

***Before the School Ethics Commission***  
***Docket No.: C03-22***  
***Decision on Motion to Dismiss***

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**Leif Andersen,**  
***Complainant***

v.

**Jodi Fernandez,**  
**Frankford Board of Education, Sussex County,**  
***Respondent***

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**I. Procedural History**

The above-captioned matter arises from a Complaint that was filed on January 4, 2022, by Leif Andersen (Complainant), alleging that Jodi Fernandez (Respondent), a member of the Frankford 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(e) and *N.J.S.A.* 18A:12-24.1(g) of the Code of Ethics for School Board Members (Code).

On January 6, 2022, the Complaint was served on Respondent via electronic mail, notifying her that charges were filed against her with the School Ethics Commission (Commission), and advising that she had twenty (20) days to file a responsive pleading.<sup>1</sup> On April 8, 2022, Respondent filed a Motion to Dismiss in Lieu of Answer (Motion to Dismiss), and also alleged that the Complaint is frivolous. On April 14, 2022, Complainant filed a response to the Motion to Dismiss and allegation of frivolous filing.

The parties were notified by correspondence dated May 16, 2022, that this matter would be discussed by the Commission at its meeting on May 24, 2022, in order to make a determination regarding the Motion to Dismiss and allegation of frivolous filing. Following its discussion on May 24, 2022, the Commission adopted a decision at its meeting on June 28, 2022, granting the Motion to Dismiss in its entirety because Complainant failed to plead sufficient, credible facts to support a finding that Respondent violated *N.J.S.A.* 18A:12-24.1(e) and/or *N.J.S.A.* 18A:12-24.1(g). The Commission also adopted a decision finding the Complaint not frivolous and denying Respondent's request for sanctions.

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<sup>1</sup> As a result of the ongoing Coronavirus (COVID-19) pandemic, and the implementation of electronic filing, service of process was effectuated by the Commission through electronic transmission only.

## II. Summary of the Pleadings

### A. *The Complaint*

Complainant states that during the public comment portion of the Board’s meeting on November 29, 2021, he read a statement “laying out some concerns [he] had with the direction [the] school is headed.” On December 10, 2021, Respondent sent a Facebook message to approximately forty (40) members of the community, which responded to/addressed Complainant’s public statement. At the outset of her message, Respondent stated, “. . . I am on the . . . [Board] but I am reaching out to you tonight as an individual, fellow parent, alum of Frankford, and taxpayer. A Dad attended the last [Board] meeting and made a 3-minute public comment . . . .”

Based on the substance of her Facebook message to several members of the community, following the reading of his (Complainant’s) public statement, Complainant argues that Respondent violated *N.J.S.A. 18A:12-24.1(e)* because she (Respondent) compromised the Board with her public statements, and also violated *N.J.S.A. 18A:12-24.1(g)* because she provided “miss truths [(sic)] publicly,” and she should have asked for a copy of his (Complainant’s) statement if she was unsure of his comments. As part of his Complaint, Complainant directly refuted several comments that Respondent incorrectly attributed to him.

### B. *Motion to Dismiss and Allegation of Frivolous Filing*

Following receipt of the Complaint, Respondent filed a Motion to Dismiss and allegation of frivolous filing. Respondent argues that Complainant failed to set forth any factual allegations suggesting that Respondent “made any personal promises or took any private action which could have compromised the Board, in violation of *N.J.S.A. 18A:12-24.1(e)*.” According to Respondent, and as noted in [\*Advisory Opinion A02-06\*](#) and [\*Advisory Opinion A36-14\*](#), Board members “do not surrender the rights they have as private citizens, such as First Amendment rights, when they become members of a school board.” Moreover, Respondent maintains that she expressed her concerns regarding Complainant’s statement in her capacity as “an individual, fellow parent, alum of Frankford and a taxpayer.” Respondent maintains that because she provided a sufficient disclaimer noting that she was speaking as an individual, and not on behalf of the Board, her comments did not have the capacity to compromise the Board. Moreover, “there are no allegations, let alone facts . . . that could evidence an impermissible personal promise from Respondent to anyone, and no facts indicating that Respondent took any action beyond the scope of her duties as a Board member.” Therefore, the Complaint fails to state a claim for a violation of *N.J.S.A. 18A:12-24.1(e)*.

As for the violation of *N.J.S.A. 18A:12-24.1(g)*, Respondent argues that although Complainant may not agree with Respondent’s “characterization of the contents of his speech, it is indisputable that he alleged CRT may be coming to the [District], decried having an LGBTQ inclusive curriculum, invoked religion as the basis for teaching values, and called for the removal of the rainbow flag from classrooms.” Regarding the “anal sex statement, the discrepancy is miniscule” and although Complainant believes there was “some villainous motive behind the discrepancy,” he does not provide any evidence to support Complainant’s “inaccuracies were

anything but a ‘reasonable mistake’ or ‘developing circumstances.’” Furthermore, “[m]ere disagreement with a Board member’s comments in her individual capacity does not establish a violation of the ... Act.” Accordingly, Complainant has failed to establish a violation of *N.J.S.A.* 18A:12-24.1(g).

Finally, Respondent asserts the Complaint is frivolous because “it does not have a factual basis,” and is nothing more than an attempt to “stifle” Respondent’s First Amendment rights. Respondent “sent a personal message regarding a real concern she noticed from Complainant’s comments to the Board.” Per Respondent, Complainant’s “unsupported, conclusory allegations and language demonstrate that it was brought for the purposes of harassment.” Respondent argues she provided an appropriate disclaimer, “never criticized any individual by name, and was simply calling attention to others who should run for the [Board] in the future if they shared her beliefs.” According to Respondent, the Complaint “unjustifiably demonizes a public servant who was simply noted [(sic)] her concerns about a public statement ... .” Moreover, the Complaint does not contain any facts to support a violation of *N.J.S.A.* 18A:12-24.1(e) and/or *N.J.S.A.* 18A:12-24.1(g). Therefore, Respondent maintains the Complaint should be dismissed and sanctions imposed on Complainant.

### ***C. Response to Motion to Dismiss and Allegation of Frivolous Filing***

In response to the Motion to Dismiss and allegation of frivolous filing, Complainant notes his allegations are “factual and based on statements that [he] and [Respondent] made.” He further maintains that Respondent’s message “crossed over from a private message to [a] public” message, and her statements were “untrue” and, therefore, violate *N.J.S.A.* 18A:12-24.1(e) and *N.J.S.A.* 18A:12-24.1(g). Complainant denies that his Complaint is frivolous and asks the Commission to review and provide its opinion on his allegations.

## **III. Analysis**

### ***A. Standard for Motion to Dismiss***

In determining whether to grant a Motion to Dismiss, the Commission shall review the facts in the light most favorable to the non-moving party (Complainant), and determine whether the allegation(s), if true, could establish a violation(s) of the Act. Unless the parties are otherwise notified, a Motion to Dismiss and any response is reviewed by the Commission on a summary basis. *N.J.A.C.* 6A:28-8.1 *et seq.* Thus, the question before the Commission is whether Complainant has pled sufficient facts which, if true, could support a finding that Respondent violated *N.J.S.A.* 18A:12-24.1(e) and/or *N.J.S.A.* 18A:12-24.1(g).

### ***B. Jurisdiction of the Commission***

In reviewing the allegations in this matter, the Commission notes that its authority is limited to enforcing the Act, *N.J.S.A.* 18A:12-21 *et seq.*, a set of minimum ethical standards by which all school officials must abide. In this regard, the Commission has jurisdiction only over matters arising under the Act, and it may not receive, hear, or consider any matter that does not arise under the Act, *N.J.A.C.* 6A:28-1.4(a).

With the jurisdiction of the Commission in mind, to the extent that Complainant seeks a determination from the Commission that Respondent's comments/statements may have constituted defamation, slander, and/or libel, the Commission advises that such determinations fall well beyond the scope, authority, and jurisdiction of the Commission. Nonetheless, Complainant may be able to pursue each of those claims in the appropriate tribunal; however, the Commission is not the appropriate entity to adjudicate such issues. As such, those claims are dismissed.

### ***C. Alleged Code Violations***

Complainant submits that, based on the conduct more fully detailed above, Respondent violated *N.J.S.A.* 18A:12-24.1(e) and *N.J.S.A.* 18A:12-24.1(g), and these provisions of the Code provide:

e. 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.

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

#### ***Alleged Violation of N.J.S.A. 18A:12-24.1(e)***

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

After review, the Commission finds that even if the facts as argued in the Complaint are proven true by sufficient credible evidence, they would not support a finding that Respondent violated *N.J.S.A.* 18A:12-24.1(e). As noted by Respondent, school officials, and publicly elected members of a board of education in particular, do not abdicate their First Amendment rights and are free to publicly address any matter which is of importance to them. Although Respondent is offering her personal opinion on a matter that relates to the business of the Board, namely the public/comment offered by a member of the community (Complainant) at a Board meeting, Respondent sufficiently disclaimed the context in which she was speaking and, in this way, made it abundantly clear to the reader that she was speaking in her capacity as a private citizen, and not as a member of the Board. By disclaiming her speech, Respondent disassociated her personal opinions and viewpoints from possibly being aligned with that of the Board and consequently, from being regarded as being made in her official capacity as a school official. Therefore, the Commission finds that the purported violation of *N.J.S.A.* 18A:12-24.1(e) should be dismissed.

### *Alleged Violation of N.J.S.A. 18A:12-24.1(g)*

As set forth in *N.J.A.C. 6A:28-6.4(a)(7)*, factual evidence of a violation of the **confidentiality provision** of *N.J.S.A. 18A:12-24.1(g)* shall include evidence that Respondent 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 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 Respondent and evidence that establishes that the inaccuracy was other than reasonable mistake or personal opinion or was not attributable to developing circumstances.

Based on a thorough review of the Complaint, the Commission finds that even if the facts as contended are proven true by sufficient credible evidence, they would not support a finding that Respondent violated *N.J.S.A. 18A:12-24.1(g)*. First, Respondent's personal opinion (which was disclaimed as being made in her capacity as "an individual, fellow parent, alum of Frankford, and taxpayer") was wholly unrelated to her position on the Board. Second, even if her speech had not been disclaimed, because Respondent's opinion/statement related to a statement that Complainant made at a public Board meeting, there is no evidence, which could possibly prove that Respondent disclosed confidential information. Finally, to the extent it could be argued that the statements attributed to Complainant by Respondent were not entirely accurate, Complainant conceded that Respondent did not have a copy of his (Complainant's) written statement until after he read (or became aware of) Respondent's social media post. As such, to the extent her attribution of certain opinions or positions to Complainant was not entirely accurate; it was clearly due to reasonable mistake and/or Respondent's own personal opinion about Complainant's public statement. Consequently, the Commission finds that the claimed violation of *N.J.S.A. 18A:12-24.1(g)* should be dismissed.

As a final note, the Commission would be remiss if it did not take this opportunity to highlight the importance of disclaimer utilization by school officials on social media. The use of disclaimers is not intended to chill or otherwise infringe on the rights of any individual, let alone school officials, but rather to help ensure that the reader (the public) fully understands the capacity in which one is speaking. When, as here, an appropriate disclaimer is used, it is clear that the Act is not implicated, and a school official should not be penalized for expressing her opinions.

#### **IV. Request for Sanctions**

At its meeting on May 24, 2022, the Commission considered Respondent's request that the Commission find the Complaint frivolous and impose sanctions pursuant to *N.J.S.A. 18A:12-29(e)*. Despite Respondent's argument, the Commission cannot find evidence that might show that Complainant filed the Complaint in bad faith or solely for the purpose of harassment, delay, or malicious injury. The Commission also does not have information to suggest that Complainant knew or should have known that the Complaint was without any reasonable basis in law or equity, or that it could not be supported by a good faith argument for an extension, modification

or reversal of existing law. *N.J.A.C.* 6A:28-1.2. Therefore, at its meeting on June 28, 2022, the Commission voted to find the Complaint not frivolous, and to deny the request for sanctions.

**V. Decision**

Based on the foregoing, and in reviewing the facts in the light most favorable to the non-moving party (Complainant), the Commission voted to **grant** the Motion to Dismiss in its entirety because Complainant failed to plead sufficient, credible facts to support a finding that Respondent violated *N.J.S.A.* 18A:12-24.1(e) and/or *N.J.S.A.* 18A:12-24.1(g). The Commission also voted to find that the Complaint is not frivolous, and to deny Respondent's request for sanctions.

Pursuant to *N.J.S.A.* 18A:12-29(b), the Commission hereby notifies Complainant and Respondent that, for the reasons set forth above, this matter is dismissed. This decision is a final decision of an administrative agency and, therefore, it is appealable only to the Superior Court-Appellate Division. *See, New Jersey Court Rule 2:2-3(a).*

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Robert W. Bender, Chairperson

Mailing Date: June 28, 2022

***Resolution Adopting Decision  
in Connection with C03-22***

***Whereas***, at its meeting on May 24, 2022, the School Ethics Commission (Commission) considered the Complaint, the Motion to Dismiss in Lieu of Answer (Motion to Dismiss) and allegation of frivolous filing, and the response to the Motion to Dismiss and allegation of frivolous filing submitted in connection with the above-referenced matter; and

***Whereas***, at its meeting on May 24, 2022, the Commission discussed granting the Motion to Dismiss in its entirety for failure to plead sufficient, credible facts to support the allegations that Respondent violated *N.J.S.A.* 18A:12-24.1(e) and/or *N.J.S.A.* 18A:12-24.1(g); and

***Whereas***, at its meeting on May 24, 2022, the Commission discussed finding the Complaint not frivolous, and denying the request for sanctions; and

***Whereas***, at its meeting on June 28, 2022, the Commission reviewed and voted to approve the within decision as accurately memorializing its actions/findings from its meeting on May 24, 2022; and

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

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Robert W. Bender, Chairperson

I hereby certify that the Resolution was duly adopted by the School Ethics Commission at its public meeting on June 28, 2022.

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Kathryn A. Whalen, Esq.  
Director, School Ethics Commission