

Before the School Ethics Commission
OAL Docket No.: EEC-01269-22
SEC Docket No.: C88-21
Final Decision

Kelly Ellis-Foster,
Complainant

v.

Salvatore Giordano,
Old Bridge Board of Education, Middlesex County
Respondent

I. Procedural History

The above-captioned matter arises from a Complaint that was filed with the School Ethics Commission (Commission) on November 29, 2021, by Kelly Ellis-Foster (Complainant), alleging that Salvatore Giordano (Respondent), a member of the Old Bridge Board of Education (Board), violated the School Ethics Act (Act), *N.J.S.A. 18A:12-21 et seq.*¹ More specifically, in Count 1, Complaint asserted that Respondent violated *N.J.S.A. 18A:12-24.1(a)* of the Code of Ethics for School Board Members (Code) when he consistently wore his mask improperly and removed his mask when making comments at Board meetings in violation of mask mandates in New Jersey schools. Complaint at 1-2. In Count 2, Complainant averred that Respondent violated *N.J.S.A. 18A:12-24.1(c)*, *N.J.S.A. 18A:12-24.1(d)*, and *N.J.S.A. 18A:12-24.1(e)* of the Code when he, on multiple occasions, sent emails to all Board members expressing his “personal and ideological views”; sent emails to school administrators “making demands and requests to take specific action without direction or consensus of the Board”; and sent an email from his school email account to a parent and members of the State Legislature urging them to take action. *Id.* at 2-4.

On May 4, 2022, Respondent filed an Answer to the Complaint and also alleged that Complaint is frivolous. On January 11, 2022, Complainant filed a response to the allegation that the Complaint is frivolous.

At a special meeting on February 4, 2022, the Commission adopted a letter decision transmitting the matter to the Office of Administrative Law (OAL). In addition, the Commission voted to reserve its determination on Respondent’s allegation that the Complaint is frivolous until after the ruling at the OAL.

¹ On November 29, 2021, Complainant filed a deficient Complaint; however, on December 1, 2021, Complainant cured all defects and filed an Amended Complaint that was deemed compliant with the requirements detailed in *N.J.A.C. 6A:28-6.3*.

At the OAL, Complainant filed a Second Amended Complaint on June 13, 2022, alleging two additional violations of *N.J.S.A.* 18A:12-24.1(c) based on emails Respondent sent to two school employees inquiring as to why they were resigning, and an additional violation of *N.J.S.A.* 18A:12-24.1(a) for Respondent's refusal to wear a mask and failure to uphold mask requirements.

Following cross-motions for summary decision with a joint statement of facts and joint exhibits, the Administrative Law Judge (ALJ) issued an Initial Decision on April 3, 2023.

At its meeting on May 23, 2023, the Commission considered the full record in this matter. Thereafter, at its meeting on June 27, 2023, the Commission voted to adopt the Initial Decision's findings of fact, legal conclusion that Respondent violated *N.J.S.A.* 18A:12-24.1(e), and the recommended penalty of reprimand.

II. Initial Decision

A. Count 1

By way of background, Complainant has been a member of the Board from January 2015 through January 2018 and from January 2019 through January 2022, holding roles including Board Vice President and Board President. *Initial Decision* at 5. Respondent has served on the Board from January 2020 to the present. *Ibid.*

Following the start of the COVID-19 pandemic, the Board adopted a plan entitled "The Path Forward" (Plan) on July 30, 2020, to outline protocols for the 2020-21 school year, and included the requirement that staff, and students wear masks when in a school facility or on a bus. *Ibid.* The Board then adopted the "Plan for Safe Return to In-Person Instruction and Continuity of Services" on June 29, 2021, which also included a mask mandate. *Id.* at 6. Following the enactment of Executive Order 251 (EO 251) on August 6, 2021, that included a mask requirement in New Jersey schools, the Board approved the "Road Forward Plan" on August 24, 2021, which referenced the mask requirement in EO 251. *Ibid.*

It is undisputed that at nine Board meetings between May 11, 2021, and November 23, 2021, Complainant wore his mask below his nose and below his mouth when speaking. *Id.* at 7-10, 20. At the Board meeting on November 23, 2021, Complainant observed Respondent remove his mask before executive session and twice requested that he wear his mask. *Id.* at 10-11, 20. When Respondent refused to put on a face covering, Complainant left the meeting. *Id.* at 11. Additionally, at the January 11, 2022, Board meeting, Respondent refused to wear a mask. *Id.* at 11, 20. When he was told that he would need to wear the mask or leave the meeting, Respondent chose to leave the meeting. *Id.* at 11.

Complainant alleged that Respondent violated *N.J.S.A.* 18A:12-24.1(a) by failing to comply with the mask mandates as required by District policies and EO 251. The ALJ concluded that Complainant failed to meet her burden that Respondent violated *N.J.S.A.* 18A:12-24.1(a). *Initial Decision* at 21. The ALJ reasoned that it would be an "expansive interpretation" of the mask mandate to find that wearing a mask below the nose or below the mouth when speaking is

a violation. *Ibid.* Additionally, the ALJ found that the record is devoid of evidence as to what happened after Complainant left the November 23, 2021, meeting, so the record does not establish that Respondent refused to wear a mask in violation of the mask mandate. *Ibid.* Finally, there is no compelling reason why Respondent’s decision to leave the January 11, 2022, meeting would be a violation of the Act. *Ibid.* Accordingly, the ALJ dismissed Count 1 of the Complaint.² *Ibid.*

B. Count 2

Complainant alleged that Respondent violated *N.J.S.A.* 18A:12-24.1(d) when he sent an email on November 19, 2020, to the Superintendent urging that the decision to return the students to remote learning “needs to be reversed.” *J-1.* The ALJ found that Respondent was “advocating for his preferred policy option which does not rise to the level of a violation of the Act.” *Initial Decision* at 22.

On December 7, 2020, Respondent sent an email to the entire Board with the subject “Lockdown Hypocrisy,” stating “[t]his is what tyranny looks like,” quoting the First Amendment, and including a link to Governor Murphy’s twitter page regarding the shutdown of clubs in Paterson. *J-2.* Complainant alleged that this email constituted a violation of *N.J.S.A.* 18A:12-24.1(c) as he was acting in furtherance of a politically partisan group. *Initial Decision* at 23. The ALJ found the email is Respondent’s personal opinion and does not advocate for a politically partisan group and is therefore not a violation of the Act. *Ibid.*

Complainant alleged that Respondent violated *N.J.S.A.* 18A:12-24.1(a)³ and *N.J.S.A.* 18A:12-24.1(d) when he responded to the Assistant Superintendent on February 13, 2021, regarding plans for reentry to the building, indicating that masks and distancing are unnecessary and should be phased out. *J-3.* The ALJ found that the email expressed Respondent’s personal views and did not direct that the Assistant Superintendent take any action. *Initial Decision* at 23-24. As such, Complainant failed to demonstrate that this email constituted a violation of the Act. *Id.* at 24.

On August 9, 2021, in response to an email by a parent regarding masking in schools, Respondent sent an email from his school email address to a State Senator and two State Assemblymen, stating:

In the totalitarian Executive Order 251 it says under 1.a that mandatory use of masks are not required “when doing so would inhibit the individual's health, such as when the individual is exposed to extreme heat indoors.” If parents and school districts can prove, which we can, that masks are dangerous to the health of children then we should be able to fight this, and I expect lawsuits to come

² To the extent that the ALJ concluded that EO 251 has the force of law, the Commission does not need to reach that issue, nor does it have jurisdiction over the validity of executive orders.

³ Complainant did not allege a violation of *N.J.S.A.* 18A:12-24.1(a) with respect to Count 2 in her Complaint; however, as the allegation was raised in her cross-motion for summary decision, the ALJ nevertheless addressed the argument.

because of this reason. School districts and elected officials need to be more vocal about this especially since executive orders are not even approved by the General Assembly and State Senate which I would personally argue is not a “law.” Please feel free to forward this to others as you see necessary. . . (J-5).

Complainant alleged that Respondent violated *N.J.S.A.* 18A:12-24.1(d) and *N.J.S.A.* 18A:12-24.1(e) when he sent the August 9, 2021, email. *Initial Decision* at 27. The ALJ found that the email does not only include Respondent’s personal views, but “ends with clear language that plainly encourages action,” specifically when Respondent writes “we should be able to fight this” and “[s]chool districts and elected officials need to be more vocal about this.” *Ibid.* The ALJ also noted Respondent encouraged that the email be forwarded to others. *Ibid.* As such, the ALJ concluded that Complainant demonstrated that this email, from Respondent’s school email address, can be interpreted as “an endorsement by the Board both of his personal position, support for lawsuits and a further call to action.” *Ibid.* Accordingly, the ALJ concluded that the August 9, 2021, email had the potential to compromise the Board and is therefore a violation of *N.J.S.A.* 18A:12-24.1(e).⁴ *Id.* at 27-28.

On September 10, 2021, Respondent sent an email to the full board that supported the passing of another Board member’s resolution, but included political rhetoric. *J-8.* Complainant asserted that Respondent violated *N.J.S.A.* 18A:12-24.1(c) due to its political views that were not related to the district or its operation. *Initial Decision* at 24. The ALJ found that Respondent’s advocating of his position on a pending Board resolution was not a violation of the Act. *Ibid.*

On September 19, 2021, Respondent sent an email to the Board and the Superintendent indicating that if mask mandates do not apply to the Governor, they should not apply to the students and staff, and he included a link to the Governor’s twitter page. *J-10.* Complainant alleged that this action violated *N.J.S.A.* 18A:12-24.1(c) because the email did not relate to a specific action of the Board. *Initial Decision* at 25. The ALJ found that Respondent’s email expressed his opinion and was not partisan, and therefore, did not violate the Act. *Ibid.*

Finally, on November 22, 2021, Respondent sent two emails to district employees inquiring as to why they were resigning and offering to speak with them by telephone or email. *J-15; J-16.* Complainant alleged that the emails were a violation of *N.J.S.A.* 18A:12-24.1(d) because Board members do not oversee personnel matters and his communications were not in the scope of his role as a Board member. *Initial Decision* at 25-26. The ALJ found that there is no evidence that Respondent was managing a personnel issue nor that the email was a means of intimidation. *Id.* at 26. As such, the ALJ found that the charge was not supported by the record. *Ibid.*

With respect to the penalty for the sustained violation of *N.J.S.A.* 18A:12-24.1(e), the ALJ noted that this was Respondent’s first violation of the Act, and the communication was a one-time incident, but that it expressed his personal opinion and advocated action from his Board

⁴ The ALJ did not indicate whether the August 9, 2021, email was a violation of *N.J.S.A.* 18A:12-24.1(d). Upon review, the Commission has determined that Complainant failed to meet her burden of demonstrating that Respondent violated *N.J.S.A.* 18A:12-24.1(d).

email address. *Id.* at 28-29. Accordingly, the ALJ concluded that a penalty of reprimand was appropriate. *Id.* at 29.

III. Analysis

Upon a careful, thorough, and independent review of the record,⁵ the Commission agrees with the ALJ that Respondent violated *N.J.S.A.* 18A:12-24.1(e) in Count 2 when he sent the August 9, 2021, email. The Commission is also in accord with the ALJ's determination that Respondent did not violate *N.J.S.A.* 18A:12-24.1(a), *N.J.S.A.* 18A:12-24.1(c), and *N.J.S.A.* 18A:12-24.1(d).

Pursuant to *N.J.S.A.* 18A:12-24.1(e), Board members must "recognize that authority rests with the board of education," and therefore, must "make no personal promises nor take any private action that may compromise the board." The ALJ appropriately found that Respondent's actions in sending correspondence from his Board email address to members of the State Legislature and a member of the public that expressed his personal views had the potential to compromise the Board. When Respondent expressed his disagreement with mask mandates by stating "[i]f parents and school districts can prove, which we can, that masks are dangerous to the health of children then we should be able to fight this, and I expect lawsuits to come because of this reason," his personal views could reasonably be interpreted as being endorsed by the Board as a whole. Additionally, when Respondent urged "[s]chool districts and elected officials need to be more vocal about this," and "[p]lease feel free to forward this to others as you see necessary," his statements had the potential to compromise the Board as the legislators and public may view his statements as the Board supporting a call to action against the masking mandate in schools. Accordingly, the Commission agrees with the ALJ that Complainant met her burden of demonstrating that Respondent violated *N.J.S.A.* 18A:12-24.1(e) when he sent the August 9, 2021, email to members of the State Legislature and the public.

The Commission further agrees with the ALJ that a **reprimand** is the appropriate penalty for such a violation. As noted by the ALJ, the issue of penalty is fact sensitive. *Initial Decision*, at 28. The masking mandate was a major issue across the State. *Ibid.* Per the ALJ, Respondent sent an email from his Board email address to members of the public conveying his personal views of the mask mandate and encouraging action. *Ibid.* However, it appears that this is Respondent's first violation and the violation of the Code resulted from one email sent by Respondent. *Id.* at 28-29. Accordingly, the Commission adopts the ALJ's recommended penalty in this matter.

IV. Decision

For all of the aforementioned reasons, the Commission adopts the Initial Decision of the OAL as the final decision in this matter. The Commission finds that Respondent violated *N.J.S.A.* 18A:12-24.1(e) and adopts the recommended penalty of **reprimand** for the violation.

⁵ The parties did not file exceptions to the Initial Decision.

Additionally, at its meeting on May 23, 2023, and because it previously reserved its determination, the Commission considered Respondent's request that the Commission find the Complaint frivolous. As the Commission found a violation of the Act in this matter, it clearly could not determine that the Complaint was filed in bad faith or solely for the purpose of harassment, delay, or malicious injury, or that it lacked a reasonable basis in law or equity. *N.J.A.C. 6A:28-1.2*. Therefore, the Commission voted to find that the Complaint was not frivolous.

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: June 27, 2023

***Resolution Adopting Decision
in Connection with C88-21***

Whereas, at its meeting on February 4, 2022, the School Ethics Commission (Commission) voted to transmit the above-captioned matter to the Office of Administrative Law (OAL) for a plenary hearing as a contested case; and

Whereas, the Administrative Law Judge (ALJ), issued an Initial Decision dated April 3, 2023; and

Whereas, the ALJ found that Respondent violated *N.J.S.A.* 18A:12-24.1(e), but did not violate *N.J.S.A.* 18A:12-24.1(a), *N.J.S.A.* 18A:12-24.1(c), or *N.J.S.A.* 18A:12-24.1(d), and recommended that Respondent be reprimanded; and

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

Whereas, at its meeting on May 23, 2023, the Commission reviewed the record in this matter, discussed adopting the ALJ's conclusion that Respondent violated *N.J.S.A.* 18A:12-24.1(e) and discussed adopting the recommended penalty of reprimand; and

Whereas, at its meeting on May 23, 2023, and because it was not determined previously, the Commission discussed finding the Complaint not frivolous; and

Whereas, at its meeting on June 27, 2023, the Commission reviewed and voted to approve the within decision as accurately memorializing its actions/findings from its meeting on May 23, 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 June 27, 2023.

Brigid C. Martens, Acting Director
School Ethics Commission