

Margeotes, Esq. Accordingly, the Commission heard testimony on all Counts of the complaints. After hearing all testimony, as summarized below, the Commission did not close the record until it had an opportunity to continue the discussion of the matter at its next meeting. At that meeting on November 26, 2013, the Commission closed the record and tabled the matter for the next meeting. At the December 19, 2013 meeting, the Commission voted to find a violation of N.J.S.A. 18A:12-24.1 (e) and (g) of the Code of Ethics for School Board Members, to dismiss the allegations that the respondent violated N.J.S.A. 18A:12-24.1(a), (c), (d), and (i) of the Code and to recommended the penalty of reprimand.

SUMMARY OF THE RECORD

After opening statements, the Commission advised the parties that issues regarding *Rice* notice violations or grievance matters were not cognizable under the School Ethics Act and would not be addressed in this forum. On review of the testimony of each of the witnesses, the Commission has determined that the parties agree upon the relevant material facts. The only issue remaining is whether the respondent violated the Code when she shared the recording of the taped a portion of the Executive Session at the regular meeting of the Board on March 26, 2013, with her attorney¹ for use against certain Board members in another ethics matter filed against her with the Commission.

Complainants’ Exhibits²

C-1	March 26, 2013 Executive Session Minutes of the Regular Meeting of the Deptford Township School District.
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FINDINGS OF FACT

As the Trier of Fact in this matter, the Commission had the greatest opportunity to observe the demeanor of the witnesses and was qualified to assess their credibility. Based on the credible testimony and documents on the record, the Commission makes the following factual findings:

1. The respondent was at all times relevant to this matter a member of the Deptford Township Board of Education (Board), having been newly sworn in on January 3, 2013.
2. The Board convened for its regular meeting on March 26, 2013.
3. Seven of the nine members, who comprise the Board testified at the hearing and had personal knowledge of the events, which took place during Executive Session.
4. For discussion that evening, the agenda included negotiations and several other personnel matters: Walter Berglund’s grievance, an apology from the Board to Mr. Berglund, the

¹ The respondent shared the recorded portion of the meeting with her original counsel and with trial counsel.

² The respondent introduced a CD of the recorded portion of the Executive Session of March 26, 2013. The Commission found the CD inadmissible as the chain of custody could not be verified and because the recording contained Board deliberations, which are confidential.

contracts of four (4) employees who received *Rice* notices, and a proposal to settle an Unfair Labor Practice charge against the Board of Education for paraprofessional personal days.

5. The employees who received *Rice* notices and the respondent are members of the same union, the DEA/NJEA.
6. When Board deliberations turned to the topic of the apology letter, the respondent, fearing that she would be treated in an unprofessional manner by incumbent Board members angry with her for comments on her blog that occurred prior to the election, decided to tape the session because her original attorney was not there to protect her and another Board member supported her decision to do so.
7. The respondent's blog is no longer public. It is maintained to preserve its content for evidence and for private purposes.
8. The respondent placed her cell phone at the corner of her desk and began recording without advising the rest of the Board or the Board Solicitor that she was doing so.
9. Sometime later, Board member Robert Gentile noticed the "record app" running and passed a note to Complainant Condo to advise him.
10. Complainant Condo, after confirming for himself with a visual observation, asked the respondent aloud if she were taping the Session.
11. The respondent immediately said, "Yes," explained that she had the right to do so and intended to play the recording for her attorney for use in another ethics proceeding against her.
12. The Board Solicitor told her that she should not tape the Session, but the respondent insisted that she had the right to do so.
13. The respondent testified that she had taped 19 minutes of the one-hour meeting.
14. The respondent offered to play the recording for the Board and the Solicitor, but all declined. The remaining Board members and the Solicitor walked out effectively ending the meeting.
15. All of the witnesses for the complainants testified that Executive Session is never taped, and the Board members and the Administrators go to great lengths to protect the confidentiality of the deliberations.
16. The respondent admitted that if no one had noticed that she had been recording the Session, she would not have told those in attendance that evening.

ANALYSIS

New Jersey's Open Public Meetings Act, N.J.S.A. 10:4-6, et seq. requires that the public have notice and access to all meetings, including Executive Session, of public bodies, which are legally empowered to vote on public matters or to spend public funds. Central to this Act is the public's right to know how the members of these public bodies vote and make decisions on behalf of the public. Yet, that right is not absolute. There are times when the public may be excluded from an open public meeting's Executive Session. N.J.S.A. 10:4-12(b) provides that "a public body may exclude the public only from that portion of a meeting at which the public body discusses:

(4)Any collective bargaining agreement, or the terms and conditions, which are proposed for inclusion in any collective bargaining agreement, including the negotiation of the terms and conditions thereof with employees or representatives of employees of the public body.

(8)Any matter involving the employment, appointment, termination of employment, terms and conditions of employment, evaluation of the performance of, promotion or disciplining of any specific prospective public officer or employee or current public officer or employee employed or appointed by the public body, unless all the individual employees or appointees whose rights could be adversely affected request in writing that such matter or matters be discussed at a public meeting.³

The purpose of executive session is to allow the Board to openly deliberate on select issues without the public being privy to those discussions. It is clear that the topics discussed during that portion of the meeting were confidential and it fell upon those individuals present in executive session to ensure those discussions remain confidential. Demonstrative of the level of care necessary to protect the confidentiality of Executive Session is the care everyone took during the hearing to preserve the confidentiality of the Board meeting. The Commission steered the witnesses away from testimony that would reveal any of the deliberations during Executive Session; the respondent's attorney described "the sanctity" of the recording and his decision not to send it even in discovery to the complainants because "anyone could have heard it" (STE-007 at 1:00:00 – 1:01:33); and the Commission, when it denied admission of the CD into the record, reasoned that recording would divulge confidential Board deliberations.

In excluding the tape, the Commission recognized that each public body enjoys its own protection of confidentiality, individually and separately from any other public body. The protection of confidentiality attaches to each public body as a whole: It is not severable and no one Board member or official can waive that protection for the Board without breaching his duty. Further, the Commission finds that sharing the deliberations of a closed meeting with any third party, who would not have been permitted to attend the meeting, is tantamount to a breach of trust and to the promise and expectation of confidentiality.

In his closing, respondent's counsel cited Pitts v. Gidwani, Winslow Township Board of Education, Camden County, C27-11, 09/27/2011 in which the Commission determined that the

³ Whether the Board was properly in executive session is not at issue in this case.

respondent did not violate the Code when she, without seeking prior permission, taped Executive Session. In its decision, the Commission found:

...the Commission does not find that the respondent's action in taping a Board session implicates his duties and functions as a Board member sufficiently to characterize his conduct as "board action" within the intendment of N.J.S.A. 18A:12-24.1(c). Further, if such action constituted private action, or action beyond the scope of the respondent's duties, the Commission finds that there are no facts set forth in the complaint that would support a conclusion that this action was of such a nature that it had the potential to compromise the Board so as to violate N.J.S.A. 18A:12-24.1(e). Indeed, inasmuch as the complainant fails to allege that the respondent took *any* action beyond taping, it appears that this matter predominantly implicates the Open Public Meetings Act, rather than the School Ethics Act. Thus, the Commission finds that the complaint, on its face, fails to allege facts sufficient to maintain a claim that the respondent violated N.J.S.A. 18A:12-24.1(c) or (e).

The credible testimony in these cases now before the Commission revealed that the respondent did take some action beyond taping and that she did do something more. She shared the confidential deliberations with two outsiders, who themselves are not parties to these deliberations and would not have been permitted to attend the meeting or be privy to the Board's discussions. Once shared with these individuals, confidentiality was breached. Consistent with this foregoing reasoning, the Commission reviewed these actions to determine whether they violated the Code.

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

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

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

The Commission's regulations require that:

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

that the respondent brought about changes through illegal or unethical procedures. N.J.A.C. 6A:28-6.4(a)1.

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

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

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

The Commission's regulations require that:

Factual evidence of a violation of N.J.S.A. 18A:12-24.1(c) shall include evidence that the respondent(s) took board action to effectuate policies and plans without consulting 2

- i. Develop the general rules and principles that guide the management of the school district or charter school;
- ii. Formulate the programs and methods to effectuate the goals of the school district or charter school; or
- iii. Ascertain the value or liability of a policy. N.J.A.C. 6A:28-6.4(a)3.

The complainants presented no evidence that the respondent took any particular "board action" so as to implicate this provision of the statute. Rather, respondent's conduct implicates N.J.S.A. 18A:12-24.1(e), as set forth below. Accordingly, the complainant failed to establish that the respondent violated N.J.S.A. 18A:12-24.1(c).

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

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

The Commission's regulations require that:

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

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

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

I will recognize that authority rests with the board of education and will make no personal promises nor take any private action that may compromise the board.

The Commission's regulations require that:

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

When the respondent, in consultation with another Board member, turned on her phone's recording app, she was still within her rights to do so, as the Commission found in Pitts v. Gidwani, *supra*. However, the Commission concludes that, here, the respondent took private action, or action that was outside the scope of her duties as a Board member when she intended to and did disclose the deliberations to two other third parties who would not otherwise have been privy to the Board's deliberations.

In finding a violation of N.J.S.A. 18A:12-24.1(e), it is not necessary for the Commission find that the respondent's action, in fact, compromised the Board. Rather, it is sufficient that the action was of such a nature that it might have compromised the Board. See, Tony John et al. v. Ken Gordon, Willingboro Bd. of Ed., Burlington County, C34-08 (October 27, 2009), *aff'd* Commissioner of Education Decision No. 102-10ASEC, decided March 30, 2010. Here, however, the Commission does so find that the Board's protection of confidentiality was breached when the respondent played the recording for two other individuals who were not permitted in Executive Session. Accordingly, the Commission finds that the respondent took private action, which was of such a nature that it had the potential to compromise the Board in violation of N.J.S.A. 18A:12-24.1(e).

In this analysis, the Commission does not diminish the respondent's stated concern that she believed that she was protecting herself by taping the 19 minutes of the Executive Session. She testified that as a newly elected Board member, she was treated harshly by incumbent Board members for questioning the credentials of Mr. Berglund. If the respondent did not want to be confronted again, she could have asked the Board Solicitor to intervene or simply walked out.

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

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

The Commission's regulations require that:

Factual evidence of a violation of the confidentiality provision of N.J.S.A. 18A:12-24.1(g) shall include evidence that the respondent(s) took action to make public, reveal or disclose information that was not public under any laws, regulations or court orders of this State, or information that was otherwise confidential in accordance with board policies, procedures or practices. Factual evidence that the respondent violated the inaccurate information provision of N.J.S.A. 18A:12-24.1(g) shall include evidence that substantiates the inaccuracy of the information provided by the respondent(s) and evidence that establishes that the inaccuracy was other than reasonable mistake or personal opinion or was not attributable to developing circumstances. N.J.A.C. 6A:28-6.4(a)7.

It is clear from respondent's actions in taping a portion of Executive Session and playing it for two individuals who could not ever be privy to the Board's deliberations that she took action to make public, reveal or disclose information that was not public under any laws, regulations or court orders of this State, or information that was otherwise confidential in accordance with board policies, procedures or practices. However, the complainants do not provide any facts to support a claim that the respondent failed to provide accurate information or evidence that establishes that the inaccuracy was other than a reasonable mistake or personal opinion or was not attributable to developing circumstances. Accordingly, the Commission finds that the complainants met their burden to establish a violation of the first part of N.J.S.A. 18A:12-24.1(g), but not the second part of the provision.

Finally, the Commission considers the complainants' allegation that the respondent violated N.J.S.A. 18A:12-24.1(i), which states:

I will support and protect school personnel in proper performance of their duties.

The Commission's regulations further provide:

Factual evidence of a violation of N.J.S.A. 18A:12-24.1(i) shall include evidence that the respondent(s) took deliberate action which resulted in undermining, opposing, compromising or harming school personnel in the proper performance of their duties. N.J.A.C. 6A:28-6.4(a)9.

On this record, the Commission does not find this subsection applicable since Board members are not considered school personnel and are not protected under this provision of the Code. On the other hand, Mr. Berglund is an employee of the District and is therefore protected. However, as the respondent testified, her inquiries questioning the credentials and experience of Complainant Berglund occurred when she was a private citizen over whom the Commission did not have *in personam* jurisdiction. Even if the respondent had made these inquiries as a Board member, doing so would have been consistent with her duty to ensure that public funds were properly expended. Consequently, respondent's actions do not in any way evidence taking deliberate action, which resulted in undermining, opposing, compromising or harming school personnel in the proper performance of their duties. Accordingly, the Commission finds that the complainants have failed to establish that the respondent violated N.J.S.A. 18A:12-24.1(i).

DECISION

The Commission finds that respondent Stacy Gray violated N.J.S.A. 18A:12-24.1(e) and (g) of the Code of Ethics for School Board Members, and the Commission dismisses the allegations that the respondent violated N.J.S.A. 18A:12-24.1(a), (c), (d), and (i).

In addition, the Commission has taken this occasion to review its determination in Pitts v. Gidwani, Winslow Township Board of Education, Camden County, C27-11, 09/27/11, and it reassessment leads to a cautionary note. The Commission does not believe that it is within its authority to prohibit the taping of the Executive Session. However, it does recommend that each District determine for itself the rule it wishes to follow. The Commission supports such a prohibition since allowing the taping of Executive Session Board deliberations creates too great a probability that Board members may not freely discuss school business. Such an outcome must not be countenanced as it makes ineffective the very purpose of a closed session—to discuss the public's business unfettered and protected. Most importantly, allowing members to tape a closed session, even a portion, introduces a greater and unacceptable threat that the confidential deliberations may become available to public scrutiny through an individual who is not a beneficiary of the protection of confidentiality recognized in Executive Session.

PENALTY

The Commission recommends a penalty of reprimand for breaching the confidentiality of Board deliberations by sharing the recording with another who would not have been permitted to attend the meeting or be privy to the Board's discussions. In doing so, the Commission takes this

opportunity to encourage the Board as a whole and its members individually to put this rancor behind them so that it does not continue to taint the future and further recommends that they attempt to rebuild the trust that the people who elected them look to for leadership.

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

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

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

Robert W. Bender
Chairperson

Mailing Date: December 20, 2013

Resolution Adopting Decision – C16-13 & C22-13 Consolidated

Whereas, the School Ethics Commission has considered the pleadings filed by the parties, the documents submitted in support thereof, and the testimony of the parties from its hearing on October 29, 2013; and

Whereas, at its meeting on November 26, 2013, and after further deliberation, the Commission closed the record and found that the complainants established that the respondent violated N.J.S.A. 18A:12-24.1(e) and (g) of the Code of Ethics for School Board Members, but dismissed the allegations that the respondent violated N.J.S.A. 18A:12-24.1(a), (c), (d), and (i); and

Whereas, at its meeting on December 19, 2013, the Commission voted to recommend to the Commissioner of Education a penalty of reprimand; and

Whereas, at its meeting on December 19, 2013, the Commission agreed that the within decision accurately memorializes its findings and recommendations; and

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

Robert W. Bender, Chairperson

I hereby certify that the Resolution was duly adopted by the School Ethics Commission at its public meeting on December 19, 2013.

Joanne M. Restivo
Interim Executive Director
School Ethics Commission