in further proceedings.

Reversed and remanded for reinstatement of the complaint. We do not retain jurisdiction.

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