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

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION

CIVIL ACTION

DOCKET NO.: A-003090-23

On Appeal from State Agency Decision on  
May 15, 2024

AGENCY DOCKET NO.: 9-8.23a

BRIEF ON BEHALF APPELLANT SHAWN GIORDANO

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TABLE OF CONTENTS

TABLE OF AUTHORITIES..... iii-v

PRELIMINARY STATEMENT ..... 1-2

PROCEDURAL HISTORY ..... 2-5

STATEMENT OF FACTS ..... 5-9

LEGAL ARGUMENT ..... 9-22

POINT I

- I. STANDARDS OF REVIEW  
(Issue Not Raised Below)

POINT II

APPELLANT’S DECISION TO ENGAGE THE BOARD ATTORNEY WAS LEGITIMATE BOARD ACTION AND FELL WITHIN HIS AUTHORITY AS BOARD PRESIDENT; THEREFORE, THE SEC’S DECISION WAS ARBITRARY, CAPRICIOUS AND CONTRARY TO LAW (Sg162-163;164-183;192-201).

POINT III

THE SEC’S DECISION WAS ARBITRARY, CAPRICIOUS, AND CONTRARY TO LAW BECAUSE IT WAS BASED ON DISPUTED MATERIAL FACTS AND FAILED TO DRAW INFERENCES IN FAVOR OF APPELLANT (Sg001-007;164-183;216-236)

POINT IV

THE RECORD OTHERWISE FAILS TO DEMONSTRATE THAT APPELLANT VIOLATED N.J.S.A. 18A:24(b) and N.J.S.A. 24.1 (e) AND (f); THEREFORE, THE COMMISSIONER’S DECISION WAS ARBITRARY, CAPRICIOUS AND

CONTRARY TO LAW(Sg001-007;164-183;192-201;216-236)

POINT V

THE SEC’S CENSURE PENALTY, AND THE COMMISSIONER’S DECISION TO UPHOLD IT, WAS ARBITRARY AND CAPRICIOUS (Sg213-215;232-236)

CONCLUSION ..... 23

## TABLE OF AUTHORITIES

### CASES

<u>Aldom v. Borough of Roseland,</u> 42 N.J. Super. 495, 502 (App. Div. 1956).....	19
<u>Brill v. The Guardian Life Insurance Co. of America,</u> 142 N.J. 520 (1995).....	18
<u>Bouie v. N.J. Dep't of Cmty. Affairs,</u> 407 N.J. Super. 518 (App. Div. 2009).....	11
<u>Cheng v. Rodas, West New York Bd. of Ed., Hudson Cty.,</u> C58-14 (Sept. 22, 2015) .....	14, 15, 16, 17, 19, 21
<u>City of Newark v. Nat. Res. Council, Dep't of Env't Prot.,</u> 82 N.J. 530 (1980).....	12
<u>Friends Retirement v. Board of Education,</u> 356 N.J. Super. 203, 214-15 (Law Div. 2002).....	19
<u>Hill v. Yaskin,</u> 75 N.J. 139 (1977).....	17
<u>In re Att'y Gen. Law Enft Directive Nos. 2020-5 &amp; 2020-6,</u> 246 N.J. 462 (App. Div. 2021).....	12
<u>In re CAFRA Permit No. 87-0959-5,</u> 152 N.J. 287 (App. Div. 1997).....	11
<u>Judson v. Peoples Bank &amp; Trust Co.,</u> 17 N.J. 67, 77 (1954).....	18
<u>Marc Soveleove v. Paul Breda,</u> C49-05 (September 26, 2006).....	13
<u>Matter of Request to Modify Prison Sentences,</u> 242 N.J. 357 (2020).....	11
<u>Mazza v. Bd. of Trs.,</u> 143 N.J. 22 (1995).....	11

<u>Petersen v. Falzarano</u> , 6 N.J. 447 (App. Div. 1951).....	10
<u>Rathmann v. Board of Directors</u> , 580 N.W.2d 773, 781-82 (Iowa Sup. Ct. 1998).....	20
<u>Russo v. Bd. of Trs., Police &amp; Firemen’s Ret. Sys.</u> , 206 N.J. 14 (2011).....	12
<u>Saccone v. Bd. of Trs., Police &amp; Firemen’s Ret. Sys.</u> , 219 N.J. 369 (2014).....	11
<u>Silviera-Francisco v. Board of Educ. of City of Elizabeth</u> , 224 N.J. 126 (2016).....	10, 11
<u>Zimmerman v. Sussex Cnty. Educ. Servs. Comm’n</u> , 237 N.J. 465 (2019).....	11

## STATE STATUTES

<u>N.J.A.C. 6A:4-4.3</u> .....	5
<u>N.J.S.A. 6A:4-4.3(a)</u> .....	11
<u>N.J.S.A. 12:24.1(e)</u> .....	12
<u>N.J.S.A. 18A:6-9.1</u> .....	5
<u>N.J.S.A. 18A:12-24(b)</u> .....	1, 3, 4, 8, 18, 19, 21
<u>N.J.S.A. 18A:12-24.1(b)</u> .....	3
<u>N.J.S.A. 18A:12-24.1(c)</u> .....	1, 3, 4, 8
<u>N.J.S.A. 18A:12-24.1(e)</u> .....	1, 3, 4, 8, 15, 18, 19, 21
<u>N.J.S.A. 18A:12-24.1(f)</u> .....	1, 3, 4, 8, 18, 19, 21

**RULES**

R. 2:2-3(a)(2)..... 10

R. 2:9-7..... 5

**STATE CONSTITUTIONAL PROVISION**

N.J. Const. Art. VI, §5, ¶ 4..... 10

## **PRELIMINARY STATEMENT**

This appeal arises out of the Commissioner of the New Jersey Department of Education's ("the Commissioner") final agency decision upholding the School Ethics Commission's ("SEC") factual findings and conclusions of law that Appellant Shawn Giordano ("Appellant") violated certain provisions of the School Ethics Act: N.J.S.A. 18A:12-24(b), N.J.S.A. 18A:12-24.1(c), N.J.S.A. 18A:12-24.1(e), and N.J.S.A. 18A:12-24.1(f).

Appellant exhausted his administrative appeals, filing a Motion for Summary Decision with the Office of Administrative Law ("OAL"), and a subsequent appeal of the OAL's February 27, 2023 and April 27, 2023 Initial Decisions to the SEC, and ultimately, an appeal of the SEC's Final Decision to the Commissioner, which decision was upheld and constitutes a final agency action or decision.

The Commissioner's final agency decision upholding the SEC's finding that Appellant violated certain provisions of the School Ethics Act was arbitrary, capricious, and unreasonable for the following reasons. Sg232-236.

First, this final agency action lacks fair support in the record. There is no evidence in support of the Commissioner's conclusion that the public could infer the Appellant requested research against

Complainant Regina C. Discenza (“Complainant”) to secure an advantage for himself or for his own personal gain.

The timing of Complainant’s actions during the recent election process precipitated Appellant’s concerns of ethics violations committed by Complainant. The timing of Appellant’s request to the Board Attorney to investigate Complainant’s conduct during the election explains the contemporaneity of his request and election day.

Second, the Commissioner’s final agency decision lacks fair support for his conclusion that the availability of other options to address concerns of Complainant’s ethic violations during the election means *ipso facto* that Appellant improperly used the Board Attorney or school resources for personal advantage or gain, despite the plain and clear language of the Lacey Township Board of Education Policy 0174 (“Policy 0174”), which does not prohibit Appellant in his position as Board President from requesting services or advice from contracted legal counsel. Sg202-204.

### **PROCEDURAL HISTORY**

Complainant Regina C. Discenza (“Complainant”) filed a Complaint with the School Ethics Commission (“SEC”) on January 13, 2020 alleging that Appellant violated multiple provisions of the School Ethics Act. Sg008-067.



In particular, Complainant alleged that Appellant 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). Sg008-067.

On February 24, 2020, Appellant 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 Appellant's Motion to Dismiss as to Counts 1-4, but granted said Motion as to Counts 5-10. Sg216-231.<sup>1</sup> The SEC also denied Appellant's frivolous filing allegation and prayer for sanctions, and ordered Appellant to file an Answer relating to Counts 1-4 of the Complaint. Sg216-231. On June 1, 2020, Appellant filed an Answer as to Counts 1-4 of the Complaint. Sg068-072.

On July 21, 2020, the SEC found probable cause for ethics violations as alleged in Counts 1-4 of the Complaint against Appellant. Sg205-212. Consequently, the SEC submitted the matter to the Office of Administrative Law ("OAL") for a hearing on Counts 1-4. Sg231.

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<sup>1</sup> At the appellate level herein, the parties are designated as Appellant and Respondent. Therefore, documents contained in the Appellant's Appendix and cited herein are designated "Sg" (Appellant's name initials) for the court's reference to avoid confusion.

The OAL initially consolidated this matter against Appellant with the ethics complaint lodged by Appellant against Complainant, Regina C. Discenza. Sg073-076. On February 27, 2023, the Administrative Law Judge issued an Order and Partial Summary Decision severing Complainant's matter from this matter. Sg164-183.

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. Sg186-191.

Appellant filed exceptions to the Initial Decision, and the SEC as Petitioner did not file a Reply. Sg192-201. 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 Appellant 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 Appellant 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. Sg001-007.

Appellant 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. Sg232-236.

Pursuant to N.J.S.A. 18A:6-9.1, Appellant filed a Notice of Appeal to the Appellate Division of the Superior Court of New Jersey regarding the Final Agency Decision and penalty.

### **STATEMENT OF FACTS**

This matter arises out of the Complainant's mischaracterization of Appellant's actions as potential ethics violations for political advantage, even though the School Board election was already over and there was no political advantage to be gained at that point.

Appellant was elected to the Lacey Township Board of Education ("School Board") in 2013 and re-elected in 2016. Sg164-183. During the relevant time period, Appellant served as School Board President. In 2019, Appellant lost his re-election bid for the School Board, which meant his current term expired on January 1, 2020. Sg164-183.

Complainant was elected to the School Board in 2014 and re-elected in 2014 and 2017. Sg164-183. Complainant stepped down from the Board in 2021. Christopher M. Suspie, Esq. served as the Board Attorney during the relevant time.

The crux of Complainant's ethics Complaint against Appellant turns on the exercise of his authority to request legal services from the Board Attorney, Christopher Suspie, Esq., based on Appellant's reasonable concerns that Complainant committed ethics violations during the election process.

As demonstrated in the record below, Appellant informed and discussed with other Board Members his reasonable concerns that Complainant committed ethics violations during the election process. Sg192-201. Appellant did not make his request to the Board Attorney without the knowledge of the other Board Members. Sg164-183.

Appellant's request to the Board Attorney was limited to Complainant's public conduct as an elected Board Member who chose to participate in the political campaigning process during the election. Sg192-201.

The fruits of Appellant's reasonable concerns culminated in the filing of an Ethics Complaint filed by Appellant and the other Board Members against Complainant on December 23, 2019. Sg192-201.

**Complainant's Ethics Violations**

The SEC found probable cause existed for two ethics violations in connection with Complainant's conduct during the election process. Sg205-212.

The first ethics violation pertains to the “endorsement allegation” against Complainant wherein she participated in a video endorsing a political candidate for the School Board, referenced her Board position and/or made it apparent that she was affiliated with the School Board, failed to include any proper disclaimer with her endorsement, and endorsed certain designated political candidates for the School Board for the benefit of that group of candidates and/or for her own personal benefit. Sg164-183.

The second ethics violation pertains to the “polling site allegation” against Complainant wherein she visited the Murray Grove polling site for Districts 8 and 13 and demanded that she was entitled to a copy of the vote tally sheets and tapes because she was a School Board Member and her procurement of the vote tally sheets and tapes was for the School Board. Sg164-183.

Subsequent to the filing of the Ethics Complaint against Complainant by Appellant and the other Board Members, Complainant responded with an ethics complaint against Appellant based on his request to the Board Attorney to investigate and determine whether she committed ethics violations during the election process. Sg008-067.

**Complainant's Ethics Allegations Against Appellant**

On January 10, 2020, approximately two weeks after Appellant and the other Board Members filed their ethics complaint against Complainant for her conduct during the election process, Complainant filed her ethics complaint against Appellant related to his request to the Board Attorney to investigate her conduct, which gave rise to the allegations of ethics violations against Complainant. Sg008-067.

Complainant's ten Count ethics Complaint was largely dismissed, except for the first four allegations. Sg008-067. Counts 1 through 4 of the Complaint allege that Appellant improperly used the Board Attorney to research "member conduct." Sg008-067. More specifically, the Complaint alleges that such conduct constitutes a violation of N.J.S.A. 18A:12-24(b), N.J.S.A. 18A:12-24.1(c), N.J.S.A. 18A:12-24.1(e), and N.J.S.A. 18A:12-24.1(f). Sg008-067.

The SEC found probable cause existed for the first four allegations that essentially pertain to Appellant's request to the Board Attorney to investigate whether Complainant's conduct during the election process constituted ethics violations. Sg205-212.

The SEC found that Appellant's request to the Board Attorney to investigate Complainant's conduct during the election process demonstrated conduct for his own personal gain, that the use of the

Board Attorney fell outside the scope of his authority as Board President, and that the information requested was unrelated to a legitimate Board policy, business, or purpose. Sg216-231.

The SEC imposed a censure penalty against Appellant for the aforementioned ethics allegations. Sg213-215. The censure penalty set forth in the SEC's Resolution adopted on May 21, 2024 states in pertinent part that the Resolution imposing censure "shall be read at the Board's next public meeting following adoption by the Commission, shall be posted in such places as the Board posts its public notices for no less than thirty (30) days, shall be published online on the District's website, if available, for no less than thirty (30) days, and the reading of the resolution shall be memorialized in the Board's meeting minutes..." Sg213-215.

## **LEGAL ARGUMENT**

### **POINT I STANDARDS OF REVIEW (ISSUES NOT RAISED BELOW)**

The Appellate Division possesses exclusive jurisdiction to review final agency actions or decisions from any state administrative agency, including the Commissioner for the Department of Education.

**Judicial Review of State Administrative Decisions**

Judicial review of administrative agency action is an enshrined constitutional right under our State Constitution. See N.J. Const. Art. VI, §5, ¶ 4. Further, R. 2:2-3(a)(2) “authorizes an appeal as of right to the Appellate Division from final agency decisions or actions of any state administrative agency or officer and to review the validity of any rule promulgated by a state administrative agency with the exception of certain tax matters.” Silviera-Francisco v. Board of Educ. of City of Elizabeth, 224 N.J. 126, 136 (2016).

“Generally, an order is considered final if it disposes of all issues as to all parties.” Silviera-Francisco v. Board of Educ. of City of Elizabeth, 224 N.J. 126, 136 (2016)(citing Petersen v. Falzarano, 6 N.J. 447, 452-53 (App. Div. 1951)). This principle applies with equal force to “orders and decisions of state administrative agencies.” Silviera-Francisco v. Board of Educ. of City of Elizabeth, 224 N.J. 126, 136 (2016)(citing In re CAFRA Permit No. 87-0959-5, 152 N.J. 287, 299 (App. Div. 1997)).

“Another feature of a final agency decision is the absence of or exhaustion of ‘all avenues of internal administrative review.’” Silviera-Francisco v. Board of Educ. of City of Elizabeth, 224 N.J. 126, 136 (2016)(quoting Bouie v. N.J. Dep’t of Cmty. Affairs, 407 N.J. Super. 518, 527 (App. Div. 2009)). Put simply, final agency action is subject to



appellate review. Matter of Request to Modify Prison Sentences, 242 N.J. 357, 390 (2020).

N.J.S.A. 6A:4-4.3(a) provides that Commissioner determinations shall be deemed final agency actions appealable to the Appellate Division of the Superior Court.

Appellate review of administrative action is “severely limited.” Mazza v. Bd. of Trs., 143 N.J. 22, 25 (1995). The Appellate Division reviews agency decisions under an arbitrary and capricious standard. Zimmerman v. Sussex Cnty. Educ. Servs. Comm’n, 237 N.J. 465, 475 (2019). “An agency’s determination on the merits ‘will be sustained unless there is a clear showing that it is arbitrary, capricious, or unreasonable, or that it lacks fair support in the record.’” Saccone v. Bd. of Trs., Police & Firemen’s Ret. Sys., 219 N.J. 369, 380 (2014)(quoting Russo v. Bd. of Trs., Police & Firemen’s Ret. Sys., 206 N.J. 14, 27 (2011)).

“The deferential standard is consistent with ‘the strong presumption of reasonableness that an appellate court must accord an administrative agency’s exercise of statutorily delegated responsibility.’” In re Att’y Gen. Law Enft Directive Nos. 2020-5 & 2020-6, 246 N.J. 462, 489 (App. Div. 2021)(quoting City of Newark v. Nat. Res. Council, Dep’t of Env’t Prot., 82 N.J. 530, 539 (1980)).

## **POINT II**

**APPELLANT’S DECISION TO ENGAGE THE BOARD ATTORNEY WAS LEGITIMATE BOARD ACTION AND FELL WITHIN HIS AUTHORITY AS BOARD PRESIDENT; THEREFORE, THE SEC’S DECISION WAS ARBITRARY, CAPRICIOUS AND CONTRARY TO LAW. (Sg162-163;164-183;192-201).**

The SEC’s Final Decision adopted the ALJ’s curious decision to recognize, but not resolve a conundrum as to the authority of the board president in determining Appellant violated the Code of Ethics. Specifically, the limits of (i) when a board president may request legal services from the board’s attorney, and (ii) the nature of the legal services to be performed.

Under the SEC’s private action/board action analysis, a board member’s action cannot be both be board action and private, thus if the board member’s action is found to be board action it cannot be private action and vice versa. See Marc Soveleove v. Paul Breda, C49-05 (September 26, 2006); see also SEC Advisory Opinion A03-07.

The Lacey Township Board of Education District Policy 0174, entitled, “Legal Services,” (“Lacey Policy 0174”) designates three persons who may “request services or advice from contracted legal counsel”: the Superintendent, the Business Administrator/Board Secretary, and Appellant, as Board President. Sg202-204.

Thus, Lacey Policy 0174 unconditionally authorized Appellant to request legal services from the Board's attorney. Further, the ALJ determined that entire Board, except Discenza, ratified the bill at the Board's December 6, 2019 meeting. See Sg169. Consequently, Appellant's actions were within the scope of his authority and constituted board action.

Yet, the ALJ grounded their threshold determination that Respondent's actions were private, not board actions, on the existence of "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." See Sg177.

The existence of any supposed "dispute" belies the plain language of Lacey Policy 0174 Township Board of Education District Policy 0174 and the ALJ's finding that the entire Board, except Discenza, ratified the bill at the Board's December 6, 2019 meeting in favor of dicta from Cheng v. Rodas, West New York Bd. of Ed., Hudson Cty., C58-14 (Sept. 22, 2015), a wholly unrelated case involving whether a board president was authorized to issue *Rice* notices to any district employees other than the superintendent.

The ALJ characterized Cheng, supra, as the SEC indicating 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). [Cheng] at 11.” See RA177. However, Cheng, supra, contains no such indication, or even dicta at page 11 or otherwise. Instead, Cheng, supra, states that:

**[t]he Complainant alleges that** between November 3, 2014 and November 10, 2014, the Respondent/Board President, without consulting the other Trustees, instructed the Board Attorney to research and/or prepare memos regarding a) the non-renewal of the Superintendent, b) replacing an employee after new elections have been held but before the new Board is reorganized, c) whether a school board can take action to bind a future board by replacing an employee’s position prior to the end of his contract, and d) addressing personnel actions taken to avoid granting tenure ...

Similar to the claim in Paragraph 3, **the Complainant asserts** that the Respondent took private action in violation of the Act when, on December 10, 2014, he surreptitiously met with the Board Attorney and certain Board members to discuss a plan to terminate the Superintendent or place him on leave. Id. at 11. (emphasis added).

Ironically, the ALJ’s reliance and interpretation of Cheng, supra, closely resembles the “lack of any evidence beyond speculation and conjecture” that led the SEC to determine that neither of the above-

quoted claims in Cheng, supra, constituted violations N.J.S.A. 18A:12-24.1(e). See Cheng, supra, at Page 11, see also Sg178.

Moreover, in direct contrast to Cheng, supra, Appellant set forth five certifications demonstrating that a majority of the seven-member board discussed Regina Discenza's conduct independently with the Appellant and recommending that the Board Attorney investigate the matter. See RA192-201. Thus, the SEC was presented with evidence specifically vindicating Appellant from any violation of N.J.S.A. 12:24.1(e).

Accordingly, the SEC's decision that Appellant's actions constituted private actions was arbitrary, capricious and contrary to law and therefore must be overturned.

### **POINT III**

**THE SEC'S DECISION AND THE COMMISSIONER'S DECISION TO UPHOLD IT WERE ARBITRARY, CAPRICIOUS, AND CONTRARY TO LAW BECAUSE IT WAS BASED ON DISPUTED MATERIAL FACTS AND FAILED TO DRAW INFERENCES IN FAVOR OF APPELLANT. (Sg001-007;164-183; 216-236).**

Even if Cheng, supra, stood for the broad principles urged by the ALJ, there are grave issues of fact which preclude the conclusion that "[Respondent] engaged in a similar use of school resources without the consent of the Board as the respondent did in [Cheng, supra]" and the

premature grant of summary disposition in favor of the SEC. See RA178.

Whereas Cheng, supra, had the benefit of a plenary proceeding to hear testimony, the ALJ's granting of summary disposition precluded such an opportunity. Nevertheless, the ALJ concerningly incorporated as facts, multiply instances of hearsay within the Complaint which the Appellant denied in his May 29, 2020 Answer.

First, "[a]t no point were the attorneys' research or conclusions formally shared with the members of the Board during Discenza's tenure on the Board." See Sg169. Second, "[a]ccording to the complaint, the [Superintendent and Business Administrator/Board Secretary] stated that they had no knowledge of the fifteen charges for "Member Conduct" in the November legal bill. See Giordano Complaint (C04-20) at 7." See Sg169.

The New Jersey Supreme Court has noted "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." Hill v. Yaskin, 75 N.J. 139, 142-143 (1977).

Both of these disputed facts unequivocally became material issues of facts upon the ALJ's of (i) determination of the existence of a dispute as to when the board president could request legal services and (ii) that

“[Respondent] engaged in a similar use of school resources without the consent of the Board as the respondent did in Cheng, supra[.]” See Sg178.

Further, the ALJ failed to draw any inferences in favor of Appellant as required by Hill, supra, and instead, clearly did so in favor of the SEC. Nothing in the record, beyond the Complaint, indicates that the information was never shared with the other members of the Board, or that the Superintendent or Business Administrator/Board Secretary were unaware of the attorneys’ research.

The Attorney General’s Office, by the SEC, provided absolutely no evidence or discovery to support the allegations in the complaint, including the above-referenced hearsay. See Sg136-162. The SEC merely regurgitated the allegations in the Complaint. Ibid. To support for these “facts” the only discovery provided was a copy of the Discenza’s Complaint, as well as the motion to dismiss pleadings, and the correspondence that occurred by the parties to the School Ethics Commission. Ibid. Nothing more.

In contrast, Appellant’s five certifications demonstrate that, at minimum, that a majority of the seven-member board discussed Regina Discenza’s conduct independently with the Appellant and recommended that the Board Attorney investigate the matter. See Sg192-201.

It has long been recognized that summary judgment, and by extension, summary disposition rulings must not “shut a deserving litigant from his trial.” The Guardian Life Insurance Co. of America, 142 N.J. 520, 540 (1995) (quoting Judson v. Peoples Bank & Trust Co., 17 N.J. 67, 77 (1954)). Yet, the ALJ’s decision did precisely that by granting the Commission’s motion as to 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) despite it lacking the requisite evidence to meet its burden of proof.

Accordingly, the SEC’s decision improperly considered certain facts and incorrectly applied the summary decision standard and thus must be overturned as it was arbitrary, capricious and contrary to law.

#### **POINT IV**

**THE RECORD OTHERWISE FAILS TO DEMONSTRATE THAT APPELLANT VIOLATED N.J.S.A. 18A:24(b) and N.J.S.A. 24.1 (e) AND (f); THEREFORE, THE SEC’S AND THE COMMISSIONER’S DECISIONS WERE ARBITRARY, CAPRICIOUS AND CONTRARY TO LAW. (Sg001-007;164-183;192-201;216-236).**

As noted supra, the ALJ’s decision is tainted by a baseless interpretation of Cheng, supra, improper characterization of material facts, and failure to appropriately draw inferences when considering a motion for summary decision. Based on those errors, the SEC and the



Commissioner otherwise failed to demonstrate that Appellant violated N.J.S.A. 18A:24(b) or N.J.S.A. 18A:24.1(e) or (f).

Whether there is an ethical violation is a case-by-case analysis for which the decisive factor is whether there is a potential for a conflict of interest, which arises when the public official has an interest not shared in common with the other members of the public. Friends Retirement v. Board of Education, 356 N.J. Super. 203, 214-15 (Law Div. 2002).

However, in Friends Retirement, supra, the Law Division noted the longstanding principle 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.” Id. at 214 (quoting Aldom v. Borough of Roseland, 42 N.J. Super. 495, 502 (App. Div. 1956)). Put simply, a public officer’s duty to render a righteous judgment stands alone in importance.

In this regard, the ALJ’s decision vindicates Respondent in that he and members of the Board had a reasonable basis to request legal research from the Board Attorney if the basis of that research and any allegations as to Discenza led to the sustained school ethics charges that are pending before Discenza. See Sg166-168; Sg174-176. Crucially,

those same charges are ones which the OAL found violated the School Ethics Act and other charges referred the matter for a full hearing. Ibid.

Given the public nature of Discenza's conduct, Appellant reasonably found himself in a situation demanding immediate action in furtherance of his duty to render a righteous judgment, for which consultation with legal counsel could not be delayed until after the next Board meeting without first considering adverse consequences for the school district. See Rathmann v. Board of Directors, 580 N.W.2d 773, 781-82 (Iowa Sup. Ct. 1998).

The ALJ's determination that Appellant and Discenza had substantial negative prior history is thus not dispositive. See Sg179. Moreover, the record did not fairly support the ALJ's assumption that Appellant and Complainant's prior negative history in politics furnished substantive proof or evidence that Appellant committed ethics violations in this matter.

Nor are the ALJ's considerations for whether the public could reasonably view Appellant's request for legal services as having violated the public trust – the timing and topic of the request and whether the request, results and legal conclusions were presented to the Board or a majority thereof – as they rest on factual record tainted by reiterated allegations and hearsay and otherwise lacking testimony or affidavits

from other Board members, the superintendent or the business administrator.

If the ALJ's decision is permitted to stand, the SEC will have created a new line of caselaw from Cheng, supra, that substantially changes the duties and ethical considerations of a board president as well as their working relationship with board counsel. Further, such caselaw will have the effect of emboldening political challengers by providing a mechanism for challenging the propriety of decisions, based solely on the situation of the decisionmaker, without accompanying consideration, let alone, rebuttal as to whether the decision was justified.

Accordingly, the SEC's decision that Appellant violated N.J.S.A. 18A:24(b) or N.J.S.A. 18A:24.1(e) or (f) was arbitrary, capricious and contrary to law and therefore must be overturned.

#### **POINT V**

**THE SEC'S CENSURE PENALTY, AND THE COMMISSIONER'S DECISION TO UPHOLD IT, WAS ARBITRARY AND CAPRICIOUS. (Sg213-215;232-236).**

The SEC modified the ALJ's recommended penalty of reprimand in favor of censure. See Sg005. However, the SEC's decision to do so reflects an organization that has overprioritized the stamping out of any alleged politicization of school boards, even when the conduct at issue

was deemed justified, and would have been reasonable in any other circumstance.

As noted supra, Appellant's chief moral duty as a school board member was rendering a righteous judgment, and the ALJ's decision as to Discenza, determining her as having betrayed her duty to the Board in favor of political candidates and having made remarks alleging sitting board members had conflicts of interest preventing them from acting impartiality, solidifies that Appellant's request was both justified and in line with that moral duty.

As further noted supra, if the SEC's decision is affirmed, the relationship between board president and board counsel will be fundamentally changed in a manner that disincentives requests requiring immediate legal services and inter-board accountability while simultaneously empowering third-party politicization of board affairs.

Accordingly, the SEC's decision to enhance the ALJ's recommendation was arbitrary and capricious and therefore must be overturned.

## **CONCLUSION**

For the foregoing reasons, the Commissioner's Final Agency Decision upholding the SEC's findings of fact and conclusions of law that Appellant violated certain provisions of the School Ethics Act should be reversed, and this court should remand this matter to the SEC for a new hearing.

Respectfully submitted,

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	:	SUPERIOR COURT OF NEW JERSEY
	:	APPELLATE DIVISION
	:	
IN THE MATTER OF SHAWN	:	DOCKET NO.: A-3090-23T1
GIORDANO, LACEY	:	
TOWNSHIP BOARD OF	:	<u>CIVIL ACTION</u>
EDUCATION, OCEAN	:	
COUNTY.	:	ON APPEAL FROM A FINAL
	:	AGENCY DECISION OF THE
	:	COMMISSIONER OF EDUCATION
	:	

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BRIEF IN OPPOSITION TO APPELLANT’S APPEAL OF THE  
COMMISSIONER’S FINAL AGENCY DECISION  
(Date Submitted: October 25, 2024)

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**TABLE OF CONTENTS**

PROCEDURAL HISTORY AND STATEMENT OF FACTS..... 1

ARGUMENT

THE COMMISSIONER’S DECISION SHOULD BE  
AFFIRMED BECAUSE IT ACCORDED WITH THE LAW  
AND WAS SUFFICIENTLY SUPPORTED BY THE  
RECORD .....8

    A. The Commissioner Correctly Found Giordano in Violation of  
        N.J.S.A. 18A:12-24(b) and -24.1(f). . . . .12

    B. The Commissioner Correctly Found Giordano in Violation of  
        N.J.S.A. 18A:12.1(e). . . . .15

    C. The Commissioner’s Decision to Affirm the Commission’s  
        Penalty Recommendation of Censure was Reasonable and  
        Supported by Precedent.....19

CONCLUSION .....21

## TABLE OF AUTHORITIES

### **Cases**

<u>Aqua Beach Condo. Ass’n v. Dep’t Cmty. Affairs,</u> 186 N.J. 5 (2006).....	9
<u>Bd. of Educ. of Sea Isle City v. Kennedy,</u> 196 N.J. 1, 16 (2008).....	11
<u>Campbell v. New Jersey Racing Comm’n,</u> 169 N.J. 579 (2001).....	10
<u>Cheng v. Rodas, West New York Bd. of Educ., Hudson Cty.,</u> SEC Dkt. No. C58-14 (Sept. 22, 2015).....	17, 18
<u>E.S. v. Div. of Med. Assistance &amp; Health Servs.,</u> 412 N.J. Super. 340 (App. Div. 2010) .....	9
<u>Friends Retirement Concepts v. Bd. of Educ. of the Borough of Somerville,</u> 356 N.J. Super. 203 (Law Div. 2002) .....	12
<u>In re Arenas,</u> 385 N.J. Super. 440 (App. Div. 2006) .....	9
<u>IMO Alphonse A. DeMeo, Belleville Board of Education, Warren County,</u> SEC Dkt. No. C09-04 (September 30, 2004) .....	13, 14, 15
<u>IMO James Morgan, Bergen County,</u> Commissioner Dkt. No. 65-2/22 (April 14, 2022) .....	20
<u>IMO Kerry Anne Mastrofilipo, Lodi Board of Education, Bergen County,</u> Commissioner Dkt. No. 15-12/23A (April 22, 2024).....	19
<u>IMO Rhonda Bemby, Hackensack Bd. of Educ., Bergen Cnty.,</u> SEC Dkt. No. C49-12 (August 25, 2014) .....	14-15



<u>Matter of Petition of S. Jersey Gas Co.,</u> 447 N.J. Super. 459 (App. Div. 2016) .....	10
<u>Rice v. Union County Regional High School Bd. of Educ.,</u> 155 N.J. Super. 64 (App. Div. 1977) .....	18
<u>Dep’t of Educ. v. Capers,</u> No. A-835-20 (App. Div. Sept. 2, 2022).....	14, 15, 17

### Statutes

N.J.S.A. 18A:11-1 .....	11
N.J.S.A. 18A:12-21 to -34 .....	1
N.J.S.A. 18A:12-22(a) .....	11
N.J.S.A. 18A:12-24(b) .....	1, 4, 9, 12, 13, 14, 15, 20, 21
N.J.S.A. 18A:12-24.1 .....	1
N.J.S.A. 18A:12-24.1(c) .....	1, 5
N.J.S.A. 18A:12-24.1(e) .....	1, 5, 6, 9, 14, 15, 16, 18, 21
N.J.S.A. 18A:12-24.1(f) .....	1, 5, 12

### Regulations

N.J.A.C. 1:1-18.4 .....	19
N.J.A.C. 6A:23A-5.2 .....	16, 17
N.J.A.C. 6A:28-6.4 .....	12, 15

### Court Rules

<u>R. 1:36-3</u> .....	13
<u>R. 2:6-1</u> .....	13, 14

**Treatises**

Pressler & Verniero, Current N.J. Court Rules ..... 13

## **PROCEDURAL HISTORY AND COUNTERSTATEMENT OF FACTS<sup>1</sup>**

Giordano became a member of the Lacey Township Board of Education in 2013, was reelected in 2016, and served as the Board President during the events at issue. (Aa165).<sup>2</sup> After he lost his bid for reelection in November 2019, he remained on the Board until January 1, 2020. Ibid.

On January 13, 2020, Regina Discenza filed a ten-count complaint with the School Ethics Commission, alleging that Giordano engaged in conduct that violated the School Ethics Act (“Act”), N.J.S.A. 18A:12-21 to -34, and the Code of Ethics for School Board Members (“Code”), N.J.S.A. 18A:12-24.1. (Aa206; Aa217). At the time of the complaint, Discenza was a member of the Board who had campaigned against Giordano during the Board’s November 2019 election. (Aa218). Discenza alleged in the complaint that on the day after the Board’s November 2019 election, Giordano violated N.J.S.A. 18A:12-24(b) (count one), N.J.S.A. 18A:12-24.1(c) (count two), N.J.S.A. 18A:12-24.1(e) (count three), and N.J.S.A. 18A:12-24.1(f) (count four), when he directed the Board’s attorney to conduct research on Discenza at the taxpayers’ expense and “without any

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<sup>1</sup> The factual and procedural history of this matter are substantially intertwined and are combined for the court’s convenience.

<sup>2</sup> “Aa” refers to Appellant’s motion appendix; “Ab” refers to Appellant’s brief.

written consent/resolution for the expenditure.” (Aa218-219).<sup>3</sup> Pursuant to Board policy, only the superintendent, the business administrator, Board secretary, and the Board president “have the authority to request services from the Board’s counsel.” (Aa2; Aa202).

Discenza became aware of the circumstances that brought about the complaint on December 6, 2019, when the Board members reviewed the November 2019 legal bill that had been delivered to them. (Aa233). Fifteen billing entries were labeled “Member Conduct,” for which the Board attorney billed 33.9 hours of research that had commenced on November 6, 2019 (one day after the Board’s election), totaling \$5,085. Ibid. Discenza asserted that for the Board’s attorney to conduct legal research, the Board would normally have to consent to such research via a Board resolution, but no such consent was given before the Board attorney’s research on “Member conduct” commenced. (Aa207). Discenza further claimed that “at no time were contents of the work done by the Board [a]ttorney . . . shared with any other members of the Board or administration.” Ibid. (alterations in original). Despite the absence of any prior resolution approving the Board attorney’s legal research on “Member

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<sup>3</sup> On May 19, 2020, the Commission issued a decision partially granting Giordano’s motion to dismiss the complaint, and dismissing counts five through ten. (Aa216-31). Those counts are therefore not at issue in this appeal and will not be addressed herein.

Conduct,” Board members still voted to ratify the bill — with the exception of Discenza, who abstained. (Aa2).

On July 21, 2020, after ruling on Giordano’s motion to dismiss, the Commission voted to find probable cause to credit the allegations asserted in counts one through four of the complaint. (Aa205-12). The matter was transmitted to the Office of Administrative Law as a contested case, and was eventually consolidated with a complaint Giordano initiated against Discenza alleging that she violated the Act by endorsing a candidate in a Board election without issuing a disclaimer that it was not an endorsement in her official capacity, and by going to a polling site to collect materials she was not authorized to receive. (Aa2; Aa166-167; Aa187). The parties filed cross-motions for summary decision at the conclusion of discovery, and on February 27, 2023, the Administrative Law Judge (“ALJ”) issued an order granting partial summary decision in favor of the Commission on counts one, three, and four of Discenza’s complaint against Giordano. (Aa7; Aa164-83).<sup>4</sup>

In his order, the ALJ found that there were no genuine issues of material fact, and that there was “evidence in the present matter . . . that Giordano engaged in a . . . use of school resources without the consent of the Board” that

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<sup>4</sup> The ALJ also granted the Commission’s motion for summary decision against Discenza. (Aa176). That matter is not the subject of this appeal.

violated the Act and Code. (Aa178). The ALJ based his finding on the following undisputed facts: (1) Giordano asked the Board attorney to research the conduct of another Board member who campaigned against him the day after he lost the Board's November 2019 election; (2) Giordano never sought "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"; (3) Discenza only became aware of Giordano's request for legal research a month later "when the Board reviewed the November 2019 legal bill for ratification"; and (4) the Board attorney's research on Discenza's conduct was never "formally shared with other members of the Board during [her] tenure on the Board." (Aa168-169; Aa180). The ALJ also found that because there existed a significant history of animosity between Giordano and Discenza, Giordano's conduct further violated the public trust, as it would be reasonable for the public to believe that Giordano's election loss led him to use taxpayers' money to investigate means to discredit Discenza. (Aa180).

The ALJ thus concluded that Giordano violated N.J.S.A. 18A:12-24(b)<sup>5</sup> by securing an unwarranted advantage when he sought legal advice from the

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<sup>5</sup> N.J.S.A. 18A:12-24(b) prohibits school board members from using their official position to secure an unwarranted advantage for themselves, a member of their family, or others.

Board’s attorney that he could use against a rival Board member “with whom he had a negative history.” Ibid. The ALJ further found that Giordano’s use of that advantage also violated N.J.S.A. 18A:12.24.1(e)<sup>6</sup> because it constituted a private action that, “by its very nature, compromise[d] the integrity and accountability of the Board and its proper use of school resources.” Ibid. The ALJ also found that Giordano’s use of the Board attorney violated N.J.S.A. 18A:12-24.1(f)<sup>7</sup> because that action constituted a use of “school resources for his own personal gain” that he would not have otherwise had access to, but for his position as Board President. Ibid.

The ALJ dismissed count two of the complaint, holding that Giordano’s conduct was based on private action, and therefore no violation of N.J.S.A. 18A:12-24.1(c)<sup>8</sup> could have occurred. (Aa181). The ALJ concluded that reprimand was the appropriate sanction in this matter, reasoning that “the

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<sup>6</sup> N.J.S.A. 18A:12-24.1(e) prohibits school board members from taking actions outside the officially mandated duties of board members that may comprise the board.

<sup>7</sup> N.J.S.A. 18A:12-24.1(f) prohibits school board members from using the schools for personal gain or for the gain of friends.

<sup>8</sup> N.J.S.A. 18A:12-24.1(c) requires board members to consult those who will be affected by the policies and plans they develop as part of their official duties.

totality of the circumstances . . . do not seem to support a formal action of censure.” (Aa182).

On February 28, 2023, the ALJ issued an order severing the Giordano and Discenza matters, explaining that his February 27, 2023 decision granting summary decision on three counts, and dismissing the remaining count, thus “resolved the entire case as to . . . Giordano.” (Aa2). On March 6, 2023, the Commission requested clarification from the ALJ as to whether the Giordano matter was fully resolved — that is, whether the February 27, 2023 order constituted an initial decision that may be reviewed by the Commission. (Aa187). After conducting a conference call with the parties, the ALJ issued an initial decision on April 27, 2023, adopting and incorporating “[t]he factual discussion and findings of fact pertaining to th[e] [Giordano] matter delineated in the Order on Summary Decision” and, once again, concluding that reprimand was the appropriate penalty. (Aa187-189).

After the parties filed exceptions, the Commission issued its decision on July 25, 2023, adopting the ALJ’s findings of fact and legal conclusions that Giordano violated N.J.S.A. 18A:12-24(b), and -24.1(e) and (f), and also agreeing with the ALJ that Giordano did not violate N.J.S.A. 18A:12-24.1(c). (Aa1-7). However, the Commission modified the ALJ’s recommended penalty of reprimand to censure. (Aa5). The Commission reasoned that Giordano “was



on the Board for at least six years and rose to the position of Board President,” and therefore, “his Board experience and years of ethics trainings . . . should have [made him] acutely aware of his ethical obligations under the Act.” Ibid. The Commission also found that Giordano’s “blatant use of Board resources” by “contact[ing] the Board attorney immediately after failing to be reelected” in order to request information about the conduct of Discenza, a fellow Board member who actively campaigned against him during the election and with whom he shared a significant history of mutual disdain, “demonstrates the bad faith behind [his] request.” Ibid. Accordingly, the Commission concluded that given Giordano’s “personal dislike for [Discenza], 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,” his violation of the Act and Code “is severe and warrants a censure instead of a reprimand.” Ibid.

Giordano appealed the Commission’s decision to the Commissioner, and on May 15, 2024, the Commissioner issued a final decision concluding that the Commission’s decision “is supported by sufficient, credible evidence, and that appellant failed to establish that the decision is arbitrary, capricious, or contrary to law.” (Aa232).

On June 7, 2024, Giordano filed an appeal of the Commissioner’s final decision, and on August 9, 2024, he filed his merits brief, as well as a motion for a stay of the Commissioner’s final decision. This court denied the motion for a stay on August 26, 2024. See IMO Shawn Giordano, Lacey Township Bd. of Educ., Ocean Cnty., No. M-6724-23 (App. Div. August 26, 2024).

### **LEGAL ARGUMENT**

#### **THE COMMISSIONER'S DECISION SHOULD BE AFFIRMED BECAUSE IT ACCORDED WITH THE LAW AND WAS SUFFICIENTLY SUPPORTED BY THE RECORD.**

Giordano does not dispute that on the day after he lost his bid for reelection to the Board, he directed the Board’s attorney to investigate whether the conduct of a rival Board member who had campaigned against him, and with whom he shared a long history of mutual dislike, violated the Act. Despite these clear and undisputed facts, Giordano continues to suggest that he did nothing wrong because his directive to the Board attorney “was [a] legitimate Board action and fell within his authority as Board president” under Board Policy 0174, which designates only three individuals, including the Board president, as “contact persons” who are authorized to unilaterally “request services or advice from contracted legal counsel.” (Ab12; Ab19; Aa169; Aa202; Aa233). Moreover, he continues to suggest that “there are grave issues of fact which

preclude the conclusion” that he used school resources for personal gain in violation of N.J.S.A. 18A:12-24(b) and N.J.S.A. 18A:12-24.1(e) and (f). (Aa177; Aa235; Ab15-18). But Giordano’s arguments are wrong. The Commissioner’s conclusion that Giordano violated the Act should be affirmed because it is reasonable, consistent with the law, and wholly supported by the record.

Appellate courts generally accord a deferential standard of review to administrative decisions. In re Arenas, 385 N.J. Super. 440, 443 (App. Div. 2006). As such, it is well settled that the scope of appellate review of a final agency decision is limited. Aqua Beach Condo. Ass’n v. Dep’t of Cmty. Affairs, 186 N.J. 5, 15-16 (2006). The court’s “function is to determine whether the administrative action was arbitrary, capricious or unreasonable.” E.S. v. Div. of Med. Assistance & Health Servs., 412 N.J. Super. 340, 348 (App. Div. 2010) (citations and quotations omitted). “The agency decision must be supported by substantial credible evidence in the record as a whole” and the decision “must not offend either the state or federal constitution and must be in accord with the agency’s legislative mandate.” Ibid. “The burden of demonstrating that the agency’s action was arbitrary, capricious or unreasonable rests upon the person challenging the administrative action.” In re Arenas, 385 N.J. Super. at 443–44.

If the court is satisfied that the evidence and the inference drawn from the evidence support the agency decision, the court must affirm even if it would have arrived at a different decision. Ibid. The reviewing court must be careful not to substitute its “judgment of the facts for that of an administrative agency.” Campbell v. New Jersey Racing Comm'n, 169 N.J. 579, 587 (2001). Further, the reviewing court “grant[s] considerable deference to the agency's expertise, where such expertise is a relevant factor.” Matter of Petition of S. Jersey Gas Co., 447 N.J. Super. 459, 480 (App. Div. 2016).

Here, the record clearly supports the Commissioner’s determination that Giordano violated the Act and, therefore, the decision was neither arbitrary, capricious, or unreasonable. The material facts are straightforward and not in dispute. Giordano and Discenza shared a long history of mutual dislike while serving as members of the Board. (Aa232-233). Discenza had campaigned against Giordano during his 2019 bid for reelection to the Board. (Aa233). On November 5, 2019, Giordano lost his bid for reelection to the Board, meaning that he would cease to be a Board member on January 1, 2020. (Aa165; Aa219; Aa233). One day after the election, Giordano directed the Board’s attorney to research whether Discenza’s participation in the political campaigning process during the 2019 Board election constituted an ethics violation. (Aa168-169; Aa233). Giordano used the information produced by the Board attorney’s

investigation as the basis for the ethics complaint that he personally filed against Discenza with the Commission. Ibid. Absent Board Policy 0174, Giordano would not have had the ability to unilaterally request any legal services or advice from the Board attorney. (Aa202; Aa235). Giordano has conceded all of these facts throughout these proceedings, (Ab5-6; Ab12-13; Ab20), but denies that his actions were improper, arguing that they fell within his authority as Board president. He is wrong.

School board members are tasked with administering the public schools. N.J.S.A. 18A:11-1. In enacting the Act, "the Legislature declared its intention 'to ensure and preserve public confidence' in local school board members by providing local board members with advance guidance on ethical conduct so that such members might conduct their personal affairs appropriately and within the bounds ethically expected." Bd. of Educ. of Sea Isle City v. Kennedy, 196 N.J. 1, 16 (2008) (citation omitted) (quoting N.J.S.A. 18A:12-22; citing N.J.S.A.18A:12-24(j)). To that end, the Legislature has declared that school board members and officials must conduct themselves to "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).

**A. The Commissioner Correctly Found Giordano in Violation of N.J.S.A. 18A:12-24(b) and -24.1(f).**

N.J.S.A. 18A:12-24(b) states that “[n]o school official shall use or attempt to use his [or her] official position to secure unwarranted privileges, advantages or employment for himself [or herself], members of his [or her] immediate family, or others.” Relatedly, N.J.S.A. 18A:12-24.1(f) requires Board members to swear the following oath: “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 Commission’s regulations offer guidance to help determine whether a school board member’s conduct rises to a violation of N.J.S.A. 18A:12-24.1(f): “[f]actual evidence of a violation of N.J.S.A. [18A:12-24.1(f)] shall include . . . evidence that the respondent(s) used the schools to acquire some benefit for the respondent(s), a member of the respondent's immediate family or a friend.” N.J.A.C. 6A:28-6.4(a)(6).

The Commissioner correctly determined that Giordano’s undisputed actions constituted a violation of N.J.S.A. 18A:12-24(b) and -24.1(f) because, regardless of whether Giordano's position as Board president authorized him to ask the Board attorney to conduct legal research, “the public could infer that [Giordano] requested the research against Discenza to secure an advantage for himself and for his own personal gain[.]” (Aa235) (citing Friends Retirement Concepts v. Borough of Somerville, Board of Education (Friends), 356 N.J.

Super. 203, 214 (Law Div. 2002) (“[i]n determining an ethics 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.”)) (Aa234).

The Commissioner’s reasoning is consistent with prior Commission and Commissioner decisions. For example, in IMO Alphonse A. DeMeo, Belleville Board of Education, Warren County, SEC No. C09-04 (September 30, 2004), aff’d, Commissioner No. 354-10/04 (November 17, 2004),<sup>9</sup> the board member “endorsed a candidate for the Belleville Municipal Council through a mailing where the envelopes and letterhead bore his official title as President of the Belleville Board of Education.” Id. at 5. The Commission reasoned that even if DeMeo did not intend to make the endorsement in his official capacity, he still violated N.J.S.A. 18A:12-24(b) because “the design of the letterhead, the content of the letter, and the nature of the return address on the envelope, could lead someone reading the letter to reasonably assume that the endorsement was made by Mr. DeMeo in his official capacity as President of the Board[,]” in

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<sup>9</sup> In the absence of any known published authority on the issues presented, the Commissioner relies on informative agency decisions of the Commission and the Commissioner as secondary authority. Pressler & Verniero, Current N.J. Court Rules, cmt. 2 on R. 1:36-3 (2024). A copy of all agency decisions has been included in respondent’s appendix pursuant to Rules 1:36-3 and 2:6-1(a)(1)(H).

order to provide the endorsed Council candidate an advantage over the other candidates. Ibid. Like the Board member in DeMeo, the circumstances surrounding Giordano's conduct would lead someone to reasonably assume that his request for legal research was made in his official capacity as President of the Board in order to secure an advantage over Discenza. See also IMO Rhonda Bembry, Hackensack Bd. of Educ., Bergen Cnty., SEC No. C49-12 (August 25, 2014), aff'd, Commissioner No. 325-10/15 (December 15, 2014) (affirming Commission's decision that Bembry violated N.J.S.A. 18A:12-24(b) when she participated in a board vote concerning the evaluation of a principal with whom she shared a substantial history of antipathy); Smith v. Capers, Commissioner No. 3-3/20A (October 20, 2020), aff'd, Dep't of Educ. v. Capers, No. A-835-20 (App. Div. Sept. 2, 2022) (affirming Commissioner's decision that Capers violated N.J.S.A. 18A:12-24.1(e) and (f) when he unilaterally accepted a potential vendor's offer to attend an all-expenses paid conference in Arizona, in his official capacity as a board member).<sup>10</sup>

Here, the record shows that Giordano used the Board's attorney to conduct research about a fellow Board member, Discenza, with whom he shared a substantial history of mutual personal animosity, the day after losing in a Board

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<sup>10</sup> A copy of this court's decision in Capers has been included in respondent's appendix pursuant to Rules 1:36-3 and 2:6-1(a)(1)(H). The undersigned is not aware of any contrary unpublished opinions.



election in which she campaigned against him. Thus, like the board members in Bembry and Capers, Giordano clearly violated N.J.S.A. 18A:12-24(b) and N.J.S.A. 18A:12-24.1(f), as it would be entirely reasonable for the public to perceive that Giordano was using the unique authority granted to him as Board President for personal gain, in the form of securing an advantage over Discenza, as a consequence of their substantially negative history. Further, like the board member in DeMeo, whether Giordano succeeded, or even intended, to secure an advantage over Discenza by using his position as Board president to direct the Board attorney's research on her is immaterial to finding a violation of N.J.S.A. 18A:12-24(b).

As such, the Commissioner was neither arbitrary, capricious, nor unreasonable in finding that Giordano violated the Act, and, therefore, this court must afford the Commissioner's decision deference and affirm it.

**B. The Commissioner Correctly Found Giordano in Violation of N.J.S.A. 18A:12-24.1(e).**

N.J.S.A. 18A:12-24.1(e) requires Board members to swear the following oath: "I will recognize that authority rests with the board of education and will make no personal promises nor take any private action that may comprise the board." "Private action" constitutes any action taken by a board member that is beyond the scope of his authority and duties as a board member. See N.J.A.C. 6A:28-6.4(a)(5) ("[f]actual evidence of a violation of N.J.S.A. 18A:12-

24.1(e) shall include evidence that the [board member] . . . took action beyond the scope of his or her duties such that, by its nature, had the potential to compromise the board.").

Even though Board Policy 0174 designates the Board president as one of three individuals who can unilaterally request legal services or advice from the Board attorney, Giordano's request for legal research violated N.J.S.A. 18A:12-24.1(e) because the policy provides that the Board president's request for such legal services must be in accordance with N.J.A.C. 6A:23A-5.2. (Aa202). Pursuant to N.J.A.C. 6A:23A-5.2(b), no school district shall

contract with legal counsel or use in-house legal counsel to pursue any affirmative claim or cause of action on behalf of school district administrators and/or any individual district board of education member(s) for any claim or cause of action in which the damages to be awarded would benefit an individual rather than the school district as a whole.

[(emphasis added).]

As such, while Giordano was certainly authorized as the Board President to unilaterally request legal research from the Board attorney, he was not authorized to do so for his own personal benefit. The research he requested was not intended to benefit the school district, as it was neither publicly voted on by the Board, nor shared with the Board afterwards. And Giordano initiated the

ethics complaint in his individual capacity after the Board expended \$5,085 on the legal research that he used to support his personal complaint. (Aa233).

Moreover, as the Commissioner noted in his final decision, Giordano had other options available to him if he believed Discenza was committing ethics violations. (Aa235). For example, Giordano could have asked the Board to vote on the research request before contacting the Board attorney, or he could have requested a free advisory opinion from the Commission. Ibid. Giordano could have also initiated 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.” Ibid. Giordano’s use of the Board attorney to pursue his ethics claim against Discenza at no personal cost clearly violated N.J.A.C. 6A:23A-5.2. The Commissioner has previously found such self-serving unilateral behavior to be a violation of N.J.S.A. 18A:12-24.1(e). See Capers, Commissioner No. 3-3/20A (concluding that Capers's action of unilaterally accepting a potential vendor’s offer to attend an all-expenses paid conference in his official capacity as a board member went beyond the scope of his duties and responsibilities and, by its nature, had the potential to compromise the board in violation of N.J.S.A. 18A:12-24.1(e)), aff’d, No. A-835-22 (slip op. at 15).

Giordano asserts that the ALJ improperly relied on Cheng v. Rodas, West New York Board of Education, Hudson County, C58-14 (Sept. 22, 2015), when

he concluded that Giordano violated N.J.S.A. 18A:12-24.1(e). In Cheng, the Commission found a board member violated N.J.S.A. 18A:12-24.1(e) when he directed the board attorney to compose and deliver a Rice<sup>11</sup> notice without the board's knowledge or consent. (Ab13-18). Giordano is wrong.

To begin with, Giordano raises an issue of limited relevance because the Commissioner did not cite Cheng when issuing the final decision in this matter. But even if he had, Cheng supports the outcome here because that case expressly states that the respondent "violated N.J.S.A. 18A:12-24.1(e) when he took board action beyond the scope of his authority when, without Board authority or consultation, he unilaterally issued a Rice notice to an employee of the District so as to compromise the Board." See Cheng, (slip op. at 12). In other words, Cheng supports the Commission's and the Commissioner's conclusion that a school board member may not exploit a school board attorney for his or her own personal aims.

Moreover, both the Commission and the Commissioner correctly rejected Giordano's alternative argument that the ALJ failed to consider five Board members certifications and granted summary disposition prematurely. See

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<sup>11</sup> "Rice" notice refers to the matter entitled, Rice v. Union County Regional High School Bd. of Ed., 155 N.J. Super. 64 (App. Div. 1977), certif. den. 76 N.J. 238 (1978) which established the right of employees to obtain notice when they will be discussed by the Board of Education.

(Ab15-18). The certifications, submitted after the close of the record and for the first time in exceptions, were not part of the record before the ALJ. (Aa192-201); N.J.A.C. 1:1-18.4(c). And even if the certifications were considered, it would not alter the result. As the Commission noted, “whether [Giordano] 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.” (Aa5).

Accordingly, it was reasonable for the Commissioner to conclude that Giordano’s unilateral request for the Board attorney to conduct research on Discenza for his own legal action, when other options were available, clearly went beyond the scope of his duties as Board President, in violation of N.J.S.A. 18A:12-24.1(e).

**C. The Commissioner’s Decision to Affirm the Commission’s Penalty Recommendation of Censure was Reasonable and Supported by Precedent.**

The Commissioner’s decision to impose a penalty of censure for Giordano’s conduct is consistent with his own prior rulings, and should be affirmed.

In IMO Kerry Anne Mastrofilipo, Lodi Board of Education, Bergen County, Commissioner No. 15-12/23A (April 22, 2024), the school official remained present during a board executive discussion over whether it should

appoint her husband or another candidate to an open seat on the board. In assessing the appropriate penalty for her violations of the Act, the Commissioner found the penalty of censure was “commensurate with those recommended by the SEC and affirmed by the Commissioner in similar matters” where board members violated N.J.S.A. 18A:12-24(b) by creating a justifiable impression among the public that they were attempting to use their official position to secure unwarranted benefits for themselves or others. See also IMO James Morgan, Bergen County, Commissioner No. 65-2/22 (April 14, 2022) (censuring board member who violated N.J.S.A. 18A:12-24(b) by making comments during a public meeting that a reasonable person could believe were intended to secure an unwarranted advantage for certain candidates in the upcoming board election over the candidate who had filed an OPRA lawsuit against the board).

Because Giordano’s actions had the potential to compromise the Board by creating a justifiable impression among the public that he was using his position as Board President in order to secure an advantage over an adversary at the Board’s expense, the Commissioner rightly affirmed the Commission’s assessment that censure is the appropriate penalty for such behavior. (Aa232, Aa235). As the Commission explained, Giordano’s “blatant use of board resources for his own motivations was not de minimis[.]” (Aa5). An examination of the record developed below demonstrates that the

Commissioner's decision is reasonable and consistent with applicable statutes, regulations, and administrative precedents. Therefore, the decision finding that Giordano should be censured for violating N.J.S.A. 18A:12-24(b) and N.J.S.A. 18A:12-24.1(e) and (f) should be accorded deference and affirmed.

**CONCLUSION**

For these reasons, Giordano's appeal of the Commissioner's final decision and imposition of a censure penalty should be denied.

Respectfully submitted,

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

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION

CIVIL ACTION

DOCKET NO.: A-003090-23

On Appeal from State Agency Decision on  
May 15, 2024

AGENCY DOCKET NO.: 9-8.23a

**REPLY BRIEF ON BEHALF APPELLANT SHAWN GIORDANO**

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Submitted on: November 8, 2024



TABLE OF CONTENTS

TABLE OF AUTHORITIES..... ii-iii

PRELIMINARY STATEMENT ..... 1

LEGAL ARGUMENT ..... 1- 15

POINT I

THE COMMISSIONER’S DECISION WAS  
ARBITRARY, CAPRICIOUS, AND UNREASONABLE;  
THEREFORE, THE COMMISSIONER’S DECISION  
MUST BE REVERSED. (Sg001-Sg068;Sg073-Sg236)

POINT II

THE COMMISSIONER INCORRECTLY FOUND THAT  
APPELLANT VIOLATED N.J.S.A 18A:12-24(b), 18A:12-  
24.1(e), and 18A:12-24.1(f). (Sg001-Sg007;Sg164-  
Sg183;Sg186-Sg191;Sg192-Sg201;Sg206-Sg236)

CONCLUSION ..... 15

## TABLE OF AUTHORITIES

### CASES

<u>A.B. v. Div. of Med. Assistance &amp; Health Servs.,</u> 407 N.J. Super. 330 (App. Div. 2009).....	2
<u>Atkinson v. Parsekian,</u> 37 N.J. 142 (1962).....	7
<u>Brady v. Bd. of Review,</u> 152 N.J. 197 (1997).....	2
<u>Dep’t of Educ v. Capers,</u> 2022 N.J. Super. Unpub. LEXIS 1585*.....	8
<u>Friends Retirement Concepts v. Bd. of Educ. Borough of Somerville,</u> 356 N.J. Super. 203 (Law Div. 2002).....	6
<u>IMO Alphonse A. DeMeo Belleville Board of Education, Warren County,</u> SEC No. C09-04 (September 30, 2004) aff’d, Commissioner No. 354- 10/04) (November 17, 2004).....	7
<u>IMO Elissa Malespina, South Orange Maplewood Board of Education,</u> <u>Essex County,</u> SEC No. C22-22 (April 11, 2024), aff’d, OAL No. 09540- 22 (April 16, 2024), WL 3313936.....	11
<u>IMO James Morgan, Bergen County,</u> Commissioner No. 65-2/22 (April 14, 2022).....	9
<u>IMO Kerry Anne Mastrofilipo, Lodi Board of Education,</u> <u>Bergen County,</u> Commissioner No. 15-12/23A (April 22, 2024).....	9
<u>In IMO Rhonda Bemby, Hackensack Bd. of Educ., Bergen Cnty., SEC</u> No. C49-12 (August 25, 2014), aff’d, Commissioner No. 325-10/15 (December 15, 2014).....	9

IMO Terry Tucker, East Orange Board of Education, Essex County, SEC  
No. C36-19 (December 24, 2019), aff'd OAL No. 18003-19 (October 17,  
2023), WL 8176342.....13, 14

In re Polk License Revocation,  
90 N.J. 550 (1982).....6

Liberty Mut. Ins. Con. v. Land,  
186 N.J. 163 (2006).....7

Weston v. State,  
60 N.J. 36 (1972).....4

### **STATE STATUTES**

N.J.A.C. 6A:28-1.2.....13

N.J.A.C. 6A:28-6.4(a)(6).....12

N.J.S.A. 18A:12-24(b) .....1, 6, 10, 11

N.J.S.A. 18A:12-24.1(e).....1, 6, 10, 11

N.J.S.A. 18A:12-24.1(f) .....1, 6, 8, 10, 12

N.J.S.A. 18A:12-28(b).....7

### **TREATISE**

Current Rules of Evidence, comment 5a on N.J.R.E. 101(b)(1)(2005)... 7

## **PRELIMINARY STATEMENT**

Appellant Shawn Giordano (“Appellant”) respectfully submits this Reply Brief in connection with his appeal of the Commissioner of Education’s (“the Commissioner”) decision upholding the School Ethics Commission’s (“SEC”) decision that Appellant violated N.J.S.A. 18A:12-24(b), 18A:12-24.1(e), and 18A:12-24.1(f) of the School Ethics Act (“SEA”).

The Commissioner’s and the SEC’s decision was arbitrary, capricious, and unreasonable on the following grounds.

First, Appellant’s request to the Board Attorney was an official act within his authority under Board Policy 0174. See Sg048-Sg050. Second, the agency decision lacked requisite factual evidence and misinterpreted N.J.S.A. 18A:12-24(b), 18A:12-24.1(e), and 18A:12-24.1(f).

Accordingly, this appellate tribunal must reverse the agency’s decision and remand it to the SEC.

## **LEGAL ARGUMENT**

### **POINT I**

**THE COMMISSIONER’S DECISION WAS ARBITRARY, CAPRICIOUS, AND UNREASONABLE; THEREFORE, THE COMMISSIONER’S DECISION MUST BE REVERSED. (Sg001-Sg068;Sg073-Sg236).**

The Commissioner’s and the SEC’s decision is rooted in the same lack of factual evidence and misreading of the relevant SEA statutory

provisions, warranting this appellate tribunal to reverse on the grounds that the decision is arbitrary, capricious, and unreasonable.

**Appellate Standard of Review of Agency Decision**

Appellate review of administrative agency decisions is limited, and will not be disturbed unless it is clearly arbitrary, capricious, and unreasonable. Brady v. Bd. of Review, 152 N.J. 197, 210 (1997). An appellate tribunal cannot substitute its own judgment for the agency's even if it would have reached a different result. It is well-settled that an administrative agency's interpretation of statutes and regulations within its enforcement responsibility are ordinarily entitled to judicial deference. Nevertheless, the appellate tribunal is not bound by the agency's legal opinions, and matters of statutory and regulatory construction are subject to de novo review. A.B. v. Div. of Med. Assistance & Health Servs., 407 N.J. Super. 330, 340 (App. Div. 2009).

In the instant matter, substantial, legally competent evidence does not exist to support the agency's unreasonable findings.

**Board Policy 0174 Authorized Appellant's Request**

The plain language of Board Policy 0174 authorizes Appellant's act of requesting the Board Attorney to investigate another Board member's potential ethics violations during an election.

Board Policy 0174 states in pertinent part:

The Board of Education authorizes the Superintendent of Schools, Superintendent of Schools's designee, School Business Administrator/Board Secretary, and the Board President as designated persons to request services or advice from contracted legal counsel.

[See Sg048-Sg050]

Further, Board Policy 0174 limits the use of legal services from the Board Attorney to claims or causes of action that benefit the school district as a whole. See ¶5, p. 21; Sg049.

In the instant matter, the factual record demonstrates that Appellant requested the Board Attorney to investigate Board member Discenza's conduct on election day itself when she attempted to use her official position on the Board as authority for demanding a copy of the voter tallies.

In addition, Board Policy 0174 does not require Appellant as a designated person with authority to request legal services to obtain an affirmative vote or resolution from the Board for permission to request such services. Sg048-Sg050. Otherwise, such prior Board approval would be spelled out in the plain language of Board Policy 0174, which clearly does not contain such a provision.

Critically, the plain language of Board Policy 0174 does not require the designated person requesting the legal services from the Board Attorney to disclose the fact of the request to the other designated persons listed in the Policy, namely, the Superintendent of Schools, the Superintendent of Schools's designee, or the School Business Administrator/Board Secretary.

**The SEC Relied On Hearsay Evidence From Board  
Member Discenza's Ethics Complaint Against Appellant**  
(Sg001-Sg006;Sg008-Sg031; Sg164-Sg191; Sg206-Sg212; Sg232-Sg236)

The SEC relied improperly on hearsay statements from Board Member Discenza's allegations in her ethics complaint against Appellant. See Sg003. Specifically, the SEC relied improperly on hearsay statements that Appellant did not inform or consult other Board members or the Superintendent or Business Administrator about the request for legal services or the results of the legal research. See Sg003.

Although in administrative proceedings, the parties are not bound by the formalities of the Rules of Evidence, "a fact finding or a legal determination cannot be based upon hearsay alone...[T]here must be a residuum of legal and competent evidence in the record" for a court to affirm an administrative agency decision. Weston v. State, 60 N.J. 36, 51 (1972).

In this matter, the factual record demonstrates that Appellant notified the majority of the Board of his decision to request the Board Attorney to investigate Board member Discenza's ethical violations on election day. Sg192-Sg201. Indeed, Appellant attached to his lower agency filings certifications to demonstrate that a majority of the Board had discussed the matter and agreed that Appellant should request the investigation from the Board Attorney. See Sg003.

The SEC summarily predicated its findings and decision on the unwarranted conclusion that “[t]he parties agreed that Respondent [Giordano] and Complainant [Discenza] had a substantial negative history and mutual disdain for each other.” See Sg004.

The factual record is bereft of any credible, independent evidence that political differences between Appellant and Board Member Discenza caused Appellant to request the Board Attorney to investigate Discenza’s very specific and discrete instances of ethics violations during the election cycle and on election day. Sg191-Sg201.

The SEC’s decision clearly assumed a fact in evidence that because the parties had previous political differences ipso facto Appellant must have used the excuse of Discenza’s ethics violations during the election to settle a political score, even though the election was already over and Appellant had nothing to gain or benefit from by requesting the Board Attorney to investigate Discenza’s ethics violations during the election and on election day.

Therefore, the core assumption supporting the SEC’s decision collapses under the weight of its own interpretive flimsiness, and this Appellate tribunal should reverse that decision.



**POINT II**  
**THE COMMISSIONER INCORRECTLY  
FOUND THAT APPELLANT VIOLATED  
N.J.S.A. 18A:12-24(b), 18A:12-24.1(e), and  
18A:12-24.1(f)(Sg001-Sg007;Sg164-  
Sg183;Sg186-Sg191;Sg192-Sg201;Sg206-Sg236).**

The Commissioner and the SEC erroneously concluded, without credible evidence in the record, that Appellant violated N.J.S.A. 18A:12-24(b)(use of official position to secure an unwarranted advantage), 18A:12-24.1(e)(taking actions outside the scope of officially mandated duties), and 18A:12-24.1(f)(using school resources for personal gain).

**Respondent’s Reliance on Inapposite Cases Does Not Support  
the Agency’s Findings and Decision**

“Whether there is an ethical violation is a case-by-case question, but the inquiry is 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 Concepts v. Bd. of Educ. Borough of Somerville, 356 N.J. Super. 203, 214-15 (Law Div. 2002).

The burden of proof in establishing the ethical violation under the SEA resides with the accusing party. N.J.S.A. 18A:12-28(b). The facts must “establish the truth of the charges by a preponderance of the believable evidence.” In re Polk License Revocation, 90 N.J. 550, 560 (1982)(quoting

Atkinson v. Parsekian, 37 N.J. 142, 149 (1962)). Under the preponderance standard, the proving party must establish that a desired inference is more probable than not. “If the evidence is in equipoise, the burden has not been met.” Liberty Mut. Ins. Con. v. Land, 186 N.J. 163, 169 (2006)(quoting Biunno, Current Rules of Evidence, comment 5a on N.J.R.E. 101(b)(1)(2005)).

Respondent does not cite any case law that supports the agency’s decision on this set of facts. Respondent cites to case law involving direct conflicts of interest where the record demonstrates a reasonable relationship, or nexus, between the Board member’s act and the unwarranted advantage or benefit.

In IMO Alphonse A. DeMeo Belleville Board of Education, Warren County, SEC No. C09-04 (September 30, 2004) aff’d, Commissioner No. 354-10/04) (November 17, 2004), for example, the accused Board member used his official position to prepare mail orders and endorse members from the local municipal governing body. Attached as Respondent’s Appendix at Ra021-Ra027. Alphonse does not involve facts remotely comparable to the case at bar. Alphonse used the imprimatur of his position as a Board Member to endorse political candidates for municipal election. Ra021-Ra027.

In stark contrast, in our case, Appellant is not accused of endorsing any political candidate. The issue in Alphonse is whether the Board

member's use of his official position in endorsing political candidates violated the SEA. Quite differently, the issue in our case is whether Appellant's investigation request was the product of exercising his lawful duties as Board President or the result of political score-settling.

Respondent's reliance on another unpublished opinion in Dep't of Educ v. Capers, 2022 N.J. Super. Unpub. LEXIS 1585\* is similarly inapposite. Ra001-Ra005. Capers involved the issue of whether a Board member violated the SEA by accepting an all-expenses paid trip to a conference on the invitation of a potential vendor who was marketing products to the school. Ra001-Ra005.

With respect to N.J.S.A. 18A:12-24.1(f)(using school resources for personal gain), the Commissioner determined that the offer of the trip related to the Board member's position on the School Board. Therefore, Capers' acceptance of the trip could be justifiably seen by the public that the trust has been violated. No such direct or indirect transactional offer or benefit took place in the case at bar. The allegations in Capers and this case are wholly different. Thus, the Capers analysis does not apply to this case.

Likewise, Respondent's Brief relies upon three other inapposite cases pertaining to direct conflicts of interest where Board members acted in a way that gave the public impression that they were endorsing a particular political candidate.

In IMO Kerry Anne Mastrofilipo, Lodi Board of Education, Bergen County, Commissioner No. 15-12/23A (April 22, 2024), the Board member did not leave the Board's executive session discussion of whether it should appoint the conflicted Board member's husband or another candidate to an open Board seat. Ra030-Ra038.

In IMO James Morgan, Bergen County, Commissioner No. 65-2/22 (April 14, 2022), the Board member made public comments about litigation filed by a fellow Board member and failed to recuse himself from an executive session discussion of that litigation. Ra028-Ra029.

In IMO Rhonda Bembry, Hackensack Bd. of Educ., Bergen Cnty., SEC No. C49-12 (August 25, 2014), aff'd, Commissioner No. 325-10/15 (December 15, 2014), the Board member committed several ethical violations arising out of her act of voting against re-appointment of a high school principal and e-mailing two principals to promote friends or acquaintances for teaching or various other positions at the school. Ra040-Ra042.

None of these unpublished cases involve remotely analogous or similar facts to the case at bar. Again, the issue in our case is whether Appellant's request for legal services was a lawful exercise of his authority as Board President, or a misuse of his position and school resources to obtain a benefit or advantage for himself, his family, friends, or relatives.

Accordingly, this Appellate tribunal should lend zero weight to Respondent's reliance on these cases.

**The Agency Lacked the Requisite Evidence and Fatally Misread N.J.S.A. 18A:12-24(b), 18A:12-24.1(e), and 18A:12-24.1(f) (Sg001-Sg007;Sg164-Sg183;Sg186-Sg191;Sg192-Sg201;Sg206-Sg236).**

The SEC and the Commissioner erroneously and summarily concluded that Appellant's prior political relationship with Ms. Discenza was the only credible evidence necessary to find violations of N.J.S.A. 18A:12-24(b), 18A:12-24.1(e), and 18A:12-24.1(f).

N.J.S.A. 18A:12-24(b) states:

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;

The fulcrum of the SEC's and the Commissioner's decision in this case is the assumption that a negative prior political relationship in itself, *ipso facto*, constitutes dispositive evidence of a conflict of interest within the Agency's interpretation of N.J.S.A. 18A:12-24(b).

The statute does not define "unwarranted." The Agency has reviewed the statutory meaning of "unwarranted" in Board election cases where a Board member, such as Ms. Discenza, makes oral or written public statements that demonstrate an attempt to influence voters to elect candidates that would help that Board member achieve his personal agenda or attempt to acquire some benefit for himself, his family, or others. See

IMO Elissa Malespina, South Orange Maplewood Board of Education, Essex County, SEC No. C22-22 (April 11, 2024), aff'd, OAL No. 09540-22 (April 16, 2024), WL 3313936 \*7. (Attached to Appellant's Reply Appendix at Ar001-Ar009).

In our case, the agency failed to identify facts that support the conclusion of connection between Appellant's request for legal services and his attempt to obtain an unwarranted advantage or benefit for himself, his family, or others. The factual record demonstrates that Ms. Discenza's conduct occurred on election day—the day before his request. Sg191-Sg201. The timing of Appellant's request is reasonable given that Ms. Discenza's conduct occurred the day before on election day.

There are no facts in the record that identify any connection between Appellant's request and attempting an unwarranted advantage or benefit. The SEC and the Commissioner never identify facts in support of that connection, other than to summarily conclude that Appellant and Ms. Discenza's prior negative political relationship supplies the requisite nexus to support a violation of N.J.S.A. 18A:12-24(b). Sg001-Sg006.

Similarly, N.J.S.A. 18A:12-24.1(e) states:

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.

In this case, there are no facts in the record that support the Agency's legal conclusion that Appellant's request constituted a "private action" that

compromised the Board. The ignored the plain language of Board Policy 0174 that authorizes Appellant as Board President to request the Board Attorney to investigate ethics violations committed by Ms. Discenza during the election. Sg048-Sg050.

The Agency's subsection (e) finding is unsustainable without relying on its flawed and unreasonable conclusion that Appellant's and Ms. Discenza's prior contentious political relationship caused, at least in part, Appellant's investigation request. Sg001-Sg006. Appellant's request could not be reasonably viewed or understood as a private action compromising the Board without the Agency's acceptance, without any credible evidence, of a connection between the prior political relationship and Appellant's reason for the request.

The SEC's and the Commissioner's disregard of Board Policy 0174's conferral of authority and the failure to identify factual evidence that supports a connection between political relationship and Appellant's request warrants this tribunal to reverse the Agency's decision. Sg001-Sg006. Further, N.J.S.A. 18A:12-24.1(f) states:

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.

Commission regulation, N.J.A.C. 6A:28-6.4(a)(6) states in pertinent part that factual evidence of a violation of subsection (f) shall include evidence "that the respondent(s) used the schools in order to acquire some

benefit for the respondent(s), a member of his or her immediate family or a friend.” Id. The benefit need not be financial in nature, or even conferred or accrued. “It is enough that Respondent used her position to seek a benefit.” IMO Terry Tucker, East Orange Board of Education, Essex County, SEC No. C36-19 (December 24, 2019), aff’d OAL No. 18003-19 (October 17, 2023), WL 8176342,\*10-11 (Attached to Appellant’s Reply Appendix at Ar010-Ar023).

N.J.A.C. 6A:28-1.2 defines “benefit” “as used in the Act, as “direct or indirect advantage, profit, privilege, or gain, whether financial, personal, or otherwise.” Id.

In the instant matter, there are no facts in the record that demonstrate that what, if any, direct or indirect advantage, profit, privilege, or gain, whether financial, personal, or political, would redound to Appellant’s benefit from making his request to the Board Attorney. The record shows that the election was already over, and the outcome of Appellant’s election to the Board was already a *fait accompli*. There is no evidence of anything to be gained by Appellant for making such a request.

Assuming, *arguendo*, the claim is that Appellant sought to damage Ms. Discenza politically, there is no evidence of such attempt and her election to the Board was not in jeopardy or at issue. It is not the prerogative or province of the SEC or the Commissioner to speculate as to the relationship or motives of a particular Board member’s reasons for action



or inaction without substantial, legally competent evidence in support thereof.

In Tucker, for example, the Board member voted to name a school in honor of the Lieutenant Governor with whom she has had a longstanding friendship. The Board member was charged with, among other violations, violating subsection (f).

The Commissioner supported his finding of a subsection (f) violation with substantial, legally competent evidence that the Board member had a longstanding personal, professional, and political relationship with the Lieutenant Governor. For instance, before serving on the Board, the Board member served as the Lieutenant Governor's Chief of Staff, campaign manager, and twenty year personal and professional friendship. Id. at \*13.

In comparison to the factual record in the case at bar, however, the Commissioner does not have any substantial, legally competent evidence that Appellant would derive or attempted to derive any "benefit," as used in the Act, from requesting the Board Attorney to investigate Ms. Discenza's conduct during the election.

To be sure, political relationships have been found to create a justifiable impression among the public that one's objectivity or independence of judgment could be impaired. Tucker, supra, 2023 WL 8176342,\*8. But those political relationship cases involve Board member actions or inactions that attempt to benefit either the Board member or a

particular individual with whom the Board member has a political relationship.

Put another way, in those cases substantial, legally competent evidence exists that the political relationship supplies the incentive for the Board member to act or not act, and is a factual nexus between a benefit and the Board member's action or inaction.

In the instant matter, no such evidence of a factual nexus between a benefit and Appellant's request exists. Therefore, the SEC and the Commissioner did not have the requisite evidence to reasonably conclude that Appellant committed a subsection (f) violation.

Accordingly, the Commission's decision is arbitrary, capricious, and unreasonable and must be reversed.

### **CONCLUSION**

For the foregoing reasons, the Commissioner's Final Agency Decision upholding the SEC's findings of fact and conclusions of law should be reversed.

Respectfully submitted,  
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