

Before the School Ethics Commission
OAL Docket No.: EEC-09540-22
SEC Docket No.: C22-22
Final Decision

In the Matter of Elissa Malespina,
South Orange-Maplewood Board of Education, Essex County,
Respondent

I. Procedural History

The above-captioned matter arises from a Complaint that was filed with the School Ethics Commission (Commission) on March 10, 2022, by Annemarie Maini (Complainant), alleging that Elissa Malespina (Respondent), a member of the South Orange-Maplewood Board of Education (Board), violated the School Ethics Act (Act), *N.J.S.A.* 18A:12-21 *et seq.* More specifically, the Complaint alleged that Respondent violated *N.J.S.A.* 18A:12-24(a) (Counts 9 and 10), *N.J.S.A.* 18A:12-24(b) (Count 1 and Counts 3 and 4), and *N.J.S.A.* 18A:12-24(e) (Count 2 and Count 9), *N.J.S.A.* 18A:12-25 (Count 11), as well as *N.J.S.A.* 18A:12-24.1(d) (Count 5 and Count 7) and *N.J.S.A.* 18A:12-24.1(e) (Counts 6-8) of the Code of Ethics for School Board Members (Code). Complainant voluntarily withdrew the claims in Counts 6 through 8, and also in Count 11.

At its meeting on July 26, 2022, and after reviewing Respondent's Motion to Dismiss in Lieu of Answer (Motion to Dismiss) and allegation of frivolous filing, and Complainant's response thereto, the Commission adopted a decision granting the Motion to Dismiss as to the allegations in Count 2, Count 9 and Count 10; denying the Motion to Dismiss as to the claims in Count 1 and Counts 3 through 5; and finding the Complaint not frivolous and denying Respondent's request for sanctions. Based on its decision, the Commission also directed Respondent to file an Answer to the Complaint (Answer) for the remaining allegations in the Complaint, which Respondent did on September 6, 2022.

Thereafter, at its special meeting on October 17, 2022, the Commission voted to find probable cause for the remaining allegations in the Complaint (in Count 1 and Counts 3-5). Based on its finding of probable cause, the Commission also voted to transmit the within matter to the Office of Administrative Law (OAL) for a hearing. After transmittal, the Commission advised that it no longer intended to pursue the claims in Count 5.

Following cross-motions for summary decision at the OAL, the Administrative Law Judge (ALJ) issued an Initial Decision on April 16, 2024, concluding Respondent violated *N.J.S.A.* 18A:12-24(b) in Count 1, but did not violate *N.J.S.A.* 18A:12-24(b) in Count 3 or Count 4, and recommending a penalty of reprimand. Petitioner filed exceptions to the Initial Decision, in accordance with *N.J.A.C.* 1:1-18.4, and Respondent filed a reply thereto.

At its meeting on May 21, 2024, the Commission considered the full record in this matter. Thereafter, at its special meeting on June 17, 2024, the Commission voted to adopt the

ALJ's factual findings, as well as the legal conclusions that Respondent did not violate *N.J.S.A.* 18A:12-24(b) in Count 3 or Count 4, modify the ALJ's legal conclusions to find that Respondent did not violate *N.J.S.A.* 18A:12-24(b) in Count 1, and dismiss the above-captioned matter.

II. Initial Decision

This matter involves allegations that Respondent violated *N.J.S.A.* 18A:12-24(b) when she endorsed Board candidates on social media without a disclaimer (Count 1), when she changed her Facebook profile picture to endorse candidates for the Board (Count 3), and when she authored an op-ed article about the Board (Count 4).

Specifically, on October 13, 2021, Respondent wrote and published an op-ed article entitled "Opinion: Using Restorative Practices to Heal the BOE," in which she identified herself as a Board member and advocated for the Board to use restorative justice practices to "fix the fractures that are occurring on the Board" that many believe are "unfixable." *Exhibit J-1*. Respondent also wrote that a Board member resigned "due to perceived bullying by other members." Respondent used "we" four times, "ourselves" once and "the Board" seven times, and stated, "[w]e as a BOE need to lead by example." *Ibid*. Respondent did include a disclaimer stating, "these statements are my own and do not represent the views of the [Board]." *Ibid*.

On October 26, 2021, Respondent changed and posted her personal Facebook profile picture displaying an endorsement for two candidates in the Board election – "Vote for Kaitlin & Will for SOMSD BOE." *Initial Decision* at 4. The ALJ notes that Respondent's Facebook page "was set to a 'friends only' privacy setting, not open to the public and her profile page states that the views posted are her own." *Id.* at 4-5. However, the ALJ further noted that her updated profile picture, which was separate from her profile page, did not indicate that the views were her own and not the views of the Board. *Id.* at 5.

On election day, November 2, 2021, Respondent posted on her Facebook page, without a disclaimer, that she was voting and endorsing two candidates running for the Board. *Ibid*. Specifically, she stated in part, "People have been asking me who will help me on the school board & I believe that Kaitlin Wittleder and William L. Rodriguez are the two truly independent candidates who can help with the dysfunction that is currently occurring on the board. You do not need to vote for three candidates & I ask that you use your votes for these [two] only." *Exhibit J-3*. Respondent continued to discuss both candidates, their positive attributes, and the reason she supports each one. *Ibid*.

With respect to the Respondent's profile picture, The ALJ notes that it is significant that the icon did not reference Respondent's Board status, and instead simply asked viewers to vote for the two candidates that she identified by first name. Therefore, the ALJ finds that "it cannot reasonably be perceived that [Respondent] was speaking in her official capacity," and concludes that a preponderance of evidence does not exist to show that Respondent's Facebook icon change violated *N.J.S.A.* 18A:12-24(b).

As to Respondent's election day post, the ALJ notes that it "more than mentions her [B]oard member status." Moreover, Respondent "responds to the question of who will help her

on the Board and urges voters to select her preferred candidates over the incumbent.” The ALJ finds that, at a minimum, the post required a disclaimer because it “could be perceived by the public as a Board endorsement absent a disclaimer, and therefore, provided an unwarranted privilege to the two candidates she endorsed in violation of *N.J.S.A. 18A:12-24(b)*.”

Finally, regarding the op-ed, the ALJ maintains, “While board member[s]’ public opinions about the Board’s operations, even though not confidential, should be discouraged,” Respondent did not mention the upcoming election or the two candidates that she later endorsed in her op-ed. According to the ALJ, Respondent’s op-ed “blamed the Board collectively for its problems, which included herself, not specific individuals.” Moreover, Respondent voiced her opinion about a solution that did not involve the upcoming election and she included an explicit disclaimer; therefore, the ALJ concludes that Respondent’s op-ed did not violate *N.J.S.A. 18A:12-24(b)*.

The ALJ further concludes that a penalty of reprimand is appropriate for Respondent’s violation of *N.J.S.A. 18A:12-24(b)* with respect to the social media post.

III. Exceptions

Petitioner’s Exceptions

Petitioner initially argues that although the ALJ sustained Count 1, Petitioner “takes exception to the ALJ’s determination that it failed to support” Counts 3 and 4, as well as the penalty of only a reprimand. According to Petitioner, the ALJ “misapplied the Commission’s previous interpretation of *N.J.S.A. 18A:12-24(b)*.” First in Count 3, the ALJ concluded that Respondent’s Facebook icon “profile picture change did not violate the Act” because it did “not mention [Respondent’s] status as a board member” and “simply asked viewers to vote for two candidates for the Board, identified by only their first names”; therefore, this could not be interpreted as coming from a Board member. However, the ALJ found that the Facebook post on the same page violated *N.J.S.A. 18A:12-24(b)*. Petitioner maintains that “whether a school official violates the Act based on their social media activity, the analysis hinges on ‘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.’” Petitioner argues the “objective standard hinges primarily on the content of the speech” and whether the speech relates to the business of the board and/or its operations, as well as whether there is a “sufficient nexus between the individual’s social media *page* and his or her role/membership on the Board.” Petitioner further argues the ALJ found that Respondent’s “Facebook post violated the Act because it could be perceived as a Board endorsement,” the ALJ “necessarily concluded there is a sufficient nexus between [Respondent’s] Facebook page and the business of the Board.” Therefore, and because Respondent’s Facebook icon endorsement appears on that same page, the ALJ erred by not finding that it also amounted to an attempt to gain an unwarranted advantage in violation of *N.J.S.A. 18A:12-24(b)*. Petitioner maintains the ALJ “found that the Facebook post alone created a strong nexus between [Respondent’s] Facebook page and her position on the Board such that other endorsements on her page also ran afoul of *N.J.S.A. 18A:12-24(b)*.” Therefore, Petitioner contends Respondent’s Facebook icon change violated the Act.

Regarding Count 4, Petitioner asserts Respondent's op-ed violated the Act, despite its inclusion of a disclaimer. According to Petitioner, the Commission has advised that a disclaimer "is not dispositive" and a "disclaimer alone may not be sufficient if the substance of the statements could still lead a reasonable member of the public to believe an official is speaking on behalf of the Board." Petitioner argues that throughout Respondent's op-ed she refers to "we," "ourselves" and the "Board." Furthermore, Respondent "also explicitly referenced the business and workings of the Board[.]" Petitioner further argues, Respondent's references to "the Board and its business, and the repeated use of phrases like 'we' and 'ourselves,'" rendered Respondent's disclaimer "ineffective." Moreover, by "denigrating the current Board and, by association, its incumbents, [Respondent] afforded an unwarranted advantage to her preferred candidates who were seeking those seats." Petitioner disagrees with the ALJ's finding that "there was no such advantage because there was 'no mention of the upcoming election or the two candidates [Respondent] later endorsed in the op-ed,'" and because the "op-ed 'blamed the Board collectively for its problems, which included [Respondent] herself, not a specific individual.'" Petitioner maintains the op-ed "must be read in conjunction with [Respondent's] other posts." Per Petitioner, when considered in context of her other posts, "a reasonable member of the public could easily conclude [Respondent's] op-ed was an attempt to further support her preferred candidates for election." Petitioner maintains Respondent issued her op-ed three weeks before her Facebook post and in the "midst of election season." Considering all the facts, "any reasonable member of the public could conclude [Respondent's] post was not a general criticism of the Board, but another attempt to emphasize the need for change in order to support her preferred candidates who were attempting to upend the incumbent Board members," and therefore, Respondent's op-ed also violated the Act.

As to the penalty, Petitioner asserts Respondent "engaged in conduct which had the potential to compromise the Board and affect its integrity." Petitioner further asserts Respondent's actions "brought her personal interests in direct conflict with her ethical obligations under the Act," and Respondent did not correct her actions. Therefore, and because Respondent is no longer a Board member, Petitioner maintains a penalty of "at least" censure is appropriate.

Respondent's Reply to Petitioner's Exceptions

Respondent argues that the ALJ did not err when she concluded Respondent did not violate *N.J.S.A.* 18A:12-24(b) in Count 3 with respect to Respondent's Facebook profile picture. Respondent argues the ALJ correctly applied the standard of a "*content-based analysis*" when reviewing the speech of public officials" when she found there was not a sufficient nexus between the content of Respondent's Facebook profile picture and the Board's business. Respondent maintains that Petitioner fails to apply a content-based standard in its argument that since the ALJ found a violation with respect to Respondent's post that endorsed candidates, a violation must also be found with respect to the profile picture, solely because they appear on the same social media page.

Regarding Count 4, and Petitioner's contentions that Respondent "vitiating her disclaimer in the article when she made repeated references to her Board membership," and that the "article must be read in conjunction with her other posts," Respondent argues Petitioner fails to

acknowledge that *the content* of [Respondent's] article had nothing to do with her political endorsements," as the ALJ highlighted, rather "advocacy for the Board's use of restorative justice practices." Respondent maintains the op-ed "was written on a different date than the other posts, appeared in a different medium than the other posts, and involved different context from that contained in the other posts." Respondent further maintains "the Commission has not established a proximity of posts analysis for determining violations of the Act," but rather has "consistently focused on the *contents* of the public official's speech." Respondent avers the ALJ correctly "reviewed the contents of [Respondent's] article" and "ultimately concluded that she did not violate the Act" in Count 4.

As to penalty, Respondent maintains the ALJ was correct and consistent with the Commission's prior interpretations of the Act, and therefore, concurs with the ALJ's penalty of reprimand.

IV. Analysis

Upon a careful, thorough, and independent review of the record, the Commission adopts the ALJ's factual findings, as well as the legal conclusions that Respondent did not violate *N.J.S.A.* 18A:12-24(b) in Count 3 or Count 4, but modifies the ALJ's legal conclusions to find that Respondent did not violate *N.J.S.A.* 18A:12-24(b) in Count 1, and dismisses the above-captioned matter.

As a preliminary matter, the Commission finds it necessary to set forth the framework by which it will review the allegations in this matter. The Commission has explained that in order for a social media post to be offered pursuant to official duties, there must be a sufficient nexus between the social media page and the role/membership on the Board. *Hodrinky v. Faussette, Hasbrouck Heights Board of Education, Bergen County*, Docket No. C11-21 (August 30, 2021); *Donnerstag, et al. v. Borawksi, Central Regional Board of Education, Ocean County*, Docket No. C20-22 (August 22, 2023); *Donnerstag, et al. v. Koenig, Central Regional Board of Education, Ocean County*, Docket No. C19-22 (August 22, 2023). Additionally, as the Commission explained in *Aziz v. Nikitinsky et al., Monroe Township Board of Education, Middlesex County*, Docket No. C56-22 (October 17, 2022):

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. In previous advisory opinions and decisions, the Commission has stated that disclaimers such as, “this endorsement is [Board Member’s Name] personal one, and not as a member of the [Township] Board of Education, nor is the endorsement on behalf of the entire Board,” or “THE FOLLOWING STATEMENTS ARE MADE IN MY CAPACITY AS A PRIVATE CITIZEN, AND NOT IN MY CAPACITY AS A BOARD MEMBER. THESE STATEMENTS ARE ALSO NOT REPRESENTATIVE OF THE BOARD OR ITS INDIVIDUAL MEMBERS, AND SOLELY REPRESENT MY OWN PERSONAL OPINIONS” would be appropriate. *Advisory Opinion A36-14* (October 29, 2014); [*I/M/O Treston, Randolph Township Board of Education, Morris County*, Docket No. C71-18 (April 27, 2021)]. 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*.

With the above in mind, the Commission must review whether Respondent violated *N.J.S.A.* 18A:12-24(b) when she endorsed Board candidates on social media without a disclaimer, when she changed her Facebook profile picture to endorse candidates for the Board, and when she authored an op-ed article about the Board. *N.J.S.A.* 18A:12-24(b) prohibits board members from using or attempting to use their official position to secure an unwarranted privilege, advantage, or employment for themselves, members of their immediate family, or others.

With respect to Respondent’s November 2, 2021, Facebook post endorsing two candidates for the Board, the Commission finds that although it recommends using a disclaimer to eliminate any question as to the capacity in which she is speaking, a reasonable member of the public would not perceive the social media endorsements of two candidates for election to the Board were made in Respondent’s capacity as a Board member, given the context of her post. Respondent posted support for two candidates on her personal Facebook page that apparently included a general page disclaimer that the views were her own (but not on the individual post). Although the post implies that Respondent is a Board member when she indicates that “[p]eople have been asking me who will help me on the school board,” the post also used language indicating the post is Respondent’s opinion, such as, “*I believe* that Kaitlin Wittleder & William L. Rodriguez are the two truly independent candidates,” “*I ask* that you use your votes for these [two] only,” “*I have honestly never seen* a candidate put this much time and effort to get to know

all the ins and out[s] of the district,” and “[Will] is not afraid to stand up for what he believes in even if it’s not the popular thing to do. *I appreciate that.*” (emphasis added). When viewing the entirety of the post, a reasonable member of the public would find it clear from the context and overall tone of the post, that Respondent is expressing her opinion of the candidates she supports, and is speaking in her individual capacity, and not on behalf of the Board. As the Commission finds that Respondent’s post was not in her official capacity as a Board member, Respondent did not use or attempt to use her official position to secure an unwarranted privilege, advantage, or employment for herself or others, and a violation of *N.J.S.A. 18A:12-24(b)* has not been established in Count 1.

As to Respondent’s Facebook profile picture that displayed an image saying, “Vote for Kaitlin & Will for SOMSD BOE,” the Commission notes that the post appeared on Respondent’s private Facebook page and the picture did not invoke Respondent’s Board status. Accordingly, the image lacks a sufficient nexus to Respondent’s membership on the Board, and a reasonable member of the public would not perceive that, in posting the profile picture that displayed an image to vote for two people, Respondent was speaking in her official capacity as a Board member, and therefore, Respondent did not use or attempt to use her official position to secure an unwarranted privilege, advantage, or employment for herself or others. As such, the Commission agrees with the ALJ that Respondent did not violate *N.J.S.A. 18A:12-24(b)* in Count 3.

Regarding the op-ed article that Respondent wrote and published on October 13, 2021, that advocated for the Board to use restorative justice practices to “fix the fractures that are occurring on the Board” that many believe are “unfixable,” the Commission notes that Respondent used a disclaimer indicating that “[t]hese statements are my own and do not represent the views of the [Board].” In *I/M/O Christopher Treston, Board of Education of Randolph Township, Morris County*, Commissioner Decision No. 208-21SEC (September 30, 2021), the Commissioner of Education found that a board member used an insufficient disclaimer in an op-ed that endorsed certain candidates and directly advocated against a candidate for the Board because the disclaimer only indicated that the opinions were his own, and not that the opinions were not those of the Board. Given the insufficient disclaimer, the Commissioner of Education found the op-ed “created the appearance that the entire Board endorsed certain candidates and opposed others.” *Id.* at 4. In contrast to *Treston*, the Commission finds that Respondent’s disclaimer indicated that the views expressed in the article do not represent the views of the Board. Considering the circumstances, including that the subject of the article discussed concerns related to the entire Board, as opposed to *Treston* who targeted a Board member to influence voters, in conjunction with Respondent’s disclaimer that indicated the views were not those of the Board, the Commission does not find a reason to deem Respondent’s disclaimer to be inadequate. As Respondent used an appropriate disclaimer, a reasonable member of the public would not perceive that she was speaking in her official capacity as a Board member. Accordingly, the Commission agrees with the ALJ that Respondent did not use or attempt to use her official position to secure an unwarranted privilege, advantage, or employment for herself or others, and a violation *N.J.S.A. 18A:12-24(b)* has not been established in Count 4.

Consequently, the Commission finds that this matter should be dismissed.

V. Decision

For the aforementioned reasons, the Commission adopts the ALJ's factual findings, as well as the legal conclusions that Respondent did not violate *N.J.S.A.* 18A:12-24(b) in Count 3 or Count 4, modifies the ALJ's legal conclusions to find that Respondent did not violate *N.J.S.A.* 18A:12-24(b) in Count 1, and dismisses the above-captioned matter.

Therefore, this is a final agency decision and is appealable only to the Superior Court-Appellate Division. *See, N.J.A.C.* 6A:28-9.10(b) and *New Jersey Court Rule* 2:2-3(a). Under *New Jersey Court Rule* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

Robert W. Bender, Chairperson

Mailing Date: June 17, 2024

**Resolution Adopting Decision
in Connection with C22-22**

Whereas, at its meeting on October 17, 2022, the School Ethics Commission (Commission) voted to transmit the above-captioned matter to the Office of Administrative Law (OAL) for a hearing; and

Whereas, the Administrative Law Judge (ALJ) issued an Initial Decision dated April 16, 2024; and

Whereas, the ALJ found that Respondent violated *N.J.S.A.* 18A:12-24(b) in Count 1, but did not violate *N.J.S.A.* 18A:12-24(b) in Count 3 or Count 4, and recommended a penalty of reprimand; and

Whereas, Petitioner filed exceptions to the Initial Decision and Respondent filed a reply; and

Whereas, at its meeting on May 21, 2024, the Commission reviewed the record in this matter, and discussed adopting the ALJ's factual findings, as well as the legal conclusions that Respondent did not violate *N.J.S.A.* 18A:12-24(b) in Count 3 or Count 4, modifying the ALJ's legal conclusions to find that Respondent did not violate *N.J.S.A.* 18A:12-24(b) in Count 1, and dismissing the above-captioned matter; and

Whereas, at its special meeting on June 17, 2024, the Commission reviewed and voted to approve the within decision as accurately memorializing its actions/findings from its meeting on May 21, 2024; and

Now Therefore Be It Resolved, the Commission hereby adopts the within decision.

Robert W. Bender, Chairperson

I hereby certify that this Resolution was duly adopted by the School Ethics Commission at its special meeting on June 17, 2024.

Brigid C. Martens, Director
School Ethics Commission