

Before the School Ethics Commission
Docket No.: C84-23
Decision on Probable Cause

Margaret Demsak,
Complainant

v.

Danuta “Donna” Carey,
Hardyston Township Board of Education, Sussex County,
Respondent

I. Procedural History

The above-captioned matter arises from a Complaint that was filed with the School Ethics Commission (Commission) on November 20, 2023, by Margaret Demsak (Complainant), alleging that Danuta “Donna” Carey (Respondent), a member of the Hardyston Township 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 violated *N.J.S.A.* 18A:12-24(e) (Count 1), as well as *N.J.S.A.* 18A:12-24.1(a) (Count 1), *N.J.S.A.* 18A:12-24.1(c) (Count 1), *N.J.S.A.* 18A:12-24.1(f) (Count 1), and *N.J.S.A.* 18A:12-24.1(g) (Count 2 and Count 3) of the Code of Ethics for School Board Members (Code).

On February 6, 2024,¹ Respondent filed a Written Statement, and also asserted that the Complaint is frivolous. On March 7, 2024, Complainant filed a response to the allegation of frivolous filing.

The parties were notified by correspondence dated April 23, 2024, that the above-captioned matter would be discussed by the Commission at its meeting on April 30, 2024, in order to make a determination regarding probable cause and the allegation of frivolous filing. Following its discussion on April 30, 2024, the Commission adopted a decision at its meeting on May 21, 2024, finding that there are insufficient facts and circumstances pled in the Complaint and in the Written Statement to lead a reasonable person to believe that the Act was violated as alleged in the Complaint. The Commission also adopted a decision finding the Complaint not frivolous, and denying Respondent’s request for sanctions.

¹ Respondent initially filed a Written Statement and allegation of frivolous filing on December 4, 2023, and Complainant filed a response to the allegation of frivolous filing on December 10, 2023. Thereafter, Respondent obtained counsel and requested to file an Amended Written Statement, which the Commission granted. Accordingly, on February 6, 2024, Respondent filed an Amended Written Statement that included an allegation that the Complaint is frivolous.

II. Summary of the Pleadings

A. *The Complaint*

In Count 1, Complainant asserts that Respondent attended the Sussex County Republicans' Salute to Freedom Award dinner on September 7, 2023, where she, and several others, received an award for their support of "Parental Rights." While accepting her award, Complainant alleges that Respondent spoke about the need to influence elected officials in Trenton. According to Complainant, at the award dinner, the vice-chairperson of the Sussex County Republican Party spoke about encouraging Boards to abolish Policy 5756, which provides protections for transgender students. Complainant alleges that on September 12, 2023, less than a week after the award dinner, Respondent made a motion to put Policy 5756 in committee as a "targeted attempt to abolish the policy one month before the election" and in a show of support for three candidates running as the "Parental Rights Movement." Complainant further alleges that on October 10, 2023, Respondent motioned to pull Policy 5756 out of committee, which passed, and then Respondent made a motion to abolish the policy, which "was not on the agenda," before the Board had the opportunity to consult with counsel, and before the public was notified of the potential abolishment of the policy.

Complainant asserts that Respondent violated *N.J.S.A. 18A:12-24.1(a)* by making a motion to circumvent Robert's Rules of Order which govern the Board meetings. Complainant further asserts Respondent violated *N.J.S.A. 18A:12-24.1(c)* by taking action to abolish Policy 5756, when the item was "not listed on the agenda and before the public could be informed and consulted," and *N.J.S.A. 18A:12-24.1(f)* by surrendering her judgment to the Sussex County Republican Party and acting on their behalf after receiving an award. Additionally, Complainant argues that by receiving an award from the Sussex County Republican party, which was conditioned on her taking action to abolish Policy 5756, Respondent violated *N.J.S.A. 18A:12-24(e)*.

In Count 2, Complainant asserts that on November 8, 2023, Respondent made a social media post regarding Policy 5756 stating that it "calls for secrecy between kids and their parents." Complainant contends that Respondent violated *N.J.S.A. 18A:12-24.1(g)* as she asserted "unfactual information as factual on social media sites" without a disclaimer.

In Count 3, Complainant asserts that Respondent replied to a post on social media on November 4, 2023, indicating that the policy "allows children to be transitioned from boy to girl (girl to boy) without parental knowledge by the school staff." The post also stated that "[o]ur resolution to remove this policy was reviewed and approved by our legal counsel, but [four Board members] opposed it because they want to keep parents in the dark and take over parenting." Complainant alleges that Respondent violated *N.J.S.A. 18A:12-24.1(g)* by discussing "non factual" information without a disclaimer, and by discussing privileged information that occurred during executive session at the October 10, 2023, Board meeting.

B. Written Statement and Allegation of Frivolous Filing

Respondent admits that she attended the award dinner and made statements expressing her opinions and beliefs. Respondent admits that she made the subject motions at the Board meetings, but denies that they were improper and made without first seeking the advice of counsel. Further, Respondent admits that she made social media posts regarding Policy 5756, but argued that this represented her opinions and beliefs.

With respect to all allegations and specifically with respect to *N.J.S.A.* 18A:12-24(e), Respondent argues that Complainant has merely alleged a “temporal proximity between her receipt of [an] award and the motions she made during Board meetings . . . which allegedly related to ‘a Parental Rights political goal to abolish Policy 5756.’” Respondent maintains that “temporal proximity falls short of satisfying the statutory requirement that there must be ‘an understanding that the gift, favor . . . promise, or other thing of value was given or offered for the purpose of influencing [the school official], directly or indirectly, in the discharge of his official duties.’”

As to *N.J.S.A.* 18A:12-24.1(a), Respondent asserts that Complainant failed to include a final decision of any court of law or agency, as required. Respondent further asserts that a motion at a Board meeting, even a motion that was deemed out of order, is insufficient to give rise to a claim under *N.J.S.A.* 18A:12-24.1(a).

With respect to *N.J.S.A.* 18A:12-24.1(c), Respondent argues that making a motion related to a subject not on the agenda is not an ethics violation. Respondent further argues that Respondent made a motion to refer Policy 5756 to committee and that the public had ample opportunity to comment on the motion at the meeting, as well as at the next meeting. According to Respondent, there was a month in between the initial referral to the committee and when the matter came to a vote, giving the public plenty of time to comment.

As to *N.J.S.A.* 18A:12-24.1(f), Respondent asserts that besides temporal proximity, Complainant does not assert facts that show Respondent took action on behalf of the Sussex County Republican Party. Respondent asserts that the mere fact that she accepted an award from the Sussex County Republican Party, in and of itself, does not establish a violation. Respondent asserts Complainant has not presented any evidence demonstrating that the award was given to Respondent on the condition that she take actions supported by the Republican Party.

With respect to the allegation that Respondent violated *N.J.S.A.* 18A:12-24.1(g), Respondent indicates that her statements with respect to Policy 5756 were her opinions and cannot establish a claim she violated *N.J.S.A.* 18A:12-24.1(g). Respondent asserts that the presence or absence of a disclaimer is not dispositive, and her statements fall under her First Amendment protection to free speech.

Respondent further argues that the Complaint is frivolous and sanctions should be imposed.

C. *Response to Allegation of Frivolous Filing*

Complainant reiterates the basic allegations of the Complaint, specifically that Respondent was an initial supporter of Policy 5756 and that prior to the award dinner, she had never taken any action against the policy. Complainant asserts that after receiving the award Respondent began supporting candidates favored by the Sussex County Republican Party and taking official actions that they supported. Complainant further asserts that her claims are not frivolous and that the matter should not be dismissed.

III. Analysis

This matter is before the Commission for a determination of probable cause pursuant to *N.J.A.C. 6A:28-9.7*. A finding of probable cause is not an adjudication on the merits but, rather, an initial review whereupon the Commission makes a preliminary determination as to whether the matter should proceed to an adjudication on the merits, or whether further review is not warranted. Pursuant to *N.J.A.C. 6A:28-9.7(a)*, probable cause “shall be found when the facts and circumstances presented in the complaint and written statement would lead a reasonable person to believe that the Act has been violated.”

Alleged Violations of the Act

Complainant submits that, based on the conduct more fully detailed above, Respondent violated *N.J.S.A. 18A:12-24(e)*, and this provision of the Act states:

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. This provision shall not apply to the solicitation or acceptance of contributions to the campaign of an announced candidate for elective public office, if the school official has no knowledge or reason to believe that the campaign contribution, if accepted, was given with the intent to influence the school official in the discharge of his official duties;

Complainant further submits that Respondent violated *N.J.S.A. 18A:12-24.1(a)*, *N.J.S.A. 18A:12-24.1(c)*, *N.J.S.A. 18A:12-24.1(f)*, and *N.J.S.A. 18A:12-24.1(g)*. These provisions of the Code provide:

a. I will uphold and enforce all laws, rules and regulations of the State Board of Education, and court orders pertaining to schools. Desired changes shall be brought about only through legal and ethical procedures.

c. I will confine my board action to policy making, planning, and appraisal, and I will help to frame policies and plans only after the board has consulted those who will be affected by them.

f. I will refuse to surrender my independent judgment to special interest or partisan political groups or to use the schools for personal gain or for the gain of friends.

g. I will hold confidential all matters pertaining to the schools which, if disclosed, would needlessly injure individuals or the schools. In all other matters, I will provide accurate information and, in concert with my fellow board members, interpret to the staff the aspirations of the community for its school.

Count 1

In Count 1, Complainant contends that Respondent violated *N.J.S.A.* 18A:12-24(e), and *N.J.S.A.* 18A:12-24.1(a), *N.J.S.A.* 18A:12-24.1(c) and *N.J.S.A.* 18A:12-24.1(f) when she took action to abolish Policy 5756 after receiving an award from a political group for her support of “Parental Rights.” Respondent counters that her motions related to abolishing Policy 5756 were not improper, the public had ample opportunity to comment, and the “temporal proximity” between receiving the award and motions made during Board meetings falls short of demonstrating that the award was given on the condition that she take actions for the political group.

To credit a violation of *N.J.S.A.* 18A:12-24(e), Complainant must provide sufficient factual evidence that Respondent, a member of her immediate family, or a business organization in which she had an interest, solicited or accepted a 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 her, directly or indirectly, in the discharge of her official duties.

Further, pursuant to *N.J.A.C.* 6A:28-6.4(a), a violation(s) of *N.J.S.A.* 18A:12-24.1(a), *N.J.S.A.* 18A:12-24.1(c), and/or *N.J.S.A.* 18A:12-24.1(f) need to be supported by certain factual evidence, more specifically:

1. Factual evidence of a violation of *N.J.S.A.* 18A:12-24.1(a) shall include a copy of a final decision from any court of law or administrative agency of this State demonstrating that Respondent failed to enforce all laws, rules and regulations of the State Board of Education, and/or court orders pertaining to schools or that Respondent brought about changes through illegal or unethical procedures.

3. Factual evidence of a violation of *N.J.S.A.* 18A:12-24.1(c) shall include evidence that Respondent took board action to effectuate policies and plans without consulting those affected by such policies and plans, or took action that was unrelated to Respondent’s duty to (i) develop the general rules and principles

that guide the management of the school district or charter school; (ii) formulate the programs and methods to effectuate the goals of the school district or charter school; or (iii) ascertain the value or liability of a policy.

6. Factual evidence of a violation of *N.J.S.A.* 18A:12-24.1(f) shall include evidence that Respondent took action on behalf of, or at the request of, a special interest group or persons organized and voluntarily united in opinion and who adhere to a particular political party or cause; or evidence that Respondent used the schools in order to acquire some benefit for herself, a member of her immediate family or a friend.

Based on its review, the Commission finds that there are insufficient facts and circumstances presented in the Complaint and the Written Statement to lead a reasonable person to believe that *N.J.S.A.* 18A:12-24(e), *N.J.S.A.* 18A:12-24.1(a), *N.J.S.A.* 18A:12-24.1(c) and/or *N.J.S.A.* 18A:12-24.1(f) were violated. With respect to *N.J.S.A.* 18A:12-24(e), the Commission finds that Complainant has not provided sufficient factual evidence, beyond speculation, that Respondent accepted the award *based on an understanding* that it was being given for the purpose of influencing her to abolish Policy 5756. The Commission notes, as to *N.J.S.A.* 18A:12-24.1(f), an individual who receives an award for their support of an issue would naturally have similar beliefs as the organization honoring them, but that does not demonstrate that the individual took action, *on behalf of, or at the request of,* the special interest or political group, and as such, Complainant has not demonstrated that Respondent surrendered her independent judgment. Regarding *N.J.S.A.* 18A:12-24.1(a), despite being required by *N.J.A.C.* 6A:28-6.4(a)(1), the Commission finds that Complainant has not provided a copy of a final decision from any court of law or other administrative agency demonstrating or specifically finding that Respondent violated a specific law, rule, or regulation of the State Board of Education and/or court orders pertaining to schools, or that she brought about changes through illegal or unethical procedures. Finally, with respect to *N.J.S.A.* 18A:12-24.1(c), Complainant has not provided factual evidence to support the claim that Respondent took board action to effectuate policies and plans without consulting those affected by such policies and plans when she took action to abolish Policy 5756. Complainant alleges that Respondent made a motion to put Policy 5756 into committee on September 12, 2023, and on October 10, 2023, made motions to pull Policy 5756 out of committee and abolish the policy. Based on the allegations, it is clear that the public was aware and had an opportunity to comment in the several weeks between Respondent's initial action and her subsequent motion to abolish the policy. Consequently, and pursuant to *N.J.A.C.* 6A:28-9.7(b), the Commission dismisses the alleged violation(s) of *N.J.S.A.* 18A:12-24(e), *N.J.S.A.* 18A:12-24.1(a), *N.J.S.A.* 18A:12-24.1(c) and *N.J.S.A.* 18A:12-24.1(f) in Count 1.

Count 2 and Count 3

In Counts 2 and 3, Complainant argues that Respondent violated *N.J.S.A.* 18A:12-24.1(g) when she made a social media post, without a disclaimer, regarding Policy 5756 stating that it “calls for secrecy between kids and their parents,” that it “allows children to be transitioned from boy to girl (girl to boy) without parental knowledge by the school staff,” and that “[o]ur resolution to remove this policy was reviewed and approved by our legal counsel, but [four Board members] opposed it because they want to keep parents in the dark and take over

parenting.” Respondent counters that her statements with respect to Policy 5756, were her opinion, and the presence or absence of a disclaimer is not dispositive. Moreover, Respondent notes her statements are protected speech under the First Amendment.

Pursuant to *N.J.A.C.* 6A:28-6.4(a), factual evidence of a violation of the confidentiality provision of *N.J.S.A.* 18A:12-24.1(g) shall include evidence that Respondent took action to make public, reveal or disclose information that was not public under any laws, regulations or court orders of this State, or information that was otherwise confidential in accordance with board policies, procedures or practices. Factual evidence that Respondent violated the inaccurate information provision of *N.J.S.A.* 18A:12-24.1(g) shall include evidence that substantiates the inaccuracy of the information provided by Respondent and evidence that establishes that the inaccuracy was other than reasonable mistake or personal opinion or was not attributable to developing circumstances.

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. *Hodrinsky 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*.

The Commission finds, in this circumstance, there is a nexus between Respondent’s social media posts and her Board membership. Respondent discusses, without a disclaimer, the policy that she moved to abolish, even indicating that “[o]ur resolution to remove this policy” was reviewed by counsel and opposed by four Board members. As such, the speech relates to the business of the Board, and it is reasonable for the reader to perceive the speech as being offered in her official capacity and pursuant to her official duties as a Board member. The Commission reiterates that a disclaimer would have removed any question as to what capacity Respondent posted on social media and obviated the need for this ethics complaint.

Although it appears that the social media posts were made in Respondent’s official capacity as a Board member, the Commission finds that there are insufficient facts and circumstances presented in the Complaint and the Written Statement to lead a reasonable person to believe that *N.J.S.A. 18A:12-24.1(g)* was violated. Complainant fails to include evidence that Respondent’s social media posts were inaccurate, other than reasonable mistake or personal opinion, or was not attributable to developing circumstances. Additionally, it is unclear which specific statement in Respondent’s social media posts divulged confidential Board information. Votes regarding the policy were taken in public, and Complainant fails to specify how Respondent’s comments regarding the policy violated confidentiality. Therefore, and pursuant to *N.J.A.C. 6A:28-9.7(b)*, the Commission dismisses the alleged violation(s) of *N.J.S.A. 18A:12-24.1(g)* in Count 2 and Count 3.

IV. Request for Sanctions

At its meeting on April 30, 2024, the Commission considered Respondent’s request that it find the Complaint frivolous, and impose sanctions pursuant to *N.J.S.A. 18A:12-29(e)*. Despite Respondent’s 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 meeting on May 21, 2024, the Commission adopted a decision finding the Complaint not frivolous, and denying the request for sanctions.

V. Decision

In accordance with *N.J.S.A.* 18A:12-29(b), and for the reasons detailed herein, the Commission hereby notifies Complainant and Respondent that there are insufficient facts and circumstances pled in the Complaint and in the Written Statement to lead a reasonable person to believe that the Act was violated as alleged in the Complaint and, consequently, dismisses the above-captioned matter. *N.J.A.C.* 6A:28-9.7(b). The Commission further advises the parties that, following its review, it voted to find that the Complaint is not frivolous, and to deny Respondent's request for sanctions.

The within 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)*. 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: May 21, 2024

***Resolution Adopting Decision
in Connection with C84-23***

Whereas, at its meeting on April 30, 2024, the School Ethics Commission (Commission) considered the Complaint, the Written Statement and allegation of frivolous filing, and the response to the allegation of frivolous filing submitted in connection with the above-referenced matter; and

Whereas, at its meeting on April 30, 2024, the Commission discussed finding that the facts and circumstances presented in the Complaint and the Written Statement would not lead a reasonable person to believe that the Act was violated and, therefore, dismissing the above-captioned matter; and

Whereas, at its meeting on April 30, 2024, the Commission discussed finding the Complaint not frivolous, and denying the request for sanctions; and

Whereas, at its meeting on May 21, 2024, the Commission reviewed and voted to approve the within decision as accurately memorializing its actions/findings from its meeting on April 30, 2024; 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 May 21, 2024.

Brigid C. Martens, Director
School Ethics Commission