

New Jersey Commissioner of Education
Final Decision

Michael Skowronski,

Petitioner,

v.

Board of Education of the Township of
East Greenwich, Gloucester County,

Respondent.

Synopsis

Petitioner appealed the denial of indemnification for legal fees and costs pursuant to *N.J.S.A. 18A:12-20* for expenses incurred in defending a complaint filed with the School Ethics Commission (Commission) that alleged violations of the School Ethics Code. Petitioner maintains that the Board's refusal to indemnify him is a breach of its statutory obligations under *N.J.S.A. 18A:12-20*. The Board asserts that petitioner's conduct was outside of his duties as a Board member, and statutory indemnification is required only with regard to conduct "arising out of and in the course of the performance of his duties as a member of a board of education." Petitioner was previously found to have violated the School Ethics Act (Act) when he sent an email to his fellow Board members that included confidential information and was inadvertently copied to a member of the public. The parties filed cross motions for summary decision.

The ALJ found, *inter alia*, that: there is no genuine issue as to any material fact here, and the matter is ripe for summary decision; the issue of indemnification of members of boards of education against the cost of legal proceedings is governed by *N.J.S.A. 18A:12-20*, which provides for indemnification when a legal action against a board member arises out of and in the course of the performance of their duties as a member of the board; here, the petitioner sent an email using his Board email account in direct response to an email from the Board president which involved a current matter before the Board; and such email exchange was deemed to be part of the Board's deliberative process. The ALJ concluded that petitioner's conduct arose out of and in performance of his duties as a member of the Board; accordingly, petitioner is entitled to indemnification consistent with *N.J.S.A. 18A:12-20*. The petitioner's motion for summary decision was granted and the opposing motion was denied.

Upon review, the Commissioner, *inter alia*, concurred with the ALJ that the petitioner is entitled to indemnification under *N.J.S.A. 18A:12-20*. Accordingly, the Commissioner granted petitioner's motion for summary decision, and ordered the Board to reimburse the petitioner for reasonable legal fees and costs in connection with the within matter.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

127-22

OAL Dkt. No. EDU 05603-21

Agency Dkt. No. 92-6/21

New Jersey Commissioner of Education

Final Decision

Michael Skowronski,

Petitioner,

v.

Board of Education of the Township of
East Greenwich, Gloucester County,

Respondent.

The record of this matter, the Initial Decision of the Office of Administrative Law (OAL), the exceptions filed by the Board pursuant to *N.J.A.C. 1:1-18.4*, and petitioner’s reply thereto, have been reviewed and considered.

Petitioner was previously found to have violated the School Ethics Act when he sent an email to his fellow Board members that included confidential information and, due to the use of the “reply all” function, inadvertently copied a member of the public on the email. *Lynch v. Skowronski*, Commissioner Decision No. 284-20SEC, decided December 15, 2020. Thereafter, petitioner sought indemnification from the Board for the legal fees and costs incurred in defending the matter before the School Ethics Commission. Following cross-motions for summary decision, the Administrative Law Judge (ALJ) found that petitioner had sent an email using his Board email account, in direct response to an email from the Board president, regarding a current matter before the Board. The ALJ noted that the Commissioner’s previous

decision had found the email to be part of the Board's deliberative process. Accordingly, the ALJ concluded that petitioner's conduct arose out of and in the performance of his duties as a member of the Board, and that petitioner therefore was entitled to indemnification.

In its exceptions, the Board argues that the ALJ failed to apply case law regarding the three factors that determine whether indemnification is appropriate. The Board contends that when petitioner disclosed a confidential email to a member of the public, he lacked any authority from the Board to do so, and therefore his actions did not arise out of or in the course of his duties as a board member. According to the Board, whether the email was part of the Board's deliberative process is not determinative.

In reply, petitioner argues that the cases cited by the Board do not require the ALJ to address all three factors, and that *N.J.S.A. 18A:12-20* only requires a board member to demonstrate that the act or omission arose out of and was in the course of performance of his duties as a board member. Petitioner contends that the ALJ properly addressed this requirement, and properly concluded that his conduct did occur in the course of performing his duties as a member of the Board.

Upon review, the Commissioner concurs with the ALJ that petitioner is entitled to indemnification. The Appellate Division has stated that "a liberal approach is taken in applying the [indemnification] statute so as not to inhibit a board member from freely expressing himself or herself and acting for the public good without fear of economic loss." *Quick v. Bd. of Educ. of the Twp. of Old Bridge, Middlesex Cty.*, 308 N.J. Super. 338, 342 (App. Div. 1998) (internal quotations and citations omitted). In requests for indemnification related to matters before the School Ethics Commission, "it is the action(s) underlying the charge, not the charge itself or its ultimate disposition, that determine whether a party's costs of defense are eligible

for indemnification in an administrative matter.” *Matthews v. Bd. of Educ. of the City of Englewood, Bergen Cty.*, Commissioner Decision No. 120-10, decided April 15, 2010.

Here, as the ALJ found, petitioner was responding to an email from the Board president, using his Board email account, regarding the Board’s handling of an issue raised by a member of the public. Petitioner’s act of sending an email to his fellow Board members, related to Board business, arose out of and in the course of performing his duties as a member of the board. The finding in *Lynch v. Skowronski* that petitioner disclosed confidential information to a member of the public does not alter that conclusion. “The outcome of the action is irrelevant. The statute protects both successful and unsuccessful litigants.” *Quick, supra*, 308 N.J. Super. at 343. Notably, N.J.S.A. 18A:12-20 was amended to include administrative proceedings in the same bill that imposed the Code of Ethics. L. 2001, c. 178. Under standard principles of statutory construction, the Commissioner presumes that the Legislature, in enacting the bill, intended that board members could potentially be indemnified for conduct that was found to be in violation of the Code of Ethics. Therefore, the fact that petitioner was found to have disclosed confidential information does not preclude an award of indemnification.¹

The Board contends that ALJ was required to address three factors regarding petitioner’s conduct: whether the board expressly granted the authority to the member to act, whether a majority of the board informally authorized the act, and whether the act arose out of an

¹ In *Lynch v. Skowronski*, it was necessary for the Commissioner to determine whether the email was confidential. In making that determination, the Commissioner concluded that the email was part of the Board’s deliberative process. While the deliberative process privilege arises from cases involving the Open Public Records Act, a law that was not applicable to the review of a School Ethics Act matter, the Commissioner nonetheless found those analyses to be instructive as a framework for assessing the confidentiality of the email. Here, it is not necessary to reach the issue of deliberative process, as the issue is whether petitioner’s conduct arose out of and in the course of performing his duties as a member of the board, and not whether the information contained in the email was confidential.

in the course of the performance of the members duties. In support of this proposition, the Board cites to the Initial Decision in *Montagna v. Bd. of Educ. of the Twp. of Belleville*, 97 N.J.A.R. (EDU) 46, OAL Dkt. No. EDU 7007-94, February 14, 1995, adopted and modified by Commissioner, March 29, 1995. First, the Commissioner notes that an Initial Decision is not binding precedent. Moreover, neither the ALJ's decision nor the decision herein is inconsistent with *Montagna*. In summarizing the factors to be considered when deciding a claim for indemnification, the ALJ in *Montagna* did not indicate – nor does any other case law indicate – that all three factors must be satisfied for indemnification to be awarded. Indeed, it is unlikely that all three factors could be satisfied for the same act, as one of the factors is whether the act was expressly authorized by the board, while another factor is whether the act was informally authorized by the board, and the existence of one type of authorization likely excludes the other.

Furthermore, a review of case law demonstrates that indemnification can be ordered when neither express nor informal authorization exists, as long as the conduct arose out of and in the course of performing the board member's duties.² The Appellate Division has held that the phrase "in the performance of their duties" cannot be construed so narrowly as to "exclude all tortious conduct by a board member, because it is never a 'duty' of a board member to commit a tort. . . .[or] all invalid resolutions because it is not a 'duty' of a board member to pass

² Accordingly, the factors listed by the ALJ in *Montagna* cannot be mandatory criteria but are rather possible ways in which a board member can demonstrate that his actions warrant indemnification.

an invalid resolution.” *Errington v. Mansfield Twp. Bd. of Educ.*, 100 N.J. Super. 130, 137 (App. Div. 1968).³

In *Errington*, one board member’s action in publishing an open letter attacking a critic of board policy was found to be personal in nature, rather than arising out of and in the course of performance of her duties as a member of the board; she was therefore not entitled to indemnification for the costs of defending a libel suit related to the open letter. *Id.* at 135. However, when the other members of the board voted to approve a resolution to engage counsel to defend the writer of the letter, their action arose out of and during the course of the performance of their duties as board members, even though the resolution was invalid, and they were “legally mistaken in their belief that the resolution could be validly adopted.” *Id.* at 137. Clearly, the members of the Mansfield Board of Education had neither express nor informal authorization to vote on an invalid resolution. However, they voted on that resolution in the course of performing their duties, and indemnification was therefore appropriate.

In *Quick*, a board member was recused from voting on a matter due to a conflict but wanted to attend closed session meetings discussing the matter. The board filed suit and obtained an order enjoining Quick from attending closed session meetings, and Quick sought indemnification for the costs of defending herself in that action. *Quick, supra*, 308 N.J. Super. at 340. The *Quick* case involves a more obvious lack of authorization than the *Errington* case, where arguably the board members were at least in agreement that their actions were lawful, despite their mistake in reaching that conclusion. In *Quick*, the board so strongly disagreed

³ See also *Powers v. Union City Bd. of Educ.*, 124 N.J. Super. 590, 595 (Law. Div. 1973), *aff’d*, 127 N.J. Super. 294 (App. Div. 1974) (the fact that an alleged criminal act was “obviously beyond the prescribed duties of a board member does not in itself immunize the board from the statutory liability [of indemnification]; for such a construction would exclude all criminal conduct and frustrate the express intent of the legislature. . . . Conduct may fall within the scope of a defendant’s duties even if it is unlawful.”)

with Quick's belief that she was entitled to attend the closed session meetings that it filed suit against her. There can be no greater demonstration that a board member's actions were not authorized, either expressly or informally. Nonetheless, because participating in meetings is part of a board member's duties, the Appellate Division found that indemnification was appropriate. *Id.* at 343-44.


Even the *Montagna* decision itself does not require all three factors to be satisfied for indemnification to be awarded. *Montagna* involved a defamation suit, based on statements made by the board president during an appearance on television. The ALJ found that the "sole purpose of the panel was to discuss the district's cutback of courtesy busing. This duty could be carried out by any board member and no express or informal authorization by the board was required. Indeed, there is no obligation or requirement that ministerial functions be preapproved by the [board of education]." *Montagna, supra*. Concluding that the president's appearance was in good faith, in direct response to allegations made against the board, and not personal in nature, the ALJ awarded indemnification.

Here, petitioner did not have either express or informal authorization to disclose confidential information. However, the third factor listed by the ALJ in *Montagna* is whether the act arose out of and in the course of the performance of the member's duties, which mimics the statutory requirement of *N.J.S.A. 18A:12-20*. The disclosure occurred when petitioner sent an email related to Board business. Petitioner's email was not personal in nature, nor is there any indication of bad faith. The ALJ concluded, and the Commissioner agrees, that the petitioner's act arose out of and in the course of the performance of his duties

as a member of the Board, as discussing matters of concern to the board is certainly part of a board member's duties.

Accordingly, petitioner's motion for summary decision is granted. The Board is ordered to reimburse petitioner for reasonable legal fees and costs in connection with this matter.

IT IS SO ORDERED.⁴


ACTING COMMISSIONER OF EDUCATION

Date of Decision: June 16, 2022
Date of Mailing: June 16, 2022

⁴ This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A. 18A:6-9.1*. Under *N.J.Ct.R. 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.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDU 05603-21

AGENCY DKT. NO. 92-6/21

MICHAEL SKOWRONSKI,

Petitioner,

v.

TOWNSHIP OF EAST GREENWICH

BOARD OF EDUCATION,

GLOUCESTER COUNTY,

Respondent.

Benjamin W. Spang, Esq., for petitioner Michael Skowronski (Dilworth Paxson
LLP, attorneys)

Stephen J. Edelstein, Esq., for respondent Township of East Greenwich Board
of Education (Weiner Law Group, attorneys)

Record Closed: April 11, 2022

Decided: May 5, 2022

BEFORE **MARY ANN BOGAN, ALJ:**

STATEMENT OF THE CASE

Petitioner Michael Skowronski (Skowronski) appeals the denial of indemnification by respondent Township of East Greenwich Board of Education (Board) pursuant to

N.J.S.A. 18A:12-20 for legal fees and costs incurred in defending a complaint filed with the School Ethics Commission (Commission) alleging violations of the School Ethics Code. Petitioner maintains that the Board's refusal to indemnify him is a breach of its statutory obligations under N.J.S.A. 18A:12-20. The Board maintains that petitioner's conduct was outside of Skowronski's duties as a Board member, and statutory indemnification is required only with regard to conduct "arising out of and in the course of the performance of his duties as a member of a board of education."

PROCEDURAL HISTORY

The matter was transmitted to the Office of Administrative Law (OAL), where it was received on July 2, 2021, and filed for determination as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. A prehearing conference was conducted, after which the parties agreed to and requested time to file motions for summary decision on the issue of whether the Board of Education should indemnify petitioner for legal fees and costs incurred in defending this action. The last submission was received on April 11, 2022 and the record closed.

DISCUSSION AND FINDINGS OF FACT

The underlying case in which petitioner seeks indemnification began when Dr. James J. Lynch, the Board superintendent, filed a three-count complaint with the Commission alleging that Skowronski violated provisions of the School Ethics Code, as well as the New Jersey Open Public Meetings Act. On March 14, 2019, Skowronski filed a motion with the Commission to dismiss the Board's complaint in lieu of an answer. In a decision dated June 20, 2019, the Commission granted Skowronski's motion in part, dismissing Counts 1 and 2 of the complaint, but denied Skowronski's motion with respect to Count 3, which alleges a violation of the State Ethics Code, N.J.S.A. 18A:12-24.1(g), for sending an email on January 22, 2019, to fellow members of the Board and copying a non-Board member. N.J.S.A. 18A:12-24.1(g) pertains to the duty of the Board member to hold matters confidential that if disclosed would needlessly injure individuals or the schools. The remaining count of Skowronski's complaint was transmitted to the OAL, where it was filed on July 25, 2019, under docket number EEC 10213-19. In an Initial

Decision dated February 2, 2020, the Administrative Law Judge (ALJ) concluded that Dr. Lynch failed to prove that Skowronski had violated N.J.S.A. 18A:12-24.1(g). In its May 19, 2020, decision, the Commission adopted the ALJ's factual findings, but found that Skowronski had violated N.J.S.A. 18A:12-24.1(g) and recommended a penalty of reprimand. The New Jersey Commissioner of Education (Commissioner) determined that the Commission's decision was supported by sufficient credible evidence, and that Skowronski had failed to establish that the decision was arbitrary, capricious, or contrary to law. Lynch v. Skowronski, East Greenwich Township Board of Education, Gloucester County, #284-20SEC, Comm'r Decision (December 15, 2020), <https://www.nj.gov/education/legal/>; N.J.A.C. 6A:4-1.1(a).

For this appeal, the parties submitted a joint statement of facts, and stipulated to the following:

1. Dr. James J. Lynch was the superintendent of the East Greenwich Board of Education in January 2019.

2. Michael Skowronski began service as a member of the Board on or about January 2, 2019.

3. On or about January 15, 2019, the Board and all of its members received a letter via email from Lisa Christopher, a teacher employed by the East Greenwich School District who is also a parent to a student in the district (the Christopher Letter). J-A.

4. The Christopher Letter raised concerns regarding the school district's response to a police incident in a neighboring township, as well as concerns that Ms. Christopher had with an interaction with the district's superintendent, Dr. Lynch.

5. On January 16, 2019, the president of the Board, Lyn McGravey, responded to the email and copied the entire Board, stating that the Board would collectively review and discuss the concerns raised in Ms. Christopher's letter. J-B.

6. On January 16, 2019, the Board held a regularly scheduled meeting. Mr. Skowronski motioned for an executive session (the Executive Session), wherein, according to the public minutes, the Board convened to discuss “personnel” and an “employee’s communication concerning the District’s response to the incident at the UPS in Logan Township.”

7. On January 19, 2019, Ms. McGravey sent an email to Ms. Christopher (the “Board Response Email”) and copied the entire Board. In the Board Response Email, Ms. McGravey informed Ms. Christopher that the Board discussed the concerns raised in the Christopher Letter during the Executive Session held on January 16, 2019. J-C.

8. After receiving the Board Response Email, Ms. Christopher sent another email to the Board on January 19, 2019 (the “Second Christopher Letter”), wherein she again raised concerns about her interaction with Dr. Lynch and the Board’s handling of it. J-D.

9. On January 22, 2019, Ms. McGravey responded to the Second Christopher Letter via email. J-E.

10. On January 22, 2019, Ms. Christopher responded via email to Ms. McGravey, copying the entire Board, and indicated that she felt that the Board had not addressed her concerns. J-F.

11. On January 22, 2019, Mr. Skowronski sent an email (the Skowronski Email) to the Board regarding the correspondence received from Ms. Christopher. J-G.

12. The Skowronski Email was sent to the entire Board and to Ms. Christopher.

13. On or about February 20, 2019, Dr. Lynch filed an Amended Complaint against Skowronski alleging violations of N.J.S.A. 18A:12-24.1(a) and N.J.S.A. 18A:12-24.1(g) based on events that took place in January 2019. J-H.

14. Mr. Skowronski filed a motion to dismiss the Amended Complaint, which was granted in part by the Commission on June 19, 2019. J-I.

15. After dismissing portions of the Amended Complaint, the sole remaining count alleged a violation of N.J.S.A. 18A:12-24.1(g), in which Mr. Skowronski “wrote an email to the entire board with a copy to a member of the public in which there are negative comments on District personnel, specifically the superintendent.” J-H, J-I.

16. The Commission held that “[i]f Complainant can additionally prove that certain/specific information in the email message was confidential (e.g., specific issues/matters discussed in executive session that were not yet public) and can cite to the authority/basis for the confidential nature of the information, Complainant may be able to establish a violation of N.J.S.A. 18A:12-24.1(g).” J-I.

17. The Amended Complaint was referred to the OAL as a contested case.

18. On March 6, 2019, Benjamin W. Spang, Esq., on behalf of Mr. Skowronski, demanded indemnification from the East Greenwich Board of Education for legal fees and costs incurred in the defense of the Amended Complaint. J-J.

19. On March 11, 2019, Board counsel Stephen J. Edelstein, Esq., responded to Mr. Spang that “the request will be considered at the conclusion of the matter.” J-K.

20. On February 25, 2020, the Initial Decision in Lynch v. Skowronski, East Greenwich Township Board of Education, Gloucester County, EEC 10213-19, Initial Decision (February 25, 2020), <https://njlaw.rutgers.edu/collections/oal/>, was issued. J-L.

21. The ALJ found that Mr. Skowronski had not violated N.J.S.A. 18A:12-24.1(g) and issued an Initial Decision dismissing the ethics complaints lodged by Dr. James Lynch against Michael Skowronski. The Initial Decision was filed with the Commission for consideration.

22. The Commission issued a Final Decision on May 19, 2020. J-M.

23. The Commission determined that Mr. Skowronski had violated N.J.S.A. 18A:12-24.1(g) and recommended a penalty of reprimand.

24. Mr. Skowronski filed an appeal to the Commissioner under docket number 284-20SEC. On December 15, 2020, the Acting Commissioner of Education affirmed both the Commission's Decision and the recommended penalty that the Commission imposed. J-N.

25. Mr. Skowronski filed a motion for reconsideration based upon what he alleged were mistakes of fact and law by the Acting Commissioner. The Acting Commissioner refused to reconsider her decision and denied the motion for reconsideration.

26. Mr. Skowronski did not appeal further.

27. On February 25, 2021, Mr. Skowronski, through counsel, again demanded indemnification. J-O.

28. On March 22, 2021, counsel for the Board advised counsel for Mr. Skowronski that the Board of Education had denied the demand for indemnification. J-P.

29. On July 2, 2021, [] the instant matter was filed.

I adopt the joint statement of facts as the **FACTS** of this matter, and I further **FIND**:

The Skowronski Email regarding the Board president's January 22, 2019, email was sent to all the members of the Board and was inadvertently copied to a member of the public due to the use of the "reply all" function. The Skowronski Email response stated the following:

Good morning fellow board members. I did see Lyn's most recent response, but in regards to Ms. Christopher's letters This whole situation has weighed heavily on me since our last meeting. And I thought long and hard as to whether I

should send my own email in these past few days. Since we received this second communication, I feel compelled to suggest we revisit this, or “re-handle” this, if not only via email as a group. And **PLEASE**, indicate to me what I may be missing here But I do not feel we really addressed this (and the very specific concerns outlined) adequately. I don’t think having Dr. Lynch handle a complaint about Dr. Lynch is how we really want to handle this. Again, **PLEASE** indicate to me what I may be missing here. Maybe there is an aspect of this situation I am not understanding or aware of. But the concerns in the communications are serious, and specific. I believe the 4 main points are (harassment, safety, communication, and fear of retaliation), but her communication additionally includes the following:

First letter:

- Was called out of her classroom
- Singled out and was called to the office
- Children dismissed without officers’ present
- No officer at entrance of building
- Dr. Lynch doesn’t question them about their jobs
- No community member, parent, or employee should be made to feel wrong for questioning the safety
- Email should have been sent informing parents & staff we were aware

Second letter:

- Communication as a whole seems to be an underlying problem in our district
- Why couldn’t an email still go out to alleviate any concerns?
- Board thinks it’s acceptable for the superintendent to not only berate a parent for expressing a concern but to also tell that parent they shouldn’t question his authority and for the superintendent to intimidate them at work
- I was under the impression that as a parent and a taxpayer I have a right to ask questions
- I was very uncomfortable writing the first letter
- Fear of retaliation for herself, children, and family
- Putting my faith in the East Greenwich Board of Education

Employers are nervous when faced with safety, discrimination, and harassment complaints, and so should we [sic]. Such complaints lead to workplace tension, government investigations, and costly legal battles. If the complaint is mishandled, even if unintentionally, we may unwittingly put ourselves and our stakeholders at risk.

If we take the complaint seriously however, we can reduce the likelihood of a lawsuit and even improve employee/parent/guardian relations in the process. I would suggest either “ricing” those we need to talk to, not in a “you’re in trouble” sort of way, but rather in a due-diligence sort of way. Alternatively, we can look at it as an opportunity to review or discuss best practices in-house. Not in an accusatory manner, but as an exercise in how we must treat these situations, our staff, and to mitigate risk.

We answered Ms. Christopher’s original message saying we discussed it as a board. But I don’t know that it would have even happened had I not called the ES, and that both worries and saddens me I feel we have a fiduciary responsibility to address these specific concerns as a group, including Dr. Lynch. Ms. Christopher is correct, changes aren’t made by keeping silent and sweeping things under the carpet. This seemed poignant to me in light of the MLK Holiday yesterday.

I attached some best practice suggestions from NOLO to this email if anyone wants to take a look.

I look forward to hearing others’ opinions on this as well.

Thank you all!
-Mike

LEGAL ANALYSIS AND CONCLUSIONS

While the Uniform Administrative Procedure Rules (UAPR) governing motions, N.J.A.C. 1:1-12.1 to -12.7, do not specifically limit the types of motions that may be made in administrative hearings or otherwise preclude a “motion to dismiss,” the more common method for resolving a case on the papers without a plenary hearing is by a motion for summary decision pursuant to N.J.A.C. 1:1-12.5.

Under N.J.A.C. 1:1-12.5, “[a] party may move for summary decision upon all or any of the substantive issues in a contested case.” N.J.A.C. 1:1-12.5(a). Such motion “shall be served with briefs and with or without supporting affidavits” and “[t]he decision sought may be rendered if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law.” N.J.A.C. 1:1-12.5(b).

However, a motion for summary decision shall be denied if, by responding affidavit, an adverse party “set[s] forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding.” Ibid.

This standard is substantially similar to that governing a civil motion for summary judgment under New Jersey Court Rule 4:46-2. E.S. v. Div. of Med. Assistance & Health Servs., 412 N.J. Super. 340, 350 (App. Div. 2010); Contini v. Bd. of Educ. of Newark, 286 N.J. Super. 106, 121 (App. Div. 1995). Summary judgment is analyzed in accordance with the principles established by the Supreme Court in Brill v. Guardian Life Ins. Co., 142 N.J. 520, 540 (1995):

[A] determination whether there exists a “genuine issue” of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party. The “judge’s function is not . . . to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.”

[Citation omitted.]

See also Nat’l Transfer, Inc. v. N.J. Dep’t of Env’tl. Prot., 347 N.J. Super. 401, 408–09 (App. Div. 2002).

The issue here is whether the Board is obligated to indemnify a Board member for legal fees and costs in the legal defense against school-ethics allegations brought against him by the District superintendent.

N.J.S.A. 18A:12-20 governs the issue of indemnification of members of boards of education against the cost of defense of legal proceedings brought against them. It states:

Whenever a civil, administrative, criminal or quasi-criminal action or other legal proceeding has been or shall be brought against any person for any act or omission arising out of and in the course of the performance of his duties as a member of a board of education, and in the case of a criminal or quasi-criminal action such action results in final disposition in favor of such person, the board of education shall defray all costs of defending such action, including reasonable counsel fees and expenses, together with costs of appeal, if any, and shall save harmless and protect such person from any financial loss resulting therefrom.

Shortly after the statute's enactment, the court in Errington v. Mansfield Township Board of Education, 100 N.J. Super. 130, 138 (App. Div. 1968), explained:

The purpose of the . . . statute is to make manifest the implied power of boards of education to provide for the legal defense of a member of the board who is sued individually for some action taken by him in furtherance of his prescribed duties. Those duties are prescribed by statute, by the rules and regulations of the board itself and of those who supervise its activities, and by resolutions of the board authorizing specific action to be taken.

Deciding whether an act or omission arises out of or in the course of performance of duties requires an examination of the time, place, and subject matter of the act or omission. Matthews v. Atlantic City, 196 N.J. Super. 145, 150 (Law Div.), aff'd, 196 N.J. Super. 338 (App. Div. 1984); Matthews v. Bd. of Educ. of Engelwood, #120-10, Comm'r Decision (April 15, 2010), <https://www.nj.gov/education/legal/> (citing Bower v. Bd. of Educ. of E. Orange, 149 N.J. 416 (1997)); see also Montagna v. Bd. of Educ. of Belleville, 1995 N.J. AGEN LEXIS 929 (March 29, 1995).

The Commissioner determined that the Skowronski Email of January 22, 2019, which was sent to the members of the Board as well as copied to a non-Board member, violated the School Ethics Act at N.J.S.A. 18A:12-24.1(g). That statute reads:

A school board member shall abide by the following Code of Ethics for School Board Members:

. . . .

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.

[N.J.S.A. 18A:12-24.1(g).]

The Commissioner found that “[t]he plain language of the regulation provides that a violation occurs when ‘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’ is disclosed. N.J.A.C. 6A:28-6.4(a)(7).” Lynch v. Skowronski, #284-20SEC, Comm’r Decision (December 15, 2020), at *3, <https://www.nj.gov/education/legal/>.

The Board asserts that petitioner cannot be indemnified from the cost of his defense because he violated the School Ethics Act, which by its very nature shows that petitioner acted on his own, without authority express or implied, to disclose confidential information. Stated simply, a violation of the ethics code is inconsistent with his duties as a Board member. The Board further asserts that offering his personal opinions and insights into his beliefs regarding a complaint from a community member is outside the scope of his Board duties.

The petitioner asserts that the Board erroneously focuses on the outcome of the conduct—the disclosure of confidential information—when instead the focus should be on the actual conduct, the context and content of the email. The email that Skowronski sent was “actively being discussed” before the Board.

In a civil context, the indemnification statute is construed liberally to promote a diversity of views on educational issues and policy and encourage members of local boards of education to express their views freely, without fear or intimidation. Castriotta v. Bd. of Educ. of Roxbury, 427 N.J. Super. 592, 602 (App. Div. 2012) (citing Quick v. Bd. of Educ. of Old Bridge, 308 N.J. Super. 338, 342, 343 (App. Div. 1998)). Unlike in criminal proceedings, a board member in the civil context is entitled to indemnification regardless of the outcome of the proceedings against the board member even if the board member's underlying conduct violated the School Ethics Act. See Matthews v. Bd. of Educ. of Engelwood, #120-10, Comm'r Decision (April 15, 2010), <https://www.nj.gov/education/legal/>.

The Board relies upon board members' actions in Errington, 81 N.J. Super. 414, and Gunther v. Board of Education of Howell, #337-05, Comm'r Decision (September 16, 2005), aff'd, State Board #42-05 (January 4, 2006), <https://www.nj.gov/education/legal/>, aff'd, No. A-2582-05T3 (App. Div. Nov. 21, 2006), to assert that Skowronski's legal fees and costs should not be indemnified by the Board. The cases do not apply. The board member's underlying conduct that violated the ethics act in Errington involved an allegedly defamatory open letter to the local newspaper to "defend her reputation" that was purely personal and outside her board duties. In Gunther, the board member, who was also an officer for the municipality's police department, was alleged to have obtained certain police reports and confidential information and disseminated these to members of the board of education without board knowledge or authorization, in direct violation of a specific board policy. The Commissioner determined that the board member's alleged conduct in the civil suit brought against him neither arose out of the performance of his board duties nor occurred in the course of performing those duties, so that he was not entitled to be defended against such allegations at public expense.

Here, Skowronski's conduct that resulted in a civil administrative action for violation of the School Ethics Act was sending an email that was: in direct response to the Board president's email; sent on the Board email account; and regarding a current matter before the Board. Indeed, the basis for the Commissioner's decision was that the Skowronski Email is part of the deliberative-process privilege, as it "bears all the hallmarks of

deliberative material. Specifically, the sent email was pre-decisional, and deliberative in nature.” The Commissioner stated:

The deliberative process privilege may be invoked to protect information or documents from disclosure when “the information sought is part of the process leading to formulation of an agency’s policy decision” and it has the “ability to reflect or to expose the deliberative aspects of that process.” Educ. Law Ctr. v. N.J. Dep’t of Educ., 198 N.J. 274, 295 (2009).

[Lynch v. Skowronski, #284-20SEC, Comm’r Decision (December 15, 2020), at *3, <https://www.nj.gov/education/legal/>.]

The privilege is necessary to ensure free and uninhibited communication within governmental agencies so they can reach the best possible decisions. Educ. Law Ctr., 198 N.J. at 286. The Commissioner’s determination demonstrates that Skowronski was engaging in the deliberative process, when he wrote a lengthy email response to the Board president’s email setting forth “these types of tentative thoughts, suggestions, and questions [that] are part and parcel of the Board’s overall deliberative process.” Lynch v. Skowronski, #284-20SEC, Comm’r Decision (December 15, 2020), at *4, <https://www.nj.gov/education/legal/>.

Having considered the parties’ submissions, I **CONCLUDE** that there are no genuine issues of material fact and, therefore, summary decision is appropriate.

I **CONCLUDE** that Skowronski’s conduct that resulted in the filing by the District superintendent of a School Ethics Act violation arose out of and in the performance of his duties as a member of the Board of Education.

I further **CONCLUDE** that conduct that resulted in the violation of the School Ethics Act may be indemnified.

I further **CONCLUDE** that Skowronski is entitled to be indemnified consistent with N.J.S.A. 18A:12-20.

Therefore, I **CONCLUDE** that the petitioner’s motion for summary decision should be **GRANTED** and the Board’s motion for summary decision should be **DENIED**.

ORDER

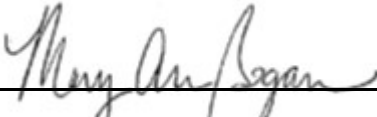
I hereby **ORDER** that petitioner’s motion for summary decision is **GRANTED** and the respondent’s motion for summary decision is **DENIED**. Respondent is **ORDERED** to reimburse petitioner for reasonable legal fees and costs in connection with the defense of this action.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10. Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500**, marked “Attention: Exceptions.” A copy of any exceptions must be sent to the judge and to the other parties.

May 5, 2022 _____

DATE



MARY ANN BOGAN, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

MAB/nmn

APPENDIX

Joint Exhibits

- J-A Christopher Letter, dated January 15, 2019
- J-B Board response email to Christopher, dated January 16, 2019
- J-C Board response email, dated January 19, 2019
- J-D Second Christopher Letter, dated January 19, 2019
- J-E Response email to Christopher, dated January 22, 2019
- J-F Christopher's response email to Board January 22, 2019
- J-G Skowronski Email dated, January 22, 2019
- J-H Amended Complaint against Skowronski filed on February 20, 2019
- J-I Commission Decision, dated June 19, 2019
- J-J Demand letter for indemnification, dated March 6, 2019
- J-K Board's response to demand letter, dated March 11, 2019
- J-L Initial Decision in Lynch v. Skowronski, East Greenwich Township Board of Education, Gloucester County, EEC 10213-19 (February 25, 2020)
- J-M Final Commission Decision, dated May 19, 2020
- J-N Commissioner's Decision, dated December 15, 2020
- J-O Demand letter for indemnification, dated February 25, 2021
- J-P Letter denying demand for indemnification, dated March 22, 2021