

***Before the School Ethics Commission
OAL Docket No.: EEC-04006-21
SEC Docket No.: C71-20
Final Decision***

***I/M/O Sheila Brogan,
Ridgewood Board of Education, Bergen County***

I. Procedural History

The above-captioned matter arises from a Complaint that was filed on October 30, 2020, by Laurie Weber (Complainant), alleging that Sheila Brogan (Respondent), a member of the Ridgewood Board of Education (Board), violated the School Ethics Act (Act), *N.J.S.A.* 18A:12-21 *et seq.* More specifically, the Complaint alleged that Respondent violated *N.J.S.A.* 18A:12-24(c) in Count 1, *N.J.S.A.* 18A:12-24(b) in Count 2, and *N.J.S.A.* 18A:12-24(b), *N.J.S.A.* 18A:12-24.1(e), and *N.J.S.A.* 18A:12-24.1(g) in Count 3.¹

At its meeting on February 23, 2021, and after considering Respondent's Motion to Dismiss in Lieu of Answer (Motion to Dismiss) and Complainant's response thereto, the School Ethics Commission (Commission) adopted a decision granting the Motion to Dismiss as to the allegations in Count 2 and Count 3, denying the Motion to Dismiss as to the allegations in Count 1, and directing Respondent to file an Answer to Complaint (Answer) to Count 1. On March 2, 2021, Respondent filed an Answer as directed.

Following receipt and review of Respondent's Answer, the Commission adopted a decision at its meeting on April 27, 2021, finding probable cause for the alleged violation of *N.J.S.A.* 18A:12-24(c) in Count 1. Based on its finding of probable cause, the Commission transmitted the within matter to the Office of Administrative Law (OAL) for a plenary hearing and, pursuant to *N.J.A.C.* 6A:28-10.7(b), the attorney for the Commission (Petitioner) was charged with prosecuting the allegations in the Complaint for which the Commission found probable cause to credit.

At the OAL, the contested matter was assigned to the Honorable Kimberly A. Moss, Administrative Law Judge (ALJ Moss). *Initial Decision* at 1. ALJ Moss conducted a hearing on September 23, 2021, and the parties filed closing briefs on December 6, 2021; immediately thereafter, the record was closed. *Id.*

On December 14, 2021, ALJ Moss issued an *Initial Decision* detailing her findings of fact and legal conclusions, and the Commission acknowledged receipt of same; therefore, the forty-five (45) day statutory period for the Commission to issue a Final Decision was January 28, 2022. Prior to January 28, 2022, the Commission requested a forty-five (45) day extension of

¹ The Complaint initially cited a violation of *N.J.S.A.* 18A:12-24(g) in Count 3, but was later amended to accurately reflect what was intended, namely a violation of *N.J.S.A.* 18A:12-24.1(g).

time to issue its final decision. Pursuant to *N.J.S.A.* 52:14B-10(c) and *N.J.A.C.* 1:1-18.8, and for good cause shown, the Commission was granted an extension until March 14, 2022.

On January 14, 2022, Petitioner filed Exceptions to the *Initial Decision*, and Respondent filed her reply to Complainant's Exceptions on January 18, 2022.

At a special meeting on February 4, 2022, the Commission considered the full record in this matter. Subsequently, and at a special meeting on February 25, 2022, and for the reasons more fully detailed below, the Commission voted to adopt ALJ Moss's findings of fact, but to reject the legal conclusion that Respondent did not violate *N.J.S.A.* 18A:12-24(c). Based on its finding of a violation, the Commission also voted to recommend a penalty of censure.

II. Remaining Allegations in the Complaint

In Count 1, Complainant states that, on May 7, 2020, the Board "met for the sole purpose of going into closed executive session with no public business on the meeting agenda." The topics to be discussed during executive session included "a legal matter and an [harassment, intimidation and bullying (HIB)] appeal." This special meeting took place "just three days after" the Board's regularly scheduled public meeting. Although the validity of calling the May 7, 2020, meeting was questioned in other matters filed with the Commission, Complainant takes exception to Respondent's involvement in the executive session discussion of "the legal matter." More specifically, the "legal matter" involved an "[Open Public Records Act (OPRA)] violation case" filed on behalf of Saurabh Dani (Mr. Dani), and relating to Respondent's and James Morgan's (Board Vice President) (Mr. Morgan) use of their personal email accounts to conduct Board business. As named parties in "the legal matter," Complainant argues that Respondent and Mr. Morgan "would have been required to recuse themselves from all discussions," yet the minutes and meeting video demonstrate that neither recused themselves from executive session. As such, Complainant argues that, "by failing to recuse herself from the executive session discussion of a legal matter to which she was a named party," Respondent "acted in her official capacity in a matter where she had a personal involvement and [a] clear interest in the outcome" in violation of *N.J.S.A.* 18A:12-24(c).

III. Initial Decision

After summarizing the testimony offered by Mr. Dani and Respondent at the hearing, ALJ Moss issued **findings of fact**. *Initial Decision*. at 2-3. More specifically, ALJ Moss found that Mr. Dani filed an OPRA lawsuit in Superior Court against the Board prior to the May 7, 2020, Board meeting. *Id.* at 4. Respondent was not a named party in Mr. Dani's lawsuit. *Id.* Respondent was required to provide a screenshot from her iPad and cell phone and a certification regarding the lawsuit, which she provided in March 2020. *Id.* Mr. Dani filed a "motion to enforce litigants," and a hearing scheduled for May 8, 2020, was adjourned until May 14, 2020. *Id.* Mr. Dani's motion would require, among other things, Respondent to provide additional screenshots from her iPad and cell phone. *Id.*

Mr. Dani was present at the May 7, 2020, Board meeting but, at that time, was not a Board member. *Id.* During the public session, Mr. Morgan (Board Vice President) stated that the "settlement of an OPRA lawsuit by a candidate ([Mr.] Dani) for the Board would be discussed," and Respondent "stated the matter should be discussed in executive session." *Id.*

During executive session, the Board “received an update” regarding the OPRA litigation filed by Mr. Dani. *Id.* According to ALJ Moss, the Board was advised there was a pending court date of May 14, 2020, and that, “based on what determination was made at the Superior Court hearing[,] if [Mr.] Dani was the prevailing party in the lawsuit, the Board would have to pay attorney fees.” *Id.* Respondent was present for the executive session discussion. *Id.* Despite what Mr. Morgan stated publicly, i.e., “that settlement of [Mr.] Dani[’s] lawsuit would be discussed,” “there was no discussion of the settlement of [Mr.] Dani[’s] lawsuit at the May 7, 2020, Board meeting.” *Id.* In addition, Respondent “did not discuss or vote on [Mr.] Dani[’s] lawsuit at the May 7, 2020, Board meeting.” *Id.*

ALJ Moss additionally found that, “[w]hen there are settlement negotiations[,] the Board is made aware of them.” *Id.* Further, the Board officers “may have more information regarding items than” the other Board members. *Id.* Respondent was not aware of the nature of the settlement negotiations in the lawsuit filed by Mr. Dani. *Id.*

Finally, at the May 18, 2020, and June 1, 2020, Board meetings, there were settlement discussions related to Mr. Dani’s litigation and, at both meetings, Respondent recused herself from those discussions. *Id.* at 5.

As stated by ALJ Moss, the issue in this matter “is whether [Respondent] being present in the executive session of May 7, 2020, violated *N.J.S.A.* 18A:12-24(c). *Id.* at 6. Referring to *Friends Retirement Concepts v. Bd. of Educ. of the Borough of Somerville* (356 N.J. Super. 203, 214 (Law Div. 2002)), a matter which “addresses members who vote on a matter,” ALJ Moss found:

At [the May 7, 2020, executive] session, the Board members received an update on [Mr.] Dani[’s] litigation by the Board’s attorney. The Board was informed of the hearing date of May 14, 2020. The Board was also informed by the attorney that they would have to pay attorney fees. There was no testimony that there was any discussion of [Mr.] Dani[’s] lawsuit other than the update by the attorney. There was no testimony that [Brogan] spoke to anyone during the executive session regarding [Mr.] Dani[’s] litigation. There was no action taken by the Board regarding [Mr.] Dani[’s] litigation during the May 7, 2020, executive session. There was no vote taken regarding [Mr.] Dani[’s] litigation at the May 7, 2020, meeting.

Based on the foregoing, ALJ Moss **concluded** that Respondent did not violate *N.J.S.A.* 18A:12-24(c) because she did not vote, there was no discussion of Mr. Dani’s litigation, and there was no action taken regarding Mr. Dani’s litigation. *Id.* at 6. As such, ALJ Moss ordered that the remaining Count of the Complaint (Count 1) be **dismissed**. *Id.*

IV. Exceptions

Petitioner’s Exceptions

Petitioner takes “exception to the ALJ’s ultimate conclusion” that Respondent’s conduct did not violate *N.J.S.A.* 18A:12-24(c). According to Petitioner, ALJ Moss “could not conclude

based on the evidence in the record that no other discussions of the lawsuit took place during that private Board meeting.” Instead, Petitioner argues that, “[t]he record clearly establishes that during the May 7, 2020[,] executive session, the Board discussed options, other than settlement, in responding to any judgment that granted [Mr.] Dani’s remaining motions in the OPRA lawsuit.” Moreover, the executive session meeting minutes indicate, “another option that was undoubtedly deliberated over by the Board” was the Board’s “option of appealing the judge’s decision.” Further, Petitioner argues Respondent testified that she “precluded herself from discussion about how the Board should respond to settlement offers,” but “never testified that she excluded herself from all discussions pertaining to how the [B]oard should respond to a judge’s decision in the OPRA matter.” Per Petitioner, “when counsel for the Commission pointed this distinction out, the ALJ dismissed it because Respondent ‘is not an attorney.’” However, Petitioner argues counsel “was only holding Respondent to the standards expected of a board member, rather than that of an attorney.”

Citing *I/M/O Anne Pirillo* (Washington Township Board of Education, Gloucester County (C12-04)), Petitioner maintains that the Commission has “explicitly found that a board member is precluded from being present and/or participating in discussions which deliberate actions relating to matters that they are indirectly involved in.” Petitioner asserts the record “clearly establishes that Respondent participated in executive session deliberations over the Board’s option of appealing a judge’s pending decision in an OPRA lawsuit that would require only Respondent and [Mr.] Morgan to disclose personal information about her email and devices.” Therefore, Petitioner asserts “there exists a preponderance of evidence that Respondent had an indirect personal interest in the outcome of the OPRA litigation, a public member could justifiably believe that her objectivity would be impaired during executive session discussions over the Board’s option of appealing a decision in that matter, or at least present a situation in which Respondent would be highly tempted to pursue her personal interests over those of the Board.” As such, and because Respondent failed to recuse herself from the discussion, Petitioner maintains that Respondent violated *N.J.S.A.* 18A:12-24(c).

As to the penalty, Petitioner argues that Respondent “engaged in conduct which could reasonably be seen as an attempt to gain a personal benefit in a pending litigation matter which she was personally involved in.” Further, Respondent was “fully aware of her ethical and statutory obligations as seen by the fact that she recused herself from the Board’s executive session discussion concerning the Board’s option of settling the same matter at the very next meeting.” According to Petitioner, Respondent “was not new to the job or unfamiliar with the process,” and since her “actions constitute a serious violation of the public trust,” and are most aligned to those in *I/M/O Rodriguez* (C09-15), “a penalty of no less than a censure is called for.”

Reply to Petitioner’s Exceptions

Despite Petitioner’s Exceptions, Respondent maintains that the Commission should “adopt [ALJ] Moss’s Decision as the Final Decision in the matter and thereby dismiss the Complaint.” Respondent asserts Petitioner’s attempt to “see if any settlement offers or terms may have been discussed” during the May 7, 2020, executive session, is “contrary to Respondent’s answers” and shows Petitioner’s “misrepresentation” of Respondent’s testimony. According to Respondent, she “repeatedly testified that settlement offers, terms, and how to proceed with the OPRA litigation were not discussed on May 7, 2020.” Moreover, Respondent asserts, “any discussions about settling the OPRA litigation took place on May 18th, not May 7th.”

Respondent contends the ALJ's decision and findings "were based on the testimony of [Respondent] and the record did not lack any support for Judge Moss's legal conclusions" and, therefore, "no violation of the Act can be established."

Respondent maintains her "careful actions highlight[] her intent to avoid the appearance of impropriety, and no reasonable member of the public would believe that their trust was violated by [Respondent's] refusal and recusal to speak on the OPRA litigation in three consecutive executive sessions." Respondent further argues she did not violate the Act because she did not engage in any conduct during the May 7, 2020, May 18, 2020, and/or June 1, 2020, executive session meetings other than simply being present in the room on May 7, 2020, when the Board "received a legal update." Respondent asserts she did not "speak or vote" during the May 7, 2020, executive session, and she "recused herself when there would be Board discussions and/or vote as to how the underlying OPRA litigation would progress." Therefore, Respondent maintains that the Commission should adopt ALJ Moss's *Initial Decision* dismissing the matter.

V. Analysis

Upon a careful and independent review of the facts and evidence set forth in the record, the Commission **adopts** ALJ Moss's findings of fact, but **rejects** the legal conclusion that Respondent did not violate *N.J.S.A.* 18A:12-24(c).

Pursuant to *N.J.S.A.* 18A:12-24(c):

No school official shall act in his official capacity in any matter where he, a member of his immediate family, or a business organization in which he has an interest, has a direct or indirect financial involvement that might reasonably be expected to impair his objectivity or independence of judgment. No school official shall act in his official capacity in any matter where he or a member of his immediate family has a personal involvement that is or creates some benefit to the school official or member of his immediate family;

According to the factual record, *as a direct result of a lawsuit filed by Mr. Dani against the Board*, Respondent "was required to provide a screenshot from her [personal] iPad and cellphone and a certification regarding the lawsuit." *Id.* at 4. In addition, depending on the court's ruling on a motion filed by Mr. Dani in that lawsuit, which was *pending* at the time of the Board's meeting on May 7, 2021, Respondent would be required "to provide additional screenshots from her [personal] iPad and cellphone." *Id.* (emphasis added).

Based on the foregoing facts, it is beyond dispute that because Respondent was required to provide screenshots from her personal iPad and cellphone and, depending on the ruling of a pending motion, *might* have to provide additional screenshots from her personal iPad and cellphone, Respondent had a personal interest and involvement in the lawsuit filed by Mr. Dani against the Board. The only remaining question is whether, given her personal interest and involvement in the lawsuit filed by Mr. Dani, Respondent violated *N.J.S.A.* 18A:12-24(c) by being present in executive session on May 7, 2021.

As to this question, based on case precedent, the Commission answers yes. In [*I/M/O Michael Kilmurray*](#), the Commission specifically stated, "[w]hen a school official has a conflict

of interest of which the public is aware, and that school official goes behind closed doors when that item is discussed, the situation creates a justifiable impression among the public that their trust is being violated.” Lacey Township Board of Education, Docket No. C12-94, at 3. The Commission continued:

In the present case, the public may believe that the respondent is actively participating in the discussion behind closed doors, that the board member will tell his relative what was said, or at the least, that the other board members will be inhibited in their discussion of the matter because of his presence. ... The board member’s rights are not circumscribed by leaving the private session only while that particular item is being discussed. This is consistent with the Commission’s public advisory opinion A33-95. *This opinion advised that a board member who has a conflict prohibiting him from negotiating would be in violation of the Act if he sat on the board’s closed session strategy discussions.* This advisory followed the Superior Court-Appellate Division’s ruling in *Scotch Plains v. Syversten*, 251 N.J. 566 (App. Div. 1991) (*School board member who had litigation pending against the district could not attend executive sessions of the board discussing that litigation*). ...

Id. (emphasis added).

In addition, in [*I/M/O Anne Pirillo*](#), the Commission found that, because Respondent Pirillo was present and participated in an executive session discussion concerning a matter (bids from commercial vendors) that her spouse had a financial interest, she too violated *N.J.S.A.* 18A:12-24(c). Washington Township Board of Education, Docket No. C12-04.

In addition, the Commission notes that, during the public portion of the Board meeting on May 7, 2021, which immediately preceded adjournment to executive session, Mr. Morgan publicly “stated that *the settlement* of an OPRA lawsuit by a candidate ([Mr.] Dani) for the Board *would be discussed.*” *Id.* at 4 (emphasis added). Furthermore, immediately following *the substance* of Mr. Morgan’s public statement, Respondent acknowledged that the matter, namely “settlement of an OPRA lawsuit,” “*should be discussed in executive session.*” *Id.* (emphasis added). In this way, regardless of whether a settlement was actually discussed, Respondent was under the belief that a settlement of a lawsuit in which she had a personal interest and involved would be discussed.

With the above in mind, the Commission must reiterate that when, as here, a school official has a conflict of interest regarding a matter, recusal from any and all discussions and Board action is **absolute**. See [*Advisory Opinion A24-16*](#) (“...a conflict would present itself requiring *absolute recusal* from that matter and abstaining from all votes” (emphasis added)).” Because recusal must be absolute, receiving an update or information of any kind regarding a matter in which a school official has a conflict of interest (in this case, a personal interest and involvement in a pending lawsuit), especially when it was publicly stated that a “settlement” regarding the matter would be discussed, is **strictly prohibited**. The fact that the Board “only” received information about the next hearing date; was informed that the Board would have to pay attorney’s fees; Respondent did not speak to anyone; and the Board did not take action or vote on the litigation after executive session is of no moment, and does not preclude the Commission from finding a violation of *N.J.S.A.* 18A:12-24(c). *Id.* at 4. Contrary to Respondent’s argument,

recusal is absolute, and cannot be selectively practiced. Selectively choosing when to recuse subverts the purpose of a recusal.

Moreover, when Mr. Morgan *publicly* stated that “settlement of [Mr.] Dani[’s] lawsuit would be discussed” by the Board in executive session, that should have cued Respondent to immediately recognize that, due to her conflict of interest (her personal interest and involvement in Mr. Dani’s lawsuit), she had to recuse herself from that discussion and, therefore, **not** be in executive session (at least for the discussion of Mr. Dani’s litigation). By merely being physically present in executive session, Respondent directly impacted, whether deliberately or otherwise, the ability of the non-conflicted Board members and Board counsel to engage in a candid conversation about the litigation. Although it was fortunate that substantive settlement negotiations did not occur, a fact which could have been directly attributable to Respondent’s physical presence in executive session, Respondent’s “luck” does not mean that she did not violate the Act by being present for a discussion concerning a matter in which she has a conflict of interest.

Furthermore, the fact that even this limited conversation took place in executive session and not in public only underscores the confidential nature of the information that was discussed – if the public was not able to hear the information, a fact that Respondent undoubtedly recognized because she publicly stated that the matter should be discussed in executive session, it necessarily follows that conflicted members of the Board (Respondent) must not hear it either.

Although it can be a challenge for a Board member to recuse herself from a matter when it is being discussed in public, it is simple for her to do so when a matter is discussed in executive session. Having been advised, in public, that a settlement regarding Mr. Dani’s lawsuit would be discussed in executive session, Respondent’s decision to attend executive session, regardless of what was actually discussed during executive session, violates *N.J.S.A. 18A:12-24(c)*.

VI. Decision

For the reasons more fully detailed above, the Commission **adopts** ALJ Moss’s findings of fact, but **rejects** the legal conclusion that Respondent did not violate *N.J.S.A. 18A:12-24(c)*.

VII. Penalty

Having found that Respondent violated *N.J.S.A. 18A:12-24(c)*, and following its review of the facts and evidence set forth in the record, the Commission recommends a penalty of **censure**. In recommending a penalty of censure, the Commission finds *I/M/O Michael Kilmurray* and *I/M/O Anne Pirillo* to be most instructive.

In both *I/M/O Michael Kilmurray* and *I/M/O Anne Pirillo*, cases which are factually analogous – although not identical – to the within matter, the Commission recommended censure for the violations of the Act. Although, in this case, there is no evidence that Respondent actively participated in the executive session discussion that ensued, the Commission finds that censure is appropriate because Respondent was undoubtedly on notice that a settlement would be discussed (even if it did not actually occur); publicly acknowledged and overtly stated that the conversation regarding the lawsuit should occur in executive session; and then she seconded the motion to

adjourn to executive session. R-1. In short, Respondent publicly commented on a matter in which she had a conflict of interest (noting its confidentiality); she seconded the motion to adjourn to executive session to discuss a matter in which she had a conflict of interest; and then attended executive session knowing that a matter in which she had a conflict of interest would be discussed. Based on all these facts, and because Respondent could have easily recused herself from the discussion concerning Mr. Dani's lawsuit, the Commission does not see Respondent's actions as "mere attendance" in executive session, but rather deliberate disregard of her clear conflict of interest.

For all the aforementioned reasons, the Commission recommends that Respondent be **censured** for having violated *N.J.S.A.* 18A:12-24(c).

Pursuant to *N.J.S.A.* 18A:12-29(c), this decision shall be forwarded to the Commissioner of Education (Commissioner) for review of the Commission's recommended sanctions. Parties may either: 1) file exceptions to the recommended sanction; 2) file an appeal of the Commission's findings of violations of the Act; or 3) file both exceptions to the recommended sanction and an appeal of the Commission's findings of violations of the Act.

Parties taking exception to the recommended sanctions of the Commission but *not disputing* the Commission's findings of violations may file, within **thirteen (13) days** from the date the Commission's decision is forwarded to the Commissioner, written exceptions regarding the recommended sanctions 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 of any comments filed must be sent to the Commission (school.ethics@doe.nj.gov) and all other parties.

Parties seeking to appeal the Commission's findings of violations *must* file an appeal pursuant to the standards set forth at *N.J.A.C.* 6A:4, *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 mailing date to the parties, as indicated below. In such cases, the Commissioner's review of the Commission's recommended sanctions will be deferred and incorporated into the Commissioner's review of the findings of violations 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 brief on appeal.

Robert W. Bender, Chairperson
School Ethics Commission

Mailing Date: February 25, 2022

***Resolution Adopting Decision in
Connection with C71-20***

Whereas, at its meeting on April 27, 2021, the School Ethics Commission (Commission) voted to find probable cause to credit the allegation that Respondent violated *N.J.S.A.* 18A:12-24(c), and voted to transmit the above-captioned matter to the Office of Administrative Law (OAL) for a plenary hearing; and

Whereas, at the OAL, the attorney for the Commission (Petitioner) was responsible for prosecuting the allegations for which it found probable cause; and

Whereas, following a hearing and the submission of closing briefs, the Honorable Kimberly A. Moss, Administrative Law Judge (ALJ Moss) issued an *Initial Decision* dated December 14, 2021; and

Whereas, in her *Initial Decision*, ALJ Moss found that Respondent did not violate *N.J.S.A.* 18A:12-24(c), and dismissed the above-captioned matter; and

Whereas, on January 14, 2022, Petitioner filed Exceptions to ALJ Moss's *Initial Decision*, and Respondent filed a reply to Petitioner's Exceptions on January 18, 2022; and

Whereas, at a special meeting on February 4, 2022, the Commission reviewed and discussed the full record in the above-captioned matter; and

Whereas, at a special meeting on February 4, 2022, the Commission discussed adopting the findings of facts; rejecting the legal conclusion that Respondent did not violate *N.J.S.A.* 18A:12-24(c); and recommending a penalty of censure; and

Whereas, at a special meeting on February 25, 2022, the Commission reviewed and voted to approve the within decision as accurately memorializing its actions/findings from its special meeting on February 4, 2022; and

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

Robert W. Bender, Chairperson

I hereby certify that this Resolution was duly adopted by the School Ethics Commission at a special meeting on February 25, 2022.

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