

***Before the School Ethics Commission
OAL Docket No.: EEC 04110-2018 S
SEC Docket No.: C76-17
Final Decision***

**Edward Kimley,
Complainant**

v.

**Michelle Kennedy,
Fairfield Township Board of Education, Cumberland County,
Respondent**

I. Procedural History

This matter arises from a Complaint filed on October 17, 2017, by Edward Kimley (Complainant), alleging that Michelle Kennedy (Respondent), a member and President of the Fairfield Township Board of Education (Board), violated the School Ethics Act (Act), *N.J.S.A.* 18A:12-21 *et seq.* By correspondence dated October 24, 2017, and November 17, 2017, Complainant was notified that his Complaint was deficient and required amendment before the School Ethics Commission (Commission) could accept his filing. On December 8, 2017, 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 violated *N.J.S.A.* 18A:6-7.1 *et seq.*, *N.J.S.A.* 18A:39-17 *et seq.*, *N.J.S.A.* 18A:6-4.13, and *N.J.S.A.* 18A:12-1 in Count 1 and Count 2; violated *N.J.S.A.* 18A:12-24(a) in Count 3; and violated *N.J.S.A.* 18A:12-24.1(a) and *N.J.S.A.* 18A:12-24.1(h) of the Code of Ethics for School Board Members (Code) in Count 4.

On December 11, 2017, the Complaint was served on Respondent, via regular and certified mail, notifying her that charges were filed against her with the Commission, and advising that she had twenty (20) days to file a responsive pleading.¹ On December 27, 2017, Respondent filed an Answer to Complaint (Answer).

The parties were notified by correspondence dated January 16, 2018, that this matter would be placed on the Commission's agenda for its meeting on January 23, 2018, in order to make a determination regarding probable cause. At its meeting on January 23, 2018, the Commission considered the filings in this matter and, at its meeting on February 27, 2018, the Commission voted to dismiss the alleged violations of *N.J.S.A.* 18A:6-7.1 *et seq.*, *N.J.S.A.* 18A:39-17 *et seq.*, *N.J.S.A.* 18A:6-4.13, and *N.J.S.A.* 18A:12-1 in Count 1 and Count 2 for lack of jurisdiction; to find no probable cause for the alleged violation of *N.J.S.A.* 18A:12-24(a) in

¹ Although the Complaint was sent to Respondent on December 11, 2017, the Exhibits referenced in the Complaint were not sent to her until December 21, 2017.

Count 3; and to transmit the remaining allegations in the Complaint (Count 4) to the Office of Administrative Law (OAL) for a plenary hearing. *N.J.A.C.* 6A:28-10.9(b). In voting to transmit the remaining allegations to the OAL, the Commission did **not** find probable cause for these allegations. Instead, the Commission noted that, at the OAL, Complainant would carry the burden to prove that Respondent violated *N.J.S.A.* 18A:12-24.1(a) and *N.J.S.A.* 18A:12-24.1(h) as alleged in Count 4. *N.J.A.C.* 6A:28-10.8.

A hearing was conducted at the OAL on September 24, 2018. At the close of Complainant's case, Respondent "made an oral application for judgment of involuntary dismissal." Following this oral application, Complainant and Respondent were directed "to brief their respective positions," and both parties complied as directed. Following these submissions, the record closed on October 30, 2018.² After review, and in his Initial Decision dated December 11, 2018, Jeffrey R. Wilson, Administrative Law Judge (ALJ Wilson), found that the matter should be dismissed because Complainant failed to satisfy his burden to prove that Respondent violated *N.J.S.A.* 18A:12-24.1(a) and/or *N.J.S.A.* 18A:12-24.1(h).

The Commission acknowledged receipt of ALJ Wilson's Initial Decision on December 11, 2018; therefore, the forty-five (45) day statutory period for the Commission to issue a Final Decision was January 25, 2019. Prior to January 25, 2019, the Commission requested a forty-five (45) day extension of time to issue its decision so as to allow the Commission, which only meets monthly, the opportunity to receive and review the full record, including the parties' Exceptions (if any). Pursuant to *N.J.S.A.* 52:14B-10(c) and *N.J.A.C.* 1:1-18.8, and for good cause shown, the Commission was granted an extension until March 11, 2019. Neither party filed Exceptions to ALJ Wilson's Initial Decision.

The Commission considered the full record in this matter at its meeting on January 22, 2019. Thereafter, at its meeting on February 26, 2019, and for the reasons more fully detailed below, the Commission voted to adopt ALJ Wilson's findings of fact; to adopt the legal conclusion that Complainant failed to satisfy his burden to prove that Respondent violated *N.J.S.A.* 18A:12-24.1(a); to adopt the legal conclusion that Complainant failed to satisfy his burden to prove that Respondent violated *N.J.S.A.* 18A:12-24.1(h); and to adopt the Initial Decision dismissing the Complaint.

II. Initial Decision

Based on the testimony of the witnesses at the hearing on September 24, 2018, and after examining the documentary evidence, ALJ Wilson issued the following findings of fact:

1. Complainant is a resident of Fairfield Township, and Respondent is a member and President of the Board. *Initial Decision* at 3.
2. Complainant was present at the Board meeting on September 14, 2017. *Id.* at 3.

² In his Initial Decision, ALJ Wilson noted that the exhibits submitted by Complainant with his brief (opposing the oral application for judgment of involuntary dismissal) were not afforded any consideration because "they were not entered into evidence at the hearing on September 24, 2018."

3. Respondent was absent from the Board meeting on September 14, 2017. *Id.* at 3.

4. At the Board meeting on September 14, 2017, one of the actions taken by the Board was to approve the use of the school gymnasium by Tracey Elliot, Fairfield Township Recreation, from September 11, 2017, through June 1, 2018, Monday through Friday, from 6:00 pm to 8:00 pm. *Id.* at 3.

5. Ms. Elliot was a volunteer for the Fairfield Township Recreation Program, and was not, and is not, a volunteer for the Board. *Id.* at 3.

6. The Fairfield Township Administrator undertook a criminal background check of Ms. Elliot. *Id.* at 4.

7. The criminal background check for Ms. Elliot did not reveal any record of convictions or other offenses, including disorderly, petty disorderly, or city ordinances. *Id.* at 4.

8. Fairfield Township and the Board entered into a Shared Services Agreement dated August 12, 2017, which includes provisions that permit Fairfield Township to utilize the school building and facilities for Fairfield Township activities. The agreement further provides that Fairfield Township is responsible for the hiring of all employees or volunteers for Fairfield Township programs, and Fairfield Township has the sole obligation to undertake appropriate background checks. *Id.* at 4.

In the Legal Analysis and Conclusions section of his Initial Decision, ALJ Wilson notes that Complainant alleges that Respondent admitted to “not complying” with statutes regarding a criminal background check in violation of *N.J.S.A.* 18A:12-24.1(a), and that Respondent violated *N.J.S.A.* 18A:12-24.1(h) because “of her failure to comply with the criminal background check, and to influence the passing of resolutions which allow for such non-compliance that ‘put our children and school in jeopardy.’” *Initial Decision* at 4.

After citing the provisions of the Code allegedly violated by Respondent, and articulating the burden of proof that Complainant must satisfy in order to factually establish the alleged violations, ALJ Wilson observed that the Complaint related to actions taken at a Board meeting that, importantly, Respondent did not attend. *Initial Decision* at 5. ALJ Wilson further stated that there is a Shared Service Agreement that permits Fairfield Township to use the Fairfield Township School District’s facilities for Fairfield Township programs, and that indicates that Fairfield Township is responsible for “the hiring or identification of competent employees and volunteers,” and that Fairfield Township has “the sole obligation to undertake appropriate background checks and to undertake...supervision as may be required...” *Id.* at 5-6.

On November 17, 2017, the former Fairfield Township Administrator submitted a criminal background check for Ms. Elliot, and it did not reveal any record of conviction(s) or other offense(s). *Initial Decision* at 6. When criminal background checks were submitted for the volunteers working under Ms. Elliot, the background checks for two (2) volunteers revealed prior convictions. *Id.* Both volunteers complied with Fairfield Township’s policy for appealing disqualifying convictions, and were ultimately determined to be eligible for their respective

volunteer positions. *Id.* Complainant argued that he had personal knowledge that the two (2) volunteers had prior convictions that would disqualify them from working with children, and that Respondent “breached her duty to conduct background checks.” *Id.* ALJ Wilson rejected this “argument” noting that pursuant to the Shared Services Agreement, Fairfield Township assumed the sole obligation to undertake appropriate background checks. *Id.* When it was pointed out to Complainant that the controlling statute, *N.J.S.A.* 18A:6-7.1, “did not place an affirmative duty upon the Board to conduct background checks of its volunteers, his response was that the statute should require background checks for everyone and that it is ‘only common sense.’” *Id.* at 7.

In this case, ALJ Wilson found that Complainant “erroneously deemed...[R]espondent to be responsible for actions by other Board members at a meeting where...[R]espondent was absent,” and that Complainant “failed to present one scintilla of credible, factual evidence of any law, rule or regulation that...[R]espondent violated or that...[R]espondent acted on a personnel matter without a recommendation from the chief administrative officer.” *Initial Decision* at 7. Therefore, ALJ Wilson concluded that Complainant “has not met his burden to factually establish a violation” of *N.J.S.A.* 18A:12-24.1(a) and/or *N.J.S.A.* 18A:12-24.1(h), and recommended that the Complaint be dismissed.

III. Analysis

Complainant bears the burden of factually proving the alleged violations of the Code in accordance with the standards enumerated in *N.J.A.C.* 6A:28-6.4(a). *See N.J.S.A.* 18A:12-29(b). Upon careful and independent review of the record, the Commission finds that the record supports ALJ Wilson’s findings of fact; supports ALJ Wilson’s legal conclusion that Complainant failed to satisfy his burden to prove that Respondent violated *N.J.S.A.* 18A:12-24.1(a); and supports ALJ Wilson’s legal conclusion that Complainant failed to satisfy his burden to prove that Respondent violated *N.J.S.A.* 18A:12-24.1(h). Accordingly, the Commission adopts ALJ Wilson’s decision to dismiss the matter.

IV. Decision

After review, the Commission adopts ALJ Wilson’s Initial Decision dismissing the Complaint based on Complainant’s failure to satisfy his burden to prove that Respondent violated *N.J.S.A.* 18A:12-24.1(a) and/or *N.J.S.A.* 18A:12-24.1(h). Therefore, this is a final agency decision and is appealable only to the Superior Court-Appellate Division. *See, N.J.A.C.* 6A:28-10.11 and *New Jersey Court Rule* 2:2-3(a).

Robert W. Bender, Chairperson
School Ethics Commission

Mailing Date: February 27, 2019

**Resolution Adopting Decision
in Connection with C76-17**

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

Whereas, Jeffrey R. Wilson, Administrative Law Judge (ALJ Wilson) issued his Initial Decision on December 11, 2018; and

Whereas, in his Initial Decision, and following Respondent's oral application for judgment of involuntary dismissal, and the submission of briefs from both Complainant and Respondent, ALJ Wilson found that Complainant failed to satisfy his burden to prove a violation of *N.J.S.A.* 18A:12-24.1(a) and/or *N.J.S.A.* 18A:12-24.1(h); and

Whereas, neither Complainant nor Respondent filed Exceptions to ALJ Wilson's Initial Decision; and

Whereas, at its meeting on January 22, 2019, the Commission reviewed and discussed the record, including ALJ Wilson's Initial Decision; and

Whereas, at its meeting on January 22, 2019, the Commission discussed adopting ALJ Wilson's findings of fact; adopting the legal conclusion that Complainant failed to satisfy his burden to prove a violation of *N.J.S.A.* 18A:12-24.1(a); adopting the legal conclusion that Complainant failed to satisfy his burden to prove a violation of *N.J.S.A.* 18A:12-24.1(h); and adopting the decision to dismiss the Complaint; and

Whereas, at its meeting on February 26, 2019, the Commission reviewed and voted to approve the within decision as accurately memorializing its actions/findings from its meeting on January 22, 2019; and

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

Robert W. Bender, Chairperson

I hereby certify that this Resolution was duly adopted by the School Ethics Commission at its public meeting on February 26, 2019.

Kathryn A. Whalen, Director
School Ethics Commission