

Before the School Ethics Commission
OAL Docket No.: EEC-09465-22
SEC Docket No.: C20-22
Final Decision

**Ronald Donnerstag, Kristin Lanko, Lisa Snider, Wendy Vacante, Matthew Delprete,
Patricia Fortus, Jaime Cestare, Scott Alfano, and Lynne Sweezo,
*Complainants***

v.

**Merissa Borawski,
Central Regional Board of Education, Ocean County,
*Respondent***

I. Procedural History

The above-captioned matter arises from a Complaint that was filed on March 3, 2022, by Ronald Donnerstag, Kristin Lanko, Lisa Snider, Wendy Vacante, Matthew Delprete, Patricia Fortus, Jaime Cestare, Scott Alfano, and Lynne Sweezo (collectively referred to as Complainants), alleging that Merissa Borawski (Respondent), a member of the Central Regional Board of Education (Board), violated the School Ethics Act (Act), *N.J.S.A. 18A:12-21 et seq.* More specifically, Complainants aver that Respondent violated *N.J.S.A. 18A:12-24.1(a)* in Counts 1-4 of the Code of Ethics for School Board Members (Code) and *N.J.S.A. 18A:12-24.1(e)* of the Code in Counts 1-7, stemming from her social media postings.

On April 11, 2022, Respondent filed a Motion to Dismiss in Lieu of Answer (Motion to Dismiss), and Complainants filed a response to the Motion to Dismiss on May 2, 2022. In addition to filing a response to the Motion to Dismiss, Complainants also sought leave from the Commission to file an Amended Complaint to include new/additional violations of *N.J.S.A. 18A:12-24.1(a)* and *N.J.S.A. 18A:12-24.1(e)* of the Code (in proposed Counts 8-12), and to submit new exhibits. The Commission granted Complainants' application at its meeting on May 24, 2022. Complainants then filed a "Motion to Supplement the Record" with additional exhibits to support their response to the Motion to Dismiss. Respondent relied on its original Motion to Dismiss in response to the Amended Complaint and did not object to the Motion to Supplement the Record.

At its meeting on August 23, 2022, the Commission adopted a decision granting the Motion to Dismiss as to the alleged violations of *N.J.S.A. 18A:12-24.1(a)* in Counts 1-4 and Counts 8-12, and as to the alleged violations of *N.J.S.A. 18A:12-24.1(e)* in Count 3 and Counts 6-7, but denying the Motion to Dismiss as to the alleged violations of *N.J.S.A. 18A:12-24.1(e)* in Counts 1-2, Counts 4-5, and Counts 8-12 of the Complaint. In light of its decision, the Commission also directed Respondent to file an Answer to Complaint (Answer) as to the remaining allegations (*N.J.S.A. 18A:12-24.1(e)* in Counts 1-2, Counts 4-5, and Counts 8-12), and

to transmit the above-captioned matter to the Office of Administrative Law (OAL) following receipt of the Answer.

On August 25, 2022, Complainants filed a request for interlocutory review with the Commissioner of Education, challenging the Commission's decision to dismiss portions of the Complaint. Respondent filed a cross-motion for interlocutory review, challenging the portions of the Commission's decision that denied her Motion to Dismiss. The Commissioner of Education denied the requests for interlocutory review on September 6, 2022. Thereafter, Respondent filed an Answer, which was subsequently amended at the OAL.

At the OAL, following Complainants' Motion for Summary Decision, the Administrative Law Judge (ALJ) issued an Initial Decision on May 30, 2023, concluding that Respondent violated *N.J.S.A.* 18A:12-24.1(e), and recommending that Respondent be censured. The parties did not file exceptions to the Initial Decision.

At its meetings on June 27, 2023, and July 25, 2023, the Commission discussed the above-captioned matter, and at its meeting on August 22, 2023, the Commission voted to reject the Initial Decision and dismiss the above-captioned matter.

II. Initial Decision

Respondent was sworn in as a member of the Board on January 7, 2022. *Initial Decision* at 3. Thereafter, Respondent posted and/or shared a series of postings on her public Facebook page, without a disclaimer, as detailed below:

- On January 17, 2022, Respondent shared a post regarding the State lawsuit against vaccine and testing requirements, stating "You should really consider forming new unions and organized labor actions... There is nothing for us to do but fight." *Id.* at 3-4.
- On January 17, 2022, Respondent posted a video that compared the treatment of unvaccinated individuals to the discrimination experienced by Jewish people. *Id.* at 4.
- On January 18, 2022, Respondent shared a post related to advocating for your rights against vaccinations. *Ibid.*
- On February 10, 2022, Respondent posted an invitation for union members to a roundtable discussion against Covid mandates sponsored by a grassroots organization for medical freedom. *Ibid.*
- On March 7, 2022, Respondent posted a picture of a kid giving a thumbs up because the child was not wearing a mask and noting she does not listen to the Governor. *Ibid.*
- On April 6, 2022, Respondent shared several posts and comments related to her perception of how gender identity is being taught in NJ schools, with the main post stating, "Do you know what you (sic) children are being taught in NJ? Educate yourself and make changes in your district." *Ibid.*
- On April 9, 2022, Respondent posted a video from Fox News related to teaching gender identity and shared a post, stating "This is a sick war on our children! But we have the power to stop it..." *Id.* at 5.

- On April 11, 2022, Respondent shared a post urging parents to call the Governor to “OPPOSE the health Education standards that will be implemented this fall!” *Ibid.*
- On April 14, 2022, Respondent shared a post asking the public to watch “Jeff Van Drew blast Governor Phil Murphy and the Radical Left ... for their bizarre and absurd plans to teach children as young as 6 and 7 years old about ‘gender ID’ and ‘gender change’...” *Id.* at 6.

Regarding Respondent’s first post on January 17, 2022, which encourages teaching staff members who are part of the local union to form new unions and organized labor actions, the ALJ asserts that the message “is clear language for a call to fight the status quo including organizing labor actions.” *Id.* at 9. The ALJ notes, “members of the public could interpret this request from the [Board] to fight existing union structure,” and consequently, the local union and the New Jersey Education Association filed an unfair practice claim against the Board. *Ibid.* Therefore, the ALJ concludes that because Respondent put the Board at risk for litigation, Respondent’s Facebook post compromised the Board in violation of *N.J.S.A.* 18A:12-24.1(e). *Id.* at 10.

The ALJ found that, as to Respondent’s second post on January 17, 2022, which equated the treatment of unvaccinated individuals to the illegal discrimination experienced by Jewish people, Respondent was “distasteful and reckless.” *Ibid.* The ALJ found that without a disclaimer indicating that the views were personal, the message had the potential to compromise the Board in violation of *N.J.S.A.* 18A:12-24.1(e). *Id.* at 11.

Respondent’s posts on January 18, February 10, and March 7, 2022, relate to Respondent’s opposition to mandatory COVID vaccines and masking. *Id.* at 11-14. The ALJ found the postings violate *N.J.S.A.* 18A:12-24.1(e) because they have the potential to compromise the Board, as Board members are charged with upholding laws of the State, and Respondent is encouraging students to defy them. *Ibid.*

Regarding Respondent’s social media posts on April 6, April 9, April 11, and April 14, 2022, which relate to Respondent’s disagreement with how gender identity is taught in the State, the ALJ emphasized the need for a disclaimer. *Id.* at 14-17. The ALJ found the posts compromised the Board due to public outcry and the need for the Board to distance itself from the posts through the passage of a resolution, as well as the introduction of a Board social media policy. *Ibid.* As such, the ALJ concluded the posts violate *N.J.S.A.* 18A:12-24.1(e). *Ibid.*

The ALJ recommended a penalty of censure for the violations as Respondent failed to exercise appropriate discretion when she posted her personal views and advocated for action without a clear disclaimer. *Id.* at 17-19. The ALJ found a censure is warranted as Respondent’s actions were not de minimis, it was not a one-time act, and Respondent continued to post after the Board requested that they be removed. *Ibid.*

III. Analysis

Upon a thorough, careful, and independent review of the record, the Commission disagrees with the ALJ's conclusion that Respondent violated *N.J.S.A.* 18A:12-24.1(e), and instead dismisses this matter.

In considering whether a school official violates the Act due to the engagement in social media activity, 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. *Aziz v. Nikitinsky, et al., Monroe Township Board of Education*, C-56-22 (October 17, 2022), at 8. "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 may then be reasonable for the reader to perceive the speech as being offered in an official capacity and pursuant to his or her official duties, provided there is a sufficient nexus between the individual's social media page and his or her role/membership on the Board. *Ibid.* 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/or pursuant to his or her official duties; however, "the presence of a disclaimer is not dispositive." *Ibid.*

In this matter, the Commission finds that, while the subject matter of the Facebook posts – State lawsuits related to union activity, vaccines and masking in schools, and gender identity standards – may relate to the business of the Board, there is an insufficient nexus between Respondent's personal Facebook page and her membership on the Board, such that a reasonable member of the public would not perceive that Respondent is speaking pursuant to her official duties. *See Hodrinsky v. Faussette, Hasbrouck Heights Board of Education*, C11-21 (August 30, 2021) (dismissing a Complaint when there lacked a nexus between the respondent's Facebook account and his role/membership on the Board as there was no indication that he referenced, or otherwise relies upon, his position on the Board on his social media account). The posts at issue here do not mention Respondent's membership on the Board nor does she advertise or rely upon her Board membership when publishing material on her social media page. In short, there is no factual evidence that the statements/posts on her Facebook account were made in her capacity as a member of the Board, or had the appearance of being representative of, or attributable to the Board. The fact that some people may be aware that Respondent is a Board member, as they know who she is, does not result in her private posts becoming in her official capacity. Respondent may have used her Facebook page to reach constituents in her campaign, but her Facebook page did not make any reference to the Board nor her membership on the same and her posts reflect the same positions on which she previously campaigned and ultimately resulted in her election onto the Board.

Under *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 Commission finds, given that Respondent's Facebook posts were on

her private page and lacked the necessary nexus to her position on the Board, her actions were not beyond the scope of her duties, and therefore, a violation of *N.J.S.A.* 18A:12-24.1(e) cannot be established.

Although the Commission is constrained to dismiss the above-captioned matter, it would be remiss if it did not address the divisive, inflammatory, and hostile nature of Respondent's public postings. Comparing the treatment of unvaccinated people to Jewish people, encouraging lawsuits against the State, and referring to the "sick war on our children" regarding gender identity teachings runs counter to the level of decorum expected from a publicly elected school official who is charged with serving New Jersey's student population. Although the Commission acknowledges the sanctity of the First Amendment, board members should recognize and refrain from inappropriate communications that have no place in the educational setting.

Finally, as the Commission has repeatedly noted, how school officials conduct themselves outside the scope of their duties as school officials is best addressed at the time of election. It is the public, not the Commission, who ultimately decides which individuals in their community are best suited to serve their students.

IV. Decision

Upon review, the Commission rejects the Initial Decision and concludes that Respondent did not violate *N.J.S.A.* 18A:12-24.1(e). As such, the Commission dismisses the above-captioned matter.

Therefore, this is a final agency decision and is appealable only to the Superior Court-Appellate Division. *See, N.J.A.C.* 6A:28-10.11 and *New Jersey Court Rule* 2:2-3(a).

Robert W. Bender, Chairperson

Mailing Date: August 22, 2023

***Resolution Adopting Decision
in Connection with C20-22***

Whereas, at its meeting on August 23, 2022, the School Ethics Commission (Commission) voted to transmit the above-captioned matter to the to the Office of Administrative Law (OAL) for a plenary hearing; and

Whereas, the Administrative Law Judge (ALJ) issued an Initial Decision dated May 30, 2023; and

Whereas, in the Initial Decision, the ALJ found that Respondent violated *N.J.S.A.* 18A:12-24.1(e), and recommended that Respondent be censured; and

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

Whereas, at its meetings on June 27, 2023, and July 25, 2023, the Commission reviewed the record in this matter; and

Whereas, at its meeting on July 25, 2023, the Commission discussed rejecting the Initial Decision and dismissing the above-captioned matter; and

Whereas, at its meeting on August 22, 2023, the Commission reviewed and voted to approve the within decision as accurately memorializing its actions/findings from its meeting on July 25, 2023; 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 its meeting on August 22, 2023.

Brigid C. Martens, Acting Director
School Ethics Commission