

Before the School Ethics Commission
Docket No.: C106-22
Decision on Motion to Dismiss

Nicole Martin,
Complainant

v.

Kristen Pedersen and Michael Pontillo,
Westwood Regional Board of Education, Bergen County,
Respondents

I. Procedural History

The above-captioned matter arises from a Complaint that was filed on November 8, 2022, by Nicole Martin (Complainant), alleging that Kristen Pederson (Respondent Pedersen) and Michael Pontillo (Respondent Pontillo) (collectively referred to as Respondents), members of the Westwood Regional Board of Education (Board), violated the School Ethics Act (Act), *N.J.S.A.* 18A:12-21 *et seq.* More specifically, the Complaint avers that Respondent Pedersen violated *N.J.S.A.* 18A:12-24(b) in Counts 1-3, and Respondent Pontillo violated *N.J.S.A.* 18A:12-24(b) in Counts 4-6.

On November 9, 2022, the Complaint was served on Respondents via electronic mail, notifying them that ethics charges had been filed against them with the School Ethics Commission (Commission), and advising that they had twenty (20) days to file a responsive pleading.¹ On December 7, 2022, Respondents filed a Motion to Dismiss in Lieu of Answer (Motion to Dismiss), and also alleged that the Complaint is frivolous. On December 19, 2022, Complainant filed a response to the Motion to Dismiss and allegation of frivolous filing.

The parties were notified by correspondence dated January 23, 2023, that the above-captioned matter would be discussed by the Commission at a special meeting on January 31, 2023, in order to make a determination regarding the Motion to Dismiss and allegation of frivolous filing. Following its discussion on January 31, 2023, the Commission adopted a decision at its meeting on February 21, 2023, granting the Motion to Dismiss in its entirety because Complainant failed to plead sufficient credible facts to support a finding that Respondent Pedersen violated *N.J.S.A.* 18A:12-24(b) in Counts 1-3, and/or Respondent Pontillo violated *N.J.S.A.* 18A:12-24(b) in Counts 4-6. The Commission also adopted a decision finding the Complaint not frivolous, and denying Respondents' request for sanctions.

¹ In order to conduct business during the Coronavirus (COVID-19) pandemic, the Commission implemented an electronic filing system, which remains a permissible method by which the Commission and parties can effectuate service of process. Consequently, service of process was effectuated by the Commission through electronic transmission only.

II. Summary of the Pleadings

A. *The Complaint*

In Count 1, Complainant alleges that, on August 31, 2022, October 5, 2022, and October 26, 2022, Respondent Pedersen violated *N.J.S.A.* 18A:12-24(b) because she endorsed Board candidate Douglas Cusato from her official Board account (“Kristen Pedersen for WWRSD Board of Education”), and did not include a disclaimer indicating that the endorsement was being made in her personal capacity, not in her capacity as a Board member.

In Count 2, Complainant contends that, on September 4, 2022, September 19, 2022, October 5, 2022, October 7, 2022, October 26, 2022, and October 31, 2022, Respondent Pedersen violated *N.J.S.A.* 18A:12-24(b) because she endorsed Board candidate Laura Cooper from her official Board account (“Kristen Pedersen for WWRSD Board of Education”), and did not include a disclaimer indicating that the endorsement was being made in her personal capacity, not in her capacity as a Board member.

In Count 3, Complainant argues that, on September 21, 2022, October 5, 2022, October 7, 2022, October 26, 2022, and October 31, 2022, Respondent Pedersen violated *N.J.S.A.* 18A:12-24(b) because she endorsed Board candidate Michelle Sembler from her official Board account (“Kristen Pedersen for WWRSD Board of Education”), and did not include a disclaimer indicating that the endorsement was being made in her personal capacity, not in her capacity as a Board member.

In Count 4, Complainant submits that, on August 29, 2022, September 21, 2022, September 27, 2022, October 1, 2022, October 8, 2022, October 15, 2022, and October 25, 2022, Respondent Pontillo violated *N.J.S.A.* 18A:12-24(b) because he endorsed Board candidate Michelle Sembler from his official Board account (“Michael Pontillo for WWRSD BOE”), and did not include a disclaimer indicating that the endorsement was being made in his personal capacity, not in his capacity as a Board member.

In Count 5, Complainant alleges that, on October 1, 2022, October 8, 2022, October 11, 2022, October 15, 2022, and October 25, 2022, Respondent Pontillo violated *N.J.S.A.* 18A:12-24(b) because he endorsed Board candidate Laura Cooper from his official Board account (“Michael Pontillo for WWRSD BOE”), and did not include a disclaimer indicating that the endorsement was being made in his personal capacity, not in his capacity as a Board member.

In Count 6, Complainant contends that, on October 25, 2022, Respondent Pontillo violated *N.J.S.A.* 18A:12-24(b) because he endorsed Board candidate Doug Cusato from his official Board account (“Michael Pontillo for WWRSD BOE”), and did not include a disclaimer indicating that the endorsement was being made in his personal capacity, not in his capacity as a Board member.

B. Motion to Dismiss and Allegation of Frivolous Filing

In their Motion to Dismiss and allegation of frivolous filing, Respondents argue that the Complaint is frivolous because their respective Facebook pages “contain clear disclaimers that their communications are their own personal views, and not those of the Board” and, moreover, “the facts pled in the Complaint cannot constitute violations of the ... Act”

In more specific response, Respondents note that while they have Facebook accounts, “Kristen Pedersen for WWRSD Board of Education” and “Michael Pontillo for WWRSD BOE” respectively, neither is an official Board member account. Moreover, the “Intro” section of Respondent Pedersen’s page states, “The content on this page reflects the views of Kristen Pedersen and not the [B]oard as a whole,” and the “about” tab on Respondent Pontillo’s page (under “Privacy and Legal Info”) states, “The words, opinions and positions expressed ... should not be construed as coming from [t]he ... District or [t]he ... Board ... The words, opinions and positions expressed here are mine and mine only.” Additionally, and on occasion, Respondents also included additional disclaimers within the body of their Facebook posts

In addition, Respondents argue Complainant has failed to articulate any facts which could establish a violation of *N.J.S.A.* 18A:12-24(b), as Complainant “does not explain how these Facebook posts, setting forth Respondents’ *personal opinions* on an important public matter (who the public should elect to the [B]oard ...), constitute [B]oard members using their *official* positions to secure any privileges, advantages, or employment, let alone any *unwarranted* privileges, advantages, or employment.” Instead, the disclaimers utilized by Respondent “make it clear that the opinions they express on their Facebook account[s] are their own *and not* on behalf of the ... Board,” and a reasonable person could not read those disclaimers and conclude that the posts were being made in an official capacity or on behalf of the Board as a whole. Further, Respondents “did nothing to suggest that the [B]oard ... as a whole was endorsing” the individuals that Respondent personally chose to endorse. Therefore, and as it has done in several recent cases, e.g., *DeVito v. Galluccio* (Docket No. C61-21) and *DeVito v. Young* (Docket No. C64-21), the Commission must dismiss the Complaint because a reasonable person could not draw the conclusion that the statements made by Respondents were being offered in an official capacity or on behalf of the Board, and Complainant does not allege any facts suggesting same.

Finally, Respondents argue that “the facts of this matter establish that Complainant frivolously filed this action because Respondents used clear disclaimers on their Facebook page,” and the communications in question do not violate *N.J.S.A.* 18A:12-24(b) because Respondents were not using their official position as Board members to secure unwarranted privileges, advantages, or employment for their chosen candidates. Given Respondents’ clear disclaimers and the “dearth of factual support” for the claims set forth in the Complaint, Respondents request that the Commission dismiss the Complaint, and impose a \$500.00 sanction on Complainant for the frivolous filing.

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 requests that the Commission consider the perspective of a person viewing each of the Respondents' Facebook pages. With respect to Respondent Pedersen's Facebook page, Complainant acknowledges that when viewed from a web browser on a desktop or laptop, the "intro" section and disclaimer is visible. However, if her page is viewed on a mobile device (through the Facebook App), the "intro" section is not as easily located. Complainant further alleges that with respect to Respondent Pontillo's Facebook page, the disclaimer cannot be found unless the reader searches for it. Complainant further asserts that since Respondents admit that disclaimers are not clearly stated on *every* post, it is not clear that readers would see the posts that include the additional disclaimer language. Therefore, and "[w]hen considering how a user would perceive the titles of the Facebook pages and knowing that Facebook algorithms do not provide users with every post from every account they follow, it is ... rational to perceive [Respondent] Pedersen[']s and [Respondent] Pontillo's public figure Facebook pages as ones that represent them within their official capacity as Board members."

In addition, and regardless of whether their Facebook pages are "official" Board member accounts, "[e]ndorsements of candidates on Facebook accounts that clearly link their names to their roles within the community have the ability to sway public opinion" Complainant maintains that the Complaint is not frivolous because of the misleading Facebook page titles used by Respondents ("Kristen Pedersen for WWRSD Board of Education" and "Michael Pontillo for WWRSD BOE"); reiterates that it is not clear to the general public that Respondents' endorsements were not made in their capacity as Board members; and *Advisory Opinion A36-14* specifically said that "use of social media ... would require the disclaimer that your endorsement is a personal one and not as a Board member or an endorsement on behalf of the entire Board," and "the use of social media ... may only be published on your own personal social media account and not one representing the Board or you as a Board member." Accordingly, Complainant denies the Complaint is frivolous.

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(s) 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 pled sufficient facts which, if true, could support a finding that Respondent Pedersen violated *N.J.S.A. 18A:12-24(b)* in Counts 1-3, and/or Respondent Pontillo violated *N.J.S.A. 18A:12-24(b)* in Counts 4-6.

B. *Alleged Violations of the Act*

Complainant submits that, based on the conduct more fully detailed above, Respondent Pedersen violated *N.J.S.A.* 18A:12-24(b) in Counts 1-3, and Respondent Pontillo violated *N.J.S.A.* 18A:12-24(b) in Counts 4-6, and this provision of the Act states:

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;

In order to establish a violation(s) of *N.J.S.A.* 18A:12-24(b), Complainant must provide sufficient factual evidence that Respondent Pedersen and/or Respondent Pontillo used or attempted to use their official position to secure an unwarranted privilege, advantage or employment for themselves, members of their immediate family, or “others.”

In the past calendar year, the Commission has received a significant number of ethics complaints alleging that school officials have violated the Act because of posts, comments, or statements made on various social media platforms. As such, the Commission feels compelled to restate the analysis that it applies when reviewing the sufficiency of such claims, namely:

As a general matter, a school official does not violate the Act merely because he/she engages in social media activity. Instead, the Commission’s analysis is guided by whether a reasonable member of the public could perceive that the school official is speaking in his or her official capacity or pursuant to his or her official duties. Whether a school official is perceived as speaking in his or her official capacity and pursuant to his or her official duties turns, in large part, on the content of the speech. If the speech in question has absolutely no correlation or relationship to the business of the Board and/or its operations and, therefore, could not possibly be regarded as a statement or position on behalf of the Board (as a body), a school official will not violate the Act. Conversely, if the speech in question *does* relate to the business of the Board and/or its operations, it is then reasonable for the reader to perceive the speech as being offered in an official capacity and pursuant to his or her official duties. Nonetheless, the filing party would still need to prove *all* elements of the cited provision of the Act

Moreover, the use of a disclaimer on social media can help to clarify whether an individual is speaking in his or her official capacity and pursuant to his or her official duties; however, the presence of a disclaimer is not dispositive. ... The failure of a school official to parrot the exact language recommended by the Commission will not mean, without more, that he or she did not use an appropriate disclaimer. In addition, if a school official utilizes an appropriate disclaimer, but the content or substance of the statements would still lead a reasonable member of the public to believe that the school official is speaking in his or her official capacity or pursuant to his or her official duties, then the

disclaimer will be inadequate and of no force or effect, and the social media activity could violate the Act. See *I/M/O Treston*[], Randolph Township Board of Education, Morris County, Docket No. C71-18].

Aziz v. Nikitinsky, Chiarella, Skurbe, and Bierman, Monroe Township Board of Education, Middlesex County, Docket No. C56-22, at 8.

With the above in mind, the Commission finds that even if the facts as asserted in the Complaint are proven true by sufficient credible evidence, they would not support a finding that Respondent Pedersen and/or Respondent Pontillo violated *N.J.S.A.* 18A:12-24(b). Although the Commission agrees with Complainant that the outward facing (and publicly visible) names/titles of Respondents' respective social media pages/accounts, "Kristen Pedersen for WWRSD Board of Education" and "Michael Pontillo for WWRSD BOE," are misleading and could cause a reasonable member of the public to believe that the statements or comments being made are in an official capacity, both Respondents have clear and unequivocal disclaimers noting that the statements and comments made are their own, are not being made in an official capacity, and are not being made on behalf of the Board. In this way, their disclaimers clarify the lens through which they are offering their public statements and comments. Moreover, and importantly, the substance of their respective social media activity does not ascribe a position or statement to any person or entity other than to themselves. In other words, the substance of their social media activity does not invalidate the intended purpose of having an appropriate disclaimer.

When Respondents' respective social media pages/accounts are viewed in their totality, the Commission finds that a reasonable person could not perceive the comments or statements as being made by Respondent Pedersen and/or Respondent Pontillo in their official capacity as Board members (or on behalf of the Board). Consequently, their social media activity cannot constitute use or attempted use of their official positions to secure an unwarranted privilege, advantage or employment for themselves, members of their immediate family, or "others" in violation of *N.J.S.A.* 18A:12-24(b).

Notwithstanding the Commission's decisions as set forth herein, it advises Respondents, and other board of education members alike, that once elected to a seat on the Board, it is no longer prudent or appropriate to use one's campaign page to post statements or comments on social media. Continued use of a campaign page following election can only, as here, cause confusion as to the capacity in which one is speaking, and this will invariably lead to the filing of ethics complaints. Transparency in communication cannot be overstated, and continued use of one's campaign page unnecessarily obfuscates the public's understanding of the capacity in which one is speaking on social media.

IV. Request for Sanctions

At its special meeting on January 31, 2023, the Commission considered Respondents' request that the Commission find the Complaint frivolous, and impose sanctions pursuant to *N.J.S.A.* 18A:12-29(e). Despite Respondents' 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 special meeting on January 31, 2023, the Commission discussed finding the Complaint not frivolous, and denying 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 Pedersen violated *N.J.S.A.* 18A:12-24(b) in Counts 1-3, and/or Respondent Pontillo violated *N.J.S.A.* 18A:12-24(b) in Counts 4-6. The Commission also voted to find that the Complaint is not frivolous, and to deny Respondents' request for sanctions.

Pursuant to *N.J.S.A.* 18A:12-29(b), the Commission hereby notifies Complainant and Respondents 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: February 21, 2023

***Resolution Adopting Decision
in Connection with C106-22***

Whereas, at a special meeting on January 31, 2023, 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 a special meeting on January 31, 2023, the Commission discussed granting the Motion to Dismiss in its entirety for failure to plead sufficient credible facts to support the allegations that Respondent Pedersen violated *N.J.S.A.* 18A:12-24(b) in Counts 1-3, and/or Respondent Pontillo violated *N.J.S.A.* 18A:12-24(b) in Counts 4-6; and

Whereas, at a special meeting on January 31, 2023, the Commission discussed finding the Complaint not frivolous, and denying the request for sanctions; and

Whereas, at its meeting on February 21, 2023, the Commission reviewed and voted to approve the within decision as accurately memorializing its actions/findings from its special meeting on January 31, 2023; 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 February 21, 2023.

Kathryn A. Whalen, Esq.
Director, School Ethics Commission