

273-19SEC

SEC Dkt Nos. C17-12, C18-12, and C21-12 (CONSOLIDATED):

<https://www.state.nj.us/education/legal/ethics/2019/C17-12,%20C18-12,%20C21-12%20Consolidated.pdf>

OAL Dkt. Nos. EEC 13642-12, EEC 13643-12, and EEC 13644-12

Agency Dkt. No. 4-5/19A

New Jersey Commissioner of Education

Final Decision

In the Matter of Israel Varela and
Kenneth Puccio, Perth Amboy Board
of Education, Middlesex County.

This matter involves an appeal of the School Ethics Commission's (Commission) May 2, 2019 decision that appellant Kenneth Puccio, a member of the Perth Amboy Board of Education, violated *N.J.S.A.* 18A:12-24.1(d) and *N.J.S.A.* 18A:12-24.1(e) of the Code of Ethics for School Board Members (Code) in connection with his attendance at a meeting of the local American Federal of Teachers (AFT), which is the teachers' union.¹ The Commission found probable cause that the appellant violated *N.J.S.A.* 18A:12-24(c), *N.J.S.A.* 18A:12-24.1(d), *N.J.S.A.* 18A:12-24.1(e), and *N.J.S.A.* 18A:12-24.1(f) in connection with his behavior at a Board personnel meeting held on February 22, 2012, and *N.J.S.A.* 18A:12-24.1(d) and *N.J.S.A.* 18A:12-24.1(e) in connection with his attendance at an AFT meeting on May 9, 2012.² Following a hearing at the Office of Administrative Law, the Administrative Law Judge (ALJ) dismissed the charges regarding the Board personnel meeting, concluded that appellant violated *N.J.S.A.*

¹ Complaint C21-12 was filed with the Commission against appellant on May 24, 2012. Complaints C17-12 and C18-12 involved Israel Varela, whose matters were consolidated with Mr. Puccio's due to the similarity of the legal issues and evidence. The Commission's May 2, 2019 decision involved findings against both Mr. Varela and Mr. Puccio. Mr. Varela did not appeal the Commission's decision. The Commissioner's Final Decision regarding Mr. Varela was issued on June 18, 2019 under Agency Docket No. 106-5/19.

² The Commission's May 2, 2019 decision indicates that it also found probable cause that appellant violated *N.J.S.A.* 18A:12-24.1(i). However, the September 26, 2012, Probable Cause Notice indicates that the Commission found no probable cause to credit the allegation that appellant violated *N.J.S.A.* 18A:12-24.1(i), and the ALJ's decision does not address this provision of the Code. Accordingly, this citation appears to have been included in the May 2, 2019 decision in error.

18A:12-24.1(d) and *N.J.S.A.* 18A:12-24.1(e) in relation to the AFT meeting, and recommended a penalty of a sixty-day suspension.³ In its May 2, 2019, decision, the Commission adopted the ALJ's factual and legal determinations, but modified the recommended penalty to a one-year suspension.

In his appeal to the Commissioner, the appellant argues that the conclusion that he violated *N.J.S.A.* 18A:12-24.1(d) and *N.J.S.A.* 18A:12-24.1(e) is not supported by the record. Appellant contends that there is no evidence that he made a direct order or became directly involved in day to day activities of the school, as required by *N.J.A.C.* 6A:28-6.4(a) to demonstrate a violation of *N.J.S.A.* 18A:12-24.1(d), or that he made a personal promise beyond the scope of his duties, as required by *N.J.A.C.* 6A:28-6.4(a)(5) to demonstrate a violation of *N.J.S.A.* 18A:12-24.1(e). Appellant claims that the ALJ and Commission decisions were based on speculative hearsay evidence by the district's superintendent, Dr. Janine Caffrey, who did not attend the AFT meeting and who instead testified based on information she had been told by an unnamed source. Appellant argues that the superintendent's testimony should be discounted because it was not supported by any residuum evidence. The only other witnesses to testify regarding the meeting were appellant and the then-president of the AFT, neither of whom corroborated the superintendent's testimony. Finally, the appellant questions the credibility of the superintendent's testimony in light of the dispute between Dr. Caffrey and the Board, and alleges that her motivation in filing the ethics complaint was to conflict appellant from voting on her continued employment.

³ The ALJ further recommended that, in lieu of a suspension, appellant be replaced as Board president by another member chosen by the county superintendent. The Commission rejected this recommendation because its authority is limited to the reprimand, censure, suspension, or removal of a board member. The Commissioner concurs with the Commission's decision to reject the ALJ's recommendation of a demotion as such an action is not contemplated by *N.J.S.A.* 18A:12-29(c).

Appellant further claims that the Commission erred in finding a violation of *N.J.S.A.* 18A:24.1(e) because he attended the AFT meeting in his capacity as Vice President of the Board, at the request of the Board President. He testified, and argues, that he believed the majority of the board wanted both him and the President to attend the meeting. Furthermore, appellant contends that he was not required to obtain formal Board approval to attend the meeting and notes that neither the ALJ nor the Commission relied upon any decision or advisory opinion requiring formal approval in these circumstances.

With respect to the penalty, appellant argues that a penalty of a one-year suspension is excessive, inconsistent with prior Commission decisions, and unwarranted given appellant's service to the Board in the seven years since the initial allegations. Appellant first notes that he was chosen as the Board President by the Middlesex County Superintendent, who was aware of the allegations of ethical violations against appellant,⁴ following a contest between two board members for the position. Additionally, the current superintendent of the district testified that appellant was a "significant asset" to the district.

Appellant distinguishes *In the Matter of Gartland and Picardo, West Essex Board of Education, Essex County*, SEC Dkt. No. C-44-05, March 28, 2006, *affirmed* Commissioner Decision No. 210-06, decided June 12, 2006, which was relied upon by the Commission, because the respondent board members in *Gartland, supra*, had been asked not to attend the union meeting by at least one other board member, while the appellant herein understood that the majority of his fellow board members wanted him to attend the AFT meeting. Furthermore, in *Gartland, supra*, the board members could have contacted the superintendent about the union meeting, but the appellant claims he could not have done so in the instant matter because

⁴ The Commissioner notes that this information was provided by David Roman, current superintendent of the Perth Amboy school district, who testified, "I believe that they were" aware of the ethics complaints. Tr8, 42:19-22.

Dr. Caffrey was not acting in the position of superintendent at the time of the meeting. Appellant also argues that the recommended penalty of a one-year suspension is not consistent with prior decisions, citing cases in which board members who engaged in similar conduct received only a reprimand or a censure, while a board member in another case who engaged in multiple instances of ethics violations received only a sixty-day suspension. Appellant contends that a penalty of suspension requires something more extreme than “just” taking action beyond the scope of one’s authority.

In reply, the Commission argues that its decision that appellant violated *N.J.S.A.* 18A:12-24.1(d) and *N.J.S.A.* 18A:12-24.1(e) was reasonable and supported by the record. The Commission notes that the appellant attended the AFT meeting without the Board’s approval and with the admitted specific purpose of removing the superintendent from her position. The Commission contends that appellant’s attempts to cure what it alleges are prior admissions about the meeting should be rejected.

The Commission compares this matter to *Gartland, supra*, in which two board members met with the local union to discuss concerns that the union had brought to their attention, without the approval or knowledge of the superintendent. In *Gartland, supra*, the Commission found that the board members had violated several provisions of the Code, including *N.J.S.A.* 18A:12-24.1(d), because the board members had usurped the authority of the superintendent by meeting with the union. According to the Commission, the appellant here similarly interfered with the superintendent’s relationship with the teacher’s union and undermined her ability to manage the district’s teachers. The Commission argues that its position is further supported by the testimony of the district’s current superintendent that actions such as appellant’s would have the effect of undermining his authority as the superintendent.

The Commission submits that appellant violated *N.J.S.A.* 18A:12-24.1(e) because he acted privately by attending the meeting without Board approval. The Commission argues that board members do not have implied authorization to act on the board's behalf in all matters, but rather are generally prohibited from acting without board authorization by the basic restriction inherent in *N.J.S.A.* 18A:12-24.1(e). Additionally, the Commission disagrees with appellant's argument that he did not make any personal promises, pointing to appellant's 2013 testimony and discovery responses in a related matter, in which appellant stated that he told the membership that the Board supported the teachers and that the Board was exploring all possible options for removing the superintendent, and contending that the Commission reasonably interpreted this statement as a promise. The Commission further points out that the more than six years of litigation that followed the meeting demonstrates that appellant's actions clearly had the potential to compromise the Board.

The Commission argues that the sixty-day suspension recommended by the ALJ is insufficient, relying on *Gartland, supra*, in which the Commission recommended, and the Commissioner concurred with, penalties of a one-month suspension and censure for two Board members who met with the local union to discuss enhancing educational opportunities in the school district. The Commission contends that appellant's conduct warrants a more significant penalty than in *Gartland, supra*, because his explicit intent was to undermine the superintendent, while the board members in *Gartland, supra*, intended only to open a channel of communication with the union.

Upon a comprehensive review of the record, the Commissioner finds that the decision of the Commission that the appellant violated *N.J.S.A.* 18A:12-24.1(d) and *N.J.S.A.* 18A:12-24.1(e) is supported by sufficient credible evidence, and appellant has not established

that the Commission's decision is arbitrary, capricious, or contrary to law.⁵ The record is clear that appellant was well aware of the significant issues between the district's teachers and the superintendent when he attended the meeting. He nonetheless inserted himself into the middle of the relationship, and he did so at a time when, according to his own admission, his intent was to have the superintendent removed from her position.⁶ At least one member of the union, local president Donna Chiera, believed that appellant was empathizing with the union members and wanted to make sure that the teachers felt supported in their dealings with the superintendent. Furthermore, the appellant attended the AFT meeting without any formal board approval, or any proof of informal consent.

The superintendent had been reinstated prior to the AFT and thus was the person responsible for the day-to-day operation of the schools, including interacting with the union members and their leadership. Appellant took this responsibility upon himself when he attended the AFT meeting, thus violating *N.J.S.A.* 18A:12-24.1(d). Appellant's actions had the potential to undermine the authority of the superintendent and her ability to manage the day-to-day operations of the schools and interactions with AFT members. While the appellant argues that he made no personal promise about Dr. Caffrey's employment, such is not required by *N.J.A.C.* 6A:28-6.4(a)(5), which provides that evidence of a violation of *N.J.S.A.* 18A:12-24.1(e) may include that "respondent made personal promises or took action beyond the scope of his or her duties" (emphasis added); *see also Persi v. Woska*, 2017 N.J. Super. Unpub. LEXIS 625, *7 (App. Div. Mar. 10, 2017) (finding that action taken by a board member that is beyond the scope

⁵ The Commissioner is also in accord with the Commission's determination that appellant did not violate *N.J.S.A.* 18A:12-24(c), *N.J.S.A.* 18A:12-24.1(d), *N.J.S.A.* 18A:12-24.1(e), and *N.J.S.A.* 18A:12-24.1(f) in connection with the February 22, 2012 Board personnel meeting.

⁶ Although appellant attempted to explain this admission, which occurred in his 2013 testimony in a related matter, when he testified in the current matter, the ALJ credited the earlier testimony, and the Commissioner accepts the ALJ's credibility determination.

of his authority and duties as a board member meets the definition of “private action” and is sufficient to demonstrate a violation). Attending a meeting of the teacher’s union to discuss the employment of the superintendent, at time when her employment was in question and when appellant clearly understood that there was friction in her relationship with the district’s teachers, without approval by the board, went beyond the scope of his duties and had the potential to compromise the board.

With respect to the appropriate penalty, the Commissioner concurs with the ALJ and finds that a penalty of a sixty-day suspension is appropriate in this matter. The one-year penalty recommended by the Commission is not consistent with other cases involving similar offenses. For example, in *Persi, supra*, a board member who wanted to terminate the interim superintendent’s employment unilaterally directed the issuance of a *Rice* notice, met with incoming board members-elect about terminating the interim superintendent and identified a potential replacement, and met with the potential replacement. He was found to have violated *N.J.S.A.* 18A:12-24.1(e) and received only a reprimand. *See also Schwartz v. Gallagher*, Commissioner Decision No. 228-19SEC (Sept. 5, 2019) (reprimanding a board member for approaching an employee to inquire whether she would be interested in assuming the position of Chief School Administrator, even though that position was not vacant). In *Gartland, supra*, two board members met with union representatives to discuss concerns that the union had brought to their attention without the knowledge of the rest of the board or the superintendent. The Commission found, and the Commissioner affirmed, that the board members had violated *N.J.S.A.* 18A:12-24.1(c) and *N.J.S.A.* 18A:12-24.1(d), with a penalty of a one-month suspension for the board member with one year of experience and censure for the newly-elected board member.

The Commissioner agrees with the Commission that appellant's actions are more egregious than those of the board members in *Gartland, supra*, as appellant was well aware that the matter of the superintendent's employment was in flux. Appellant was also more experienced than the board members in *Gartland, supra*, having served three years on the board at the time of the AFT meeting. As such, an increase from the reprimand, censure, and thirty-day penalties assessed in those cases is warranted. However, a one-year suspension is excessive in comparison to the similar cases.

Accordingly, respondent is hereby suspended for sixty days as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.⁷

COMMISSIONER OF EDUCATION

Date of Decision: October 16, 2019
Date of Mailing: October 17, 2019

⁷ This decision may be appealed to the Superior Court, Appellate Division, pursuant to *P.L. 2008, c. 36 (N.J.S.A. 18A:6-9.1)*.