

Before the School Ethics Commission
OAL Docket No.: EEC-06640-22
SEC Docket No.: C87-21
Final Decision

In the Matter of Kerry Anne Mastrofilipo,
Lodi Board of Education, Bergen County,
Respondent

I. Procedural History

The above-captioned matter arises from a Complaint that was filed on November 29, 2021, by Nancy Cardone (Complainant), alleging that Kerry Anne Mastrofilipo (Respondent), a member of the Lodi 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(b) and *N.J.S.A.* 18A:12-24(c) in Count 1, and violated *N.J.S.A.* 18A:12-24.1(a), *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) in Count 2 when she attended executive session while her husband's candidacy for the Board was discussed.

At its meeting on April 26, 2022, and after reviewing Respondent's Motion to Dismiss in Lieu of an Answer (Motion to Dismiss) and allegation of frivolous filing, and Complainant's response thereto, the School Ethics Commission (Commission) adopted a decision granting the Motion to Dismiss as to the alleged violation of *N.J.S.A.* 18A:12-24.1(a) in Count 2; denying the Motion to Dismiss as to all other allegations; and finding the Complaint not frivolous and denying Respondent's request for sanctions. Based on its decision, the Commission also directed Respondent to file an Answer to Complaint (Answer) as to the remaining allegations, which she did on May 13, 2022.

Thereafter, at its meeting on July 26, 2022, the Commission voted to find probable cause to credit the alleged violations of *N.J.S.A.* 18A:12-24(b) and *N.J.S.A.* 18A:12-24(c) in Count 1, but not to find probable cause to credit the purported violations of *N.J.S.A.* 18A:12-24.1(e) and/or *N.J.S.A.* 18A:12-24.1(g) in Count 2. Based on its finding of probable cause, the Commission voted to transmit the within matter to the Office of Administrative Law (OAL) for a hearing and, pursuant to *N.J.A.C.* 6A:28-10.7(b),¹ the attorney for the Commission (Petitioner) was charged with prosecuting the allegations in the Complaint.

Following a hearing at the OAL, the Administrative Law Judge (ALJ) issued an Initial Decision on August 16, 2023, concluding Respondent did not violate *N.J.S.A.* 18A:12-24(b) and/or *N.J.S.A.* 18A:12-24(c), and ordering the dismissal of the matter. Petitioner filed

¹ This citation refers to the regulation that was in effect at the time of the probable cause determination.

exceptions to the Initial Decision, in accordance with *N.J.A.C.* 1:1-18.4, and Respondent filed a reply thereto.

At its meeting on October 17, 2023, the Commission considered the full record in this matter. Thereafter, at its meeting on November 28, 2023, the Commission voted to adopt the ALJ's findings of fact but reject the ALJ's legal conclusions, and instead the Commission found that Respondent violated *N.J.S.A.* 18A:12-24(b) and *N.J.S.A.* 18A:12-24(c), and recommended that a penalty of censure be imposed.

II. Initial Decision

According to Respondent's testimony, she served as a Board member from January 2019 through January 2022, and decided to resign from the Board due to "family obligations." *Initial Decision* at 3. On September 14, 2021, the Board held a special meeting to interview candidates for Respondent's open seat, and according to Respondent, prior to the meeting Board counsel advised her "she should not vote on any of the candidates because her husband was one of the candidates." *Ibid.* Respondent maintains she was not advised that she could not attend the remote meeting. *Ibid.* Respondent further maintains she and her husband were in separate rooms of the house and using separate computers. *Id.* at 4. Per Respondent, her husband was having technical issues logging in to the public meeting, and despite a Board member suggesting Respondent and her spouse share a computer (and no one objected to that suggestion), Respondent and her husband decided to switch computers for the interview so they would not be in the same room. *Ibid.*

Respondent contends that during the interviews, Complainant was friendly and smiling during the first interview; however, she "rolled her eyes, yelled" and "repeatedly interrupted" Respondent's husband during his interview. *Ibid.* After the interviews were complete, the Board went into executive session, including Respondent. *Ibid.* Respondent further contends at the start of executive session, Board counsel asked Respondent if she received an email he sent, and Respondent said she did not. *Ibid.* Board counsel advised Respondent to review the email, and she found that at 6:40 p.m., which was during public session, Board counsel sent an email to the Superintendent, which was forwarded to Respondent at 6:48 p.m. *Id.* The email contained a link to the New Jersey Department of Education webpage, which contained the "entire language" of the Act. *Id.* at 5. Respondent maintains that she removed her ear bud, read the information on the website, "did not listen to what anyone else was saying" in executive session "because she was busy reading the information in the link," did not participate in any discussion during executive session, and did not discuss any of the executive session with her husband. *Ibid.* Subsequently, Respondent emailed Board counsel to ask whether she should abstain from voting on the candidates and Board counsel advised that she should "recuse on both." *Ibid.* The ALJ notes that Respondent testified "consistently and credibly." *Id.* at 6.

Based on the testimony and evidence, the ALJ finds Respondent was present for both the public meeting and executive session on September 14, 2021. *Ibid.* The ALJ further finds Respondent was not advised by Board counsel or any other individual not to attend the virtual meeting. *Ibid.*

The ALJ asserts that Petitioner did not offer any evidence nor testimony to support that Respondent used her Board status to obtain any unwarranted privileges, advantages, or employment for herself, her husband or anyone else, and therefore, the ALJ concludes that Petitioner failed to show that Respondent violated *N.J.S.A.* 18A:12-24(b). The ALJ further concludes that Petitioner did not provide any evidence or testimony that Respondent’s “objectivity and/or independence of judgment was impaired,” and therefore, failed to demonstrate that Respondent violated *N.J.S.A.* 18A:12-24(c), and consequently, the ALJ dismissed the Complaint.

III. Exceptions

Petitioner’s Exceptions

Petitioner takes exception to the Initial Decision, specifically that Respondent did not violate *N.J.S.A.* 18A:12-24(b) and/or *N.J.S.A.* 18A:12-24(c). Petitioner avers that the Initial Decision should be rejected because the ALJ “incorrectly applied a standard of success that is not required by the statutory language,” and therefore, the ALJ “ignored both the law and the Commission’s plain language instructions.” *Petitioner’s Exceptions* at 6. According to Petitioner, when the Commission issued its probable cause notice, it properly explained that even if Respondent did not “actively participate” in the issue related to the candidates, which included her husband, “mere presence in executive session could have (and may have), without more,” violated the Act because it could have a “chilling effect (intentional or otherwise) on the discussion and selection process” *Id.* at 7. According to Petitioner, despite this standard, the ALJ concluded that although Respondent was present, Petitioner also needed to demonstrate that “she succeeded in securing a benefit for herself or her husband in order to establish a violation of *N.J.S.A.* 18A:12-24(b),” which per Petitioner “is based upon a flawed legal premise that *N.J.S.A.* 18A:12-24(b) requires a showing of success.” *Id.* at 8.

Moreover, it has been previously established that “as long as it can be reasonably assumed that a board member’s conduct was undertaken in an attempt to secure unwarranted privileges for themselves or others, the board member’s intentions behind such conduct are immaterial to finding” a violation of *N.J.S.A.* 18A:12-24(b). *Id.* at 10. Furthermore, Petitioner maintains “in determining whether a board member’s particular interest in a matter is sufficient to disqualify them from even being present during discussions of that matter, our courts have concluded that ‘[t]he question will always be whether the circumstances could reasonably be interpreted to show that they had the likely capacity to tempt the official to depart from his sworn public duty.’” *Id.* at 10-11. Therefore, Petitioner asserts the Commission has found that if a board member has any level of involvement in a matter affecting the interests of a family member employed by the district, it “‘will, among other things, always create a justifiable impression among the public’ that the board member used or attempted to use their official position to secure an unwarranted privilege or advantage for their family member.” *Id.* at 11-12. Petitioner asserts that because the ALJ correctly found that Respondent was present for the entirety of the September 14, 2021, executive session while the board discussed and deliberated over the candidates, one of whom was her husband, any reasonable member of the public could infer that she used her official position to gain access to a private platform in order to persuade

the other Board members to support her husband's candidacy, in violation of *N.J.S.A.* 18A:12-24(b).

In addition, in reaching the conclusion that Respondent did not violate *N.J.S.A.* 18A:12-24(c), Petitioner also maintains that the ALJ "incorrectly applied a standard of actual impairment of objectivity that is not required by the statutory language" and the ALJ "once again ignored both the law and the Commission's plain language instructions." *Id.* at 14. Petitioner argues the Commission "properly explained" in its probable cause notice that because "there is certainly value, and an advantage, in one[']s spouse being present for the discussion and decision-making process of a matter when their own spouse is being considered," Respondent's "mere presence" during the executive session on September 14, 2021, is enough to establish a violation of *N.J.S.A.* 18A:12-24(c). *Ibid.* Petitioner further argues the ALJ's conclusion "stems from the incorrect premise that *N.J.S.A.* 18A:12-24(c) requires a showing that" Respondent's "objectivity and/or independence of judgment was impaired." *Ibid.*

Of importance, Petitioner notes the Commission has previously found that "where a board member's immediate family member is seeking employment with the district, the expectation of such a conflict is especially reasonable since any questions about the qualification of the board member's family member can be seen by that board member as a personal attack." *Id.* at 17. Petitioner asserts it has been established that Respondent was present during the September 14 meeting, when her husband's candidacy was discussed, and Respondent admitted that she "viewed [] Complainant's questioning of her husband's qualifications during his public interview to be a personal attack on him." *Id.* at 18. Petitioner notes the minutes from that meeting would demonstrate that Respondent did not recuse herself from the executive session and was present during the Board's private deliberation. In essence, Respondent "created circumstances that might reasonably be expected to impair her objectivity or independence of judgment, thus 'creating a justifiable impression among the public that their trust is being violated,'" and as such the ALJ erred in finding that Respondent did not violate *N.J.S.A.* 18A:12-24(c). *Id.* at 19.

Turning to a penalty, Petitioner argues Respondent cannot assert inexperience or lack of legal advice as mitigating factors. According to Petitioner, Respondent was a Board member for nearly three years at the time and Respondent did not request legal advice nor did Board counsel provide her with incorrect legal advice. Petitioner maintains that ultimately, it was Respondent's duty to ensure that she was aware of the Commission's previously issued advice related to her ethical and statutory obligations. Per Petitioner, Respondent chose to "shirk" her obligations and purposely chose to attend a meeting in which her husband's candidacy was going to be discussed. Therefore, based on Respondent's presence during the executive session and because it could be seen as using her official position to gain access to the Board's private deliberation so that she could try to pressure the non-conflicted Board members into selecting her husband for that vacant seat, and securing an unwarranted privilege for him, Petitioner recommends the Commission impose a penalty of censure.

Respondent's Reply to Petitioner's Exceptions

Respondent argues the Commission’s probable cause notice indicates a violation may be supported if Respondent was present in executive session “*despite Board counsel’s advice to the contrary.*” *Respondent’s Reply Exceptions* at 1. Respondent asserts it was undisputed that Board counsel only advised that she should not *vote* on a candidate, that neither Board counsel nor anyone else advised Respondent not to log in to executive session, that the Superintendent sent Respondent the meeting link and then admitted Respondent into the meeting, and that once logged in, Board counsel discussed an email that he sent her and still did not advise her to log out of the meeting. Therefore, Respondent contends the ALJ accurately determined “the element of the issue as framed by the [Commission] was not satisfied.” *Id.* at 2. Respondent further contends Petitioner’s exceptions “fail to address the fact that the [Commission’s] framing of the issue in this case required a demonstration that Respondent acted ‘despite Board counsel’s advice to the contrary.’” *Ibid.*

Respondent asserts that despite Petitioner’s argument that the Commission has determined “physical attendance and participation in executive session meetings may constitute a violation of the Act,” it should be noted that “there is no legal authority declaring that a Board member may have violated the Act under the unique circumstances presented in this case.” *Ibid.* Respondent reiterates, in this matter, Respondent was admitted to the meeting remotely, by the Superintendent and spent the entirety of the meeting focused elsewhere (reading the email from Board counsel) and these circumstances “present an issue of first impression never before discussed in case law.” *Id.* at 3. Therefore, Respondent maintains the ALJ “appropriately exercised his discretion to consider the fact that Respondent’s remote ‘presence’ in the executive session did not impair anyone’s objectivity nor did it benefit Respondent or her husband.” *Ibid.* Moreover, Petitioner’s argument ignores Board Policy 0143, which confirms the “non-confidential nature of the Board’s discussion about the candidates ... and negates any argument that, by merely logging in ... Respondent may have made other Board members too uncomfortable to express their opinions.” *Ibid.* Finally, Respondent maintains Petitioner did not present any witnesses or evidence at the hearing to support the assertion that Respondent violated the Act.

For these reasons, Respondent contends the Commission should adopt the ALJ’s decision or, at the very most, the Commission should find that any violation was *de minimis* and should not issue a penalty.

IV. Analysis

Upon a careful, thorough, and independent review of the record, the Commission adopts the ALJ’s findings of fact, rejects the ALJ’s legal conclusions, finds that Respondent violated *N.J.S.A.* 18A:12-24(b) and *N.J.S.A.* 18A:12-24(c), and recommends that a penalty of censure be imposed.

N.J.S.A. 18A:12-24(b) prohibits a school official from using or attempting to use her official position to secure unwarranted privileges, advantages or employment for herself, members of her immediate family or others. By attending executive session while the Board discussed her husband’s potential appointment to the Board, Respondent used her official position as a Board member to secure the unwarranted advantage of hearing the Board’s private

deliberations regarding her family member during executive session. The spouse or other immediate family members of the other candidate for the Board were not permitted to attend executive session and hear the private discussions, so Respondent was only present due to her Board member status. Additionally, Respondent's mere presence in executive session may have resulted in a chilling effect on the discussion and selection process that ensued by the other non-conflicted members of the Board. *See I/M/O S.J., Englewood Cliffs Board of Education*, Docket No. C09-20 (August 22, 2023) (finding a violation of *N.J.S.A. 18A:12-24(b)*) when the respondent remained in executive session while the Board discussed a personal matter involving her family member because she was present for confidential discussions to which members of the public and other individuals involved in the matter were not privy). Accordingly, the Commission finds Respondent's attendance in executive session while the Board discussed the potential appointment of her husband to the Board, provided her with an "unwarranted privilege" or "advantage" that other members of the public, including the other candidates' family members, were not afforded, and therefore, violated *N.J.S.A. 18A:12-24(b)*.

N.J.S.A. 18A:12-24(c) prohibits a school official from acting in her official capacity in a matter where she, or a member of her immediate family, has a direct or indirect financial involvement that might reasonably be expected to impair her objectivity, or in a matter where she has a personal involvement that created some benefit to her, a member of her immediate family, or others. Respondent acted in her official capacity as a board member when she attended executive session on September 14, 2021, while her husband's candidacy for a position on the Board was being discussed. Respondent had a personal involvement in the matter as the discussions involved her husband's potential appointment to the Board, and her presence created a benefit to her and/or her spouse as she witnessed the deliberations and selection process and had the opportunity to influence or affect the discussion or possibly chill the comments and opinions of the other non-conflicted Board members. *See I/M/O Shiela Brogan, Ridgewood Board of Education*, Docket No. C71-20 (February 25, 2022) at 7 (finding a violation of *N.J.S.A. 18A:12-24(c)*) when Brogan remained in executive session while litigation in which she had a personal interest was discussed, and noting "[b]y 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"); *see also I/M/O Michael Kilmurray, Lacey Township Board of Education*, Docket No. C12-94 (February 24, 1998), at 3. (stating, "[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"). As such, the Commission finds Respondent's decision to attend executive session when her husband's potential appointment to the Board was going to be discussed violated *N.J.S.A. 18A:12-24(c)*.

The Commission disagrees with Respondent's argument that she did not violate the Act because she relied upon the advice of the Board attorney, who she contends only advised her not to vote on the Board candidates and did not advise her not to attend executive session. Board members are not "insulated from blame" when they rely on the advice of counsel, and are "responsible for their own actions," with a duty to act "prudently and cautiously." *Cheng v. Rodas, West New York Board of Education*, Commissioner's Decision No. 22-17ASEC (January 20, 2017), at 6. It is relevant to note that it does not appear that Respondent specifically asked for

the advice of counsel regarding attendance in executive session; instead, she appears to rely on the absence of advice telling her not to attend executive session as an implicit approval to do so. Additionally, Respondent had been a Board member for nearly three years, and was required to undergo Board member ethics training during that time. Thus, Respondent should have known that it was a conflict to remain in executive session while a matter in which she has a personal interest was discussed.

With respect to a penalty, the Commission recommends a penalty of **censure** for the violations of *N.J.S.A.* 18A:12-24(b) and *N.J.S.A.* 18A:12-24(c). Respondent should have known that she was not permitted to attend executive session while a matter in which she had a direct conflict – one involving an immediate family member – was being discussed. The Commission has previously issued a penalty of censure for violations of *N.J.S.A.* 18A:12-24(b) and/or *N.J.S.A.* 18A:12-24(c) in similar matters involving a board member’s attendance at executive session while a matter involving a personal interest was discussed. *See S.J.*, Docket No. C09-20 (recommending a penalty of censure for violations of *N.J.S.A.* 18A:12-24(b) and *N.J.S.A.* 18A:12-24.1(e) when a board member remained in executive session on at least three occasions while a matter involving a personal family member was discussed); *I/M/O Shiela Brogan*, Docket No. C71-20, *penalty adopted*, Commissioner’s Decision No. 79-22SEC (April 14, 2022) (recommending a penalty of censure for a violation of *N.J.S.A.* 18A:12-24(c) in connection with Brogan’s attendance in an executive session during discussions regarding a legal matter in which she had a personal involvement); *I/M/O James Morgan, Ridgewood Board of Education*, Docket No. C68-20 (February 25, 2022), *penalty adopted*, Commissioner’s Decision No. 78-22SEC (April 14, 2022) (recommending a penalty of censure for violations of *N.J.S.A.* 18A:12-24(b), *N.J.S.A.* 18A:12-24(c), and *N.J.S.A.* 18A:12-24.1(g) in connection with public comments that Morgan made regarding litigation filed by a fellow Board member and his failure to recuse himself from executive session discussing the litigation in which he had an interest in the outcome). Accordingly, the Commission recommends that Respondent be censured for violating *N.J.S.A.* 18A:12-24(b) and *N.J.S.A.* 18A:12-24(c).

V. Decision

For the aforementioned reasons, the Commission adopts the ALJ’s findings of fact, but rejects the ALJ’s legal conclusions, finds that Respondent violated *N.J.S.A.* 18A:12-24(b) and *N.J.S.A.* 18A:12-24(c), and recommends that a penalty of censure be imposed.

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

Parties taking exception to the recommended sanction of the Commission but *not disputing* the Commission’s finding of a violation may file, **within thirteen (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, 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 must also be sent to the Commission (school.ethics@doe.nj.gov) 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:4:1 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 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 (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 briefs on appeal.

Robert W. Bender, Chairperson

Mailing Date: November 28, 2023

***Resolution Adopting Decision
in Connection with C87-21***

Whereas, at its meeting on July 26, 2022, the School Ethics Commission (Commission) voted to transmit the above-captioned matter to the Office of Administrative Law (OAL) for a hearing; and

Whereas, the Administrative Law Judge (ALJ) issued an Initial Decision dated August 16, 2023; and

Whereas, the ALJ found that Respondent did not violate *N.J.S.A.* 18A:12-24(b) and/or *N.J.S.A.* 18A:12-24(c), and ordered the dismissal of the above-referenced matter; and

Whereas, Petitioner filed exceptions to the Initial Decision and Respondent filed a reply; and

Whereas, at its meeting on October 17, 2023, the Commission reviewed the record in this matter, discussed accepting the ALJ's findings of fact, rejecting the ALJ's legal conclusions, finding that Respondent violated *N.J.S.A.* 18A:12-24(b) and *N.J.S.A.* 18A:12-24(c), and recommending a penalty of censure; and

Whereas, at its meeting on November 28, 2023, the Commission reviewed and voted to approve the within decision as accurately memorializing its actions/findings from its meeting on October 17, 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 regularly scheduled meeting on November 28, 2023.

Brigid C. Martens, Director
School Ethics Commission