

Before the School Ethics Commission
OAL Docket No.: EEC-01138-21
SEC Docket No.: C28-20
Final Decision

Matthew Schapiro,
Complainant

v.

Marilyn Roman and Sudhan Thomas,
Jersey City Board of Education, Hudson County,
Respondents

I. Procedural History

This matter arises from a Complaint that was filed on June 15, 2020, by Matthew Schapiro (Complainant), alleging that Marilyn Roman and Sudhan Thomas (Respondents), members of the Jersey City Board of Education (Board), violated the School Ethics Act (Act), *N.J.S.A.* 18A:12-21 *et seq.* More specifically, the Complaint alleges that Respondents violated *N.J.S.A.* 18A:12-24(c) and *N.J.S.A.* 18A:12-24.1(e) of the Code of Ethics for School Board Members (Code).

At its meeting on September 29, 2020, and after reviewing Respondents' Motion to Dismiss in Lieu of Answer (Motion to Dismiss), along with Complainant's response thereto, the School Ethics Commission (Commission) voted to deny Respondents' Motion to Dismiss in its entirety and directed Respondents to file an Answer to Complaint (Answer). On October 17, 2020, Respondents filed an Answer as directed.

At its meeting on December 22, 2020, the Commission found probable cause to credit the allegations that Respondents violated *N.J.S.A.* 18A:12-24(c) and *N.J.S.A.* 18A:12-24.1(e). Based on its findings of probable cause, the Commission transmitted the matter to the Office of Administrative Law (OAL) for a plenary hearing on January 24, 2021, and, pursuant to *N.J.A.C.* 6A:28-10.7(b), the attorney for the Commission (Petitioner) was charged with prosecuting the allegations in the Complaint which the Commission found probable cause to credit.

At the OAL, the matter was assigned to the Honorable Nanci G. Stokes, Administrative Law Judge (ALJ Stokes). On February 18, 2021, ALJ Stokes conducted telephone conferences in which the parties "agreed that the material facts were largely undisputed, and a motion for summary decision could be appropriate." *Initial Decision* at 2. On August 3, 2021, Respondents Roman and Thomas filed their motion for summary decision, and on August 10, 2021, the Commission filed its opposition and a cross-motion for summary decision. *Id.* at 3. On August 26, 2021, Respondents Roman and Thomas filed a response to the cross-motion. *Id.* On September 6, 2021, Respondents Roman and Thomas filed their reply, and on September 16, 2021, the Commission submitted its reply. *Id.* On October 18, 2021, at the ALJ's request, Respondents filed a revised stipulation of facts and then ALJ Stokes closed the record. *Id.*

On October 22, 2021, ALJ Stokes issued an *Initial Decision* detailing her findings of fact and legal conclusions. The Commission acknowledged receipt of ALJ Stokes' *Initial Decision* on the date it was issued (October 22, 2021); therefore, the forty-five (45) day statutory period for the Commission to issue a Final Decision was December 6, 2021. Prior to December 6, 2021, the Commission requested a forty-five (45) day extension of time to issue its decision so as to allow the Commission, which only meets monthly, the opportunity to receive and review the full record, including the parties' Exceptions (if any). Pursuant to *N.J.S.A. 52:14B-10(c)* and *N.J.A.C. 1:1-18.8*, and for good cause shown, the Commission was granted an extension until January 20, 2022. Prior to January 20, 2022, the Commission requested and, for good cause shown, was granted a second extension to January 30, 2022, to allow the Commission to adopt its decision at its regularly scheduled meeting on January 25, 2022.

On October 26, 2021, Respondents filed Exceptions to ALJ Stokes' *Initial Decision*. On November 18, 2021, Petitioner filed Exceptions, and filed a response to Respondents' Exceptions.

At its meeting on December 14, 2021, the Commission considered the full record in this matter, including the filed Exceptions and the filed reply. Thereafter, and at its meeting on January 25, 2022, the Commission voted to adopt the findings of fact from ALJ Stokes' *Initial Decision*; to adopt the legal conclusion that, based on the admissible evidence, there is sufficient credible evidence to establish a violation of *N.J.S.A. 18A:12-24(c)* and *N.J.S.A. 18A:12-24.1(e)* of the Code; and to adopt the recommended penalty of reprimand.

II. Initial Decision

In the *Initial Decision*, ALJ Stokes offered the following *findings of fact* as stipulated by the parties:

- As of January 2019, Respondents were members of the Board.
- On January 30, 2020, Jersey City Superintendent of Schools Marcia Lyles (Superintendent Lyles) commenced an action in the U.S. District Court for NJ, accusing the Board and its members of colluding with the Jersey City Education Association (JCEA) to place her unlawfully on administrative leave. Also joined as defendants were the JCEA, and Respondents 'both individually and as a member of' the Board.
- Superintendent Lyles also commenced separate administrative action before the Commissioner of Education on April 18, 2019. This petition alleged that the Board and Respondent Thomas colluded with the JCEA to have Superintendent Lyles placed on leave. Respondent Roman was not joined as a party to that proceeding.
- Respondents were afforded indemnification and legal counsel at the Board's expense. Respondent Thomas was also afforded indemnification and legal counsel at the Board's expense in the administrative case. In all proceedings the Board, and Respondents were represented by Genova Burns LLC.

- On August 20, 2019, all claims against Respondent Thomas in the administrative proceeding before the Commissioner of Education were dismissed for lack of jurisdiction by order of Thomas Betancourt, Administrative Law Judge (ALJ Betancourt).
- On November 7, 2019, the Board voted to approve a written agreement settling both the federal court and administrative proceedings. Respondents were both present and voted in favor of approving the settlement.
- Respondents consulted with Board Counsel, Michael Gross, Esq. before voting on the settlement, and he “explicitly advised” Respondents that there was no ethical impediment to their voting on the matter or signing the settlement agreement.

Initial Decision at 3-4.

After outlining the stipulation of facts, ALJ Stokes presents her conclusions of law. Regarding the motions for Summary Decision, ALJ Stokes asserts that a genuine issue as to the material facts does not exist and the only issues presented are whether Respondents’ votes for approval and execution of the settlement agreement violated *N.J.S.A.* 18A:12-24(c) and/or *N.J.S.A.* 18A:12-24.1(e) and if so, any appropriate sanction. ALJ Stokes further asserts a genuine issue does not exist that Respondents served as Board members, they both voted to approve a settlement of federal litigation against the Board and themselves on November 7, 2019, that they signed the settlement agreement, and that the settlement agreement resolved an administrative claim against the Board and Respondent Thomas. However, an order dismissed the claims against Respondent Thomas, concluding that Superintendent Lyles did not present her case to the agency with jurisdiction. Board counsel advised Respondents that there was no ethical impediment that would preclude their involvement in the settlement. Therefore, ALJ Stokes ***concluded*** that this case was ripe for summary decision.

As to the School Ethics Act, ALJ Stokes asserts the Commission found probable cause to credit the allegations that Respondents violated *N.J.S.A.* 18A:12-24(c), which “prohibits a school official’s actions where such involvement might reasonably be expected to impair their judgement or if benefit is conferred upon the school official or their family members.” ALJ Stokes notes Respondents argued that Superintendent Lyles “named them individually in name only and that the only relief sought was against the Board.” ALJ Stokes cites, *In re Petition for Review of Opinion 552 of Advisory Committee on Professional Ethics*, 102 *N.J.* 194 (1986) (Opinion) and notes that “opinion explains the difference between an action based on ‘official-capacity’ or action involving ‘personal-capacity’ and the real party in interest.” *Initial Decision* at 9. With that in mind, ALJ Stokes maintains the lawsuit against the Board and Respondents individually and the administrative action against the Board and Respondent Thomas are “official capacity” actions. *Id.*

ALJ Stokes further explains, “the Court’s decision does not address whether the official’s action regarding the litigation or its resolution can create an ethical conflict for the official.” *Id.* at 10. ALJ Stokes notes that Superintendent Lyles’ complaint “alleged specific actions improperly taken by [Respondents] for which the Board was vicariously responsible” and the administrative case “asserted [Respondent] Thomas colluded with the JCEA to place [Superintendent] Lyles on administrative leave.” *Id.* Citing *In Re Kilmurray*, ALJ Stokes

maintains, “Regardless, whether the claims against [Respondents] are in their official capacity, which the government entity will be held ultimately responsible financially, the review of a government official’s actions regarding such legal matters is from the perspective of a reasonable person.” *Id.* (citing *In re Kilmurray, Lacey Township Board of Education, Ocean County*, C12-94 Comm’n Decision (April 15, 1998), [School Ethics Commission Decisions: state.nj.us/education/legal/ethics/index.html](http://state.nj.us/education/legal/ethics/index.html)).

According to ALJ Stokes, the Commission “argues that the facts here are nearly identical to those in [*In re Gonzalez*] and warrant the same conclusion,” which is that Respondents “voted to approve the settlement agreement and signed it” and, therefore, violated the Act. *Id.* (citing *In re Gonzalez*, EEC19282-1, Initial Decision, (Sept. 11, 2018), <http://njlaw.rutgers.edu/collections/oal/search.html>, *aff’d*, C08-15, Comm’n Decision (Nov. 27, 2018), state.nj.us/education/legal/ethics/index.html). *Id.* at 11. However, Respondents argue, “their circumstances are distinct from those” noted in *Gonzalez* because the petitioners in *Gonzalez* gained a personal benefit when they dismissed the ethics charges against them where the Board was not the real party in interest.” *Id.* ALJ Stokes maintains “a review of [Superintendent] Lyles’ complaint and administrative petitions demonstrates she alleged improper official actions taken by [Respondent] Thomas in both cases and [Respondent] Roman in the lawsuit” and, therefore, their “interest in resolving these claims is one not fully shared with the public.” *Id.* at 11-12.

ALJ Stokes also finds it noteworthy that Respondents “acted upon the advice of counsel and rely upon counsel’s determination that no ethical impediment precluded their voting upon or executing the settlement agreement.” *Id.* at 12. ALJ Stokes asserts, “reliance on advice of counsel only serves as a defense to a penalty.” *Id.* (citations omitted). ALJ Stokes further maintains that Board counsel advised Respondents “before the vote, and counsel was well aware of the allegations against [Respondents] in both actions”; Respondents “voiced their concerns that they were named individually in” the matters; Board counsel was experienced and was responsible for “ethically guiding” Board members; Board counsel’s recommendation was to “vote upon and execute the settlement agreement” without restrictions; Board counsel certified that the Board “indemnified” Respondents in the Superintendent Lyles’ cases “as the matter sought redress from the Board”; and Board counsel believed that Respondents did not secure a personal benefit in resolving those matters and that an ethical problem did not exist. *Id.* at 13. Therefore, ALJ Stokes **concludes** Respondents evidenced sensitivity to the issue of potential conflict in seeking counsel’s advice and that it was reasonable to rely upon such advice.

ALJ Stokes further notes that because of Superintendent Lyles’ alleged unethical conduct of Respondents in the lawsuit and the administrative action that was resolved by the agreement, ALJ Stokes concludes that a public member could justifiably believe that their objectivity was impaired when voting upon and executing the settlement. ALJ Stokes asserts the terms of the settlement agreement “was a bargained-for-exchange where the interests of all parties, including those of” Respondents, was served. *Id.* at 14. Therefore, ALJ Stokes further **concludes** that Respondents acted in their official capacity in a matter where they had personal involvement and received a benefit in violation of *N.J.S.A.* 18A:12-24(c).

Regarding the Code violation, *N.J.S.A.* 18A:12-24.1(e), ALJ Stokes maintains the Commission’s “probable cause determination asserts that because [Respondents] had personal involvement in the litigation that this suggests ‘action’ beyond the scope of their duties as board

members.” *Id.* at 15. However, the Commission “routinely agrees that those ‘board members, who are acting in their capacity as board members, and not as private citizens, do not violate *N.J.S.A.* 18A:12-24.1(e).” *Id.* ALJ Stokes cites several previous cases and asserts “there is no evidence that [Respondent] Thomas or [Respondent] Roman acted outside their official capacities in voting upon or executing the settlement agreement or that the Board did not authorize [Respondent] Thomas or [Respondent] Roman to act concerning the agreement.” *Id.* at 16. According to ALJ Stokes, the vote occurred at a public meeting and “no conduct asserted suggests [Respondent] Thomas or [Respondent] Roman made promises to anyone concerning these acts.” *Id.* Therefore, ALJ Stokes **concludes** that neither Respondent violated *N.J.S.A.* 18A:12-24.1(e) in their official actions as Board members voting to approve and executing a settlement resolving the litigation.

As to the penalty, ALJ Stokes maintains that Respondents “seek to rely upon the defense that they acted under the advice of counsel to avoid any penalty, even if [the ALJ] conclude[s] violations occurred.” *Id.* at 17. ALJ Stokes notes Respondent Thomas is no longer a Board member and, therefore, the maximum penalty that he could receive would be a censure. ALJ Stokes reiterates Respondents’ “reasonable reliance on the advice of counsel mitigates the penalty here.” *Id.* at 17-19 (citations omitted). Therefore, ALJ Stokes **concludes** the appropriate **penalty** for Respondents is **reprimand**.

In summary, ALJ Stokes orders, based on the stipulation of facts and conclusions of law, that Complainant’s motion for summary decision is partially granted as to Respondents violation of *N.J.S.A.* 18A:12-24(c), and that Respondents’ motion for summary decision is partially granted as to Respondents’ lack of a violation of *N.J.S.A.* 18A:12-24.1(e). ALJ Stokes further orders that Respondents receive a reprimand for their respective violations of *N.J.S.A.* 18A:12-24(c).

III. Exceptions

Respondents’ Exceptions

In their Exceptions, which were filed on October 26, 2021, Respondents argue they were “never at risk of any financial exposure due to the [D]istrict’s legal obligation to indemnify them,” and unlike the Respondents in *Gonzalez*, Respondents Thomas and Roman did not secure a personal benefit unique to them. Respondents disagree with ALJ Stokes’ finding that because Respondents “received a release of any claims and a promise of confidentiality, a reasonable person would conclude there was enough of a personal benefit to implicate *N.J.S.A.* 18A:12-24(c).” Respondents argue the “release was as to claims that [R]espondents were fully indemnified for, and the promise of confidentiality was no more valuable to Respondents than any of the other Board members who voted to approve the settlement and had an interest as Board members in bringing this litigation to an end.” Respondents further argue “a reasonable person” knowing that Respondents did not have a personal stake “in the outcome of the proceedings would not assume they were unethically feathering their own nest by voting to approve this settlement.”

Next, Respondents “agree that school board members should not be able to hide behind legal advice that they know, or reasonably should know, is questionable.” However, Respondents assert that did not happen here. Respondents reassert they “relied in good faith on the advice of

an experienced school board attorney regarding a technical legal question, where the Commission had not issued any precedent squarely on point.” Respondents note that if the Commission still finds, notwithstanding Respondents’ good faith reliance on legal advice, that Respondents should not have voted on the settlement, a penalty should still not be imposed. Respondents maintain that the Commission should “take the opportunity to educate the school community on what it views as the proper interpretation of the rule at issue, provide clear guidance prospectively, and refrain from imposing discipline.”

Petitioner’s Exceptions and Reply to Respondents’ Exceptions

In Respondents’ Exceptions, which were filed on November 18, 2021, Petitioner (Commission) initially notes that they agree with ALJ Stokes’ decision that Respondents violated *N.J.S.A.* 18A:12-24(c), but “takes exception to the conclusion that Respondents did not violate *N.J.S.A.* 18A:12-24.1(e) and, therefore, recommends that the Initial Decision be modified. More specifically, Petitioner asserts ALJ Stokes “correctly determined” Respondents’ approval and execution of the settlement agreement violated *N.J.S.A.* 18A:12-24(c), because Superintendent Lyles agreed not to sue Respondents “in exchange for her resignation and monetary consideration.” Furthermore, Superintendent Lyles agreed to “dismiss the administrative action and federal lawsuit and to never disclose any of the circumstances leading to the agreement.” Petitioner contends ALJ Stokes concluded, based on the settlement agreement that a “public member could justifiably believe that [R]espondents’ objectivity was impaired when voting to approve that settlement agreement – which served the interests of all parties involved – and therefore, [R]espondents violated *N.J.S.A.* 18A:12-24(c).” However, according to Petitioner, ALJ Stokes “incorrectly determined” that Complainant did not demonstrate that Respondents “made promises to anyone concerning these acts.” Petitioner notes that ALJ Stokes “failed to consider that [R]espondents’ actions to execute the settlement agreement had the potential to compromise the Board” and, therefore, Petitioner argues that the ALJ’s determination that Respondents did not violate *N.J.S.A.* 18A:12-24.1(e), is “incorrect[.]”

Petitioner argues that ALJ Stokes’ conclusion that Respondents did not violate *N.J.S.A.* 18A:12-24.1(e), “must be rejected, and her decision modified to reflect a violation of the Code” because Respondents did not deny “the undisputed facts of this matter” and they “entered into a settlement agreement that released claims made against them as individuals.” Petitioner further argues when Respondents voted to approve the settlement agreement at a public Board meeting, “and did so without Board approval,” Respondents “acted beyond the scope of their duties that compromised the [B]oard.” Petitioner cites *I/M/O Lorenzo Richardson, Jersey City Bd. of Educ., Hudson Cty.*, 2021 N.J. AGEN LEXIS 30 (Jan. 26, 2021), and notes that similarly, Respondents “acted beyond the scope of their duties, and compromised the Board, by resolving a legal action, by entering into a settlement agreement, by signing the agreement with their individual names, and by voting to approve that settlement agreement at a Board meeting – all of which was done despite a clear conflict of interest.” Therefore, Petitioner asserts Respondents violated the Code and the *Initial Decision* should be modified to reflect this violation.

As to a violation of *N.J.S.A.* 18A:12-24(c) and Respondents’ exceptions, Petitioner asserts ALJ Stokes’ “reasoning ... is in line with the law, and the ALJ’s conclusion is not erroneous.” Petitioner reaffirms the settlement was “a bargained-for-exchange agreement that served the interest of [R]espondents.” Petitioner argues, “Regardless of whether [R]espondents faced direct financial liability from the administrative or federal actions, [R]espondents engaged

in conduct that served their interests not shared in common with other members of the public” and, therefore, ALJ Stokes did not “err in her conclusion” that Respondents “acted in a manner where they had personal involvement and received a benefit in violation of the Act.” Furthermore, according to Petitioner, Respondents’ argument that their “good faith reliance on legal advice was a valid defense and justifies no disciplinary action against them” is also incorrect. Petitioner notes ALJ Stokes’ conclusion that Respondents’ reliance on legal advice “does not insulate an official from a finding that a violation occurred, but it acts as a defense to a penalty for that violation” is correct and as for the penalty, Petitioner further notes ALJ Stokes “correctly assessed the penalty of reprimand” Therefore, Petitioner reasserts the *Initial Decision* should be “adopted in part as to a violation of *N.J.S.A. 18A:12-24(c)*, and rejected in part and modified to reflect a violation of *N.J.S.A. 18A:12-24.1(e)*.”

IV. Analysis

Upon a careful, thorough, and independent review of the record, the Commission **adopts** ALJ Stokes’ findings of fact, and **adopts** the legal conclusion that Respondents violated *N.J.S.A. 18A:12-24(c)*, but did not violate *N.J.S.A. 18A:12-24.1(e)*. In finding a violation of *N.J.S.A. 18A:12-24(c)* when Respondents voted to approve a written agreement settling proceedings in which Respondents were parties, ALJ Stokes properly concluded that Respondents acted in their official capacity in a matter where they had a personal involvement and received a benefit. The Commission holds that ALJ Stokes correctly determined that Respondents’ approval and execution of the settlement agreement violated *N.J.S.A. 18A:12-24(c)*. The Commission further concurs that Respondents did not violate *N.J.S.A. 18A:12-24.1(e)*. Respondents neither acted outside their official capacities nor made promises to anyone in connection with voting upon or executing the settlement agreement at issue.

V. Decision

The Commission adopts ALJ Stokes’ Initial Decision finding that Respondents violated *N.J.S.A. 18A:12-24(c)*, but did not violate *N.J.S.A. 12-24.1(e)*.

VI. Penalty

In recommending the penalty, ALJ Stokes notes that Respondent Thomas is no longer a Board member and, therefore, the maximum penalty that he could receive would be a censure. ALJ Stokes further highlights Respondents’ reasonable reliance on the advice of counsel. Based on the above, the Commission **adopts** the recommended penalty of **reprimand**.

Pursuant to *N.J.S.A. 18A:12-29(c)*, this decision shall be forwarded to the Commissioner for review of the Commission’s recommended sanctions. Parties may either: 1) file exceptions to the recommended sanction; 2) file an appeal of the Commission’s findings of violations of the Act; or 3) file both exceptions to the recommended sanction and an appeal of the Commission’s findings of violations of the Act.

Parties taking exception to the recommended sanctions of the Commission but *not disputing* the Commission’s findings of violations may file, within **thirteen (13) days** from the date the Commission’s decision is forwarded to the Commissioner, written exceptions regarding the recommended sanctions 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.” A copy of any comments filed must be sent to the Commission and all other parties.

Parties seeking to appeal the Commission’s findings of violations *must* file an appeal pursuant to the standards set forth at *N.J.A.C. 6A:4, 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 mailing date to the parties, as indicated below. In such cases, the Commissioner’s review of the Commission’s recommended sanctions will be deferred and incorporated into the Commissioner’s review of the findings of violations 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 brief on appeal.

Robert W. Bender, Chairperson

Mailing Date: January 25, 2022

***Resolution Adopting Decision
in Connection with C28-20***

Whereas, by correspondence dated January 24, 2021, the School Ethics Commission (Commission) transmitted the above-referenced matter to the Office of Administrative Law (OAL) for a hearing; and

Whereas, at the OAL, both Respondents and Petitioner filed Motions for Summary Decision; and

Whereas, the Honorable Nanci G. Stokes, Administrative Law Judge (ALJ Stokes) issued an Initial Decision dated October 22, 2021; and

Whereas, in her Initial Decision, ALJ Stokes partially granted Petitioner's motion for summary decision as to Respondents' violation of *N.J.S.A.* 18A:12-24(c) and partially granted Respondents motion for summary decision as to Respondents lack of a violation of *N.J.S.A.* 18A:12-24.1(e).

Whereas, on October 26, 2021, Respondents filed Exceptions to the Initial Decision; and

Whereas, on November 18, 2021, Petitioner filed exceptions and a reply to Respondents' Exceptions; and

Whereas, at its meeting on December 14, 2021, the Commission reviewed and discussed the record, including ALJ Stokes' Initial Decision and the filed Exceptions; and

Whereas, at its meeting on December 14, 2021, the Commission discussed adopting the findings of fact from the Initial Decision, adopting the legal conclusion that Respondents violated *N.J.S.A.* 18A:12-24(c), but did not violate *N.J.S.A.* 18A:12-24.1(e); and adopting the recommended penalty of reprimand; and

Whereas, at its meeting on January 25, 2022, the Commission reviewed and voted to approve the within decision as accurately memorializing its actions/findings from its meeting on December 14, 2021; and

Now Therefore Be It Resolved, the Commission hereby adopts the within decision.

Robert W. Bender, Chairperson

I hereby certify that this Resolution was duly adopted by the School Ethics Commission at its meeting on January 25, 2022.

Salma T. Chand, Executive Director
School Ethics Commission