117-24
SEC Dkt. No. C98-21
OAL Dkt. No. EEC 06483-22
Agency Dkt. No. 14-11/23A

New Jersey Commissioner of Education

Final Decision

Tyrone Jon Tarver,

Complainant,

v.

Jeffrey Wingfield, Orange Board of Education, Essex County,

Respondent.

This matter involves an appeal of a School Ethics Commission (Commission) decision issued October 17, 2023, determining that respondent/appellant Jeffrey Wingfield, a member of the City of Orange Board of Education, violated *N.J.S.A.* 18A:12-24.1(e) and (g) of the Code of Ethics for School Board Members (Code) by disseminating allegedly confidential email content regarding a Board matter to three non-Board members—the City Mayor, a City Attorney, and a City Councilwoman. Having carefully reviewed the Commission's decision and the record in its entirety, the Commissioner finds that the Commission's decision is supported by sufficient credible evidence, and that respondent failed to establish that the decision is arbitrary, capricious, or contrary to law. *N.J.A.C.* 6A:4-4.1(a). The Commissioner further finds that the penalty of a reprimand was appropriate.

The emails at issue pertained to a time-sensitive facilities request by NFL Films to produce a television show at Bell Stadium, the Orange High School football facility, featuring two well-known former NFL players. NFL Films submitted the facilities request form to the district on September 30, 2020, and wanted to tape the show on October 5, 2020; however, the next regularly scheduled Board meeting was not until October 13, 2020. Therefore, the Board could not formally vote to approve the facilities request until after the filming was tentatively scheduled to take place. Consequently, the Board Superintendent emailed complainant, the Board President, on October 1, 2020, regarding the facilities request and asked him to advise whether the Board would "allow retroactive approval."

That same day, October 1, 2020, complainant forwarded the Board Superintendent's email to the Board members. This email explained to the Board members, among other things, that: (1) the facilities request form was submitted the day before, "well after our deadline to consider" a facilities request; (2) the Board attorney had already reviewed and approved related paperwork "for our consideration," including a Hold Harmless Agreement; and (3) NFL Films had agreed to make a $5,000 donation to the district, but needed to know by the next morning whether the Board anticipated approving the request. Complainant asked Board members to reply before the end of the evening only if they anticipated voting against the facilities request at their upcoming October 13, 2020, meeting. Later that evening, respondent copied and pasted complainant's email to the Board, sent it to the City Mayor, a City Attorney, and a City Councilwoman, and wrote: "I HAVE COPIED AND PASTED FROM MY BOARD EMAIL TO YOU . . . You should know the following."

The next day, October 2, 2020, the Board Superintendent forwarded an email to the Board Members from the district's athletics director. The email contained a message that the athletics director received from an NFL Films location scout sometime on October 1, 2020, confirming that the district would receive the $5,000 donation and thanking him for making the event possible. When forwarding this email to the Board Members, the Board Superintendent added his thanks to the Board members for their efforts. Respondent copied and pasted the contents of that email and sent it to the City Attorney later that evening.

In the end, none of the Board members objected to the facilities request on the evening of October 1, 2020, in response to complainant's email. The filming took place as planned on October 5, 2020, without incident, and the Board retroactively approved the facilities request at its meeting on October 13, 2020.

Subsequently, complainant filed a complaint with the Commission alleging, among other things, that respondent violated *N.J.S.A.* 18A:12-24.1(c), (e) and (g) of the Code by copying and pasting the emails at issue and sending the content to the three non-Board members.[1] The Commission found probable cause to credit the allegations and transmitted the matter to the Office of Administrative Law (OAL) for a contested hearing. After complainant presented his case-in-chief, counsel for respondent requested leave to file a motion for a directed verdict, which the Administrative Law Judge (ALJ) permitted but treated as a motion for summary decision.

[1] Because they are not challenged on appeal, the other allegations in the complaint that were dismissed by the Commission on June 28, 2022, are not discussed herein.

Upon review of the motion papers and complainant's opposition thereto, the ALJ concluded that summary decision was appropriate because none of the material facts were in dispute. Critically, the ALJ found as fact that respondent did indeed copy and paste the content of the two Board emails at issue and shared the content with the City Mayor, a City Attorney, and a City Councilwoman. The ALJ reasoned, however, that the email content was not confidential. Ultimately, the ALJ concluded that complainant had not demonstrated by a preponderance of evidence that respondent's actions violated the Code; accordingly, the ALJ granted respondent's motion for summary decision, and dismissed the complaint. The parties did not file exceptions.

Thereafter, the Commission adopted the ALJ's conclusion that respondent did not violate *N.J.S.A.* 18A:12-24.1(c). However, the Commission rejected the ALJ's conclusion that respondent did not violate *N.J.S.A.* 18A:12-24.1(e) and (g) and instead found that respondent did violate subsections (e) and (g). The Commission recommended the sanction of a reprimand for those violations.

Regarding the violation of subsection (e), which states that a Board member "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 found that respondent acted beyond the scope of his duties as a Board member by sending the content of the Board emails to non-Board members, and that said action had the potential to compromise the Board. Specifically, the Commission determined that respondent disseminated information he learned about solely through his position on the Board that had not yet been voted upon and revealed inner communications of the Board. Regarding the violation of subsection (g), which states in relevant part that a Board member "will hold confidential all matters pertaining to the

schools which, if disclosed, would needlessly injure individuals or the schools," the Commission found that by sending the content of the Board emails to non-Board members, respondent took action to disclose information regarding the facilities request that was not public as the Board had not yet voted on the request.

On appeal, respondent does not deny that he shared the content of the two Board emails pertaining to the facilities request with the non-Board members. However, he maintains that he neither violated *N.J.S.A.* 18A:12-24.1(e) nor (g). Initially, he argues that the Commission's finding that his actions had the potential to compromise the Board is unsupported by the record. He maintains that the content of the Board emails was not confidential. Furthermore, he asserts that the terms of the deal with NFL Films were settled before he forwarded the information to the non-Board members—that is, the information he disclosed was not deliberative. He also claims that the Commission's finding that the event had not been publicized is an assumption that is unsupported by the record.

In adjudicating appeals from decisions of the Commission, the Commissioner must "ascertain whether the decision is supported by sufficient credible evidence in the record and shall not disturb the decision unless the appellant has demonstrated that [the Commission] acted in a manner that was arbitrary, capricious, or contrary to law." *N.J.A.C.* 6A:4-4.1(a). The Commissioner finds that the Commission's determination that respondent violated *N.J.S.A.* 18A:12-24.1(e) and *N.J.S.A.* 18A:12-24.1(g) is supported by sufficient credible evidence in the record, and that respondent has not demonstrated that it was arbitrary, capricious, or contrary to law.

Beginning with subsection (e), "[f]actual evidence of a violation of *N.J.S.A.* 18A:12-24.1(e) shall include evidence that the respondent . . . took action beyond the scope of [his] duties such that, by its nature, had the potential to compromise the district board of education . . . ." *N.J.A.C.* 6A:28-6.4(a)(5). Sufficient, credible evidence in the record establishes that respondent unilaterally and independently took private action beyond the scope of his duties as a Board member when he disseminated the email content about the facilities request to the non-Board members. *See Persi v. Woksa*, 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 of his authority and duties as a board member meets the definition of "private action" and is sufficient to demonstrate a violation of the Code). Respondent's actions had the potential to compromise the Board in numerous ways. For instance, the City officials could have attempted to prevent the event from taking place, thereby jeopardizing the donation promised to the district. Alternatively, the City officials could have shared information about the event with other members of the public, which could have attracted a large crowd at Bell Stadium during the height of the COVID-19 pandemic and/or caused NFL Films to reconsider its location for the show.

As for subsection (g), "[f]actual evidence of a violation of the confidentiality provision of *N.J.S.A.* 18A:12-24.1(g) shall include evidence that the respondent[] took action to make public, reveal, or disclose information . . . that was otherwise confidential in accordance with policies, procedures, or practices." *N.J.A.C.* 6A:28-6.4(a)(7). Again, it is undisputed that respondent disclosed the email content to three non-Board members. Furthermore, the Commissioner has previously held that pre-decisional, deliberative material in Board emails is confidential. *Lynch v. Skowronski, East Greenwich Township Board of Education, Gloucester County*, Commissioner

Decision No. 284-20SEC (December 15, 2020), at 3-4; *see Skowronski v. Board of Education of the Township of East Greenwich*, 2024 *N.J. Super.* Unpub. LEXIS 69, *18-19 (App. Div. January 16, 2024) (citing with approval, in a related indemnification matter, the Commissioner's decision in *Lynch* regarding the confidentiality of pre-decisional, deliberative material in Board emails that contain "tentative thoughts, suggestions and questions [that] are part and parcel of the Board's overall deliberative process").

The October 1, 2020, email from complainant to the Board members regarding the facilities request is pre-decisional, deliberative, and therefore confidential under *Lynch*. It is pre-decisional in that, as of the writing of the email, it was not yet settled whether the Board would retroactively approve the facilities request. Indeed, complainant asked Board members to reply if they anticipated voting against the facilities request because NFL Films needed confirmation of their anticipated approval by the following morning. Additionally, complainant informed the Board members that the Board attorney had reviewed and approved related paperwork "for our consideration."

The clear intent of the October 1, 2020, email was to invite the Board members to deliberate, i.e., to consider their position regarding the facilities request. Had any of the Board members expressed an objection to the request that evening, the event might not have gone forward. Moreover, the fact that non-Board members, including the district athletics director and the NFL Films location scout, participated in negotiations regarding the event does not alter the Commissioner's conclusion that, under *Lynch,* the October 1, 2020, email that respondent shared was confidential. The email contained "tentative thoughts, suggestions and questions

[that] are part and parcel of the Board's overall deliberative process." *Skowronski,* at *18-19 (quoting *Lynch*, at 4).

Additionally, respondent's disclosure of the October 1, 2020, email to the Board members needlessly injured the schools. Exposing the Board's internal decision-making practices to the public negatively impacts the Board's ability to deliberate about the important issues before it with candor and honesty. *Lynch*, at 4. The Commissioner has previously held that "[t]his factor alone is sufficient to demonstrate the requisite injury" under *N.J.S.A.* 18A:12-24.1(g). *Ibid.* Thus, by sharing the content of the October 1, 2020, email with the non-Board members, respondent exposed the Board's pre-decisional, deliberative process regarding the facilities request and caused needless injury to the schools in violation of *N.J.S.A.* 18A:12-24.1(g).

Respondent further contends that if the Commissioner does not rule in his favor and instead agrees with the Commission that he violated the Code, then the matter should be remanded to the OAL to continue the contested hearing because respondent has not yet presented his case. The Commissioner disagrees. With the ALJ's permission, respondent opted to forgo the opportunity to finish the contested hearing and instead proceeded via motion for summary decision after complainant presented his case. Respondent argued to the ALJ that no genuine issues of material fact existed. If no genuine issues of material fact exist, then a hearing is unnecessary. *See Frank v. Ivy Club*, 120 *N.J.* 73, 98 (1990) ("[W]here no disputed issues of material fact exist, an administrative agency need not hold an evidential hearing in a contested case."). Whether respondent took private action that compromised the Board, and whether the email content he shared with non-Board members is confidential, are not factual questions. They are legal questions.

Finally, the Commissioner concurs with the Commission regarding the sanction imposed. In *Lynch*, at 4-5, the Commission issued a reprimand for a violation of *N.J.S.A.* 18A:12-24.1(g) when a board member inadvertently disclosed a Board email to a member of the public. Here, the disclosure was intentional. Furthermore, respondent violated both *N.J.S.A.* 18A:12-24.1(e) and *N.J.S.A.* 18A:12-24.1(g). On balance, as noted by the Commission, the two emails disclosed pertained to a one-time event which fortunately took place without incident or disruption. For these reasons, a reprimand—the least severe penalty—is appropriate and reasonable under the circumstances.

Accordingly, respondent is hereby reprimanded as a school board member found to have violated the Code.

IT IS SO ORDERED.[2]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: February 20, 2024
Date of Mailing: February 22, 2024

[2] 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.

Before the School Ethics Commission
OAL Docket No.: EEC-06483-22
SEC Docket No.: C98-21
Final Decision

Tyrone Jon Tarver,
Complainant

v.

Jeffrey Wingfield,
Orange Board of Education, Essex County,
Respondent

I. Procedural History

The above-captioned matter arises from a Complaint that was filed on December 24, 2021, by Tyrone Jon Tarver (Complainant), alleging that Jeffrey Wingfield (Respondent), a member of the Orange Board of Education (Board), violated the School Ethics Act (Act), *N.J.S.A.* 18A:12-21 *et seq*. More specifically, the Complaint avers that Respondent violated *N.J.S.A.* 18A:12-24.1(c), *N.J.S.A.* 18A:12-24.1(e), and *N.J.S.A.* 18A:12-24.1(g) of the Code of Ethics for School Board Members (Code) in Counts 1-51.

At its meeting on June 28, 2022, and after reviewing Respondent's Motion to Dismiss in Lieu of Answer (Motion to Dismiss) and allegation of frivolous filing, and Complainant's response thereto, the Commission adopted a decision at its meeting on June 28, 2022, finding that the Complaint was timely filed, granting the Motion to Dismiss as to the alleged violations of *N.J.S.A.* 18A:12-24.1(c), *N.J.S.A.* 18A:12-24.1(e), and *N.J.S.A.* 18A:12-24.1(g) in Counts 1-45 (including those already voluntarily withdrawn by Complainant), and denying the Motion to Dismiss as to the alleged violations of *N.J.S.A.* 18A:12-24.1(c), *N.J.S.A.* 18A:12-24.1(e), and *N.J.S.A.* 18A:12-24.1(g) in Counts 46-51. The Commission also adopted a decision finding the Complaint not frivolous and denying Respondent's request for sanctions. Based on its decision, the Commission also directed Respondent to file an Answer to Complaint (Answer) as to the remaining allegations in the Complaint (Counts 46-51), and to transmit the above-captioned matter to the Office of Administrative Law (OAL) following receipt of the Answer, which he filed on July 18, 2022.

At the OAL, a hearing was held on January 30, 2023. Following the conclusion of Complainant's case-in-chief, Respondent requested leave to file a motion for Summary Decision, which the Administrative Law Judge (ALJ) granted. Thereafter, Respondent filed a motion for Summary Decision and the ALJ issued an Initial Decision on August 1, 2023. The parties did not file exceptions to the Initial Decision.

At its meeting on September 26, 2023, the Commission considered the full record in this matter. Thereafter, at its meeting on October 17, 2023, the Commission voted to modify the

Initial Decision by adopting the Initial Decision's conclusion that Respondent did not violate *N.J.S.A.* 18A:12-24.1(c) but modifying the Initial Decision to find Respondent violated *N.J.S.A.* 18A:12-24.1(e) and *N.J.S.A.* 18A:12-24.1(g). The Commission also voted to recommend a penalty of reprimand.

II. Initial Decision

This matter stems from a National Football League (NFL) initiative to film a show at Bell Stadium. On October 1, 2020, the Superintendent sent Complainant (Board President) an email regarding a "facilities request form" that NFL Films submitted and inquiring whether the Board will allow for retroactive approval. *Initial Decision* at 3. On the same date, Complainant forwarded the Superintendent's email to the Board and indicated:

> A facilities request form was submitted, but only yesterday, which is well after our deadline to consider a Facilities Request. In addition, a Hold Harmless Agreement, and other paperwork, were reviewed by Atty. Kleen, and she approved all of the paperwork for our consideration.
>
> A $5,000 donation to the district was also agreed upon by NFL Films.
> . . . NFL needs to know of our anticipated approval no later than tomorrow morning.
>
> Please do not reply to this email with "Yes" or "Absolutely" or any positive comments. I am doing my best to avoid this becoming a meeting via email.
>
> Please only reply if you anticipate voting "**NO**" for this retroactive Facilities Request Resolution during our October 13 Board Meeting. But I need any "**NO**" replies before the end of this evening.
>
> [*Id.* at 3-4.]

Also on the same date, Respondent copied and pasted Complainant's email and sent it to officials for the Township of Orange (Township), including the Mayor, counsel, and a Councilwoman, and added the text "I HAVE COPIED AND PASTED FROM MY BOARD EMAIL TO YOU . . . You should know the following." *Id.* at 4. At some point that day, the NFL Films location scout sent an email to the Board's Athletic Director to confirm the donation amount and thank him for the opportunity to use the stadium, which the Superintendent forwarded to the Board the following morning. *Id.* at 4-5. Respondent copied and pasted the email chain and sent it to the Township attorney. *Id* at 5. The NFL completed filming on October 5, 2020, and the Board retroactively approved the request on October 13, 2020. *Ibid.*

Respondent argues the content of the emails shared was not confidential because the information in the email was "public and not deliberated," and the Board had already decided on the date, location, hold harmless agreement and donation amount by October 1, 2020. *Id.* at 9-10. Complainant counters that the emails were not public, the matter was still under deliberation as of October 1, 2020, and the matter should have remained confidential until the Board voted on October 13, 2020. *Id.* at 9. Additionally, according to Complainant, Respondent's actions put the "public safety in 'jeopardy,'" as the Board was not publicizing the event due to COVID restrictions, and this could have negatively impacted the Board. *Ibid.*

As to the allegations of *N.J.S.A.* 18A:12-24.1(c) and *N.J.S.A.* 18A:12-24.1(e), the ALJ asserts Complainant did not present any evidence other than his own testimony that Respondent's actions jeopardized the safety of the public or may have caused unwanted public reaction. *Id.* at 13. Therefore, the ALJ concludes violations of *N.J.S.A.* 18A:12-24.1(c) and *N.J.S.A.* 18A:12-24.1(e) have not been established. *Ibid.*

Regarding a violation of *N.J.S.A.* 18A:12-24.1(g), the ALJ contends the issue remains whether the information contained in the email that Respondent forwarded was (1) public, and (2) if not, whether the information contained in the email was deliberative. *Id.* at 14. According to the ALJ, the record reveals that the emails Respondent forwarded disclose that the parties negotiating the "facilities request form" were the NFL and the Athletic Director (not a Board member). Per the ALJ, as the negotiations for the "facilities request form" were not confined to the capacities of the Board, they were not confidential. *Id.* at 14-15. Moreover, the ALJ contends the information that was in the shared email was not confidential because it was not being deliberated by the time Respondent forwarded it to the Mayor, counsel and the Councilwoman on October 1. *Id.* at 15. The ALJ asserts the donation price, hold harmless agreement, and location for the request were already agreed upon, and the facts show the only thing needed was the Board's "anticipated approval" by October 2. *Id.* at 17. Therefore, the ALJ concludes the Board's "negotiative process" concerning the approval for the NFL filming was finalized on October 1, 2020, which was before the time Respondent forwarded the email from the Superintendent, so the alleged violation of *N.J.S.A.* 18A:12-24.1(g) should be dismissed. *Id.* at 17-18.

III. Analysis

Upon a careful, thorough, and independent review of the record, the Commission agrees with the ALJ that Respondent did not violate *N.J.S.A.* 18A:12-24.1(c), but finds Respondent violated *N.J.S.A.* 18A:12-24.1(e) and *N.J.S.A.* 18A:12-24.1(g). As such, the Commission modifies the Initial Decision and recommends a penalty of reprimand.

Pursuant to *N.J.S.A.* 18A:12-24.1(c), board members must confine board action to "policy making, planning, and appraisal" and "frame policies and plans only after the board has consulted those who will be affected by them." The Commission finds Respondent's actions in copying and pasting from his Board email, while inappropriate, does not constitute Board action to effectuate policies and plans without consulting those affected by such policies and plans. As Complainant did not meet his burden of establishing that Respondent sought to effectuate policy, the Commission finds a violation of *N.J.S.A.* 18A:12-24.1(c) has not been established.

Pursuant to *N.J.S.A.* 18A:12-24.1(e), a board member must recognize that authority rests with the board and a board member shall not make any personal promises or take any action that may compromise the board. The ALJ found that Respondent did send the emails to the Township officials. *Initial Decision* at 4, n.3. In copying and pasting from his Board email and sending the information to Township officials, Respondent took action beyond the scope of his duties as a Board member that had the potential to compromise the Board. *See Arthur Jacobs v. Raymond Delbury, Sussex Wantage Regional Board of Education*, C44-07 (November 25, 2008) (finding a violation of *N.J.S.A.* 18A:12-24.1(e), *N.J.S.A.* 18A:12-24.1(g) and *N.J.S.A.* 18A:12-24.1(i) when a board member posted an email sent to the board "word for word" on an internet chat room and bulletin board). The scheduled filming had not been publicized, and Respondent took it upon himself to spread information that he learned about solely because of his position as a Board member. Revealing the inner communications of the Board is not only inappropriate but, by its nature, has the potential to compromise the Board. Accordingly, the Commission finds Respondent violated *N.J.S.A.* 18A:12-24.1(e).

As set forth in *N.J.S.A.* 18A:12-24.1(g), Board members must "hold confidential all matters pertaining to the schools which, if disclosed, would needlessly injure individuals or the schools." Establishing a violation 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 policies, procedures, or practices." *N.J.A.C.* 6A:28-6.4(a)(7). The Commission finds by copying and pasting from his Board email, Respondent took action to make public, reveal or disclose information that was not public. Contrary to the ALJ's conclusion, the Commission finds the matter was not public when Respondent shared the Board correspondence. The October 1 email makes clear that the Board had not yet voted on the matter as it provides Board members the opportunity to indicate whether they "anticipate" voting against the "retroactive" facilities request. The NFL filming did not occur until October 5, 2020, and the Board did not officially vote on the matter until October 13, 2020. *Initial Decision* at 5. Moreover, Complainant sent the email at 5:39 p.m. on October 1 and asked the Board members to reply if they intended to vote "no" by the end of the evening. Respondent then forwarded the October 1 email at 9:20 p.m. that same evening to the Township officials, followed by a sending a second email to Township officials on October 2 that had been sent to the Board from the Superintendent. The testimony cited by the ALJ shows that Board members could have weighed in on the proposal until the time the filming occurred on October 5. *Initial Decision* at 6-7. The fact that no further negotiations occurred does not mean that Respondent did not disclose information that was still being considered by the Board.

Contrary to the ALJ's conclusion, the Commission finds *James Lynch v. Michael Skowronski, East Greenwich Township Board of Education*, Commissioner's Decision No. 284-20SEC (December 15, 2020) instructive in this matter. There, the Commissioner of Education (Commissioner) found a violation of *N.J.S.A.* 18A:12-24.1(g) when a board member inadvertently shared an email with a parent, which discussed Board business. The Commissioner noted that the email contained deliberative material because it contained "tentative thoughts, suggestions, and questions," which are all part of the deliberative process. *Id.* at 3-4. The

Commissioner also found that the disclosure of such deliberative material needlessly injures the schools. *Id.* at 4. Here, Respondent intentionally shared Complainant's email proposing how to handle the approval of the NFL filming with Township officials mere hours after receiving it. Certainly, Complainant's email could fall under the realm of deliberative material as Complainant made a suggestion to the Board as to the Board's action, and when Respondent shared the email, it was not clear whether the Board agreed or disagreed with the proposed plan. As such, the Commission finds Respondent violated *N.J.S.A.* 18A:12-24.1(g).

With respect to the violations of *N.J.S.A.* 18A:12-24.1(e) and *N.J.S.A.* 18A:12-24.1(g), the Commission finds a penalty of **reprimand** is appropriate. Copying and pasting directly from the Board email and sending its non-public contents to public officials is not a de minimis action. *See Lynch, supra,* (issuing a penalty of reprimand for a violation of *N.J.S.A.* 18A:12-24.1(g) when a board member inadvertently disclosed a Board email to a member of the public); *Jacobs, supra* (recommending a penalty of censure for violations of *N.J.S.A.* 18A:12-24.1(e), *N.J.S.A.* 18A:12-24.1(g) and *N.J.S.A.* 18A:12-24.1(i) resulting from the posting of a board email on NJ.com, when the respondent had previously been censured for ethics violations). Respondent's actions not only revealed Board communications regarding a suggested Board action, but also made public an event that had not yet been publicized. However, given that the disclosure was limited to two emails about a one-time event, the Commission recommends a penalty of reprimand for the violation.

IV. Decision

For the aforementioned reasons, the Commission modifies the Initial Decision of the OAL. Specifically, the Commission adopts the Initial Decision's conclusion that Respondent did not violate *N.J.S.A.* 18A:12-24.1(c). However, the Commission modifies the Initial Decision to find Respondent violated *N.J.S.A.* 18A:12-24.1(e) and *N.J.S.A.* 18A:12-24.1(g) and recommends a penalty of **reprimand** for the violation.

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

Parties taking exception to the recommended sanction of the Commission but *not disputing* the Commission's finding of a violation may file, **within thirteen (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, as indicated below. Such exceptions must be forwarded to: Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, New Jersey 08625, marked "Attention: Comments on Ethics Commission Sanction," as well as to (ControversiesDisputesFilings@doe.nj.gov). A copy must also be sent to the Commission (school.ethics@doe.nj.gov) 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:4:1 *et seq.* **within thirty (30) days** of the filing date of the decision from which the appeal is taken. The filing date shall be three (3) 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 (thirteen (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

Robert W. Bender, Chairperson

Mailing Date: October 17, 2023

Resolution Adopting Decision in Connection with C98-21

Whereas, at its meeting on June 22, 2022, the School Ethics Commission (Commission) voted to transmit the above-captioned matter to the Office of Administrative Law (OAL) for a plenary hearing; and

Whereas, the Administrative Law Judge (ALJ) issued an Initial Decision dated August 1, 2023; and

Whereas, the ALJ found that Respondent did not violate *N.J.S.A.* 18A:12-24.1(c), *N.J.S.A.* 18A:12-24.1(e) and/or *N.J.S.A.* 18A:12-24.1(g), and ordered the dismissal of the above-captioned matter; and

Whereas, the parties did not file exceptions to the Initial Decision; and

Whereas, at its meeting on September 26, 2023, the Commission reviewed the record in this matter, and discussed adopting the Initial Decision's conclusion that Respondent did not violate *N.J.S.A.* 18A:12-24.1(c) but modifying the Initial Decision to find Respondent violated *N.J.S.A.* 18A:12-24.1(e) and *N.J.S.A.* 18A:12-24.1(g), and recommending a penalty of reprimand; and

Whereas, at its meeting on October 17, 2023, the Commission reviewed and voted to approve the within decision as accurately memorializing its actions/findings from its meeting on September 26, 2023; and

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

Robert W. Bender

Robert W. Bender, Chairperson

I hereby certify that this Resolution was duly adopted by the School Ethics Commission at its regularly scheduled meeting on October 17, 2023.

Brigid C. Martens

Brigid C. Martens, Acting Director
School Ethics Commission

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EEC 06483-22
AGENCY DOCKET NO. C98-21

IN THE MATTER OF TYRONE JON TARVER, JEFFREY WINGFIELD, ORANGE BOARD OF EDUCATION, ESSEX COUNTY,
Respondents.

Tyrone Jon Tarver, complainant, pro se

Alyssa K. Weinstein, Esq., for respondent (Busch Law Group, L.L.C., attorneys)

Record Closed: July 26, 2023 Decided: August 1, 2023

BEFORE **JULIO C. MOREJON**, ALJ:

STATEMENT OF THE CASE

The underlying matter arises by way of a complaint filed by complainant, Tyrone Jon Tarver (Complainant or Tarver) under the School Ethics Act, N.J.S.A. 18A:12-21 to N.J.S.A. 18A:12-34, (the Act) against Jeffrey Wingfield (Respondent or Wingfield), a school board member for the Orange Board of Education (the Board). Tarver alleges that Wingfield violated N.J.S.A.18A:12-24.1(c), (e), and (g) of the state Code of Ethics for School Board Members (Code of Ethics).

PROCEDURAL HISTORY

On December 24, 2021, Tarver filed the within School Ethics Complaint (Complaint), with the Department of Education, School Ethics Commission (SEC), containing fifty-one (51) counts alleging that Wingfield violated N.J.S.A. 18A:12-24.1, (c), (e) and (g) of the Act. On January 3, 2022, the Complaint was served on Wingfield. On March 22, 2022, Wingfield filed a Motion to Dismiss in Lieu of Answer (Motion to Dismiss), and also alleged that the Complaint was frivolous. On April 26, 2022, Tarver filed a response to the Motion to Dismiss and allegations of frivolous filing.

On June 28, 2022, the SEC granted the Motion to Dismiss concerning the alleged violations of N.J.S.A. 18A:12-21, (c), (e) and (g), as to counts 1 to 45 of the Complaint only, and denied the Motion to Dismiss as to Counts 46 to 51 of the Complaint. The SEC also ruled that the Complaint was not frivolous.

On July 21, 2022, the SEC transmitted the remaining claims asserted in Counts 46-51 of the Complaint to the Office of Administrative Law as a contested case where it was filed on July 27, 2022.

A prehearing order was entered on September 13, 2022. A zoom hearing was scheduled and held on January 30, 2023. At the conclusion of Tarver's case in chief, Wingfield requested leave to file a Motion for Summary Decision, which request was granted.

On March 31, 2023, Wingfield filed the within Motion for Summary Decision pursuant to N.J.A.C. 1:1-12.5 and N.J.A.C. 6A:3-1.12. On April 28, 2023, Tarver filed his opposition to the Motion and on May 15, 2023, Wingfield filed a Reply.

I closed the record on July 26, 2023.

SUMMARY AND FINDINGS

Below is a discussion of the salient facts not in dispute, which I **FIND** as **FACT** herein:

Complainant was President of the Board and Respondent was a Board member during the relevant time of October 1 and 2, 2020. They are both currently members of the Board as of June 2023.

On October 1, 2020, at 5:39 p.m., Complainant received an email from Orange Public Schools Superintendent Dr. Gerald Fitzhugh (Dr. Fitzhugh) regarding a "facilities request form," which was a request from NFL Films to film at Bell Stadium, Orange, New Jersey.

Dr. Fitzhugh's email stated:

> Please find the narrative regarding the NFL Initiative. In addition, the hold harmless and insurance documentation has been sent to Ms. Kleen. Please advise if the Board will allow retroactive approval.

[Exhibit C-1.[1]]

After 5:39 p.m. on October 1, 2020 [2], Complainant forwarded Dr. Fitzhugh's email with additional text to the members of the Board as follows:

> A facilities request form was submitted, but only yesterday, which is well after our deadline to consider a Facilities Request. In addition, a Hold Harmless Agreement, and other paperwork, were reviewed by Atty. Kleen, and she approved all of the paperwork for our consideration.

[1] Complainant's exhibits were admitted in evidence in the hearing as "C" exhibits and will be referenced the same herein.

[2] In the hearing Complainant could not establish the exact time he submitted his email, but it was established that the same was sent after receipt of Dr. Fitzhugh's email of October 1, 2020, at 5:39 p.m.

> A $5,000 donation to the district was also agreed upon by NFL Films.
> . . . NFL needs to know of our anticipated approval no later than tomorrow morning.
>
> Please do not reply to this email with "Yes" or "Absolutely" or any positive comments. I am doing my best to avoid this becoming a meeting via email.
>
> Please only reply if you anticipate voting "**NO**" for this retroactive Facilities Request Resolution during our October 13 Board Meeting. But I need any "**NO**" replies before the end of this evening.

[Id. (emphasis in original text).]

None of the Board members replied to Complainant's email. Thereafter, on October 1, 2020, at 9:20 p.m., Respondent then copied and pasted Complaint's email [3], and forwarded it to Mayor Dwayne Warren, Attorney Avram White, and Councilwoman Adrienne Wooten, [4] and added the additional text as follows: "I HAVE COPIED AND PASTED FROM MY BOARD EMAIL TO YOU . . . You should know the following" (Exhibit, C-2).

Sometime during October 1, 2020, NFL Films Location Scout Brendan Keogh (Keogh) sent an email to Orange School District Athletics Director Anthony Frantantoni (Frantantoni), stating the following:

> **Please take this email as written confirmation of our agreement to the donation of $5000.00** for the opportunity to shoot the sport in the Bell Stadium. Also again, I would really like to thank you again on all of our behalfs [sic] for all your hard work in helping us make this happen. . . . Have a great night.

[3] Respondent did not concede to sending the emails in his testimony. However, because Respondent did not deny sending the emails, and because the legal analysis does not change regardless, it is determined that Respondent did send the emails.

[4] Mayor Dwayne Warren is the Mayor of Orange; Attorney Avram White is the corporation counsel for Orange, and Councilwoman Adrienne Wooten is councilwoman for the town of Orange. All are not members of the Board. T: 150:15-151:25.

[Exhibit C-3 (emphasis in original text).]

Frantantoni copied and pasted Keogh's email and forwarded it to Dr. Fitzhugh on the morning of October 2, 2020, at 8:31 a.m. Id. Later that same day, Dr. Fitzhugh sent the same email to the Board members and added "[t]hank you for working with me and for our student to make this happen." Id.

Respondent copied and pasted the email discourse from Frantantoni to Dr. Fitzhugh and forwarded it to attorney Avram White on October 2, 2020, at 7:04 p.m. Id. On October 5, 2020, the NFL filming was done, and on October 13, 2020, the Board retroactively approved the request. (T:41:9-19).

Below is a discussion concerning the testimony provided in the January 30, 2023, plenary hearing, which I **FIND** as **FACT** herein:

In response to questions from the undersigned concerning Complainant's assertion that the substance of the October 2020 emails was "confidential," Complainant provided the following testimony:

Q : Who decided that it was going to be confidential?
…
A: That was my determination initially -- mine and the Vice President's determination initially … .
…
Q Was there a vote taken?
A: No, no. We didn't have -- no.
Q : Did every member -- was every member made aware that these discussions would be confidential?
A: Well, no, not --
…
Q So, Mr. Tarver, I asked you -- you said there was no vote taken and my next question was how was it communicated to the other Board members that this was a confidential nature of discussions?
A: By virtue -- it wasn't communicated … .

[T:32:2-35:16]

Complainant then provided testimony when questioned by Respondent's attorney regarding the alleged confidential, negotiated, or deliberative nature of the October 2020 emails:

Q: Can you show me in exhibit C-2 or C-3 anything that indicates that this was a contract negotiation issue that's being discussed in these emails?
A: [nonresponsive]
Q: Where in exhibit C-2 does the proposal or the request by NFL Films to use Bell Stadium, where is that defined as a "Contract negotiation?"
A: Oh, by -- by -- by virtue of the Facilities Request Form.
Q: Okay. So this was a Facilities Request by an outside entity to use Bell Stadium which was the Orange High School football field.
A: Yes.
Q: Okay. Board of educations typically receive facilities requests occasionally, right, from outside entities?
A: Yes.
Q: Where would I find any authority declaring that Facilities Request Forms are contract negotiations?
A: They -- they -- from my understanding and from my training that they -- they are actual contracts, they're legal agreements that -- that are negotiated.
…

Q: Is the Facilities Request Form that NFL Films submitted in October 2020 included anywhere in the exhibits that you have presented in this litigation?
A: No. It's -- it's a -- it's a standard form but, no.
…
Q: Where in the emails in exhibits C-2 and C-3 would I find information indicating that the terms of the Facilities Request were being negotiated?
A: … it was in front of the Board to either, accept, modify, or reject.
…
Q: And where in that email is there an indication that the Facilities Request was an item that was still being negotiated, meaning the terms of it were still being negotiated?
A: There -- there is no -- there is no text indicating that but it's -- it is the standard procedure that once a Facilities Request is submitted the Board still has the power to accept, reject, or modify any terms of the Facilities Request.
…

Q: Where do I find information in that email indicating that not just the acceptance was still pending …, but the terms of the agreement were still being negotiated, where do I find that?
A: Again the 5,000 -- the $5,000 [donation], that was still negotiative material. The Hold Harmless Agreement, there was still room for the Board members to weigh in on that before it was fully accepted.
Q: But your email seems to indicate that the $5,000 donation was all -- already agreed upon by NFL Films, so it doesn't look like that was being negotiated. Right?
A: Well, the last sentence of the email says, "Please only reply if you anticipate voting 'No' for this retroactive Facilities Request resolution," so it was not set in stone.

…

Q: Does your email give the Board members an option to come back to you with proposed revisions … or does it just say, "Let me know if you are going to vote 'No'?"
A: No, but it doesn't need to. This is the part of the negotiative process of -- of the School board.
Q: And again where do I find information indicating that this deal was still being negotiated?
A: It's not -- it's negotiated until the Board fully approves it.
Q: Where do I find information indicating when this particular request stopped being negotiated?
A: There is no indication, it was still -- it was still pre -- pre-approval.
Q: Well, the actual event took place pre-approval. Right? … So these emails are dated October 1st and October 2nd … and I believe you testified that the event took place on October 5th. Right?
A: Right, right.
Q: And approval didn't happen until October 13th. Right?

A: An official approval, yes.
Q: So we can't possibly logically say that until the 13th it's still up in the air if it already occurred on the 5th. Right?
A: Yeah, but we do have up until October 5th for a number of Board members to still weigh in … .

…

Q: Between your email on October 1st and the actual event occurring on October 5th were there any further negotiations?
…
A: No.

…

Q: And where in your email of October 1, 2020 . . . where would I find information indicating that the Facilities Request by NFL Films was a confidential issue?

A: Again negotiations by State law are always confidential, they are deliberative materials, it falls under the Deliberative Privilege Process I believe or Deliberative Process Privilege.
Q: That applies to negotiations between Boards of Education and the teachers unions. Correct?
A: It can, yes.
Q: And between Board of Educations and vendors who submit bids for contracts. Correct?
A: Yes, it can.
Q: Where would I find information indicating that that Deliberative Privilege applies to an outside entities Facilities Use Request?
A: Because again the -- the Facilities Use Request is always deliberative until it's finally agreed upon. … no, you won't -- you won't find that actual language … .
…
Q: … [I]s there anything in your email advising the Board members "This is a confidential, non-public issue, don't share it"?
A: No …. .
…
Q: Where would I find information in your email indicating that this was still draft form?
A: You won't … .
Q: Does every item that comes across a Board member's desk qualify as confidential?
A: Not every item, no. …
….
Q: Is there anything in any of the New Jersey School Boards Association training materials that you submitted in your exhibits that indicates that an outside entity's facilities request is a confidential matter?
A: No.
…
Q: Where would I find information indicating that this particular event … discussed in the October 1, 2020 email was negotiative?

A: You won't, it's implied.
…
Q: Where in your October 1, 2020 email do you say, "This is still in the process of being negotiated so if you have specific concerns to share or specific suggested revisions please get back to me"? Where in your email does it say that?
A: No, it -- it doesn't, it doesn't at all.
…
Q: Okay. But with respect to this NFL Film Facilities Request back in October 2020 … would you agree with me that there is nothing in your email that says, "Please keep this confidential"?

A: No, there's nothing - - there's no text that say [sic] that - - says that no.
Q: And there's nothing in your email that says, "The terms of this are still being negotiated".
A: No.

[T:131:16-143:16; 161:18-23; 163:12-22]

Complainant acknowledged that the opportunity to have Peyton Manning film a show in Orange would have been an issue of interest to the City of Orange. (T:153:12-16). Complainant admitted that he did not seek copies of Respondent's emails regarding the October 2020 event until after Complainant lost re-election to the Board (and Respondent won). (T:221:3-21; see also Exhibit C-13).

In the hearing, Complainant called Wingfield as a witness. Wingfield is a New Jersey School Boards Association Certified Master Board Member. (T:115:1-18). On direct examination, Wingfield confirmed that the October 2020 emails regarding the NFL Films facilities request were not confidential. (T:199:22-24). Wingfield further testified that it is his understanding that Bell Stadium is owned by the City of Orange and not by the Orange Board of Education, and that the Board approval process for use of the stadium is "merely procedural." (T:205:4-9).

Party's Arguments

A. Respondent's Arguments

Respondent argues that Complainant, who carries the burden of proof, cannot factually prove that the information in the email, which Respondent shared, was confidential information because it was public and not deliberated. There was no express language in the email which indicated the information within the email was confidential. Complainant conceded the same in his testimony. T:163:15-19.

Also, Respondent argues that the information in the email was public, because the Board routinely published their meeting schedule, and the matters discussed several days prior. Furthermore, Respondent argues, the email indicated that the use of Bell Stadium

was already decided in regard to the date, location, hold harmless agreement, and donation amount by October 1, 2020, 5:39 p.m. In underscoring this argument, Respondent argues that Complainant also testified "the Superintendent had done his due diligence with his staff . . . to kind of agree on a donation number and the fee for the NFL to pay for and to contribute for use of the facility" and the parties came to an agreement. T:31:18-32:1. The matter was already finalized by October 1, 2020, 9:20 p.m.

Therefore, Respondent claimed there is no genuine issue with the material facts and Complainant did not fulfill his burden of proof. Respondent could not have violated the above ethic codes and should be granted summary decision.

B. Complainant's Arguments

Complainant argues that Respondent's motion for summary decision should be denied, because the information in the email was confidential. Complainant argues that the email was not public and the matter in the mail was still being "deliberated" on October 1, 2020, 9:20 p.m. The Board never voted to release the information within the emails or had a "public vote" to approve the "facilities request form" until October 13, 2020, and so it was not public until then (Opposition of Petitioner at 14). It was also deliberative because languages such as "retroactive approval," and "for [the Board's] consideration" in the email implied that the matter was being deliberated. Id. at 2-3. Furthermore, although Complainant admitted in his testimony that the email lacked express language which said the information was confidential, he argues it was implied. T:143:13-16; 163:12-23.

Complainant also argues that Respondent's actions placed the public safety in "jeopardy". Complainant described in his opposition that "the Board had an express interest in not publicizing this event due to the COVID-19 pandemic," therefore, Respondent's actions may have caused negative public outcry against Board activities. Id. at 14; T:63:4-11. (Despite making this argument, Complainant testified that such public outrage did not happen and did not provide testimony whether public safety was indeed jeopardized. T:219:19-220:5.

Complainant did not argue that there is a genuine issue with the material facts, but rather, contended that Respondent should not be granted summary decision because Complainant has fulfilled his burden of proof.

LEGAL ANAYALYS AND CONCLUSIONS

The School Ethics Act.

A member of a local Board of Education holds a position of public trust. Our Legislature has declared:

In our representative form of government, it is essential that the conduct of members of local boards of education and local school administrators hold the respect and confidence of the people. These board members and administrators must avoid conduct which is in violation of their public trust or which creates a justifiable impression among the public that such trust is being violated. (N.J.S.A. 18A:12-22).

A formal Code of Ethics offers guidance to members of local Boards (N.J.S.A. 18A:12-24.1). The essence of the Code of Ethics is perhaps best summarized by the language in N.J.S.A. 18A:12-24.1(d), which describes the scope of the Board member's role by stating that "Board members do not themselves run the public schools, rather they see to it that the schools are well run."

The Complainant in this case has the burden of factually establishing a violation of the Code of Ethics. N.J.S.A. 18A:12-29(b) and N.J.A.C. 6A:28-6A.

Standard for Summary Decision

Motion for summary decision may be granted "if the papers and discovery which have been filed . . . 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). In order to defeat summary decision, the adverse party must show "that there is a genuine issue which can only be determined in an evidentiary proceeding." Ibid. The same

standard to grant summary judgment is applicable to summary decisions under R. 4:46-2(c). Contini v. Bd. of Educ. Of Newark, 286 N.J. Super. 106, 121, 668 A.2d 434 (App. Div. 1995), *certif. denied*, 145 N.J. 372, 678 A. 2d 713 (1996). Therefore, like summary judgment, whether a genuine issue exists "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." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520 (1995). Also, summary decision can be granted if it is "so one-sided that one party must prevail as a matter of law." Id. at 533.

In this matter, the SEC granted the motion to dismiss the alleged violations of N.J.S.A. 18A:12-24.1(c), N.J.S.A. 18A:12-24.1(e), and N.J.S.A. 18A:12-24.1(g) in Counts 1-45. However, SEC found the alleged violations of N.J.S.A. 18A:12-24.1(c), N.J.S.A. 18A:12-24.1(e), and N.J.S.A. 18A:12-24.1(g) in Counts 46-51 with probable cause and transmitted the case to the OAL. The SEC has factual evidence standards for each violation of N.J.S.A. 18A:12-24.1, which is N.J.A.C. 6A:28-6.4. Therefore, the OAL hearing was limited to the findings of factual evidence relevant to N.J.A.C. 6A:28-6.4: "whether Respondent may have taken Board action to effectuate policies and plans without consulting those affected by such policies and plans, or taken action that was unrelated to his duties as a Board member" for N.J.S.A. 18A:12-24.1 (c); "made personal promises or took action beyond the scope of his duties such, by its nature, had the potential to compromise the Board" for N.J.S.A. 18A:12-24.1 (e); and or "taken action to make public, reveal or disclose information that was not pubic or was otherwise confidential" for N.J.S.A. 18A:12-24.1 (g). (SEC Decision at 9-10). The Complainant, or accusing party, has the burden of proof. N.J.S.A. 18A:12-29(b); N.J.A.C. 6A:28-6.4(a).

Factual evidence of a violation of N.J.S.A. 18:A12-24.1(e) shall include evidence that the respondent made personal promises or took action beyond the scope of the respondent's duties such that, by its nature, had the potential to compromise the district board of educator or the board of trustees. N.J.A.C. 6A:28-6.4(a)(5).

Factual evidence of a violation of the confidentiality provision at N.J.S.A. 18A:12-24.1(g) shall include evidence that 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 policies, procedures, or practices. N.J.A.C. 6A:28-6.4(a)(7).

With regard to the first two violations, N.J.S.A. 18A:12-24.1(c) and (e), Complainant stated, "the Board had an express interest in not publicizing this event due to the COVID-19 pandemic," and therefore, Respondent's actions jeopardized the safety of the public or may have caused unwanted public reaction. Despite testifying to the same and arguing this point in his opposition, Complainant did not present any evidence other than his own testimony that this was indeed a concern.

I **CONCLUDE** that the evidence presented does not raise an issue of material fact under Brill as to the alleged violations of N.J.S.A. 18A:12-24.1 (c), and (e), and therefore **I CONCLUDE**, that said alleged violations of N.J.S.A. 18A:12.1(c) and (e), in the Complaint is **DISMISSED** inasmuch as Complainant will be unable to satisfy the burden of proof set forth in N.J.A.C. 6A: 28-6.4, should this matter proceed.

Ultimately, regardless of whether the emails were confidential, **I CONLCUDE** that Complainant's evidence for N.J.S.A. 18A:12-24.1 (c) and N.J.S.A. 18A:12-24.1 (e) fell short of the requirements of establishing violations by the preponderance of evidence standard. Atkinson v. Parsekian, 37 N.J. 143, 149 (1962). Therefore, the main issue in this case became whether Wingfield violated the confidentiality provision of N.J.S.A. 18A:12-24.1(g) when he forwarded Complainant's email to three non-Board members on October 1, 2020, 9:20 p.m.

Public information cannot be confidential. N.J.S.A. 47:1A-1:1; N.J.A.C. 6A:28-6.4(a)(7). If the information was either "[i]nter-agency or intra-agency advisory, consultative or deliberative material," it is confidential. N.J.S.A. 47:1A-1:1. The New Jersey Commissioner of Education has established that any "pre-decisional" matter and emails with "tentative thoughts, suggestions, and questions" are deliberative, thus, confidential:

> . . . 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."
>
> [Lynch v. Skowronski, East Greenwich Township Bd. of Educ., Gloucester County, EEC 10213-19, Initial Decision (February 25, 2020), modified, Comm'r (December 15, 2020), <http://njlaw.rutgers.edu/collections/oal/search.php/> (quoting Educ. Law Ctr. v. N.J. Dep't of Educ., 198 N.J. 274, 295 (2009)).]

In Lynch, the respondent mistakenly carbon copied a non-Board member to his email, which he only meant to send to Board members. Ibid. The email did not have express language that indicated it was confidential. Ibid. The matters discussed in the email were topics that the non-Board member would have known, for it was about her own complaint to the Board; however, the respondent further added his thoughts and suggestions on how to handle the complaint before the Board made a public decision. Ibid. Therefore, although the ALJ initially decided to dismiss the complaint, the SEC and Commissioner disagreed and held that it was confidential information. Ibid.

Thus, the main issue here relies on whether the information contained in the email forwarded by Respondent was (1) public, and (2) if not, whether the information in the email was deliberative. If there is no genuine issue of material fact to determine this and Complainant fails to establish the above factual evidence, summary decision must be granted in favor of Respondent. However, if there is a genuine issue of material fact or Respondent cannot prevail as a matter of law when the facts are seen in the light most favorable to Complainant, then the motion for summary decision must be denied.

The record herein reveals that the emails forwarded by Respondent in Exhibit C-3 reveal that the parties negotiating the "facilities request form" were representatives of NFL Films (Keough) and Orange Public Schools faculty (Frantantoni). Keogh, a location scout who worked for the NFL, and Frantantoni, who is not a member of the Board, were negotiating the matter. Moreover, the details of the negotiations for "facilities request form" were not confined to the capacities of the Board, as these emails did not indicate

that the matters discussed were "confidential". Thus, I **CONCLUDE** the information within the email was not confidential.

The record herein is differentiated from Lynch, where the matter in the e-mail was regarding an incident between a non-Board member and a faculty member. The respondent argued that the matter was public, at least to the non-Board member. Ibid. However, the Commissioner disagreed because the email contained his suggestions and thoughts that was not discussed with the non-Board member, while the matter was still being deliberated. Ibid. Such suggestions made the email confidential. Ibid.

In the case herein, Complainant shared an email regarding information that was public to at least two non-Board members before Complainant determined it was "confidential". Moreover, the information in the shared email was not confidential because it was not being deliberated by the time Respondent forwarded the e-mail at 9:20 p.m. on October 1, 2020, to the three non-Board members (Mayor, Municipal Attorney and Councilperson).

As to Complainants argument that Respondent's email was sent when the Board was still in its negotiative process, there were four time periods in which the request could have been actually finalized, hence, ended its deliberative stage: (1) October 13, 2020, at the Board meeting, (2) October 5, 2020, the day of filming, (3) the evening of October 1, 2020, after 5:39 p.m. until the morning of October 2, 2020, or (4) the evening of October 1, 2020, before 5:39 p.m. To begin with, the matter could not have possibly been finalized on October 13, 2020, because the Board approval was a "retroactive approval" on October 13, 2020. A Board member's "NO" vote on October 13, 2020, did not have any contractual effect, because the contract was already completed by both parties prior to this date.

The Complainant may argue that because this was the only express "official acceptance," the finalization happened on October 13, 2020; however, this is a weak argument. If one were to draw an analogy to contract law and assume that there was no other evidence of express acceptance, the negotiations of the "facilities request form" is similar to that of acceptance by performance. Restatement (Second) of Contracts § 50(2)

(Am. L. Inst. 1981). Because the "official acceptance" came after the performance of the contract, it is reasonable to assume that the actual acceptance happened either by performance on October 5, 2020, when NFL Films filmed on Bell Stadium or earlier. Regardless, because the performance was already completed by both parties by October 13, 2020, that day cannot be the actual day of finalization.

The record reveals that the request was finalized before October 5, 2020, as well. Complainant testified the matter in the email was "contract negotiation material" that "had not been completed" and was "pre-approval," because the possibility of the Board members rejecting the plan prior to filming on October 5, 2020, existed. However, Complainant wrote in his email "NFL needs to know of our anticipated approval no later than tomorrow morning," which implied the actual approval was expected on October 1, 2020, not on October 5 or 13, 2020. This point is highlighted by Complainant's testimony that "[Dr. Fitzhugh] had done his due diligence with his staff . . . to kind of agree on a donation number and the fee for the NFL to contribute to . . . pay for and to contribute for use of the facility. . ." by the time he sent the email on October 1, 2020.

Furthermore, Complainant, as the Board President, did not ask for any opinions from his fellow Board members in his email sent on October 1, 2020. He also testified that no further negotiations were made after October 1, 2020. Keogh's email, which was noted as "written confirmation" of the request, was sent on the night of October 1, 2020. Dr. Fitzhugh's email thanking all of the Board members for making the film happen was sent on the morning of October 2, 2020. The facts show that the matter was expected to be finalized on the night of October 1, 2020, and it was indeed finalized by the end of October 1, 2020. Under this fac patter it is not reasonable to assume that negotiations were being pursued until October 5, 2020.

The next time period is the evening of October 1, 2020, after 5:39 p.m. until the morning of October 2, 2020, in which deliberations for the Board's "anticipated approval" may have been happening. However, the matter was finalized before then as well. Complainant's email did not indicate that the matter was still negotiable. The e-mail asked for a Board vote, but to "only reply if you anticipate voting '**NO**' for this retroactive Facilities Request Resolution during our October 13 Board Meeting" and "to avoid . . . a meeting

via email." The vote which Complainant held was unofficial, for the "official acceptance" was scheduled for October 13, 2020, and he explicitly noted that the vote, or the email, was not intended to be a Board meeting. Thus, the Board members were specifically noted to not negotiate, which implied it was not deliberated.

Furthermore, this hypothetical vote would not have been a firm confirmation of negotiations, for Complainant specifically asked the members to not reply "Yes" or "Absolutely," and reply only if they anticipate rejecting, causing the lack of reply to be an approval. [5] Again, Complainant repeatedly testified that the matter within the email was open for negotiations, yet he did not ask for opinions or revisions in the email to encourage negotiations and deliberations.

The record herein discloses that the donation price of $5,000, hold harmless agreement, and location for the request were agreed upon on October 1, 2020, 5:39 p.m. All that was needed, as the facts show, was the Board's "anticipated approval" by October 2, 2020. This "anticipated approval" was not an official Board meeting, as Complainant made clear in his email. Because the lack of reply was an approval, there would have been no proof of the approval. And most importantly, Complainant specifically asked the Board members to not deliberate or negotiate.

Accordingly, as no Board member replied to the email to show their approval and Respondent forwarded the email to the non-Board members three hours after Complainant's email late in the evening at 9:20 p.m., it is reasonable to accept that, by 9:20 p.m. on October 1, 2020, not only did the Board members silently agree upon an "anticipated approval," and the matter was simply not being deliberated by anyone. Therefore, I **CONCLUDE** the Board's negotiative process concerning the approval for the NFL filming at Bell stadium was finalized on October 1, 2020, 5:39 p.m. which is before the time Respondent forwarded the email from Dr. Fitzhugh.

Complainant's best argument is that, because his email stated NFL Films needed an "anticipated approval" from the Board by "next morning" on October 2, 2020,

[5] No Board member replied "NO" to Complainant on October 1, 2020.

Respondent "should have known that he might" breach potential confidentiality by forwarding the email to non-Board members before the next morning. However, Respondent testified that the "anticipated approval" was "merely procedural." Once again, the bulk of the matter was already agreed upon by outside parties, and Complainant's unorthodox manner in taking a "vote" had no negotiable power, did not encourage any deliberation, and did not imply that negotiations were continuing. Respondent could not have inferred that the matter was confidential.

For the reasons stated herein, I **CONCLUDE** that the evidence presented does not raise an issue of material fact under Brill as to an alleged violation of N.J.S.A. 18A: 12-24.1(g) and therefore **I CONCLUDE**, that the alleged violation of N.J.S.A. 18A:12.1(g), in the Complaint is **DISMISSED** inasmuch as Complainant will be unable to satisfy the burden of proof set forth in N.J.A.C. 6A: 28-6.4, should this matter proceed.

ORDER

It is **ORDERED** that Respondent's motion for summary decision is **GRANTED**, pursuant to N.J.A.C. 1:1-12.5 and N.J.A.C. 6A:3-1.12, and under the standards set forth in Brill.

Based on the foregoing, it is **ORDERED** that the remaining Counts 46 to 51 of the Complaint are hereby **DISMISSED**.

I hereby **FILE** my initial decision with the **SCHOOL ETHICS COMMISSION**. Pursuant to N.J.S.A. 18A:12-29, the School Ethics Commission has jurisdiction to determine whether a violation of the School Ethics Act occurred. If it concludes that the conduct constitutes a violation of the School Ethics Act, it shall recommend an appropriate penalty to the Commissioner of Education. The Commissioner of Education shall issue the final decision in this matter.

If the School Ethics Commission determines that a violation has occurred, it shall issue a written decision recommending to the Commissioner of Education an appropriate penalty and shall forward the record, including this recommended decision and its

decision, to the Commissioner of Education. The Commissioner of Education may subsequently render a final decision as to the appropriate penalty. If the Commissioner of Education does not render a final decision within forty-five days of its receipt of this initial decision, and unless such time period is otherwise extended, the recommended decision of the School Ethics Commission shall become the final decision.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **SCHOOL ETHICS COMMISSION**, **DEPARTMENT OF EDUCATION, PO Box 500, Trenton, NJ 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

August 1, 2023 — Julio Morejon

DATE — **JULIO C. MOREJON, ALJ**

Date Received at Agency: August 1, 2023

Date E-Mailed to Parties: August 1, 2023

lr

APPENDIX

EXHIBITS

For Complainant:

Brief in opposition to the Motion for Summary Decision and all exhibits admitted in evidence in the plenary hearing held on January 30, 2023.

Complainant Exhibits submitted in evidence on January 30, 2023:

C-1
C-2
C-3
C-3A (admitted via email on January 31, 2023)
C-4
C-5
C-6
C-10
C-12
C-13
C-24
C-25
C-28
C-31
C-32

For Respondent:

Motion for Summary Decision and Reply Brief