

Before the School Ethics Commission
Docket No.: C03-23
Decision on Motion to Dismiss

Judy Mayer,
Complainant

v.

Timothy Berrios,
Parsippany-Troy Hills Board of Education, Morris County,
Respondent

I. Procedural History

The above-captioned matter arises from a Complaint that was filed with the School Ethics Commission (Commission) on January 6, 2023, by Judy Mayer (Complainant), alleging that Timothy Berrios (Respondent), a member of the Parsippany-Troy Hills 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) of the Code of Ethics for School Board Members (Code).

On January 9, 2023, the Complaint was served on Respondent via electronic mail, notifying him that ethics charges had been filed against him with the Commission, and advising that he had twenty (20) days to file a responsive pleading.¹ On February 10, 2023, Respondent filed a Motion to Dismiss in Lieu of Answer (Motion to Dismiss), and Complainant filed a response to the Motion to Dismiss on February 10, 2023, which was amended on February 12, 2023.

The parties were notified by correspondence dated March 13, 2023, that the above-captioned matter would be discussed by the Commission at its meeting on March 21, 2023, in order to make a determination regarding the Motion to Dismiss. Following its discussion on March 21, 2023, the Commission adopted a decision at its meeting on April 25, 2023, 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).

¹ In order to conduct business during the Coronavirus (COVID-19) pandemic, the Commission implemented an electronic filing system, which remains a permissible method by which the Commission and parties can effectuate service of process. Consequently, service of process was effectuated by the Commission through electronic transmission only.

II. Summary of the Pleadings

A. *The Complaint*

Complainant states that, on July 11, 2022, Respondent, a member and President of the Board, sent an email regarding the 2022 Board election “to local [Republican] club members without any disclaimer that he was seated as a [Board m]ember or as the [Board] President and without any disclaimer that he does not speak for the [Board] or its members.” Complainant notes that four other Board members were included as recipients of the original email, and were also included on the forwarded email.

By failing to disclaim his July 11, 2022, email message, Complainant asserts that Respondent violated *N.J.S.A.* 18A:12-24.1(e).

B. *Motion to Dismiss*

In his Motion to Dismiss, Respondent argues that on July 7, 2022, and “shortly before the deadline for filing petitions to run in the upcoming school election that November,” he sent an email to a fellow member of the Republican Club, and to members of the Board who he believed were also members of the Republic Club, in order “to generate interest in encouraging like-minded to run for the Board.” Respondent maintains that he “emailed them in his private capacity, from his personal email account to their personal email addresses, and no ... [Parsippany-Troy Hills School District (District)] resources were used for that communication.”

Respondent additionally notes that, although the Complaint was timely filed, Complainant had knowledge of the facts at issue “no later than July 13, 2022.” Nonetheless, Complainant “waited until January 6, 2023, shortly before expiration of the Commission’s 180-day filing deadline, and the day following the Board’s 2023 reorganization meeting, after [R]espondent declined to support her re-election as Board Vice President the evening before.” As such, the Complaint is “nothing more than a score-settling payback,” and Complainant “knowingly sat on this alleged violation until the 180-day limitations period was about to expire.” Moreover, she filed her Complaint “the day after the Board reorganization meeting where she angrily confronted [R]espondent for not supporting her re-election as Vice President.” For this reason alone, the Complaint should be dismissed.

Returning to the facts of the case, Respondent maintains “Respondent’s email, on its face, was plainly intended to spur interest among likeminded citizens to throw their hat in the ring for the open Board seats in the upcoming school election four months away”; “[i]t was not posted on publicly accessible social media or otherwise broadcast to the community at large in a manner suggesting he was speaking in his official capacity on behalf of the Board”; “it was sent privately to five individuals, four of whom were fellow Board members, and all of whom would have plainly understood, from the face of the email itself, that he was not speaking for, or purporting to make commitments on behalf of, the Board itself”; and “it is clear from the email that [R]espondent was attempting to generate opposition to two incumbents he anticipated would be running that fall.”

Respondent also reiterates that “the email did not engage in any personalized attacks against any Board member or [D]istrict employee, disclose confidential district information, or attempt to direct or influence any ongoing [D]istrict operations,” and instead was sent to “encourage members of the community sharing common values to pursue a seat on the Board in the upcoming election months away.” Consequently, it was “core political speech in its purest form.”

In this case, Respondent argues that a disclaimer was not required because “[n]o reasonable reader could possibly have construed [R]espondent’s email as anything other than what it plainly was: a private political communication to several like-minded citizens.” Per Respondent, “[t]here was no conceivable possibility of implied endorsement by the Board since the recipients, four of whom were Board members themselves, plainly would have recognized it as election strategizing among citizens with similar views.” Moreover, there is no evidence that Respondent used Board resources to send his message, and there is no proof that Respondent’s email “risked compromising the Board by implying Board endorsement that did not exist.” Even if a disclaimer should have been utilized, which Respondent denies, Respondent argues that the Commission’s recent decisions, which were issued after the email message at question was sent (in July 2022), recognizes that clarification was needed regarding the use of disclaimers; in this way, Respondent should not be disciplined for proceeding in good faith.

For the foregoing reasons, Respondent contends that the Complaint should be dismissed.

C. *Response to Motion to Dismiss*

In her response to the Motion to Dismiss, Complainant denies that she filed her Complaint “out of ‘sour grapes’ for not having his support.” Instead, Complainant reiterates that she filed her Complaint only after Respondent indicated, when confronted by Complainant, that he did not see anything wrong with the email message he sent. Based on the information she has received, Complainant believes that when Board members make a statement, “it should always be noted that [they] are not speaking for the [B]oard but stating [their] personal opinion.” Per Complainant, by including a disclaimer on all communications, the integrity of the Board is maintained, as are the positions of Board members. Had Respondent acknowledged he made a mistake by not including a disclaimer, Complainant indicates she would not have filed a complaint.

Because Respondent failed to include a disclaimer in his email, Complainant maintains he violated *N.J.S.A. 18A:12-24.1(e)*, and the Complaint should not be dismissed.

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).

B. *Alleged Violations of the Act*

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

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.

Pursuant to *N.J.A.C.* 6A:28-6.4(a), 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 his duties such that, by its nature, had the potential to compromise the [B]oard.”

Following its review, the Commission finds that even if the facts as asserted 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). Complainant suggests that merely because Respondent did not include a disclaimer on the July 11, 2022, email message that he sent from his personal email account to five people, which was then forwarded to at least one other individual, Respondent “made personal promises or took action beyond the scope of his duties such that, by its nature, had the potential to compromise the [B]oard.”

As the Commission explained in [Aziz v. Nikitinsky et al., Monroe Township Board of Education, Middlesex County \(Docket No. C56-22\)](#):

... Although social media activity by a school official can be regarded as action ([I/M/O Treston, Randolph Township Board of Education, Morris County, Docket No. C71-18](#) and [Kwapniewski v. Curioni, Lodi Board of Education, Bergen County, Docket No. C70-17](#)), it is only when certain competent and credible factual evidence is proffered therewith that a violation can be substantiated.

As a general matter, a school official does not violate the Act merely because he/she engages in social media activity. Instead, the Commission’s analysis is guided by whether a reasonable member of the public could perceive that the school official is speaking in his or her official capacity or pursuant to his or her official duties. Whether a school official is perceived as speaking in his or her official capacity and pursuant to his or her official duties turns, in large part, on the content of the speech. If the speech in question has absolutely no correlation or relationship to the business of the Board and/or its operations and, therefore, could not possibly be regarded as a statement or position on behalf of the Board (as a body), a school official will not violate the Act. Conversely, if the speech in question *does* relate to the business of the Board and/or its operations, it

is then reasonable for the reader to perceive the speech as being offered in an official capacity and pursuant to his or her official duties. Nonetheless, the filing party would still need to prove *all* elements of the cited provision of the Act ...

Moreover, the use of a disclaimer on social media can help to clarify whether an individual is speaking in his or her official capacity and pursuant to his or her official duties; however, the presence of a disclaimer is not dispositive. ... In addition, if a school official utilizes an appropriate disclaimer, but the content or substance of the statements would still lead a reasonable member of the public to believe that the school official is speaking in his or her official capacity or pursuant to his or her official duties, then the disclaimer will be inadequate and of no force or effect, and the social media activity could violate the Act. *See I/M/O Treston.*

Adding to the Commission's analysis as set forth above, just as the inclusion of a disclaimer is not dispositive, neither is the omission of a disclaimer. The fact that a school official may engage in social media activity or, in this case, send a private email communication, does not mean that they must always include a disclaimer and that the failure to do so, in and of itself, is a violation(s) of their ethical obligations. Instead, when evaluating whether a school official may have violated the Act when using any and all social media platforms, online magazines or newspapers, blogs, or any other electronic or online medium for communication, the focus of the analysis must also be on the content of the speech, and whether a reasonable member of the public could perceive that the school official is speaking in their official capacity or pursuant to their official duties. If a reasonable member of the public could perceive that the school official is speaking in their official capacity or pursuant to their official duties, regardless of whether a disclaimer is used, a violation(s) of the Act may be established if the filing party can prove *all* elements of the cited provision of the Act. Conversely, if a reasonable member of the public could **not** perceive that the school official is speaking in their official capacity or pursuant to their official duties, regardless of whether a disclaimer is used, a violation(s) of the Act will not be substantiated. Although the use of a disclaimer can help to clarify the capacity in which one is speaking, the presence of a disclaimer does not mean that the school official cannot still be regarded as speaking in an official capacity, and the absence of a disclaimer does not mean that the school official is automatically speaking in their official capacity.

With the above in mind, and because the email message in question was sent from Respondent's personal email account to a select number of individuals, the Commission finds that a reasonable member of the public could not possibly perceive Respondent's email message as one being made in his official capacity as Board President and/or as a member of the Board, or pursuant to his official duties. The fact that nearly all of the initial recipients were Board members, yet the email message was sent to their personal email accounts and not to their official Board accounts, only reinforces the non-official nature of Respondent's communication. Further, and although the substance of Respondent's email message concerned the upcoming Board election, it was nothing more than his attempt to garner the interest of others in running (or rerunning) for a seat on the Board and such action, based on the facts and circumstances here, is not violative of *N.J.S.A. 18A:12-24.1(e)*.

Accordingly, the Commission finds that the alleged violation of *N.J.S.A.* 18A:12-24.1(e) should be dismissed.

IV. 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).

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).*

Robert W. Bender, Chairperson

Mailing Date: April 25, 2023

***Resolution Adopting Decision
in Connection with C03-23***

Whereas, at its meeting on March 21, 2023, the School Ethics Commission (Commission) considered the Amended Complaint, the Motion to Dismiss in Lieu of Answer (Motion to Dismiss), and the response to the Motion to Dismiss submitted in connection with the above-referenced matter; and

Whereas, at its meeting on March 21, 2023, 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

Whereas, at its meeting on April 25, 2023, the Commission reviewed and voted to approve the within decision as accurately memorializing its actions/findings from its meeting on March 21, 2023; 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.

Robert W. Bender, Chairperson

I hereby certify that the Resolution was duly adopted by the School Ethics Commission at its public meeting on April 25, 2023.

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