

On January 23, 2015, the Commission confirmed that the matter was scheduled for plenary hearing on February 24, 2015 and so advised the parties. Prior to the hearing, on February 3, 2015, counsel for both respondents sought a stay of the hearing, pending the outcome of an appeal before the Commissioner of Education on a related matter, Lesinski v. Smallwood, SEC Dkt. No.C14-14. By letter of February 11, 2015, the Commission denied the request, ruling that the gravamen of the instant matter, i.e., the site visit, was not before the Commission at the time it heard Lesinski. In that matter, the Commission heard testimony from Respondent Smallwood and admitted documents, which evidenced that she and Ms. Simmons conducted the site visit without approval of the State Monitor. The Commission determined that Complainant Lesinski met her burden to prove the violations alleged in her complaint, for which Respondent Smallwood was sanctioned for disclosing confidential Executive Session discussions to third parties and for making those disclosures without Board approval in violation of N.J.S.A. 18A:12-24.1 (e) and (g) of the Code. Knowledge of the site visit was raised before the Commission by Respondent Smallwood; however, the site visit was not at issue in the Lesinski matter. The site visit was part of the Commission's decision solely because it demonstrated that Respondent Smallwood engaged in greater disclosure of confidential matters than she admitted. The Commission did not find Respondent Smallwood in violation of any provisions of the Code based on the site visit.

On February 18, 2015, prior to the day of the hearing, counsel for Respondent Simmons filed a Motion for Interlocutory Appeal on Emergent Relief for a Stay before the Commissioner of Education asserting, as he had before to the Commission, that it had previously made certain findings of fact and certain conclusions arising from the site visit which is the subject of this complaint as part of the Lesinski matter. The Commissioner denied counsel's request for a stay of the Lowell matter finding, *inter alia*, that the request failed to satisfy all of the standards set for in Crowe v. DeGioia, 90 N.J. 126 (1982), which require a showing of irreparable harm, that the legal right underlying claim is well settled, the probability of prevailing on the merits, and a balance of hardships. On March 6, 2015, the Commissioner affirmed the Commission's findings and conclusions of law in Lesinski and accepted the recommended penalty of reprimand. Lesinski v. Smallwood, Asbury Park Board of Education, Monmouth County, (10/28/14), SEC Dkt. No.C14-14 (Lesinski). (See Barbara Lesinski v. Geneva Smallwood, Board Member, Board of Education of the City of Asbury Park, Monmouth County, 3/6/15, (#83-15A)).

Following the Commissioner's denial of the stay, the matter of Corey J. Lowell v. Geneva Smallwood and Felicia Simmons, Asbury Park Board of Education, Monmouth County, SEC Dkt. #C16-14 was heard as scheduled by the Commission at its February 24, 2015 meeting.

The complainant, Corey Lowell, appeared *pro se*. Respondent Smallwood appeared with her attorney, Joshua S. Sklarin, Esq., and Respondent Simmons appeared with her attorney, Carl N. Tripician, Esq. The Commission heard only Complainant Lowell's testimony on all Counts of the complaint on direct and cross examination, and the Commission further questioned the complainant and accepted the documentary evidence she presented, as well as the documentary evidence presented by Respondent Simmons' counsel. Respondents Smallwood and Simmons decided not to testify or call any witnesses after the complainant rested. Based on the testimony and evidence, as summarized below, the Commission determined that the complainant had

established a *prima facie* case and met her burden of proof by a preponderance of the credible, uncontested evidence. The tribunal voted during the public portion of its meeting on February 24, 2015 to find a violation of N.J.S.A. 18A:12-24.1 (c) and (e) of the Code of Ethics for School Board Members (Code), and to dismiss the allegations that the respondents violated N.J.S.A. 18A:12-24.1(a), (d) and (g) of the Code and to recommend the penalty of censure for Respondent Smallwood and Respondent Simmons.

SUMMARY OF THE RECORD

Before opening statements, counsel for the respondents renewed their Motion for a Stay of the proceedings, pending the outcome of the appeal of the Lesinski matter before the Commissioner, or to refer the matter to the Office of Administrative Law, asserting that the determination of the matter on appeal may affect the case at bar. Counsel for Respondent Smallwood affirmed that the language in the case on appeal regarding the site visit was heard before the Commission in the earlier matter. The complainant maintains that the matter should not be stayed as she was not at the Board meeting on February 25, 2014 when the telephone call, which was the issue in Lesinski, was discussed, and maintains that the matter involving the site visit is a separate matter, and subject to a subsequent complaint which includes an additional respondent who was not a party to the Lesinski matter.

As it held previously, the Commission determined that this matter was not before it in the earlier matter and the allegation was, therefore, not adjudicated at that time. The Commission denied respondents' Motion for a Stay.

OPENING REMARKS AND PROCEDURAL ISSUES

In her opening remarks, Complainant Corey Lowell stated that her Complaint concerns five Code violations involving the respondents' personal actions without Board authorization and disclosure to third parties of confidential material discussed in Executive Session. Complainant Lowell further states that the respondents acknowledge that they did attend this site visit but argue that the Board had authorized them to do so. She maintains that as a Board member, she was not advised of this site visit for a potential Assistant Superintendent candidate nor did she grant her approval. Moreover, three other Board members have told her that they too did not have such knowledge nor did they authorize Respondent Smallwood and Respondent Simmons to schedule and attend the visit.

The complainant maintains that the Board minutes, submitted by respondents' counsel, did not indicate by motion or action that it authorized the respondents to conduct such a visit. Thereafter, complainant Lowell objected to the calling of Gregory Allen as respondents' witness as he should have no knowledge of confidential Executive Session discussions and his presence before the Commission could compromise the Board. When asked by counsel for the Commission the identity of Gregory Allen, Respondent Smallwood's counsel explained that he was the candidate whose selection the State Monitor overturned. Respondent Smallwood's attorney then explained, over the complainant's objection, what Mr. Allen's testimony would be, and stated that he would ask Mr. Allen what occurred at the visit and if any confidential matters

were discussed. Since Mr. Allen had not yet appeared for the hearing with the other subpoenaed witnesses, the Commission tabled the objection until Mr. Allen was called by the respondents.

In his opening remarks, Mr. Sklarin, counsel for Respondent Smallwood, stated that this matter before the Commission is just one of several matters brought by Complainant Lowell's faction on the Board against Respondent Smallwood's faction, and that the repetitive nature of these filings is tantamount to harassment of the respondents. As to the present case, he argued that Complainant Lowell would not be able to meet her burden under the Act and that the evidence will not support a finding against Respondent Smallwood.

In his opening remarks, Mr. Tripician, counsel for Respondent Simmons, recommended that the Commission limit the issues to the "four corners" of the complaint and no more. In doing so, he maintained that complainant's testimony and evidence will not be sufficient to support the complaint's burden of proof in light of the residuum rule, which requires that hearsay testimony be supported by competent, credible evidence. He also advised that he would make a motion for sanctions against the complainant since the allegations are not based on fact or any reasonable law.

Mr. Tripician also made the complainant and Commission aware that he had not received any documentation or the Verification of Attendance for the complainant's list of witnesses. Mr. Sklarin also claimed that he too did not receive the complainant's Verification of Attendance nor could he be certain that he received her total information packet. Complainant produced the certified mail receipt and the green cards reflecting prior counsels' receipt of complainant's documents. Although respondents' counsel did not oppose introduction of the complainant's documents, they did oppose the calling of her witnesses since she did not provide a certification of mailing to counsel and the Verification of Attendance. In the interest of fundamental fairness and due process requirements, the Commission barred the complainant's witnesses on direct, but she would be allowed her to call them on rebuttal.

COMPLAINANT: Corey Lowell—Board Member

Corey Lowell was sworn in and testified that in November 2013, prior to joining the Board as a member, she kept abreast of the Board's activities regarding the search and selection of Mr. Gregory Allen's appointment as Superintendent and the reversal of the appointment by the fiscal State Monitor assigned to the District on the grounds that Mr. Allen was not qualified for the position. The Board then sued the Monitor for her action in overturning the appointment. The suit was subsequently withdrawn in September 2014. Complainant Lowell further testified that, having joined the Board as a member, she was present at the Board meeting on February 11, 2014, when Respondent Smallwood discussed with the Board her idea of appointing Mr. Allen as Assistant Superintendent "to see if he would work out." The Board then directed her and the Personnel Committee, comprised of Respondent Smallwood, Respondent Simmons and Ms. Angela Abhez-Anderson, to meet and to discuss her plan with the State Monitor, who had the statutory authority to hire and fire within the District. (CD File 2, 02:05—02:30)

At the Board meeting of March 18, 2014, Complainant Lowell laid the foundation that she was in attendance that night as recorded in the minutes, and that during Executive Session

that evening she personally heard Respondent Smallwood state that she and Respondent Simmons conducted a site visit on Mr. Allen's behalf and met with several Pleasantville school officials and co-workers to discuss Mr. Allen's work ethic, qualifications for performance, and his candidacy for the position of Assistant Superintendent in Asbury Park. Respondent Smallwood also stated that although Mr. Allen's contract was not renewed in Pleasantville because the fiscal State Monitor, assigned to the Pleasantville School District, had pulled his name from consideration, the Business Administrator spoke highly of him. Complainant Lowell further maintains that the visit took place without her knowledge, and when she asked three other Board members—Connie Breech, Barbara Lesinski and Angela Abhez-Anderson—whether they knew of the visit, they told her that they did not nor did they give their consent to the visit. Complainant Lowell asserts that Respondent Smallwood stated that the meeting was scheduled over the weekend of March 8, 2014.

Complainant Lowell states as fact that, based on Respondent Smallwood's discussion at the Board meeting of March 18, 2014, the site visit took place, without the knowledge of the full board or during a meeting of the Board and that no the authorization was given to meet with the Superintendent candidate and his past employers. Moreover, there was no evidence in the Executive Session minutes or regular meeting minutes of March 18, 2014 to demonstrate that a site visit was ever discussed, who should be present at this visit, or what the appropriate criteria or rubric would be to conduct the visit.

Ms. Lowell affirmed that she was in attendance at the Board meeting in February when Respondent Smallwood was advised that she and the Personnel Committee had the Board's authority only to contact the State Monitor regarding her plan and in attendance at the March 18, 2014 meeting when Respondent Smallwood disclosed that she and Respondent Simmons conducted the site visit on behalf of Mr. Allen, whose appointment had already been overturned by the State Monitor.

On cross examination, counsel for Respondent Simmons introduced R-1(Simmons), the Executive Session minutes for the meeting of March 18, 2014, for the purpose of demonstrating that Ms. Lowell's name was not recorded among the names of those in attendance. She firmly stated in response that she definitely was in attendance during Executive Session that evening and the full minutes of the meeting support her attendance and role in the proceedings that evening.

Ms. Lowell did admit that she had no first-hand knowledge of what took place during the site visit, that she had no idea who else was present besides the respondents, and that she had no knowledge of the substance of the conversations which were exchanged during the visit. All that she learned about the visit came from Respondent Smallwood's account of the session. Upon further cross examination, Ms. Lowell also admitted that she had produced no documentary evidence yet to prove the violations she alleged, or to support her testimony regarding her first-hand knowledge of Executive Session discussions, the entire March 18, 2014 minutes, or respondents' Answers.

On cross-examination by counsel for Respondent Smallwood, Ms Lowell said that she has not produced documentary evidence that would prove a violation of N.J.S.A. 18A:12-

24.1(a), (c), (d), (e), and (g), but she stated that for some allegations documentary evidence was not available, but that she expected to prove the alleged violations on redirect. In consideration of the Commission's time, counsel ended his cross-examination as it would have repeated the same issues raised by Respondent Simmons' counsel.

When questioned by the Commission, Ms. Lowell testified that she was present during Executive Session at the Board meeting on March 18, 2014 and that at the Public Session after the closed portion of the meeting only two member of the audience remained, one of whom was a security guard and that to the best of her recollection the meeting ended between 9 pm and 10 pm, but could not remember how many Board members were present. Ms. Lowell was not able to confirm whether the March 18, 2014 minutes in evidence were the same as those at the March 25, 2015 meeting. In responding to a question regarding the State Monitor during the February 11, 2014 meeting¹, the Ms. Lowell confirmed that the Board asked the Personnel Committee to meet with the State Monitor to discuss the notion of creating an Assistant Superintendent position, but nothing more.

Ms. Lowell settled the question that the current State Monitor is the same Monitor who overturned the appointment of Mr. Allen, and that she was present at the March 18, 2014 meeting. When Ms. Lowell was asked how she responded to the revelation that the respondents conducted a site visit without authorization, she testified that she said, "You did what? That's an ethics violation!" To which Board counsel responded, "Now hold on now. You're not qualified to make that statement."

When questioned if she had any documentary evidence to support her assertions that the site visit took place sometime before the March 18, 2014 meeting, Ms. Lowell responded that she learned of the meeting from Respondent Smallwood at the meeting of March 18, 2014 and that based on the dates in an email exchange between Respondent Smallwood and Mr. Allen which she acquired from Respondent Smallwood's then counsel during the hearing of Lesinski v. Smallwood, C14-14. Based on the email, Ms. Lowell calculated that the meeting took place on the Thursday after the weekend of March 8-9, 2014 but before the meeting of March 18, 2014.

Counsel for Respondent Simmons objected to the admission of the email into evidence on the grounds that Ms. Lowell did not establish the proper foundation, nor could she attest to its authenticity, even though it was Respondent Smallwood's own document. In response to counsel, Ms. Lowell countered that both respondents acknowledged that the visit did take place, asserting that they had the Board's authorization. Counsel for the Commission asked if Simmons' counsel believed that the email exchange did not take place. He said his only objection was that Ms. Lowell did not lay the proper foundation for its admission. After deliberation, the Commission overruled the objection and admitted the Smallwood-Allen email as Complainant's Exhibit C-1.

Thereafter, a lengthy conversation ensued regarding R-1, the redacted Executive Session minutes, including a discussion about the process of minute distribution to the Board members. The minutes, both public and closed session, are distributed to the members at the meeting for

¹ A review of the Asbury Park Board of Education meeting minutes reveals that Ms. Lowell was present for the February 11, 2014 meeting but not the February 25, 2014 meeting. <http://www.asburypark.k12.nj.us/site>

adoption, but the Executive Session minutes are returned to the Business Administrator for safekeeping. Ms. Lowell stated that if a Board member were absent for the meeting at which the minutes were adopted, the public session minutes would be emailed to the member, but not the closed session minutes.² Thus, she had to make an OPRA request for the closed session minutes, which were intentionally redacted to preserve the confidentiality of the Executive Session discussions. After examining the various copies of R-1, the parties and the Commission agreed that they were all dealing with the same redacted document.

While still under oath and before she rested her case, Ms. Lowell testified that she did not recall Respondent Simmons making statements at the March 18, 2014 meeting regarding the site visit, but she did recall Respondent Smallwood statement that Respondent Simmons accompanied her on the visit. Ms. Lowell then requested that the full minutes of the March 18, 2014 meeting be admitted into evidence as Complainant's Exhibit C-2. The Commission so admitted the document and Ms. Lowell rested.

Counsel for Respondent Simmons made a Motion to Dismiss based on Ms. Lowell's lack of first-hand knowledge of the Executive Session discussions as the minutes of that session reflect that she was not present, and that she was not present at the site visit. Counsel relied on the determination in Steven Hoh v. C.B., Mine Hill Board of Education, Morris County, C50-10, 7/26/11, in which the Commission found that the complainant did not sustain his burden of proof as he failed to factually establish the violations alleged in his complaint. More to counsel's point here, the complainant in the Hoh matter shaped his entire case on hearsay evidence, having no personal knowledge of the facts to support his allegations. Although N.J.A.C. 1:1-15.5 allows for the admission of hearsay evidence, there must be some residuum of competent credible evidence to support the hearsay evidence. Without actual proof, the hearsay evidence cannot stand alone. Counsel argues that such is the case in the Lowell matter. He asserts that the complainant here lacks personal knowledge of the facts and has only hearsay to support the claims that the respondents violated the Code. He further argues that the complainant was not present at the meeting on March 18, 2014, or at the site visit, or had knowledge of the exact day the meeting took place. Counsel concluded that because the complainant's case relies strictly on hearsay evidence and has not provided the residuum proof to support her allegations, the Commission must dismiss her complaint.

Counsel for Respondent Smallwood then addressed the Commission to join in the Motion to Dismiss and remarked that the complainant has offered no proof that either respondent violated the Code "one way or the other." He further re-argues the application of the residuum rule and affirms that Ms. Lowell did not present any witnesses with personal knowledge of the facts or documentary evidence to successfully meet her burden of proof.

² The Commission has determined that Executive Session minutes are confidential and would not be available to any third party who would not be admitted to the Executive Session. It would seem appropriate that Executive Session minutes would not be distributed by email as the confidentiality of their contents would be breached. See [Messner & Condo v. Gray, Deptford Twp. Board of Education, Gloucester County, C16-13, 12/19/13](#) and [Berglund v. Gray, Deptford Twp. Board of Education, Gloucester County, C22-13, 12/19/13 \(Consolidated\)](#), Commissioner of Education Decision No. 243-14ASEC, decided June 9, 2014.

In response, the complainant contends that the Smallwood-Allen email exchange set the schedule for the site visit, the topics to be discussed, and who would be present. Moreover, she argues that both respondents in their respective Answers state that they did attend the site visit and with the full knowledge of the Board. The complainant again states that she, as a member of the Board, had no knowledge of the site visit and that three other members told her that they had no knowledge of it either. Finally, the complainant maintains that these documents are sufficient, competent, documentary evidence to meet the requirements of the residuum rule, pursuant to N.J.A.C. 1:1-15.5, and as such she has met her burden of proving the allegations in her complaint.

After a short recess to deliberate, the Commission advised the parties that it will reserve on the decision on the Motion to Dismiss until the respondent's present their case.

Upon return from the lunch recess, both counsel for the respondents elected not call witnesses and rested.

In summation, counsel for Respondent Simmons contends that the Smallwood-Allen email does not mention Respondent Simmons at all, that her Answer does not admit to a violation in any way, and further reiterated his arguments as he did in his Motion to Dismiss, directed that the Commission consider only the "four corners" of the complaint. Counsel concluded that the Commission would have to "twist itself into a pretzel" to decide other than to dismiss the complaint for failure to establish a violation of the Code.

Similarly, counsel for Respondent Smallwood contends that there is no documentary evidence or testimony from anyone with first-hand knowledge to establish a violation of the Code as alleged in the Complaint. He avers that there is no testimony whether the site visit was or was not authorized by the Board, and that the site visit was not in and of itself a violation. He maintains that the holding in Hoh requires first-hand knowledge to prove a violation of confidentiality and that the Commission would have to "go through some significant legal gymnastics" to find a violation of the Code. Moreover, he argues that the respondents were members of the Personnel Committee and that Respondents Smallwood's Answer did not admit any violation of the Code.

In her summation, Complainant Lowell contends that the lack of documentary evidence is telling that the visit was not planned or authorized. As a Board member she was not presented with any notes regarding the site visit and the Board never developed a list of questions or a scoring rubric, and three other Board members told her that they had no knowledge of the site visit. She reiterated the fact that the respondents took private action without authorization from the Board when they arranged for and conducted a site visit, which had the potential to compromise the Board, and demonstrates that the respondents violated the Code.

Finally, counsel for Respondent Simmons made a Motion for Sanctions against Ms. Lowell for filing a frivolous claim, pursuant to N.J.S.A. 18A:12-29(e) and the determination in Valdes v. Morejon, Union Cty. Bd. of Ed., Hudson County, C39-10 (February 22, 2011).

Complainant's Exhibits

C-1	Respondent Smallwood's E-mail of March 12, 2014 to Gregory Allen Scheduling a Meeting
C-2	Minutes of the Public Session of the March 18, 2014 Board Meeting

Respondent Simmons' Exhibit

R-1	Minutes of the Executive Session of the March 18, 2014 Board Meeting
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FINDINGS OF FACT

As the trier of fact in this matter, the Commission had the opportunity to observe the demeanor of the witness and to judge her credibility. As such, the Commission found Corey Lowell to be a credible witness who offered consistent testimony which was not weakened by an often contentious cross-examination. When faced with the loss of her ability to call witnesses,³ Ms. Lowell did not falter or waver, and was able to testify convincingly, with conviction and honesty. Her testimony was further supported by the documentary evidence upon which she relied. As neither Respondent Smallwood nor Respondent Simmons offered testimony or documentary evidence in their defense, except for R-1, the testimony of Complainant Lowell stands undisputed and unopposed. The Commission found the complainant's testimony to be credible and uncontroverted.

Accordingly, based on the pleadings, documents in the record, and credible, relevant testimony, the Commission makes the following factual findings on the issues of whether the Asbury Park Board Education authorized Respondents Smallwood and Simmons to conduct a site visit for the position of Assistant Superintendent on behalf of a candidate whose appointment had already been overturned by the fiscal State Monitor and whether they actually attended the visit.

1. At all times relevant to this matter, the complainant and respondents were members of the Asbury Park Board of Education (Board).
2. The Board has been subject to the oversight of a fiscal State Monitor, pursuant to N.J.S.A. 18A:7A-54 et seq., since September 2013.
3. The Board's search for a new Superintendent since early 2013 has been unsuccessful.
4. In November 2013, the State Monitor overturned the Board's appointed candidate, Gregory Allen, for Superintendent citing, *inter alia*, his lack of experience and concerns about his qualifications for the position.
5. The Board meetings at the center of the controversy were held on February 11, 2014 and March 18, 2014.
6. The minutes of the February 11, 2014 meeting, published on the Asbury Park website reveal that Complainant Lowell was in attendance at that meeting.

³ Although the complainant produced the green cards proving delivery of her documents on the prior attorneys, succeeding counsel for both respondents prevailed in striking her witnesses, limiting her only to questions on rebuttal. Since counsel for the respondents rested after the complainants case, Ms. Lowell had no opportunity to question witnesses.

7. At the meeting of February 11, 2014, the Board authorized the Personnel Committee, comprised of Respondent Smallwood, Respondent Simmons and Angela Abhez-Anderson, to only contact the State Monitor to discuss the plan to create a position of Assistant Superintendent.
8. Between March 9, 2014 and March 12, 2014, Respondent Smallwood engaged in an email exchange with Gregory Allen, the candidate for Superintendent whose appointment was overturned by the State Monitor, for the purpose of arranging a site visit to support his candidacy for the Assistant Superintendent position.
9. After the meeting, Mr. Allen and Respondent Smallwood again emailed each other stating that the meeting went well and that Respondent Smallwood would report to the Board on Tuesday night.
10. In that same email, Respondent Smallwood wrote to the unsuccessful candidate saying, "I'm doing everything I can to resolve this CSA situation." (Complainant's Exhibit C-1)
11. At the Board meeting on March 18, 2014, Respondent Smallwood reported that she and Respondent Simmons conducted a site visit on behalf of Gregory Allen.
12. Respondent Simmons' Answer admits to attending the site visit but states she did so with the full knowledge of the Board,
13. The Public Session minutes of the March 18, 2014 meeting clearly show that Complainant Lowell attended the entire meeting.
14. The redacted minutes of the March 18, 2014 meeting are not competent to demonstrate that Complainant Lowell was not at the meeting. (R-1)
15. The complainant testified that she heard Respondent Smallwood's account of the site visit and was surprised that it had taken place, as were three other Board members who told Complainant Lowell that they never authorized the visit. One of the three was a member of the Personnel Committee—Angela Abhez-Anderson.
16. The State Monitor attended the March 18, 2014 meeting.
17. There is no evidence, by either testimony or documentation, that the State Monitor corrected Ms. Lowell's objection upon learning of the site visit.
18. At the August 26, 2014 meeting, the Commission reviewed Respondent Simmons' allegation of frivolous complaint and voted to find this complaint not frivolous.
19. Respondent Geneva Smallwood rested without testifying or calling witnesses to rebut Complainant Lowell's testimony and documentary evidence.

20. Respondent Felicia Simmons rested without testifying or calling witnesses to rebut Complainant Lowell's testimony and documentary evidence.
21. Complainant Lowell's testimony and documentary evidence are unchallenged and uncontroverted by any competent, credible evidence by either respondent, and she has established her *prima facie* case against the respondents.
22. Respondent Smallwood and Respondent Felicia Simmons conducted the site visit without Board approval in violation of the Code of Ethics for School Board Members, N.J.S.A. 18A:12-24.1 et seq.

ANALYSIS

MOTION TO DISMISS

Pursuant to N.J.A.C. 6A:28-8.1(d), upon completion of the complainant's case, and prior to the respondent's testimony, counsel for Respondent Simmons moved to dismiss the Complaint.⁴ After hearing arguments from counsel, the Commission asked the parties to leave the room so that it could deliberate. It is the complainant's burden to factually establish violation(s) of the Code of Ethics for School Board Members. In considering a motion to dismiss, the Commission considers the facts in the light most favorable to the non-moving party. The question before the Commission was whether the complainant alleged facts and provided testimony which, if true, could support a finding that the respondent violated N.J.S.A. 18A:12-24.1(a), (c), (d), (e), and (g) of the Code of Ethics for School Board Members. The Commission determined to reserve its decision on the Motion pending presentation of respondents' respective cases.

Both respondents elected not to testify or call witnesses on their behalf and rested.

During his closing arguments, counsel for each respondent renewed the earlier Motion to Dismiss on the grounds that the complainant had failed to meet her burden to prove the allegations in her Complaint by a preponderance of credible evidence. In support of their joint motion, counsel rely on the determination in Steven Hoh v. C.B., Mine Hill Board of Education, Morris County, C50-10, 7/26/11 (Hoh). In that matter, the complaint was dismissed for failure of the complainant to meet his burden since his complaint was based on hearsay and he had no personal knowledge of the incident which gave rise to the filing. He learned of the event at issue from someone else and was not present when the episode occurred. Counsel for the respondents argue that Ms. Lowell's Complaint should suffer the same fate since her testimony is all based on hearsay as demonstrated by her nonattendance of the Executive Session portion of the March 18, 2014 Board meeting as shown in the March 18, 2014 Minutes of Executive Session, and she has not provided the residuum proof in support of her hearsay testimony as required under N.J.A.C. 1:1-15.5. They proffered Respondent Simmons' Exhibit R-1 to show that Complainant Lowell was not in attendance during Executive Session when Respondent Smallwood revealed to

⁴ N.J.A.C. 6A:28-6.9(c) provides that all hearings shall be conducted in accordance with the rules of the OAL. Such rules permit a party to make an oral motion during a hearing and to state the grounds for the motion. N.J.A.C. 1:1-12.1(a)1 and 2.

the Board members that she and Respondent Smallwood conducted a site visit on behalf of the same candidate whose appointment the State Monitor overturned. Counsel assert that Complainant Lowell could have no first-hand knowledge of the disclosure. According to the Executive Session minutes, the seven members in attendance were Ahbez-Anderson, Hall, Harris, Lesinski, Saunders, Simmons, and Smallwood. Also present was the State Monitor.

In response, Complainant Lowell asserted that she was present for the entire meeting and proffered Complainant's Exhibit C-2, the minutes of the entire Public Session, which reflect that she was present at roll call to open the meeting, and was mentioned in two other agenda items as either seconding a motion or voting "nay" on the Motion to go into Executive Session. Thus, Ms. Lowell asserts that she was present for the entire meeting.

The Commission agrees and determines that application of Hoh is inapposite to the facts in the instant matter. When R-1 and C-2 are read *in pari material*, R-1, the Executive Session minutes, reflects two critical inconsistencies when compared with C-2, sufficient to render R-1 unreliable to prove Ms. Lowell was absent from Executive Session.

First, the Public Session minutes show Ms. Lowell present for roll call at the outset of the meeting and specifically mentioned in the activity of two other agenda items, including the vote to go into Executive Session. There is no entry that she departed. However, Mr. Saunders is marked "absent" at initial roll call; yet, his name appears on the Executive Session minutes as in attendance, but Ms. Lowell's name notes she is absent. There is no entry that Mr. Saunders arrived late to the meeting nor is his name mentioned on any other Board initiative that evening. Further, there is no indication that Ms. Lowell left.

Second, at the opening roll call, eight Board members were in attendance and every vote thereafter reflected eight members voting; however, Executive Session roll call shows Mr. Saunders present when he was not before, and the number of members reduced to seven. While there may be some explanation for these irregularities, none were offered at the hearing by the respondents; therefore, R-1 is unreliable to prove that Ms. Lowell was not present during Executive Session, and the Commission accords it no weight. In contrast, C-1 demonstrates that Ms. Lowell was in attendance that evening, and when coupled with her credible testimony that she was present at all times, the Commission accorded greater weight to C-1 as evidence to prove that Ms. Lowell was present to hear Ms. Smallwood's account of the site visit, which she and Ms. Simmons conducted.

The Commission further determines that there is also independent evidence that the site visit took place. First, Ms. Smallwood's email conversation (Complainant's Exhibit C-1) with Mr. Allen is evidence that after he contacted Ms. Smallwood she planned the visit, gathered the necessary participants, and emailed Mr. Allen concerning the perceived success of the visit after the fact and advised him that she would report to the Board that Tuesday and that she would do "everything I can to resolve this CSA situation". Second, Ms. Simmons' Answer to the Complaint in which she admits that she attended the site visit with the full knowledge of the Board.

For the reasons stated above and based on the Findings of Fact, *supra*, the Commission determines that the residuum rule requirement does not apply in this setting as Ms. Lowell has met her burden of proof by providing credible evidence, which does not rely on hearsay, that Respondent Smallwood and Respondent Simmons violated the Code. The joint Motion to Dismiss is hereby denied.

MOTION FOR SANCTIONS

After closing argument, counsel for Respondent Simmons made a motion to impose a monetary sanction on Ms. Lowell for filing a frivolous complaint, pursuant to N.J.S.A. 18A:12-29(e). To succeed at such a request, the movant must show that that the complainant filed the Complaint in bad faith solely for the purpose of harassment, delay or malicious injury. Counsel has provided no evidence of bad faith nor has he provided information to suggest that the complainant 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. Moreover, at its August 26, 2014 meeting, the Commission reviewed Respondent Smallwood's allegation of frivolous complaint as alleged in her Answer and voted to find this Complaint not frivolous. The allegation once decided cannot be raised again, pursuant to N.J.A.C. 6A:28-7.2(b)(1). Consequently, based on the foregoing, the Commission denies counsel's request for sanctions.

CODE VIOLATIONS

The relevant, credible testimony in the case now before the Commission revealed that the respondents took board action beyond the scope of their authority and in violation of the Code when, without Board authority and without the approval of the State Monitor, they conducted a site visit to assess a candidate for Assistant Superintendent. They further violated the Code when they made personal promises to the candidate by advancing the possibility of his employment with the District, and promising to resolve the CSA issue for the Asbury Park District, which had the potential to compromise the Board. Respondent Smallwood and Respondent Simmons conducted a site visit without necessary approval. Consistent with this foregoing reasoning, the Commission reviewed these actions to determine the manner in which the respondents violated the Code.

The Commission again notes that the complainant bears the burden of factually proving any violations of the Code of Ethics for School Board Members in accordance with the standards set forth at N.J.A.C. 6A:28-6.4(a). See also, N.J.S.A. 18A:12-29(b). The complainant asserts that the respondent violated N.J.S.A. 18A:12-24.1(a), (c), (d), (e), and (g) of the Code of Ethics for School Board Members.

The Commission first considers the allegation that the respondent violated N.J.S.A. 18A:12-24.1(a), which states:

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.

The Commission's regulations require that:

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 the respondent(s) failed to enforce all laws, rules and regulations of the State Board of Education, and/or court orders pertaining to schools or that the respondent brought about changes through illegal or unethical procedures. N.J.A.C. 6A:28-6.4(a)1.

The complainant did not produce a copy of a final decision from a court of law or administrative agency of this State which demonstrates that this respondent failed to enforce all laws, rules and regulations of the State Board of Education, and/or court orders pertaining to schools or that the respondents brought about changes through illegal or unethical means. See, David Hollander v. Judith Millman, et al., Springfield Twp. Board of Education, Union County, C33-07 (January 22, 2008); Denise Bouyer v. Rita Owens and Oscar McCoy, Willingboro Board of Education, Burlington County, C37-09 (December 15, 2009); Martha Oramas-Shirey v. Peter Gallo et. al., Bethlehem Twp. Bd. of Ed., Hunterdon County, C43-10 (March 22, 2011). Accordingly, the complainant failed to establish that the respondent violated N.J.S.A. 18A:12-24.1(a).

The Commission next considers the allegation that the respondent violated N.J.S.A. 18A:12-24.1(c), which states:

I will confine my board action to policymaking, 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.

The Commission's regulations require that:

Factual evidence of a violation of N.J.S.A. 18A:12-24.1(c) shall include evidence that the respondent(s) took board action to effectuate policies and plans without consulting those affected by such policies and plans, or took action that was unrelated to the 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.
- N.J.A.C. 6A:28-6.4(a)3.

The complainant alleges that the respondents took action beyond the scope of their authority when they conducted the site visit without Board approval and without authorization of the State Monitor. Ms. Lowell testified that at the Board meeting of February 11, 2014, the Board gave approval to the Personnel Committee only to contact the State Monitor to discuss the notion of creating a new Assistant Superintendent position. At that time, the Personnel Committee was comprised of Respondent Smallwood, Respondent Simmons, and Angela Abhez-Anderson. Four times during the course of her testimony, Ms. Lowell stated that three other Board members told her that they did not authorize the respondents to conduct a site visit, and those statements were never once challenged by the respondents. Most importantly, one of the three who advised Ms. Lowell that she did not approve the visit was Ms. Anderson, the third member of the Personnel Committee. She was left out of the decision.

Moreover, the State Monitor was in attendance at Executive Session on March 18, 2014 when Respondent Smallwood recount hers and Ms. Simmons' experiences on the site visit and would have heard Ms. Lowell respond, "You did what? That's an ethics violation!" To which Board counsel responded, "Now hold on now. You're not qualified to make that statement." It is reasonable to conclude that had the respondents actually discussed the creation of the new position and received authorization to conduct the site visit, the State Monitor would have taken this opportunity to defuse the situation to avoid litigation or for any of the other Board members who were present, who could have explained that authority was previously granted at the earlier February 25, 2014 meeting which Complainant Lowell was not in attendance. But that did not happen because the respondents neither sought approval nor received authorization. Instead, the respondents acted unilaterally to plan and arrange the site visit. Moreover, if they had the requisite approvals, they would have included that fact in their respective Answers, but they did no. Further, they would have testified to that fact or had others testify on their behalf, which they did not. Accordingly, based on the preponderance of the credible testimony and evidence, the Commission finds that because Respondent Smallwood and Respondent Simmons failed to secure the necessary Board approval and/or State Monitor authorization prior to conducting the site visit, they violated N.J.S.A. 18A:12-24.1(c).

The Commission next considers the allegation that the respondent violated N.J.S.A. 18A:12-24.1(d), which states:

I will carry out my responsibility, not to administer the schools, but together with my fellow board members, to see that they are well run.

The Commission's regulations require that:

Factual evidence of a violation of N.J.S.A. 18A:12-24.1(d) shall include, but not be limited to, evidence that the respondent(s) gave a direct order to school personnel or became directly involved in activities or functions that are the responsibility of school personnel or the day-to-day administration of the school district or charter school. N.J.A.C. 6A:28-6.4(a)4.

Based on the testimony and in accordance with the Commission's findings of fact, the Commission finds insufficient evidence to conclude that the respondents gave a direct order to school personnel or became directly involved in activities or functions that are the responsibility of school personnel or the day-to-day administration of the school district. Accordingly, the complainant failed to establish that the respondents violated N.J.S.A. 18A:12-24.1(d).

The Commission next considers the complainant's allegation that the respondent violated N.J.S.A. 18A:12-24.1(e), which provides:

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.

The Commission's regulations require that:

Factual evidence of a violation of N.J.S.A. 18A:12-24.1(e) shall include evidence that the respondent made personal promises or took action beyond the scope of his or her duties such that, by its nature, had the potential to compromise the board. N.J.A.C. 6A:28-6.4(a)5.

In finding a violation of N.J.S.A. 18A:12-24.1(e), it is not necessary for the Commission to find that the respondent's action, in fact, compromised the Board. Rather, it is sufficient that the action was of such a nature that it might have compromised the Board. See, Tony John et al. v. Ken Gordon, Willingboro Bd. of Ed., Burlington County, C34-08 (October 27, 2009), aff'd Commission of Education Decision No. 102-10ASEC, decided March 30, 2010.

Respondent Smallwood continued to pursue Mr. Allen as a candidate for the Assistant Superintendent position and enlisted the assistance of Respondent Simmons to attend and conduct the site visit. The Commission determines that actually conducting a site visit on behalf of and in the presence of Mr. Allen, whose appointment the State Monitor overturned in November 2013, was the next step in the hiring process for which the respondents had no approval. As such, the action they took in attending and conducting the site visit was private action beyond the scope of their authority. This site visit had the ability to compromise the Board. In further violation of the Code, Respondent Smallwood held out a promise to Mr. Allen in her email reply to him when she stated, "I'm doing everything I can to resolve this CSA⁵ situation." This promise of future employment also had the potential to compromise the Board, despite the fact that she had no authority to bring the promise of employment with the District to fruition.

Accordingly, the Commission finds that based on the preponderance of the relevant, credible evidence, Respondents Smallwood and Simmons took private action and made a personal promise of possible future employment with the District, when they attended the

⁵ CSA is the acronym for the Chief School Administrator or Superintendent.

meeting. These actions were of such a nature that they had the potential to compromise the Board in violation of N.J.S.A. 18A:12-24.1(e).

The Commission last considers the allegation that the respondent violated N.J.S.A. 18A:12-24.1(g), which provides:

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.

The Commission's regulation requires that:

Factual evidence of a violation of the confidentiality provision of N.J.S.A. 18A:12-24.1(g) shall include evidence that the respondent(s) 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 the 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 the respondent(s) and evidence that establishes that the inaccuracy was other than reasonable mistake or personal opinion or was not attributable to developing circumstances. N.J.A.C. 6A:28-6.4(a)7. The purpose of executive session is to allow the Board to openly deliberate on select issues without the public being privy to those discussions. It is clear that the topics discussed during that portion of the meeting were confidential and it fell upon those individuals present in executive session ensure those discussions remain confidential.

The Commission confines its review to the first portion of this regulation, which requires evidence that the respondent took action to make public, reveal or disclose information that was not otherwise public. The complainant has provided no testimony or evidence that either respondent actually disclosed confidential information to the individuals attending the site visit. Although Ms. Lowell testified that Ms. Smallwood referred to Mr. Allen's "candidacy" in her discussion with the group, there is no corroborating evidence to support the allegation that she shared confidential information. Complainant's Exhibit C-1, the Smallwood-Allen email⁶, does

⁶ The Smallwood-Allen email was admitted into evidence by Respondent Smallwood in a prior matter as R-3 and was only used in that matter to corroborate that Ms. Smallwood divulged Executive Session conversations and shared far more information, including her "out of the box" proposal in her telephone call in greater detail than simply gauging the candidates' interest and disclosed confidential matters discussed in Executive Session in

not demonstrate that Respondent Smallwood or Respondent Simmons disclosed confidential information to the group during the visit. While it is reasonable to conclude that a discussion regarding Mr. Allen's candidacy could only mean Ms. Smallwood's intention to appoint Mr. Allen to the Assistant Superintendent position, a finding that she had actually breached the Code would be based solely on conjecture. Accordingly, the complainant failed to establish that respondents violated N.J.S.A. 18A:12-24.1(g).

DECISION

The Commission finds that the complainant has proved by a preponderance of the relevant, credible evidence that Respondent Geneva Smallwood and Respondent Felicia Simmons violated N.J.S.A. 18A:12-24.1(c) and (e) of the Code of Ethics for School Board Members, and the Commission dismisses the allegations that the respondent violated N.J.S.A. 18A:12-24.1(a), (d), and (g) of the Code.

PENALTY

The Commission recommends a penalty of censure of each respondent, as it did in matters where similar violations of N.J.S.A. 18A:12-24.1(c) and (e) were found and a comparable violation was endorsed. In recommending the penalty, the Commission notes that a censure was the appropriate penalty when it found that a Board member violated (c) and exceeded her authority to appraise the resumes of candidates for Superintendent when she went in search of the resumes for her review. I/M/O Marlene Polinik, Wayne Township Board of Education, Passaic County, C45-06 1/22/08, Commissioner of Education Decision No. 112-08 SEC, decided March 10, 2008. A censure was also the penalty for a violation of N.J.S.A. 18A:12-24(e) *inter alia* for taking private action by attending a meeting the Board had not authorized the member to attend. Brown, et al. v. David Matthews, City of Englewood Bd. of Education, Bergen County, C13-07, 10/27/08, Commissioner of Education Decision No 123-09A, decided April 14, 2009. Here, where the respondents were found to have violated both N.J.S.A. 18A:12-24.1(c) and (e), the Commission finds that the penalty of censure is appropriate.

Pursuant to N.J.S.A. 18A:12-29(c), this decision shall be forwarded to the Commissioner of Education for review of the School Ethics Commission's recommended sanction. Parties may either: 1) file exceptions to the recommended sanction; 2) file an appeal of the Commission's finding of violation; or 3) file both exceptions to the recommended sanction together with an appeal of the finding of violation.

Parties taking exception to the recommended sanction of the Commission but *not disputing* the Commission's finding of violation may file, within **13 days** from the date the Commission's decision is forwarded to the Commissioner, written exceptions regarding the recommended penalty to the Commissioner. The forwarding date shall be the mailing date to the parties, indicated below. Such exceptions must be forwarded to: Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, NJ 08625, marked "Attention:

violation of N.J.S.A. 18A:12-24.1(g). The Commission did not have the issue of the propriety of the site visit before it at that time.

Comments on Ethics Commission Sanction.” A copy of any comments filed must be sent to the School Ethics Commission and all other parties.

Parties seeking to appeal the Commission’s finding of violation *must* file an appeal, pursuant to the standards set forth at N.J.A.C. 6A:4, within **30 days** of the filing date of the decision from which the appeal is taken. The filing date shall be three days after the date of mailing to the parties, as shown below. In such cases, the Commissioner’s review of the Commission’s recommended sanction will be deferred and incorporated into the Commissioner’s review of the finding of violation on appeal. Where a notice of appeal has been filed on or before the due date for exceptions to the Commission’s recommended sanction (13 days from the date the decision is mailed by the Commission), exceptions need not be filed by that date, but may be incorporated into the appellant’s briefs on appeal.

Robert W. Bender, Chairperson

Mailing Date: March 26, 2015

Resolution Adopting Decision – C16-14

Whereas, the School Ethics Commission has considered the pleadings filed by the parties, the documents submitted in support thereof, and the testimony of the parties from its hearing on February 24, 2015; and

Whereas, at its meeting on February 24, 2015, the Commission denied respondents' request for reconsideration its denial of their Motion for a Stay; and

Whereas, at its meeting on February 24, 2015, the Commission found that the complainant established that the respondents violated N.J.S.A. 18A:12-24.1(c) and (e) of the Code of Ethics for School Board Members, but dismissed the allegations that the respondent violated N.J.S.A. 18A:12-24.1(a), (d), and (g); and

Whereas, at its meeting on February 24, 2015, the Commission voted to recommend to the Commissioner of Education a penalty of censure of each respondent; and

Whereas, at its meeting on March 24, 2015, the Commission agreed that the within decision accurately memorializes its findings and recommendations; and

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

Robert W. Bender, Chairperson

I hereby certify that the Resolution was duly adopted by the School Ethics Commission at its public meeting on March 24, 2015.

Joanne M. Restivo
Acting Executive Director
School Ethics Commission