

Simons, Jennifer

From: Christopher A. Khatami <ckhatami@dastilaw.com>
Sent: Saturday, June 8, 2024 4:39 PM
To: ControversiesDisputesFilings
Cc: Christopher J. Dasti; David Kalisky
Subject: [EXTERNAL] I/M/O Shawn Giordano/Lacey Township Board of Education; OAL Docket No.: EC10952-2020; Agency Docket No.: CO4-20
Attachments: Notice of Motion.pdf; Certification of Counsel.pdf; 6-7-24 Letter Brief w-exhibits.pdf

***** CAUTION *****

This message came from an **EXTERNAL** address (ckhatami@dastilaw.com). **DO NOT** click on links or attachments unless you know the sender and the content is safe.

New Jersey State Government Employees Should Forward Messages That May Be Cyber Security Risks To
PhishReport@cyber.nj.gov.

Dear Ms. Simons,

This Firm respectfully submits on behalf of Respondent Shawn Giordano the attached Motion for Stay of the Final Agency Decision and Imposition of Censure Penalty in the above-referenced matter. Thank you.



Christopher A. Khatami, Esq.
Dasti & Staiger, P.C.
310 Lacey Road
P.O. Box 779
Forked River, New Jersey 08731
Office: 609-549-8990
Fax: 609-549-5043
Email: ckhatami@DastiLaw.com
www.DastiLaw.com

CHRISTOPHER A. KHATAMI, ESQ. [043472013]

DASTI & STAIGER

310 Lacey Road | P.O. Box 779
Forked River, NJ 08731

☎: 609-549-8990 📠: 609-549-5043

Attorneys for Respondent, Shawn Giordano

IN THE MATTER OF SHAWN
GIORDANO, LACEY TOWNSHIP
BOARD OF EDUCATION, OCEAN
COUNTY

COMMISSIONER OF EDUCATION
NEW JERSEY DEPARTMENT OF
EDUCATION

DOCKET NO.: EEC 10952-2020
AGENCY DOCKET. NO. C04-20

NOTICE OF MOTION FOR A STAY PENDING APPEAL

TO: Jennifer Simons, Director, Office of Controversies and Disputes, New Jersey
Department of Education, 100 Riverview Plaza, Trenton, New Jersey 08625

COUNSEL: David Kalisky, Deputy Attorney General, for petitioner;

PLEASE TAKE NOTICE that on _____, at 9:00 o'clock in the forenoon,
or as soon thereafter as counsel may be heard, the undersigned attorneys for Respondent,
Shawn Giordano, shall apply to the Commissioner for the New Jersey Department of
Education for an Order Staying the Commission's Final Agency Decision dated May
15, 2024 pursuant to N.J.A.C. 6A:4-4.1.

PLEASE TAKE FURTHER NOTICE that in support of the within motion,
Respondent Shawn Giordano shall rely upon the enclosed legal brief.

PLEASE TAKE FURTHER NOTICE that a proposed form of Order is
attached pursuant to R. 1:6-2(a).

DASTI & STAIGER
ATTORNEYS AT LAW

310 Lacey Road | P.O. Box 779
Forked River, NJ 08731

PLEASE TAKE FURTHER NOTICE that pursuant to Rule 1:6-2(d), the undersigned requests oral argument in the event that opposition to the motion is filed.

DASTI & STAIGER, P.C.

Attorneys for Respondent

By: /s/ Christopher A. Khatami

CHRISTOPHER A. KHATAMI, ESQ.

Dated: June 8, 2024

DASTI & STAIGER

ATTORNEYS AT LAW

310 Lacey Road | P.O. Box 779
Forked River, NJ 08731

DASTI & STAIGER

Christopher J. Dasti
Lauren R. Staiger

ATTORNEYS AT LAW

310 Lacey Road | P.O. Box 779
Forked River, NJ 08731

O: 609-549-8990
F: 609-549-5043

DastiLaw.com

Jeffrey D. Cheney
Brian R. Clancy
Brigit P. Zahler*
Christopher A. Khatami

*Also admitted in NY

File No.: GL-771

June 7, 2024

VIA E-MAIL

Jennifer Simons
Director
Office of Controversies & Disputes
New Jersey Department of Education
100 Riverview Plaza
Trenton, New Jersey 08625

***Re: I/M/O Shawn Giordano/Lacey Township Board of Education
OAL Docket No.: EC10952-2020
Agency Docket No.: C04-20***

Dear Director Simons:

This Firm represents Respondent Shawn Giordano (“Respondent”) in the above-referenced matter.

Respondent respectfully submits this letter brief in lieu of a more formal brief in support of his application for emergent relief for a stay of the Commissioner’s Final Decision dated May 15, 2024 (“Final Agency Decision”) pending appeal to the Appellate Division.

For the following reasons, the Respondent’s legal interests at stake require the Commissioner to grant his Motion for Stay Relief under the applicable standard of review pursuant to N.J.A.C. 6A:4-4.1(b) and the multi-factor test under Crowe v. DeGioia, 90 N.J. 126 (1982).

PRELIMINARY STATEMENT

This Motion arises out of the Final Agency Decision of the Commissioner of the New Jersey Department of Education, which concluded that Respondent violated the School Ethics Act and imposed the penalty of censure.

Director Jennifer Simons

Re: I/M/O Shawn Giordano/Lacey Township Board of Education
OAL Docket No. EC10952-2020
Agency Docket No. CO4-20

Page 2

The imposition of a stay in this matter is necessary to prevent irreparable harm to the Respondent.

PROCEDURAL HISTORY

Complainant Regina C. Discenza (“Complainant”) filed a Complaint with the School Ethics Commission (“SEC”) on January 13, 2020 alleged that Respondent violated multiple provisions of the School Ethics Act.

In particular, Complainant alleged that Respondent violated the following provisions of the School Ethics Act: N.J.S.A. 18A:12-24(b)(Count 1); N.J.S.A. 18A:12-24.1(b)(Count 5 and Count 8); N.J.S.A. 18A:12-24.1(c)(Count 2); N.J.S.A. 18A:12-24.1(e)(Counts 3 and 6); and N.J.S.A. 18A:12-24.1(f)(Counts 4, 7, and 9).

On February 24, 2020, Respondent filed a Motion to Dismiss in Lieu of an Answer. On March 20, 2020, Complainant filed a response to the Motion to Dismiss and allegation of a frivolous filing.

On May 19, 2020, the SEC denied Respondent’s Motion to Dismiss as to Counts 1-4, but granted said Motion as to Counts 5-10. The SEC also denied Respondent’s frivolous filing allegation and prayer for sanctions, and ordered Respondent to file an Answer relating to Counts 1-4 of the Complaint. On June 1, 2020, Respondent filed an Answer as to Counts 1-4 of the Complaint.

On July 21, 2020, the SEC found probable cause for ethics violations as alleged in Counts 1-4 of the Complaint. Consequently, the SEC submitted the matter the Office of Administrative Law (“OAL”) for a hearing. The OAL initially consolidated this matter against Respondent with the ethics complaint lodged by Respondent against Complainant, Regina C. Discenza. On

Director Jennifer Simons

Re: I/M/O Shawn Giordano/Lacey Township Board of Education
OAL Docket No. EC10952-2020
Agency Docket No. CO4-20

Page 3

February 27, 2023, the Administrative Law Judge issued an Order and Partial Summary Decision severing Complainant's matter from this matter. See, OAL Order and Partial Summary Decision dated February 27, 2023 attached hereto as **Exhibit A**. As a result, the ALJ issued an Initial Decision on April 27, 2023, incorporating findings of fact, conclusions of law, and his recommended penalty from his February 27, 2023 Order. See, OAL Initial Decision dated April 27, 2023 attached hereto as **Exhibit B**.

Respondent filed exceptions to the Initial Decision, and the SEC as Petitioner did not file a Reply. On June 27, 2023, the SEC met and considered the record developed to that point in this matter. On July 25, 2023, the SEC adopted the Initial Decision's findings of fact and conclusions of law, which found that Respondent violated 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(f), but that Respondent did not violate N.J.S.A. 18A:12-24.1(c). The SEC also voted to modify the recommended penalty of reprimand to censure. See, SEC Commission Final Decision dated July 25, 2023 attached hereto as **Exhibit C**.

Respondent timely filed a Notice of Appeal with the Commissioner for the New Jersey Department of Education to appeal the Initial Decision and penalty issued by the OAL and adopted by the SEC. The parties submitted briefs on the matter. On May 15, 2024, the Commissioner issued a Final Agency Decision, upholding the OAL's ruling and penalty recommendation and the SEC's adoption of that ruling and modified penalty. See, Final Agency Decision attached hereto as **Exhibit D**.

Pursuant to N.J.S.A. 18A:6-9.1, Respondent is filing a Notice of Appeal to the Appellate Division of the Superior Court of New Jersey regarding the Final Agency Decision and penalty. Pursuant to N.J.A.C. 6A:4-3.5, Respondent files the instant Motion to Stay Relief pending appeal.

Director Jennifer Simons

Re: I/M/O Shawn Giordano/Lacey Township Board of Education

OAL Docket No. EC10952-2020

Agency Docket No. CO4-20

Page 4

LEGAL ARGUMENT

STANDARD OF REVIEW

The Commissioner must apply the four-factor Crowe test in determining motions for stay or emergency relief. N.J.A.C. 6A:4-4.1(b). “Applications for a stay pending appeal are governed by the familiar standard outlined in Crowe v. DeGioia, 90 N.J. 126 (1982).” Garden State Equality v. Dow, 216 N.J. 314, 320 (2013).

Thus, an applicant for emergent relief must establish: (1) the issuance of the emergent relief is necessary to prevent irreparable harm; (2) the applicant’s legal right to relief must be well settled; (3) the applicant has a reasonable probability to succeed on the merits; and (4) the applicant must show a balancing of the relative hardships of granting the injunctive relief in favor of his position. Crowe, supra, 90 N.J. at 132-34.

The moving party has the burden to prove each of the Crowe factors by clear and convincing evidence. Brown v. City of Paterson, 424 N.J. Super. 176, 183 (App. Div. 2012). However, in acting only to preserve the status quo, the court may “place less emphasis on a particular Crowe factor if another greatly requires the issuance of the remedy.” Ibid.

The New Jersey Supreme Court expanded the Crowe factors such that “when a case presents an issue of ‘significant public importance’ a court must [also] consider the public interest[.]” Garden State Equality, supra, 216 N.J. at 321. In exercising their equitable powers, courts may and frequently do, go much farther to give and withhold relief in furtherance of the public interest than they are accustomed to go when private interests are involved. See Brown, supra, 424 N.J. Super. at 184.

Director Jennifer Simons

Re: I/M/O Shawn Giordano/Lacey Township Board of Education

OAL Docket No. EC10952-2020

Agency Docket No. CO4-20

Page 5

As more fully set forth below, Respondent satisfies his burden under Crowe, supra, as to the necessity of a stay of the Commissioner's Final Agency Decision during the pendency of Respondent's appeal.

POINT I

RESPONDENT WILL SUFFER IRREPARABLE HARM IF A STAY FROM ENFORCEMENT OF THE FINAL AGENCY DECISION AND PENALTY IS NOT GRANTED

Respondent satisfies the irreparable harm prong in support of his application for a stay pending appeal.

Respondent's censure would become a matter of public notice, which would likely harm his prospects for employment and ultimately inflict economic harm to Respondent, even though the merits of his appeal have yet to be adjudicated by the Appellate Division. Further, the public disclosure of Respondent's censure and the Final Agency Decision would also likely prejudice Respondent in the eyes of not only members of the inquiring public, but also with prospective employers.

An injunction usually issues "to prevent an anticipated or threatened injury, either to protect against a repetition of unlawful conduct or to guard against reasonably apprehended misconduct or infringement of a legal right." Sheahan v. Upper Greenwood Lake Prop. Owners Ass'n., 36 N.J. Super. 133, 136 (App. Div. 1955) (quoting Hoffman LaRoche, Inc. v. Weissbard, 11 N.J. 541, 555 (1953)).

Additionally, "[h]arm may be considered irreparable if it cannot be remedied by monetary damages." City of Orange Twp. Bd. of Educ. v. City of Orange Twp., 451 N.J. Super. 310, 320 (Ch. Div. 2017). Stays of judgments pending appeal are appropriate where the subject matter of

Director Jennifer Simons

Re: I/M/O Shawn Giordano/Lacey Township Board of Education

OAL Docket No. EC10952-2020

Agency Docket No. CO4-20

Page 6

the judgment will be protected, not destroyed or impaired. White House Hotel, Inc. v. Defendants of Lakewood, 53 N.J. Super. 532, 535 (App. Div. 1959); R. 2:9-5.

In this matter, the Commissioner's grant of Respondent's application for stay relief would not harm the interests of the Complainant, the SEC, or the Board of Education. This matter is proceeding further up the chain of appeal. Delaying public disclosure of the Final Agency decision and imposition of the censure penalty only harms Respondent, especially since this matter has not been fully resolved pending appeal before the Appellate Division.

Based on the forgoing, Respondent satisfied his burden under the first prong of Crowe, supra and a stay must issue.

POINT II

THE LEGAL RIGHT UNDERLYING RESPONDENT'S CLAIM IS WELL SETTLED

The legal right underlying Respondent's claim is well settled. The issue in this matter is that the bald allegations of the Complaint were taken at face value without any supporting or corroborating evidence as to the purpose of Respondent's request. The Complaint's bare allegations were assumed to be true without any evidence of such purpose, which permitted the assumption of the allegations' factual validity necessary to interpret ethics violations based on those allegations.

Further, there is nothing in the statutory provisions of the School Ethics Act that constitutes a per se ethics violation for a Board President who requests the Board attorney to evaluate whether potential ethics violations had been committed by another Board member. Pursuant to Board Regulation 0174, the Board President, the Superintendent, and the Business Administrator are authorized to request legal services from the Board Attorney related to Board business. Potential

Director Jennifer Simons

Re: I/M/O Shawn Giordano/Lacey Township Board of Education
OAL Docket No. EC10952-2020
Agency Docket No. CO4-20

Page 7

ethics violations during an election allegedly committed by another Board Member falls within the ambit of Board business.

There is no allegation or evidence that Respondent directed the use of Board resources to gain any political or personal advantage since the election was already over.

Based on the forgoing, Respondent has satisfied his burden under this prong of Crowe, and a stay must issue.

POINT III

RESPONDENT HAS A REASONABLE PROBABILITY OF SUCCESS ON APPEAL, THEREFORE A STAY MUST ISSUE

The second prong of Crowe requires that a movant to show a reasonable probability of success on the merits, however, “[t]hat requirement is tempered by the principle that mere doubt as to the validity of the claim is not an adequate basis for refusing to maintain the status quo.” Crowe, *supra*, 90 N.J. at 133.

In the instant matter, the Appellate Division’s de novo standard of review of decisions to grant summary judgment on appeal illustrates that Respondent has a reasonable probability of success on the merits.

The legal arguments raised in support of Respondent’s position at every procedural level of this matter make it clear that Respondent’s appeal will likely succeed on the merits. As Respondent made clear in each of its briefs in this matter, there are genuine issues of material fact that have not been subject to a full hearing and fact-finding process.

More specifically, the OAL’s summary disposition mechanism is governed by the summary judgment standard under Brill v. The Guardian Life Insurance Co. of America, 142 N.J. 520 (1995)(see also, Hill v. Yaskin, 75 N.J. 139, 142-43 (1977), where the New Jersey Supreme Court

Director Jennifer Simons

Re: I/M/O Shawn Giordano/Lacey Township Board of Education

OAL Docket No. EC10952-2020

Agency Docket No. CO4-20

Page 8

explains that “summary dispositions should be upheld only where there exists no issues of material fact, and that all legitimate inferences must be drawn in favor of the party resisting the motion.”).

Two critical material facts were never subject to proper discovery to determine pertaining whether Respondent exceeded his duty as Board President, and whether Respondent made a legitimate request to the Board attorney to conduct an ethics investigation into another member of the Board.

Resolution of these disputed facts goes to the heart of the merits, and necessarily to the censure penalty imposed. Further, as stated in Respondent’s March 7, 2023 brief to the Commissioner, the SEC provided zero discovery or evidence to support the complaint’s allegations. Moreover, there was no evidence presented in the record that satisfies the SEC’s burden of proof that the Respondent committed a willful act contrary to the educational welfare of the children, to obstruct school programs or policies, or to harm the Board.

Critically, Respondent’s request to the Board attorney to conduct an ethics investigation into a potential ethics violation during the election was in the best interest of the Board. It was not intended to harm the Board or the school.

Based on the forgoing, Respondent has satisfied his burden under this prong of Crowe, and a stay must issue.

Director Jennifer Simons

Re: I/M/O Shawn Giordano/Lacey Township Board of Education

OAL Docket No. EC10952-2020

Agency Docket No. CO4-20

Page 9

POINT IV

THE RELATIVE HARDSHIP ENDURED BY THE RESPONDENT IF THE STAY IS DENIED OUTWEIGHS ANY HARDSHIP TO COMPLAINANT OR THE BOARD IF THE STAY IS ISSUED

The final prong of Crowe requires that a movant prove, by clear and convincing evidence, that the relative hardships to the parties reveals that greater harm would occur if a stay is not granted than if it were. Crowe, supra, 90 N.J. at 133. Further, a stay to preserve the status quo on appeal should be granted even if the claim appears to be uncertain or attended with difficulties, when a balancing of the hardships favors the movants. Waste Management of New Jersey, Inc. v. Union County Utilities Authority, 399 N.J. Super. 508, 535 (App. Div. 2008).

A balancing of the hardships and the consideration of the public interest weighs entirely in favor of granting Respondent's Motion for a stay. Respondent's due process interests outweigh the public interest in this matter, at least at this juncture. The public interest is not served by premature disclosure of the Final Agency Decision and censure penalty when the Respondent has not had an opportunity to exhaust his due process rights, which will likely result in a favorable outcome for Respondent.

By contrast, there will be no harm to the Complainant or the Board if the stay issues, as permitting Respondent to avail himself of his due process rights will not result in any harm to the Complainant or the Board. If the Final Agency Decision and censure penalty were upheld by the Appellate Division, and the stay had been granted, the result would be that the decision and the penalty could be disclosed and the penalty enforced. Permitting a delay of imposition of the penalty would not result in harm to the Complainant or the Board. It would simply safeguard

Director Jennifer Simons

Re: I/M/O Shawn Giordano/Lacey Township Board of Education

OAL Docket No. EC10952-2020

Agency Docket No. CO4-20

Page 10

Respondent's reputation with prospective employers while the merits of his appeal and the Final Agency Decision are decided on appeal.

Based on the forgoing, Respondent has satisfied his burden under the final prong of Crowe, and a stay must issue.

CONCLUSION

For all the reasons set forth herein, Respondent has demonstrated that he will incur irreparable harm if a stay does not issue, that he has a reasonable probability of success on appeal, will be harmed if a stay does not issue and Complainant or the Board will suffer no hardship if a stay does issue. As a result, the Court must issue a stay during the pendency of the Respondent's appeal.

Respectfully Submitted,

s/ Christopher A. Khatami

CHRISTOPHER A. KHATAMI

EXHIBIT A



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER

PARTIAL SUMMARY DECISION

OAL DKT. NO. EEC 06738-2020

AGENCY DKT. NO. C75-19

**IN THE MATTER OF REGINA DISCENZA,
LACEY TOWNSHIP BOARD OF EDUCATION,
OCEAN COUNTY,**

AND

OAL DKT. NOS. EEC 10952-2020

AGENCY DKT. NOS. C04-20

**IN THE MATTER OF SHAWN GIORDANO,
LACEY TOWNSHIP BOARD OF EDUCATION,
OCEAN COUNTY.**

Michal Czarnecki, Deputy Attorney General, and **Sydney Finkelstein**, Deputy Attorney General, for petitioner (Matthew J. Platkin, Attorney General, State of New Jersey, attorney)

Alyssa K. Weinstein, Esq., for respondent Regina Discenza (The Busch Law Group, LLC, attorneys)

Christopher J. Dasti, Esq., for respondent Shawn Giordano (Dasti Associates, attorneys)

BEFORE ELIA A. PELIOS, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This case involves two school ethics complaints against two prior members of the Lacey Township Board of Education (the Board): Regina Discenza and Shawn Giordano, both now respondents to the consolidated case. In EEC 06738-20, Regina Discenza is the respondent defending against a complaint initiated by Shawn Giordano, who is the respondent in EEC 10952-20 where he is defending against a complaint initiated by Ms. Discenza.

Giordano, along with several other Board members, filed a complaint with the School Ethics Commission (SEC or the Commission) on December 26, 2019. On or about January 13, 2020, Discenza filed a SEC complaint against Giordano. On July 21, 2020, the Commission found probable cause existed for all four of the counts against Giordano, two counts against Discenza, and transmitted the matters to the OAL for review. The two cases were consolidated on June 3, 2021, via court order and discovery was exchanged between all parties. Discenza and Giordano both filed separate motions for summary decision on March 10, 2022, and the Commission filed its cross motion on May 11, 2022. Responsive papers and replies were received.

FACTUAL DISCUSSION

Giordano was first elected to the Board in 2013, was re-elected in 2016, and was the Board president during the events at issue. He did not win his bid for re-election in 2019 but remained on the Board until January 1, 2020. Discenza was first elected to the Board in 2014, was re-elected in 2017, and stepped down from the Board after the 2021 election. Christopher M. Suspie of Stein & Suspie, P.C., served and continues to serve as the Board's attorney.

The following is a discussion of the factual background and the parties' arguments. The incidents giving rise to the allegations, the charges and the arguments are discussed separately with respect to each respondent.

As To Respondent Discenza:

The charges against respondent Discenza involve two incidents, the first of which (“endorsement”) occurred on November 1, 2019, and the second of which (“polling site”) occurred on November 5, 2019.

Endorsement

On November 1, 2019, when the “Marchitello, Rozzi & Armato for Lacey Board of Education” Facebook group posted a video of Discenza endorsing the candidates and encouraging the public to vote for them in the upcoming election. These three candidates were collectively running under the title “Team 147.” The caption to the video read “Thank you Lacey School Board Member Discenza for her endorsement and support! With a new majority on the school board, we can bring a new year of change and fiscal responsibility.” In the video Discenza is seen sitting in front of a bookcase and wearing her Board identification badge, where she says the following:

Hello, my name is Regina Discenza. I am currently serving my second term on the Lacey School Board and I thank you for your votes of confidence in 2017 and 2014. This November fifth the taxpayers in Lacey Township have a very big decision to make and they have the power to make historic change. Please help me serve you the taxpayers on November fifth and vote for Team 147 to assist me on the Board. A new majority for change and fiscal responsibility. 67% of your property taxes are going directly to the school district. The current local tax levy is now over \$48 million and student enrollment has decreased from 5,100 to 4,000 in the past ten years. The total budget for the pre-K-12 Lacey District is over \$77 million. The annual debt service payments total over \$3.7 million. Over 82% of the budget is for salaries, benefits, and other contractual obligations. With the tax levy constantly escalating and enrollment declining it is essential for the citizens to take control of their school taxes. There is a twenty-eight-year incumbent candidate with conflicts and another with lifetime connections to employees. They do not have the ability to act impartially, it's human nature. Team 147 has no conflicts of interest and no relatives working for the district. All of us can act impartially while performing our duties with no ties to any union. The

New Jersey Citizens for Property Tax Reform and I endorse and support Sonia Marchitello, Gavin Rozzi, and Sal Armato for Lacey School Board. On November fifth, please make your voice heard, go to the polls and vote Column D candidates 147. There's no room for politics in education. Thank you. Please share this video with your friends and neighbors.

[Commission Supporting Brief, Exs. A, B, E.]

Shortly after the endorsement was posted Rozzi commented on the video: "Working in conjunction with Lacey School Board Member Discenza, if our team is elected, we will have a full majority on the board. This will allow us to deliver historic change and not be outvoted by the special interest." There is no evidence in the record or claims by Discenza that she replied to this comment, made her own comment on the post, or reposted or otherwise shared the video endorsement.

Discenza's arguments in response are: (1) that she had no knowledge or involvement over the posting of her endorsement, (2) the candidates did not win their bids for election (hence she did not "attempt to use [her] official position"), (3) the endorsement did not name any sitting Board members, (4) she never expressly said she was speaking on behalf of the Board or in her capacity as a Board member, and (5) the video and transcript have not been verified for authenticity and as the candidates' Facebook page is no longer available their authenticity cannot be proven.

Polling Site

The second incident occurred on November 5, 2019, at the end of the election day, at the Murray Grove polling site for districts 8 and 13. There is no dispute that Discenza came to the polling site to collect a copy of the tally sheets and tapes. Nor that Discenza was informed by a poll worker (Peggy Sue Juliano) that she would not be able to get a copy as the county clerk only permitted a certain number of tapes to be produced at the polling place, and Discenza would need to go to city hall to receive a copy. Discenza insisted that she receive a copy, arguing that the county clerk had never issued such a rule. She was eventually given the information and left the polling site.

However, there is a dispute among the parties as to what Discenza said during the encounter. Written statements by Juliano and another poll worker (Louise Quist) of their recollection of the events was given to a Board member on or about December 13, 2019, and then to Giordano. Their written statements contend that Discenza said “she was there on behalf of the Board to collect tally sheets and tapes for the Board.” The written statements also state that in response to being denied the information Discenza replied that “her request had nothing to do with the clerk and that the tape was for the Board.” Discenza in turn stated in her brief and response to the original complaint that she expressly requested the tally sheets “on behalf of Team 1-4-7,” and made no mention of the Board. Discenza also contends that the two poll workers have “strong political connections to certain Board members and to Lacey Township,” and that Quist was “nowhere near Ms. Juliano and [Discenza] during [the] conversation.”

The SEC found probable cause existed for two of the allegations in the complaint against Discenza. Namely, a violation of N.J.S.A. 18A:12-24(b), -24.1(e) (Count 3, the polling site), and a violation of N.J.S.A. 18A:12-24(b), -24.1(e), (f) (Count 4, endorsement). For the endorsement allegation, the SEC stated that the violations could be proven with evidence that (1) Discenza referenced her Board position and/or it was apparent she was affiliated with the Board (i.e., acted in her capacity as a Board member); (2) did not include a proper disclaimer with her endorsement; and (3) made the endorsement at the request and/or benefit of Team 147, or for her own personal benefit. For the allegations involving the polling site, the SEC stated that the violations could be proven with evidence that she referenced and/or used her Board membership position to secure information she was not authorized to receive, thus acting beyond the scope of her duties and responsibilities.

As to Respondent Giordano:

The activities giving rise to the charges against respondent Giordano began the day after the election on November 6, 2019, when Giordano contacted the Board’s attorney and requested that he conduct research regarding the conduct of Board member Discenza. (See Giordano Supporting Brief, Ex. C no. 38.) Discenza became aware of

this request for the first time on December 6, 2019, when the Board reviewed the November 2019 legal bill for ratification. The entire Board elected to ratify the bill except for Discenza who abstained. On the bill in question were fifteen entries marked "Member Conduct." The amount of time billed for this research was 33.90 hours, for a total cost of \$5,085. See Giordano Complaint (C-04-20) at 3-4, 5-7. At no point were the attorney's research or conclusions formally shared with other members of the Board during Discenza's tenure on the Board.

According to the Lacey Township Board of Education District Policy 0174 (titled "Legal Services") there are three designated contacts who may "request services or advice from contracted legal counsel," the Superintendent, the Business Administrator/Board Secretary, and the Board President. According to the complaint, the former two stated they had no knowledge of the fifteen charges for "Member Conduct" in the November legal bill. See Giordano Complaint (C-04-20) at 7.

Giordano admitted that he made the request to the Board's attorney, but argues he was legally entitled to do so as an authorized contact person and did not need approval from the Board before requesting legal services. He also claims that there is no other evidence that he did not share the results of the research, or that the request was done without the knowledge of the Board members or the other two authorized individuals. Finally, he contends the Board did consent to his conduct when it ratified the November bill.

The SEC also found probable cause existed for the first four allegations in the complaint against Giordano. The charges in the complaint alleged a violation of the following: N.J.S.A. 18A:12-24(b); N.J.S.A. 18A:12-24.1(c), (e), and (f). In its discussion the Commission stated that the four violations could be established from evidence that: (1) Giordano used the Board's attorney to investigate Discenza's conduct for his own personal gain; (2) that this use of the attorney was outside the scope of his authority as the Board President or as an authorized contact person; and, (3) the information was requested for purposes unrelated to legitimate Board policy, business, or concerns (i.e., because of "personal hostility").

CONCLUSIONS OF LAW

A motion for summary decision is proper when “papers and discovery which have been filed together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law.” N.J.A.C. 1:1-12.5(b).

The conduct of members of the local school boards of education is governed by the School Ethics Act (the Act), N.J.S.A. 18A:12-21 to 18A:12-34. In creating the Act, the Legislature found that public officials working for and in school districts “hold the respect and confidence of the people . . . [and] must avoid conduct which is in violation of their public trust or which creates a justifiable impression among the public that such trust is being violated.” N.J.S.A. 18A:12-22(a). To effectuate this goal the Legislature adopted rules governing conflicts of interest (N.J.S.A. 18A:12-24) and a Code of Ethics for School Board Members (N.J.S.A. 18A:12-24.1). The Legislature also created the School Ethics Commission which reviews allegations and enforces ethical violations of these ethical standards. N.J.A.C. 6A:28-1.1.

The complainant bears the burden to establish a violation of the ethical standards by a preponderance of the credible evidence. N.J.S.A. 18A:12-29(b). See In re Polk, 90 N.J. 550, 556 (1982). If this matter, the Commission, as the petitioner, bears the burden rather than the original complainants.

The pertinent portion of the section governing general conflicts of interest in this matter is:

No school official shall use or attempt to use his official position to secure unwarranted privileges, advantages or employment for himself, members of his immediate family or others.

[N.J.S.A. 18A:24(b).]

The Code of Ethics for School Board Members, N.J.S.A. 18A:12-24.1, covers ethical rules and conflicts of interest specifically for members of local school boards. Among the ten ethical rules set forth in the Code of Ethics, the relevant provisions here are:

c. I will confine my board action to policy making, planning, and appraisal, and I will help to frame policies and plans only after the board has consulted those who will be affected by them.

. . .

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.

. . .

f. I will refuse to surrender my independent judgment to special interest or partisan political groups or to use the schools for personal gain or for the gain of friends.

The rules promulgated under the Act include a list of the factual evidence necessary to establish a violation of each of the rules in the Code of Ethics. N.J.A.C. 6A:28-6.4(a). The relevant sections are as follows:

Factual evidence of a violation of N.J.S.A. 18A:12-24.1(c) shall include evidence that the respondent(s) took board action to effectuate policies and plans without consulting those affected by such policies and plans, or took action that was unrelated to the respondent's duty to:

- i. Develop the general rules and principles that guide the management of the school district or charter school;
- ii. Formulate the programs and methods to effectuate the goals of the school district or charter school; or
- iii. Ascertain the value or liability of a policy.

[N.J.A.C. 6A:28-6.4(a)(3).]

Factual evidence of a violation of N.J.S.A. 18A:12-24.1(e) shall include evidence that the respondent made personal promises or took action beyond the scope of [their] duties

such that, by its nature, had the potential to compromise the board.

[N.J.A.C. 6A:28-6.4(a)(5).]

Factual evidence of a violation of N.J.S.A. 18A:12-24.1(f) shall include evidence that the respondent(s) took action on behalf of, or at the request of, a special interest group or persons organized and voluntarily united in opinion and who adhere to a particular political party or cause; or evidence that the respondent(s) used the schools in order to acquire some benefit for the respondent(s), a member of [their] immediate family, or a friend.

[N.J.A.C. 6A:28-6.4(a)(6).]

Members of local boards of education are held to the same standards as other municipal officials regarding any conflict of interests. Friends Retirement Concepts v. Borough of Somerville, Bd. of Educ., 356 N.J. Super. 203, 213-14 (Law Div. 2002)). In municipal matters, the State's policy is that public officials should "avoid even the appearance of impropriety." Id. at 214. The court explained that "the moral philosophy is that next in importance to the duty of the officer to render a righteous judgment" is in doing so in a manner that begets "no suspicion of the pureness and integrity of his action." Ibid. (citations omitted). The test for determining the existence of an ethics violation is the same as for determining a conflict of interest. Hyman et al. v. Pleasantville Bd. of Educ. et al., 2017 N.J. AGEN LEXIS 890, 24 (Dec. 21, 2017) (discussing Friends Retirement as it applies to violations of the Act and Code of Ethics). In the Friends case the court noted there are four types of situations that involve municipal officials and conflicts of interest claims under the Act: direct and indirect pecuniary interests and direct and indirect personal interests. Id. at 213 (citing Wyzykowski v. Rizas, 132 N.J. 509, 525-26 (1993)). A conflict of interest occurs when the public official has "an interest not shared in common with the other members of the public" or when there are contradictory interests pulling the official in opposite directions. Id. at 215 (citations omitted).

Whether there is an ethical violation is a case-by-case analysis, but the question is essentially 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. . . . An actual conflict of interest is not the decisive factor, nor is whether the public servant succumbs to the temptation, but rather whether there is a potential for conflict.

Friends Retirement, 356 N.J. Super. at 214-15 (citing Griggs v. Borough of Princeton, 33 N.J. 207, 219 (1960)).

See e.g., John, et al. v. Gordon, Willingboro Bd. of Educ., Burlington Cty., C34-08 (Oct. 27, 2009) (holding that it is not necessary to find an action compromised the board, rather it is sufficient for the action to be “of such a nature that it may have compromised the [b]oard.”); In re Freilich, Washington Twp. Bd. of Educ., Burlington Cty., C18-04 & C19-04 (Apr. 4, 2005) (if there is a risk that the autonomy and independent discretion and judgement of the board may be compromised, the action had the potential to compromise the board). See also SEC Advisory Opinion A03-07, 4 (Apr. 2, 2007) (whether a board member’s “private action” compromised the board is a fact specific question).

For example, in Dericks et al. v. Schiavoni, Sparta Twp. Bd. of Educ., Sussex Cty., a board president sent a letter to the editor in response to an article that he believed was injurious to the board, without first obtaining the board’s consent. C41-07 (Feb. 24, 2009). The letter addressed board business and was intended to speak for the board, thus the SEC found that there was a reasonable likelihood that the public would perceive the letter to be an official statement of the board’s position. Thus, his action could have compromised the board.

In addition, whether the respondent’s action was a violation of the Code of Ethics depends on whether it was a “private action” or a “board action.” The SEC has advised that a “private action” does not mean the opposite of a “public action,” instead it means something that is not a “board action.” SEC Advisory Opinion A03-07, at 3. And acting without the authority or authorization of the board may constitute a private action. Ibid. (citing In re Freilich, C18-04 & C19-04) (where a board member sent a signed letter to a private donor in their capacity as the chair of the board’s technology committee, but the board member did not have the authorization to send the letter). See c.f., Dericks et al.,

C41-07 (holding that there was no violation of N.J.S.A. 18A:12-24.1(e) when a board president met with a senator with both the knowledge and consent of the board, as the act was now a “board action” it could not simultaneously be a “private action”).

As To Respondent Discenza:

Endorsement

Although board members do not give up their right to participate in political activities, the Legislature has established specific standards to guide board members’ conduct to “ensure and preserve public confidence.” SEC Advisory Opinion A02-06, 1 (Mar. 10, 2006) (citing 18A:12-22). Consequently, before engaging in such private action, the board member must include a disclaimer, the purpose of which is to prevent the member from compromising their local board of education by causing reasonable confusion among the public as to whether the board member’s statement is made as a private citizen or as a public official. SEC Advisory Opinion A03-07, at 3. To not hold oneself out as a board member, the official should identify themselves as a board member, but also indicate that they are writing “in their role as a private citizen and that the letter is neither authorized by nor written on behalf of the board.” Id. at 2-3 The SEC has determined that this disclaimer will not impact the official’s First Amendment rights and will also fulfill the Legislature’s intent behind the Act. Id. at 3. A disclaimer should be used both in traditional print forms and on all forms of social media. SEC Advisory Opinion A36-14, (Oct. 29, 2014).

However, having a disclaimer alone, may not be enough if the substance of the statements may reasonably lead the public to believe that the official is speaking and representing themselves as a member of the board. See Nazir v. Patel, Piscataway Twp. Bd. of Educ., Middlesex Cty., C43-19, at *12 (May 25, 2021) (“In short, when a school official cites to [their] Board position/office but fails to include an appropriate disclaimer, [they are taking] action which is violative of N.J.S.A. 18A:12-24.1(e).”). See e.g., Kwapniewski v. Curioni, Lodi Bd. of Educ., Bergen Co., 2019 N.J. AGEN LEXIS 1156, 21-22 (Oct. 24, 2019) (ALJ found the respondent was not speaking strictly as a private

citizen when respondent's blog posts contained a disclaimer, but the posts' substance included phrases like "before I joined the Board" and "before I got on the Board").

In the present matter there is no evidence that Discenza included, or intended to include, a disclaimer with her endorsement of the candidates. As such I **FIND** that she did not. Even if Discenza had included a disclaimer at the start of her endorsement (or in the video's caption) it likely would have been negated by the substance of the statements, as the public would be justified in believing she was speaking, and representing, herself as a member of the Board. Specifically, I **FIND** that Discenza made multiple references to her position on the Board:

. . . I am currently serving my second term on the Lacey School Board, and I thank you for you votes of confidence in 2017 and 2014. . . . Please help me serve you the taxpayers on November fifth and vote for Team 147 to assist me on the Board. A new majority for change and fiscal responsibility. . . . Team 147 has no conflicts of interest and no relatives working for the district. All of us can act impartially while performing our duties with no ties to any union. The New Jersey Citizens for Property Tax Reform and I endorse and support [Team 147] for Lacey School Board. . . .

Consequently, the fact that Discenza never expressly said that she was acting in her official capacity or on behalf of the Board is not material. As seen in numerous Commission decisions, the mere absence of such express language does not negate a failure to include any disclaimer nor the multiple use of language associating Discenza with the Board and her official position. A respondent cannot claim they were speaking as a private citizen after the fact, it is the disclaimer and substance of the endorsement that decides whether they were, or if the public would be justified in believing otherwise.

There is insufficient evidence in the record proving that Discenza made this endorsement at the request of Team 147 and/or any of the individual candidates. However, the endorsement would have benefited the candidates, and as Discenza said in the endorsement, the candidates' election to the Board would benefit her personally as they would "assist [her] on the Board." The fact that the endorsed

candidates were unsuccessful in their bids for a seat on the Board is immaterial for purposes of finding a violation of the Act or Code of Ethics. That Discenza did not expressly name the two sitting Board members she referenced is also not material. Her endorsement—implicitly in her capacity as a Board member—had the potential to compromise the Board. Her remarks called into question the impartiality and autonomy of the Board and its members.

Consequently, there is sufficient evidence at this point in the proceeding to find that in endorsing the candidates of Team 147 without the appropriate disclaimer Discenza violated N.J.S.A. 18A:12-24(b), -24.1(e), and (f) as a matter of law. Thus, I **CONCLUDE** that the Commission's motion for summary decision as it relates to this incident should be **GRANTED**, and Discenza's motion **DENIED**.

Polling Site

As discussed previously, the charges against Discenza regarding her endorsement of Board candidates in the 2019 election was a violation of the Act and Code of Ethics as a matter of law. However, there is a genuine issue of material fact regarding her conduct at the polling site on November 5, 2019. Regarding this incident Discenza claims that she requested a copy of the tally sheets "on behalf of Team 147." On the other hand, the record also includes hearsay statements from two individuals that were working at the poll site the night in question who attest that Discenza made the request on behalf of the Board. Whether Discenza referenced her position on the Board, and/or otherwise used her position on the Board to obtain this information will determine whether there was a violation of N.J.S.A. 18A:12-24(b), and -24.1(e). Therefore, as to the two charges relating to Discenza's conduct at the polling site, I **CONCLUDE** that both Discenza's motion and the Commission's cross motion should be **DENIED**.

As to Respondent Giordano:

Private Action vs Board Action

As previously discussed, if a respondent's act was a "board action" it conversely cannot be a "private action." While the cases and Commission advisory opinions discussing this rule generally focus on N.J.S.A. 18A:12-24.1(e), this axiom also applies in alleged violations of N.J.S.A. 18A:12-24.1(c). See e.g., John v. Gordon, C34-08, at 6, 17 (citing Sovelove v. Breda, Mine Hill Twp. Bd. of Educ., C49-05 (Sept. 26, 2006)) (finding that because the board never took action to formally support or authorize the mock election, the respondent's actions were not "board actions" to implicate N.J.S.A. 18A:12-24.1(c)); Lesinski v. Smallwood, Asbury Park Bd. of Educ., Monmouth Cty., C14-14, at 11 (Oct. 28, 2014); aff'd 2017 N.J. Super. Unpub. LEXIS 1267 (App. Div. 2017) (holding that respondent's act was a private action when the board did not formally or informally authorize her to contact the candidate, and her further contact and unauthorized site visit was of a nature that had the potential to compromise the board). See also, Persi v. Woska, Brick Twp. Bd. of Educ., Ocean Cty., C03-14, at 7 (Oct. 28, 2014).

A primary factor that appears in these decisions is whether the respondent acted with the formal support or authorization of the board. In the present matter, there is some dispute as to whether a board president can request legal services from the board's attorney without the prior formal consent or authorization of the board or the other two individuals authorized by the district to request such services.

The present matter is similar to a discussion by the Commission in Cheng v. Rodas, West New York Bd. of Educ., Hudson Cty., C58-14 (Sept. 22, 2015). In Cheng the Commission indicated that a board president who—without consulting other board members—instructs the board's attorney to perform legal research and prepare a memorandum would violate N.J.S.A. 12:24.1(e). Id. at 11. The board's attorney was asked by the respondent, the board's president, to research the non-renewal of the superintendent, replacing an employee after elections were held but prior to the new board's organization, if the board could bind a future board by replacing an employee's position prior to the end of their contract, and addressing personnel actions taken to avoid granting tenure. Id. at 2. The complainant in that matter did not have personal knowledge of who prompted the assignments for legal services nor any support for his suspicions. Id. at 11. And during the hearing the respondent did not testify nor call any witness before

resting his case, only arguing that the board's attorney could have done the research sua sponte. Ibid. Consequently, the Commission did not find there was sufficient evidence of a violation of 18A:12-24.1(e) for this charge. Ibid.

However, the language of the decision appears to indicate that it was the lack of any evidence beyond speculation and conjecture on the petitioner's part that prevented the Commission from finding a violation had occurred. As there is evidence in the present matter and I **FIND** that Giordano engaged in a similar use of school resources without the consent of the Board as the respondent did in Cheng, this decision appears persuasive in finding that Giordano's conduct violated the Code of Ethics. I **CONCLUDE** that the Board's motion in this aspect should be **GRANTED**, and respondent's motion **DENIED**.

Conflict of Interest & Animus

As has also been previously discussed, what determines a violation of the Act or Code of Ethics is not the existence of an actual conflict of interest, but rather if there is a potential for a conflict of interest. Friends Retirement, 356 N.J. Super. at 214 (quoting Wyzykowski, 132 N.J. at 524). See also, John v. Gordon, C34-08. This goes to the Legislature's findings and declarations when enacting the School Ethics Act, namely that:

it is essential that the conduct of members of local boards of education and local school administrators hold the respect and confidence of the people. These board members and administrators must avoid conduct which is in violation of their public trust or which creates a justifiable impression among the public that such trust is being violated.

[N.J.S.A. 18A:12-22(a). See also In re Deborah Anderson, High Point Reg'l Bd. of Educ., Sussex Cty., 2020 N.J. AGEN LEXIS 624, Initial Decision (Nov. 10, 2020) ("it is the public policy of this State that public officials avoid even the appearance of impropriety").

Evidence of a personal animus or other evidence of prior negative history between the respondent and the complainant or another can create a justifiable impression among the public that the respondent used their official position as a board member to secure an

unwarranted privilege or advantage for themselves in violation of the Act. In re Rhonda Williams Bembry, Hackensack Bd. of Educ., Bergen Cty., 2014 N.J. AGEN LEXIS 514, 34-35 (Aug. 25, 2014); adopted Commission, C49-12 (Oct. 28, 2014).

For example, the Commission has previously issued an advisory opinion stating that it would be a violation of the Act for a board member to participate in a superintendent's evaluation when the board member was previously employed by the district, was terminated as a result of the superintendent's decision, and their first act upon being elected to the board was to call for a vote of no confidence against the superintendent. SEC Advisory Opinion A06-08, (June 10, 2008). The Commission advised that board members "must avoid conduct which is in violation of their public trust or which creates a justifiable impression among the public that such trust is being violated." Id. (quoting N.J.S.A. 18A:12-22). And that if the board member participated in the evaluation, it would be reasonable for the public to perceive them as using their position to secure an advantage over the superintendent because of their shared history. Id.

All parties in the present matter agree and I **FIND** that there is substantial negative prior history and continuing mutual disdain between the two respondents. Giordano explained in his briefs that his relationship with Discenza is "nothing short of political discord" and the allegations against him "arise from nothing more than personal animosity and political bitterness." While Discenza has stated in her briefs that she and Giordano "harbor substantial animus toward each other, as is evidenced by both ethics complaints, and by the fact that [Discenza and Giordano] ultimately entered into a Municipal Mediation Agreement whereunder they agreed to have no further contact with each other."

The public would be reasonably justified in believing that Giordano violated the public trust when considering: the relationship and history between the two respondents; the timing of when Giordano made the request; the topic of the request; and that besides seeking ratification of the legal bill, the research request, results, and legal conclusions were never formally presented to the Board. There is a strong impression from the evidence in the record, which has not been negated by any of Giordano's arguments, that he requested the Board's attorney to conduct research into a political rival for the purpose

of gaining a personal advantage against her. The result being a not inconsiderable expense of \$5,085, which was ultimately borne by the taxpayers.

When examining the evidence in the record, even in the light most favorable to Giordano, his conduct by all accounts appears to be a private action as it was not within the scope of his duties as the Board President nor as a person authorized to prudently request legal services from the Board's attorney. Consequently, as this was a private action, it cannot simultaneously be a board action, and so I **CONCLUDE** that Giordano did not violate 18A:12-24.1(c).

However, there is sufficient evidence in the record to find as a matter of law, and I **CONCLUDE** that Giordano violated 18A:12-24(b), -24(e) and (f). In support of this, conclusion, I **FIND** that Giordano used his official position as Board President, and one of three individuals authorized to contact the Board's attorney to request legal services and did so to secure an unwarranted advantage for himself against a political rival with whom he had a negative history. N.J.S.A. 18A:12-24(b). I further FIND that he failed to recognize the Board's authority by both using school resources for personal reasons and by failing to seek formal approval of either the request or the later use of the research at any time beyond seeking ratification of the charges in the November legal bill. This private action, by its very nature, compromises the integrity and accountability of the Board and its proper use of school resources. N.J.S.A. 18A:12-24.1(e). Giordano used school resources for his own personal gain and would not have had access to such resources but for his position on the Board. N.J.S.A. 18A:12-24(b), -24.1(f).

Therefore, the Commission's motion for summary decision should be **GRANTED** regarding violations of 18A:12-24(b), -24.1(e), and (f), and denied regarding a violation of 18A:12-24.1(c). Giordano's motion should be **GRANTED** as to the violation of 18A:12-24.1(c) and **DENIED** in the remainder.

CONCLUSION

The Commission's two motions for summary decision should each be **GRANTED** in part and **DENIED** in part. Respondent Discenza's motion should be **DENIED** in its

entirety, and respondent Giordano's motion should be **GRANTED** in part and **DENIED** in part.

The motion for the complaint against Discenza (EEC 06738-20) should be **GRANTED** for all charges relating to her endorsement of the candidates (i.e., N.J.S.A. 18A:12-24(b), -24.1(e), and (f)) and should be **DENIED** for all charges relating to her conduct at the polling site as in the latter case there are material facts in dispute precluding a summary disposition (i.e., N.J.S.A. 18A:12-24(b), and -24.1(e) and requiring an evidentiary hearing. Discenza's motion is **DENIED** in full.

The motion for the complaint against Giordano (EEC 10952-20) should be **GRANTED** for the first, third, and fourth charges (i.e., N.J.S.A. 18A:12-24(b), -24.1(e), and (f)), but **DENIED** as to the last charge as Giordano's conduct was a private action and thus cannot also be a board action as required for finding a violation of N.J.S.A. 18A:12-24.1(c). Giordano's motion should be **GRANTED** as to that charge and **DENIED** in the remainder.

PENALTY

As matters regarding the charges against respondent Discenza remain outstanding and subject to further proceedings, it would be premature to discuss penalty at this time and such discussion is to be held in abeyance until the conclusion of these proceedings.

As all issues regarding the charges against respondent Giordano have been resolved, and charges of violating the Code having been sustained, it is appropriate at this time to determine the appropriate penalty. When a violation is found to have occurred the Commission shall, by majority vote, "recommend to the Commissioner the reprimand, censure, suspension, or removal" of the board member found to have violated the Code of Ethics. N.J.S.A. 18A:12-29(c). "If a violation of the Act is found, the Commission may recommend to the Commissioner the reprimand, censure, suspension, or removal of the school official. The recommendation of any of the foregoing sanctions shall require a vote of the majority of the full membership of the Commission. The Commission may decline

to issue a penalty for violations that it finds by a majority vote are de minimis.” N.J.A.C. 6A:28-10.12(a).

Pursuant to N.J.A.C. 6A:28-1.2:

“Reprimand” means a rebuke by the Commissioner of a school official for having been found to have breached the standards of conduct prescribed by N.J.S.A. 18A:12-21 et seq.

“Censure” means, except in the case of a school official who is an officer or employee of the New Jersey School Boards Association, a formal expression of disapproval by the Commissioner which is publicized by the adoption of a formal resolution by the School Ethics Commission and the school official’s district board of education or the board of trustees of his charter school at a public meeting when said school official has been found to be in violation of N.J.S.A. 18A:12-21 et seq. In the case of a school official who is an officer or employee of the New Jersey School Boards Association, censure means a formal expression of disapproval by the School Ethics Commission publicized by the adoption of a formal resolution by the Commission at a public meeting.

“Removal” means removal from office for the length of a board member or charter school trustee’s term of office or termination of employment.

In the present matter, the violations in question do not appear to be de minimis, and therefore imposition of one of the enumerated sanctions is appropriate. The regulations implementing the act clearly limit the sanction of removal to the length of a board member’s term of office. Here, respondent Giordano no longer serves on the Board. As such, removal is not an appropriate sanction. Although not defined in the regulation, the sanction of suspension presumably carries the same limitation and barrier to imposition. Given the totality of the circumstances the charges do not seem to support a formal action of censure and as such, I **CONCLUDE** that reprimand is the appropriate sanction to be imposed in this case.

ORDER

Based on the foregoing, it is **ORDERED** that the Commission's motion regarding the complaint against respondent Discenza (EEC 06738-20) is hereby **GRANTED** for all charges relating to her endorsement of the candidates (i.e., N.J.S.A. 18A:12-24(b), -24.1(e), and (f)) and is **DENIED** for all charges relating to her conduct at the polling site pending an evidentiary hearing limited to that issue. Discenza's motion is **DENIED** in full. Further proceedings shall be scheduled to resolve the identified factual disputes regarding all charges relating to her conduct at the polling site.

It is further **ORDERED** that the Commission's motion for the complaint against Giordano (EEC 10952-20) be **GRANTED** for the first, third, and fourth charges (i.e., N.J.S.A. 18A:12-24(b), -24.1(e), and (f)), but **DENIED** as to the remaining charge as Giordano's conduct was a private action and thus cannot also be a board action as required for finding a violation of N.J.S.A. 18A:12-24.1(c). Giordano's motion is hereby **GRANTED** as to that charge and **DENIED** in the remainder. It is further **ORDERED** that respondent Giordano be reprimanded for violating the School Ethics Act, N.J.S.A. 18A:12-21 to -34.

This order may be reviewed by the **SCHOOL ETHICS COMMISSION**, either upon interlocutory review pursuant to N.J.A.C. 1:1-14.10, or at the end of the contested case, pursuant to N.J.A.C. 1:1-18.6.

February 27, 2023

DATE



ELIA A. PELIOS, ALJ

EAP/tat

Cc: Clerk, OAL, Trenton

EXHIBIT B



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EEC 10952-20

AGENCY DKT. NO. C04-20

**IN THE MATTER OF SHAWN GIORDANO,
LACEY TOWNSHIP BOARD OF EDUCATION,
OCEAN COUNTY.**

Sydney Finkelstein, Deputy Attorney General, for petitioner (Matthew Platkin,
Attorney General of New Jersey, attorney)

Christopher J. Dasti, Esq., for respondent Shawn Giordano (Dasti Associates,
attorneys)

Record Closed: March 15, 2023

Decided: April 27, 2023

BEFORE **ELIA A. PELIOS**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This case involves a school ethics complaint against a prior member of the Lacey Township Board of Education (the Board): respondent Shawn Giordano. He is defending against a complaint initiated by Ms. Regina Discenza, another former board member, who is respondent in another matter, EEC 06738-20.

On July 21, 2020, the Commission found probable cause existed for four counts against Giordano and for two counts against Discenza, and transmitted the matters to the Office of Administrative Law (OAL) for hearings as contested cases. The two cases were consolidated on June 3, 2021, via court order and discovery was exchanged between all parties. Discenza and Giordano both filed separate motions for summary decision on March 10, 2022, and the Commission filed its cross motion on May 11, 2022. Responsive papers and replies were received.

On February 27, 2023 I issued an Order on Summary Decision granting summary decision in part and denying it in part. That order is attached to this initial decision as court's exhibit C-1 and is incorporated into this decision as if set forth more fully herein. As that order resolved all charges against respondent Giordano I also issued, on February 28, 2023, an order of severance severing this matter from EEC 06738-20. That order is also attached to this initial decision, as court's exhibit C-2, and is incorporated into this decision as if set forth more fully herein.

On March 6, 2023, DAG Finkelstein, who represents petitioner in this matter, sent a request for clarification asking if the Order on Summary Decision (C-1) was intended to serve as an initial decision as it applied to respondent Giordano. A conference call was held on March 15, 2023 which included counsel for the parties to the present matter. We discussed the request for clarification and it was agreed that as the Order (C-1) resolved all issues regarding respondent Giordano and the matters severed, I would issue an Initial Decision in the present matter incorporating the findings of fact, conclusions of law and recommendations of penalty pertaining to respondent Giordano as enunciated in the Summary Decision Order (C-1).

The record was then closed in the present matter. EEC 06738-20 remains open pending further proceedings as specified in the order (C-1).

FACTUAL DISCUSSION

The factual discussion and findings of fact pertaining to this matter delineated in the Order on Summary Decision (C-1) are hereby **ADOPTED** and **INCORPORATED** into this

decision as if set forth more fully herein.

More specifically, I **FIND** that there is substantial negative prior history and continuing mutual disdain between respondent Giordano and his former colleague Discenza. I further **FIND** that Giordano used his official position as Board President, and one of three individuals authorized to contact the Board's attorney to request legal services and did so to secure an unwarranted advantage for himself against a political rival with whom he had a negative history in violation of N.J.S.A. 18A:12-24(b).

I further **FIND** that respondent Giordano failed to recognize the Board's authority by both using school resources for personal reasons and by failing to seek formal approval of either the request or the later use of the research at any time beyond seeking ratification of the charges in the November legal bill and that this private action, by its very nature, compromises the integrity and accountability of the Board and its proper use of school resources in violation of N.J.S.A. 18A:12-24.1(e).

I further **FIND** that Giordano used school resources for his own personal gain, and would not have had access to such resources but for his position on the Board in violation of N.J.S.A. 18A:12-24(b), and N.J.S.A. 18A:12-24.1(f).

CONCLUSIONS OF LAW

The legal discussion and conclusions of law pertaining to this matter delineated in the Order on Summary Decision (C-1) are hereby **ADOPTED** and **INCORPORATED** into this decision as if set forth more fully herein.

More specifically, I **CONCLUDE** that the charges spelled out in the complaint against Giordano (EEC 10952-20) should be **SUSTAINED** for the first, third, and fourth charges (i.e., 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(f)), but be **DISMISSED** as to the remaining charge as Giordano's conduct was a private action and thus cannot also be a board action as required for finding a violation of N.J.S.A. 18A:12-24.1(c).

PENALTY

As charges of violating the Code having been sustained against respondent, it is appropriate at this time to determine the appropriate penalty. The analysis and conclusions pertaining to penalty delineated in the Order on Summary Decision (C-1) are hereby **ADOPTED** and **INCORPORATED** into this decision as if set forth more fully herein.

More specifically, I **CONCLUDE** that reprimand is the appropriate sanction to be imposed in this case.

ORDER

It is hereby **ORDERED** that, consistent with the Order On summary Decision (C-1), the first, third, and fourth charges (i.e., 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 (f)), against respondent Giordano be and are hereby **SUSTAINED**. The remaining (second) charge is hereby **DISMISSED** as Giordano's conduct was a private action and thus cannot also be a board action as required for finding a violation of N.J.S.A. 18A:12-24.1(c). It is further **ORDERED** that respondent Giordano be reprimanded for violating the School Ethics Act, N.J.S.A. 18A:12-21 to -34.

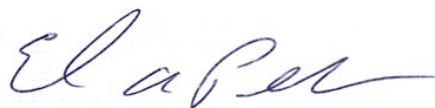
I hereby **FILE** my initial decision with the **SCHOOL ETHICS COMMISSION**. Pursuant to N.J.S.A. 18A:12-29, the School Ethics Commission has jurisdiction to determine whether a violation of the School Ethics Act occurred. If it concludes that the conduct constitutes a violation of the School Ethics Act, it shall recommend an appropriate penalty to the Commissioner of Education. The Commissioner of Education shall issue the final decision in this matter.

If the School Ethics Commission determines that a violation has occurred, it shall issue a written decision recommending to the Commissioner of Education an appropriate penalty and shall forward the record, including this recommended decision and its decision, to the Commissioner of Education. The Commissioner of Education may subsequently render a final decision as to the appropriate penalty. If the Commissioner of Education does not render a final decision within forty-five days of its receipt of this initial decision, and unless such time period is otherwise extended, the recommended decision of the School Ethics Commission shall become the final decision.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **SCHOOL ETHICS COMMISSION, DEPARTMENT OF EDUCATION, PO Box 500, Trenton, NJ 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

April 27, 2023

DATE



ELIA A. PELIOS, ALJ

Date Received at Agency:

Date Mailed to Parties:

EAP/ca

APPENDIX

EXHIBITS

For Court:

C-1 Order on Summary Decision, February 27, 2023

C-2 Order of Severance, February 28, 2023

EXHIBIT C

Before the School Ethics Commission
OAL Docket No.: EEC-10952-20
SEC Docket No.: C04-20
Final Decision

I/M/O Shawn Giordano,
Lacey Township Board of Education, Ocean County
Respondent

I. Procedural History

The above-captioned matter arises from a Complaint that was filed with the School Ethics Commission (Commission) on January 13, 2020, by Regina C. Discenza (Complainant), alleging that Shawn Giordano (Respondent), a member of the Lacey Township Board of Education (Board), violated the School Ethics Act (Act), *N.J.S.A.* 18A:12-21 *et seq.*, when he directed Board counsel to conduct research on another Board member who had campaigned against him in a recent election. More specifically, Complaint asserted that Respondent violated *N.J.S.A.* 18A:12-24(b) (Count 1), as well as *N.J.S.A.* 18A:12-24.1(b) (Count 5 and Count 8), *N.J.S.A.* 18A:12-24.1(c) (Count 2), *N.J.S.A.* 18A:12-24.1(e) (Count 3 and Count 6), and *N.J.S.A.* 18A:12-24.1(f) (Count 4, Count 7, and Count 9) of the Code of Ethics for School Board Members (Code).¹

On February 24, 2020, Respondent filed a Motion to Dismiss in Lieu of an Answer (Motion to Dismiss), and also alleged that the Complaint is frivolous. On March 20, 2020, Complainant filed a response to the Motion to Dismiss and allegation of frivolous filing.

At its meeting on May 19, 2020, the Commission voted to deny the Motion to Dismiss as to the allegations in Counts 1-4, and to grant the Motion to Dismiss as to the allegations in Counts 5-10. The Commission also voted to find the Complaint not frivolous and to deny the request for sanctions. Based on its decision, the Commission voted to direct Respondent to file an Answer to Complaint (Answer) to the allegations in Counts 1-4. On June 1, 2020, Respondent filed an Answer as directed.

At its meeting on July 21, 2020, the Commission voted to find probable cause for the remaining allegations in this matter. 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),² the attorney for the Commission (Petitioner) was

¹ The Complaint also alleged that Linda A. Downing violated *N.J.S.A.* 18A:12-24.1(b) (Count 8) and *N.J.S.A.* 18A:12-24.1(f) (Count 9 and Count 10), and Harold “Skip” Peters violated *N.J.S.A.* 18A:12-24.1(b) (Count 8) and *N.J.S.A.* 18A:12-24.1(f) (Count 9). The alleged violations against Respondent Downing and Peters were dismissed, and as such they are no longer parties in this matter.

² This citation refers to the regulation that was in effect at the time of the probable cause determination.

charged with prosecuting the allegations in the Complaint which the Commission found probable cause to credit.

At the OAL, this matter was initially consolidated with a complaint against Discenza (C75-19). Following cross-motions on summary decision, the Administrative Law Judge (ALJ) issued an Order on Partial Summary Decision on February 27, 2023, that resolved the entire case as to Respondent Giordano. As such, the consolidated matters were severed, and the ALJ issued an Initial Decision on April 27, 2023, incorporating the findings of fact, conclusions of law, and recommendations of penalty pertaining to Respondent as stated in his February 27, 2023, Order on Partial Summary Judgment. Respondent filed Exceptions to the Initial Decision, in accordance with *N.J.A.C.* 1:1-18.4. Petitioner did not file a Reply.

At its meeting on June 27, 2023, the Commission considered the full record in this matter. Thereafter, at its meeting on July 25, 2023, the Commission voted to adopt the Initial Decision's findings of fact, legal conclusions that Respondent violated *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(f), but did not violate *N.J.S.A.* 18A:12-24.1(c), and voted to modify the recommended penalty of reprimand in favor of censure.

II. Initial Decision and Order on Partial Summary Decision

The events giving rise to the within matter began on November 6, 2019, the day after the Board election in which Respondent lost his bid for reelection, when Respondent (Board President) "contacted the Board's attorney and requested that he conduct research regarding the conduct of Board member Discenza." *Order* at 5. The Board reviewed the November 2019 legal bill on December 6, 2019, which is when Complainant first became aware of the request. *Ibid.* The entire Board voted to ratify it, with the exception of Complainant, who abstained. *Id.* at 6. The bill had fifteen entries marked "Member Conduct," and the Board attorney billed for 33.90 hours of research, totaling \$5,085. *Ibid.* According to Board policy, the Superintendent, the Business Administrator/Board Secretary, and the Board President have the authority to request services from the Board's counsel. *Ibid.*

In deciding the cross-motions for summary decision, the ALJ found both parties to the matter agreed there is "substantial negative prior history and continuing mutual disdain" between Respondent and Complainant, and as such, Respondent "violated the public trust" in making his request given the relationship between Respondent and Complainant; the timing and topic of Respondent's request (the day after he lost the election); and that other than seeking ratification of the legal bill, Respondent did not apprise the Board of the request or the results of the research. *Id.* at 16.

In concluding that Respondent violated *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(f), the ALJ found Respondent "used his official position as Board President, as one of the three individuals authorized to contact the Board's attorney to request legal services and did so to secure an unwarranted advantage for himself against a political rival with whom he had a negative history." *Id.* at 17. The ALJ further found Respondent "failed to recognize the Board's authority" when he used school resources for personal reasons and failed to seek the Board's approval for his request beyond seeking ratification for the charges, and such "private action, by its very nature, compromises the integrity and accountability of the Board and

its proper use of school resources.” *Ibid.* Further, the ALJ explained that Respondent would not have had access to such resources but for his position on the Board. *Ibid.* However, the ALJ failed to find a violation of *N.J.S.A.* 18A:12-24.1(c). *Ibid.*

With respect to the appropriate penalty for the violations of *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(f), the ALJ recommended a penalty of reprimand. *Id.* at 19. The ALJ found that since Respondent no longer serves on the Board, he cannot remove or suspend Respondent. *Ibid.* The ALJ notes that the violations are not *de minimis*, but given the totality of the circumstances, a reprimand is appropriate. *Ibid.*

III. Exceptions

In his exceptions, Respondent argues that summary decision was “premature and prejudicial” to Respondent as it prevented him from calling witnesses to testify on his behalf. Respondent contends the “OAL questionably determined that ‘there is some dispute as to whether a board president can request legal services from the board’s attorney without the prior formal consent or authorization of the board or the other two individuals authorized by the district to request such services.’” Respondent asserts there is no dispute because Board policy designates the Board President as one of the individuals authorized to request services, but alternatively, a dispute would establish a genuine issue of material fact, resulting in the need for a hearing. Additionally, Respondent argues the Initial Decision “incorporates hearsay” from the Complaint as fact, such as that the Board attorney’s research or conclusions were not shared with other members of the Board or that the Superintendent or Board Secretary were not aware of the attorney’s research, and Petitioner failed to provide any evidence to support those allegations. Respondent maintains that Petitioner failed to provide evidence of violations of *N.J.S.A.* 18A:12-24(b), *N.J.S.A.* 18A:12-24.1(e) and/or *N.J.S.A.* 18A:12-24.1(f) because Respondent was authorized to contact the Board attorney for legal services, and he did so after discussing Complainant’s conduct with other Board members. Respondent notes his “concerns were clearly warranted because the research . . . led to an ethics violation against Ms. Discenza and have now been sustained in the [pending] matter.”

Respondent further argues that the ALJ’s determination that he used his official position “to secure an unwarranted advantage for himself against a political rival” is irreconcilable with the OAL’s determination that there was a reasonable basis to request legal research if the basis of that research resulted in ethics charges against Complainant. Respondent reiterates that Board policy did not require an affirmative vote or resolution to request legal services, and he was authorized to contact the Board attorney and was “clearly within his right to request legal research from the Board Attorney on potential unethical conduct of another board member.”

Respondent attached certifications to demonstrate that a majority of the Board had discussed the matter and agreed that Respondent should request legal research. As such, Respondent urges the Commission to reverse the Initial Decision, and at the very least, reopen the matter for a hearing on the merits.

Petitioner did not file exceptions to the Initial Decision and/or a reply to Respondent’s exceptions.

IV. Analysis

Upon a careful, thorough, and independent review of the record, the Commission agrees with the ALJ that Respondent violated *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(f). The Commission is also in accord with the ALJ's determination that Respondent did not violate *N.J.S.A.* 18A:12-24.1(c). However, the Commission modifies the recommended penalty of reprimand in favor of censure.

N.J.S.A. 18A:12-24(b) prohibits a board member from using or attempting to use his official position to secure unwarranted privileges, advantages or employment for himself, members of his immediate family or others. The ALJ properly concluded Respondent used his official position as Board President to secure an unwarranted advantage for himself. The parties agreed that Respondent and Complainant had a substantial negative history and mutual disdain for each other. Respondent used his position as an individual authorized to contact the Board's attorney to direct the Board attorney to conduct legal research regarding Complainant's conduct. This was done to gain a personal advantage against Complainant, with whom he had a significant negative history. As a result of Respondent's request, the Board's attorney performed almost 34 hours of research and cost the District's taxpayers over \$5,000.00.

The Commission also agrees that Respondent violated *N.J.S.A.* 18A:12-24.1(e). 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. Requesting legal research for personal reasons constitutes private action, or action beyond the scope of Respondent's duties as a Board member. The ALJ appropriately concluded "[t]his private action, by its very nature, compromises the integrity and accountability of the Board and its proper use of school resources."

Additionally, the Commission agrees with the ALJ that Respondent's actions also constitute a violation of *N.J.S.A.* 18A:12-24.1(f). Under *N.J.S.A.* 18A:12-24.1(f) a board member must refuse to surrender independent judgment to special interest or partisan political groups or to use the schools for personal gain or for the gain of friends. Respondent used the school's resources for his own personal gain. Respondent utilized the Board's legal counsel to get information regarding someone he personally disliked, and he would not have had access to those resources absent his position as Board President.

Finally, the Commission finds Respondent's actions did not violate *N.J.S.A.* 18A:12-24.1(c) as he did not take official action to effectuate policies and plans without consulting those affected, nor did he take action that was unrelated to his duty to: develop the general rules that guide the management of the District; formulate the programs and methods to effectuate the District's goals; or ascertain the value or liability of a policy.

The Commission is not persuaded by Respondent's exceptions. Respondent filed a cross-motion for summary decision, but only because he was not successful, does he now argue that the matter should proceed to a hearing. It is irrelevant that Complainant also faced ethics charges; whether another Board member committed an ethics violation does not justify Respondent's actions. While Respondent argues that he was authorized by Board regulation to

seek services from the Board attorney, the Commission notes that his request was beyond the scope of his duties as a Board member as it was motivated by his own personal animus for a political rival. Finally, the certifications Respondent attached to his exceptions are not part of the record; regardless, whether Respondent spoke to other Board members to validate his desire to obtain research about Complainant, it does not change that he made the request for personal reasons which goes beyond the scope of his duties.

While the ALJ recommended a penalty of reprimand for Respondent's violations of *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(f)*, the Commission **modifies** the recommended penalty of reprimand to **censure**. The Commission agrees with the ALJ that the Respondent's blatant use of Board resources for his own motivations was not *de minimis*, but finds that considering the facts in the record and the totality of the circumstances, a penalty of censure is justified.

In this regard, the Commission notes that Respondent was elected to the Board in 2013 and remained a Board member until he lost his bid for re-election in 2019. Respondent was on the Board for at least six years and rose to the position of Board President. Given his Board experience and years of ethics trainings, he should have been acutely aware of his ethical obligations under the Act. The Commission also finds the timing of Respondent's violation to be noteworthy. Respondent lost the election, and the very next day used his position as Board President, which he would only hold until January 2020, when his term would end, to seek information about a fellow Board member who campaigned against him. The fact that Respondent contacted the Board attorney immediately after failing to be reelected further demonstrates the bad faith behind Respondent's request. Given the nature of, and relation to, his personal dislike for Complainant, the timing of his request immediately following the election, and that he did it without waiting to discuss it with the Superintendent, Board Secretary and/or the whole Board, the Commission finds such a violation is severe and warrants a censure instead of a reprimand.

IV. Decision

For all of the aforementioned reasons, the Commission adopts the Initial Decision's findings of fact and legal conclusions that Respondent violated *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(f)*, but did not violate *N.J.S.A. 18A:12-24.1(c)*. However, the Commission modifies the recommended penalty of reprimand in favor of **censure** for the violations.

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: July 25, 2023

***Resolution Adopting Decision
in Connection with C04-20***

Whereas, at its meeting on July 21, 2020, the School Ethics Commission (Commission) voted to transmit the above-captioned matter to the Office of Administrative Law (OAL) for a hearing; and

Whereas, on February 27, 2023, the Administrative Law Judge (ALJ), issued an Order on Partial Summary Decision, which was incorporated into an Initial Decision dated April 3, 2023; and

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

Whereas, Respondent filed exceptions to the Initial Decision but Petitioner did not file exceptions and/or a reply to Respondent's exceptions; and

Whereas, at its meeting on June 27, 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(b)*, *N.J.S.A. 18A:12-24.1(e)* and *N.J.S.A. 18A:12-24.1(f)*, and discussed modifying the recommended penalty of reprimand in favor of censure; and

Whereas, at its meeting on July 25, 2023, the Commission reviewed and voted to approve the within decision as accurately memorializing its actions/findings from its meeting on June 27, 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 July 25, 2023.



Brigid C. Martens, Acting Director
School Ethics Commission

EXHIBIT D

193-24
SEC Dkt. No. C04-20
OAL Dkt. No. EEC 10952-20
Agency Dkt. No. 9-8/23A

New Jersey Commissioner of Education
Final Decision

In the Matter of Shawn Giordano,
Lacey Township Board of Education,
Ocean County

This matter involves an appeal of the School Ethics Commission's (SEC) July 25, 2023, determination that appellant – President of the Lacey Township Board of Education (Board) – violated *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 (f)* of the School Ethics Act (Act) by directing the Board attorney to conduct research on a fellow Board member, Regina C. Discenza. Appellant and Discenza filed ethics complaints against each other, resulting in motion practice. Ultimately, the counts against appellant were reduced to those cited above, as well as *N.J.S.A. 18A:12-24.1 (c)*, which appellant was found to have not violated. The SEC recommended that appellant be censured for the violation. Having carefully reviewed the SEC's decision and the record in its entirety, the Commissioner finds that the SEC's decision that appellant violated the Act is supported by sufficient, credible evidence, and that appellant failed to establish that the decision is arbitrary, capricious, or contrary to law. *N.J.A.C. 6A:4-4.1(a)*. The Commissioner further finds that the SEC appropriately assessed the penalty of a censure.

The events in question involve the Board election in November 2019. Appellant and

Discenza had a historically acrimonious relationship, and Discenza campaigned against appellant. Appellant lost the election. One day later, he instructed the Board attorney to investigate Discenza about potential violations concerning her conduct during the election, including her alleged video endorsement of candidates while wearing her Board of Education badge. The Board attorney completed a memo regarding Discenza's conduct, which was reflected on a legal bill. The Board reviewed and approved the November 2019 legal bill on December 6, 2019, which is when Discenza and one other board member first became aware of the matter. The legal bill had fifteen entries marked "Member Conduct," for which the Board attorney billed 33.9 hours of research, totaling \$5,085.

On appeal, appellant argues that he was authorized to contact the Board attorney pursuant to Board Policy 0174, as he was one of three designated contacts who may "request services or advice from contracted legal counsel" as Board President. The other two authorized positions able to seek assistance of legal counsel, according to the Policy, were the Superintendent and the Business Administrator. Appellant submitted certifications from five other Board members, indicating that they each individually contacted him to both discuss the matter and to authorize the research by the Board attorney; however, no quorum was ever reached due to their individual discussions. Appellant argues that any inferences regarding the timing or the topic of the research that may stem from the parties' acrimonious relationship are explained by the certifications of the other five Board members. Appellant also points to the fact that, in a separate proceeding, Ms. Discenza was found to have violated a portion of the School Ethics Act, supporting his argument that his actions were justified.

In opposition, the SEC argues that appellant's long tenure on the Board, years of ethics

trainings, and his position as Board President should have made him aware of the potential ethical violations of his actions. The SEC contends that appellant's use of Board resources by contacting the Board attorney immediately after losing the election to request information about Discenza – whom he actively disliked and who had openly campaigned against him – demonstrated bad faith. According to the SEC, the combination of appellant's personal dislike for Discenza, the timing of the request following the election, and appellant's unilateral decision to instruct the Board attorney to investigate without consulting with the full Board, Superintendent, or Business administrator demonstrate that he violated the Act. The SEC argues that this erosion of public trust warrants a censure instead of a reprimand.

N.J.S.A. 18A:12-24(b) states that “[n]o school official shall use or attempt to use his official position to secure unwarranted privileges, advantages or employment for himself, members of his immediate family, or others.” In determining a violation, the question is not whether a school board member intended to secure an unwarranted benefit for themselves or others, but whether a reasonable person could infer that such was the reason for their conduct. *See Friends Retirement Concepts v. Borough of Somerville, Bd. Of Educ.*, 356 N.J. Super. 203, 214 (Law Div. 2002). Similarly, pursuant to *N.J.S.A. 18A:12-24.1(f)*, Board members swear to, “...refuse to surrender [their] independent judgment to special interest or partisan political groups or to use the schools for personal gain or the gain of friends.”

Pursuant to *N.J.S.A. 18A:12-24.1(e)*, Board members agree that they 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.” In support of this statute, “*N.J.A.C. 6A:28-6.4(a)(5)* provide[s] that evidence that a [board member] made personal promises or took action

beyond the scope of his or her duties' shall support a finding that a violation of *N.J.S.A. 18A:12-24.1(e)* occurred." *Persi v. Woska*, 2017 N.J. Super. Unpub. LEXIS 625, *20 (App. Div. Mar. 10, 2017).

The record demonstrates that Discenza actively campaigned against appellant, and they had a history of mutual dislike. Additionally, the timing of the request on the day after appellant lost the election, and the brief time span the appellant had to act until he would no longer be a Board member, support the SEC's conclusions. In light of these facts, the Commissioner finds that it was not arbitrary, capricious, or unreasonable for the SEC to conclude that the public could infer that the appellant requested the research against Discenza to secure an advantage for himself and for his own personal gain. Nor was it arbitrary, capricious, or unreasonable for the SEC to conclude that appellant took action that could compromise the Board.

Pursuant to Policy 0174, appellant was authorized to contact the Board attorney regarding legal issues. However, there were other options available to appellant. For example, appellant could have asked the Board to vote on the research request before contacting the Board attorney. Alternatively, appellant could have requested an advisory opinion from the SEC, pursuant to *N.J.S.A. 12-31*. This free option could have potentially saved the district \$5,085, but it may not have achieved results prior to the end of appellant's term. Another option would have been for appellant to file an ethics complaint directly against Discenza, as she did to him, without the use of the Board attorney research and the unnecessary expense to the Board. Instead of availing himself of one of these options, appellant took action that created the appearance to the public that he was using his position for personal gain.

Furthermore, in light of the seriousness of appellant's actions, the Commissioner finds that the penalty of censure is appropriate.

Accordingly, appellant is hereby censured as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.¹



ACTING COMMISSIONER OF EDUCATION

Date of Decision: May 15, 2024
Date of Mailing: May 16, 2024

¹ This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

DASTI & STAIGER

310 Lacey Road | P.O. Box 779
Forked River, NJ 08731

☎: 609-549-8990 📠: 609-549-5043

Attorneys for Respondent, Shawn Giordano

IN THE MATTER OF SHAWN
GIORDANO, LACEY TOWNSHIP
BOARD OF EDUCATION, OCEAN
COUNTY

COMMISSIONER OF EDUCATION
NEW JERSEY DEPARTMENT OF
EDUCATION

DOCKET NO.: EEC 10952-2020
AGENCY DOCKET. NO. C04-20

CERTIFICATION OF COUNSEL

I, CHRISTOPHER A. KHATAMI, ESQ., hereby certify as follows:

1. I am an attorney at law licensed to practice in the State of New Jersey, and an Attorney with the law firm of Dasti & Staiger, P.C., attorneys for Respondent Shawn Giordano. As such I am fully familiar with the facts pertaining to this matter.
2. I make this Certification in support of the Respondent's Motion for a Stay Pending Appeal pursuant to N.J.A.C. 6A:4-4.1(b).
3. Attached hereto as Exhibit A to Respondent's Letter Brief In Support of the Motion for Stay is a true and correct copy of the Order and Partial Summary Decision dated February 27, 2023.
4. Attached hereto as Exhibit B to Respondent's Letter Brief In Support of the Motion for Stay is a true and correct copy of the Office of Administrative Law's Initial Decision dated April 27, 2023.
5. Attached hereto as Exhibit C to Respondent's Letter Brief In Support of the Motion for Stay is a true and correct copy of the School Ethics Commission's Final Decision dated July 25, 2023.

6. Attached hereto as Exhibit D to Respondent's Letter Brief In Support of the Motion for Stay is a true and correct copy of the New Jersey Commissioner of Education's Final Agency Decision dated May 15, 2024.

7. I hereby certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

DASTI & STAIGER, P.C.
Attorneys for Respondent

By: /s/ Christopher A. Khatami
CHRISTOPHER A. KHATAMI, ESQ.

Dated: June 8, 2024