Superior Court of New Jersey

Appellant Division

Docket No. A-003422-22

MICHAEL SPILLE,

Complainant-Appellant,

vs.

KEVIN KOVELOSKI, MARTHA DENNIS, DIANA PURSELL, FILOMENA HENGST, JIM GALLAGHER, RONI TODD-MARINO, LAUREN BRAUN STRUMFELS, TRACI PACIULLI , MEAGAN WARNER, SOUTH HUNTERDON REGIONAL BOARD OF EDUCATION, HUNTERDON COUNTY

Respondents-Respondents

ON APPEAL FROM A FINAL AGENCY DECISION OF THE SCHOOL ETHICS COMMISSION

DOCKET NO.: C63-21

BRIEF (AMENDED) FOR APPELLANT MICHAEL SPILLE
INITIALLY SUBMITTED August 16, 2023, 2nd AMENDED November 29, 2023

MICHAEL SPILLE
APPELLANT
32 HEWITT ROAD
LAMBERTVILLE, NJ 08530
(917) 921-3502
michael.spille@gmail.com

TABLE OF CONTENTS

TABLE OF JUDGEMENTS, ORDERS AND RULINGS

TABLE OF AUTHORITIES

Page(s)

Cases:

School Ethics Commission Decisions:

Statutes & Rules:

PRELIMINARY STATEMENT

This case arises from the summary dismissal by the School Ethics Commission ("Commission") of a complaint (as amended, the "Complaint") by Appellant Spille filed against several members of the Board of Education ("Board") of the South Hunterdon public school District ("District"), in 2021.

The complaint alleges that the Respondents engaged in a nearly year-long campaign to deceive and misdirect the voting public regarding a $33 million 2021 public referendum involving school facilities ("Referendum") in West Amwell Township, Lambertville City, and Stockton Borough. The complaint details dozens of situations where Board members have acted unethically to promote the Referendum, attempted to hide negative material regarding the Referendum from the public, and tried dissuade other public officials from weighing in against the Referendum.

The Referendum was highly controversial in that it proposed gut-renovating Lambertville Public School ("LPS"), a school with numerous physical challenges, including but not limited to exceedingly small lot size and being within a FEMA flood zone. These defects in the plan and others were hidden from the voting public, and in the end the Referendum ultimately passed by only 2 votes, which was possible only due to the

extreme electioneering and disinformation campaign put forth by individual Board members.

The foundation of the School Ethics Code is the concept that School Boards in NJ hold tremendous power as elected officials, and as elected officials they must avoid ethical violations that could erode the public's trust, or the perception of such violations. The individual members of the SHRSD School Board breached that trust when they decided to deceive the voting public about all of the facts behind the referendum, and to spend tens of thousands of dollars of tax payer money to get out a "yes" vote. The Commission appears to have ignored these facts in its decision to dismiss.

There are two very broad issues with the Commission's final order to dismiss the complaint in its entirety. First, the Commission denied complainant's request to amend his complaint. Subsequent to filing, complainant filed an OPRA request with the District regarding the referendum, and received a very large document dump in response ("Document Dump"). The Document Dump was a veritable treasure trove of information regarding unethical individual and collective BOE conduct during the referendum. This includes numerous emails and documents between Board members and the District Superintendent directly discussing referendum electioneering and how to shape the referendum narrative in a

light favorable to the voting public. By failing to allow Mr. Spille to amend his complaint based on the new Document Dump information, the Commission failed to allow Mr. Spille the liberality and generosity required as a matter of law in considering a motion to dismiss.

Further, in dismissing the complaint in its entirety, the School Ethics Commission failed to consider each count on its own merits, based on the law and its own history of precedents and advisory decisions. In numerous similar decisions that will be detailed in this brief, the Commission has found violations of the School Ethics Act and ordered penalties. In its findings here, the Commission has completely ignored its own advisory opinions and decisions involving Social Media, and actions of individual Board members on public forums. The Commission clearly acted arbitrarily and capriciously by failing to follow its own precedents and advisory opinions, and failing to carefully consider each charge on its own merits.

Finally, by dismissing these counts with little or no reasoning behind the decision, the Commission is encouraging School Boards across the State to engage in similar actions. The Commission has sent a message that Boards are now free to electioneer for district referendums and that Board members have carte blanche to deceive voters on facilities questions.

PROCEDURAL HISTORY

Mr. Spille appeals the Commission's final decision on May 23, 2023 (Pa1), which summarily dismissed his ethics complaint against Respondents.

Mr. Spille filed his complaint with the Commission on October 27th, 2021, alleging the respondents had violated the School Ethics Act ("Act"), *N.J.S.A.* 18A:12-21 *et seq*. By correspondence dated October 28, 2021, Mr. Spille was notified that the Complaint was deficient, and required amendment before the Commission could accept his filing. On November 2, 2021, Mr. Spille cured all defects and filed an Amended Complaint (Complaint) that was deemed compliant with the requirements detailed in *N.J.A.C.* 6A:28-6.3 (Pa19). More specifically, the Complaint avers that Respondents violated *N.J.S.A.* 18A:12-24.1(g) in Counts 1- 8, Count 12, Counts 14-15, and Count 18; Respondent Koveloski violated *N.J.S.A.* 18A:12- 24.1(g) in Count 5 and *N.J.S.A.* 18A:12-24.1(e) in Count 11; Respondent Koveloski and Respondent Gallagher violated *N.J.S.A.* 18A:12-24.1(e) and *N.J.S.A.* 18A:12-24.1(g) in Count 9; Respondent Gallagher violated *N.J.S.A.* 18A:12-24.1(e) and *N.J.S.A.* 18A:12-24.1(g) in Count 10; Respondent Hengst, Respondent Braun-Strumfels, Respondent Warner, and Respondent Todd-Marino violated *N.J.S.A.* 18A:12-24.1(e),

N.J.S.A. 18A:12-24.1(f), and *N.J.S.A.* 18A:12- 24.1(g) in Count 13, and violated *N.J.S.A.* 18A:12-24.1(e) and *N.J.S.A.* 18A:12-24.1(f) in Count 17; and Respondent Pursell violated *N.J.S.A.* 18A:12-24.1(e) in Count 16. On November 24, 2021, Respondents filed a Motion to Dismiss in Lieu of Answer ("Motion to Dismiss"). The Motion Dismiss's legal argument fell into three broad categories, that the allegations against the Superintendent and/or Board as a whole should be dismissed, that complaints against "the board" should be dismissed because it failed to allege facts that demonstrate an ethical violation, and that similarly the complaints against individual members should be dismissed on the same grounds.

On December 21, 2021, Mr. Spille filed a Response to the Motion to Dismiss and in support of Motion to Amend Complaint ("Response").

On January 27th, 2022, the Commission informed all parties that this matter was put into abeyance pending a related matter pending in the Superior Court of New Jersey, Law Division, Hunterdon County involving a contest of the referendum results ("Referendum Contest"), a contest brought by the Township of West Amwell and a number of Township residents, including Mr. Spille. On December 27, 2021,West Amwell Township Committee members and several members of the public (including the plaintiff-appellant here) filed a filed a three-count verified complaint in

support of petition for election contest pursuant to N.J.S.A. 19:291. Count I asserted an election contest. Count II sought a declaratory judgment. Count III alleged violations of the New Jersey Civil Rights Act, N.J.S.A. 10:62. The election contest was based on the following allegations: illegal votes accepted as to fifteen specific voters; legal votes rejected as to one specific voter; illegal votes accepted as to one specific ballot; and illegal use of taxpayer monies by the District. On March 4, 2022, following oral argument on the District's second motion to dismiss, the trial court dismissed count I-D, along with counts II and III with prejudice. The trial court declined to exercise jurisdiction over plaintiffs' Reporting Act claims. Ultimately the trial court dismissed the case. On January 31, 2023, plaintiffs appealed the decision (S. Hunterdon Reg'l Sch. Dist. Pub. Question v. Hunterdon Cnty. Bd. of Elections, No. A-3178-21 (App. Div. Feb. 23, 2023)). The appeals court ultimately affirmed the trial court decision.

On or about March 17, 2023, parties agreed that the Referendum Contest had been fully resolved.

Consequently, the parties were notified by the Commission on April 17, 2023, that the Complaint would be discussed by the Commission at its meeting on April 25, 2023, in order to make a determination regarding the Motion to Dismiss. Following its discussion on April 25, 2023, the

Commission adopted a decision at its meeting on May 23, 2023, granting the Motion to Dismiss in its entirety because Complainant failed to plead sufficient credible facts to support a finding that Respondents had violated the indicated statutes.

STATEMENT OF FACTS

The South Hunterdon Regional School District was formed in 2013 by combining a regional high school district and elementary school districts from three municipalities: the Township of West Amwell ("West Amwell"), Stockton and Lambertville. Currently, the regional school district has three school buildings; two are located in West Amwell and one is in Lambertville.

The 2021 Referendum and Respondents' Promotional Blitz

In April 2021, the Board approved a facilities referendum to finance new construction, building improvements, and a school building closure, at an estimated $33 million price tag. That same month, the Board conducted a community survey that showed that 63.3% of respondents were unsure or against the Referendum. (Pa21) The Board received hundreds of comments as to why voters did not support the proposal (Pa21). Thereafter, Respondents embarked on a multimedia crusade to sway the public to approve the Referendum at the November 2, 2021 election. For eight months, from April 2021 to November 2, 2021, they urged voters not just to vote, but to vote

"yes." Early on, they created a "Key Communicator" group (Pa21). By June 2021, they had provided the Key Communicator Group with the results of the April 2021 community survey that showed strong opposition to the Referendum (Pa22). They created three videos, scheduled community meetings, created slide presentations and mailings, posted messages on social media, and made appearances at city council meetings, not just to provide information, but to get out a pro-Referendum message (Pa22-Pa27). Their August 2021 "Referendum Community Presentation" (Pa22) included statements such as "Planning for THEIR Future"; "How School Districts Impact a Home's Value"; "We can't wait any longer to address these issues [Lambertville Public School repairs and West Amwell School structural and site issues]" and "Our students and staff deserve 21st century learning spaces!" They published a "Referendum FAQ" that included "answers" such as that "high performing schools with 21st century facilities raise property values" and "The only way that South Hunterdon can effectively pay for [addressing substandard buildings and lack of ADA- compliant accessibility] is by referendum." (Pa24) These statements were repeated in an October 9, 2021 school district newsletter. (Pa26).

In addition, the Board produced and uploaded videos to You Tube in August, September and October 2021 that unabashedly highlighted the

advantages of approving the Referendum. (Complaint Counts 5, 6, 7, Pa24-26). They allowed lawn signs to be used in the community that proclaimed "Vote Yes" and that displayed the school district's Referendum url as well as two school district crests. (Complaint, Figure 4, Pa34). The crests and school district website strongly conveyed the impression that the board of education authorized the signs, particularly since no source is identified on the signs.

The Superintendent scheduled 24 "community information sessions" in a one-month period in September and October 2021, averaging six per week in that period. (Complaint, Count 12, Pa31).

In addition to the Board acting in a coordinated fashion to manufacture a "yes" vote on the Referendum, individual Board members took a number of actions regarding the Referendum.

On October 6, 2021, Board member Gallagher and Board President Koveloski appeared before the West Amwell Township Township Committee and tried to persuade the Township Committee to stay neutral in the matter of the referendum (Complaint, Count 9, Pa27). Without disclaiming their words were their own and they were not representing the Board, they attempted to influence a Municipal body regarding the school Referendum.

On October 11, 2021, the same Board member Gallagher made a number of posts to Facebook regarding the referendum, in particular one purporting to answer a number of open referendum questions (Complaint count 10, Pa28). While he included a disclaimer was speaking as a member of the public and not as a Board Member, Mr. Gallagher intentionally withheld material, non- private information about the Referendum, and attempted to mislead readers about the costs of the referendum and what other options might look like. He also omitted a number of questions entirely from his answers.

On October 11, 2021, Board President Koveloski posted to the main Lambertville and West Amwell Facebook pages in favor of the Referendum. In his post, Mr. Koveloski failed to properly disclaim his membership on the board, and went so far as to try to prevent the public from seeking their own answers on referendum questions, exhorting readers "*Please do not let the so-called social media experts persuade you in any way with their negativity, false statements, and bad information*" (Complaint count 11, Pa29).

Throughout the Referendum, all 5 Lambertville Board members were active members of the special interest group, SaveLPS (Complaint, count 13, Pa31). SaveLPS is a group dedicated to keeping a "walkable" school in

Lambertville at all costs, to the exclusion of the wants or needs of Stockton or West Amwell residents, who are also part of the school district. These five members are captive to the interests of SaveLPS, and bent regularly to their will, blocking any attempts at reasonable discourse regarding schools outside of Lambertville.

On October 12, 2021, BOE member Diana Pursell posted a link to a document on the West Amwell Facebook site advocating for the referendum (Complaint 16, Pa37). While Ms. Pursell disclaimed her membership in the BOE, near the end of her statement she said "Please also feel free to reach out to one of your local Board of Education members. I can be reached at diana.pursell@shrsd.org.".

The Ethics Complaint and Post-Vote

On October 27, 2021, Complainant Michael Spille, a resident of West Amwell, filed a 17-count Complaint with the Commission against the nine members of the South Hunterdon Regional School District Board of Education. The Complaint alleged that Respondents shirked their ethical responsibilities to all of the voters by providing the public only with reasons to vote in favor of the Referendum, and by omitting information as to any drawbacks such as the extent to which the measure's cost would increase voters' property taxes. The Commission notified Mr. Spille that the language

of certain claims was technically defective, and on November 2, 2021, Mr. Spille filed an Amended Complaint with 18 counts ("Complaint", Pa19).

On November 2, 2021, the voters of the three constituent municipalities of the regional district approved the Referendum by only two (2) votes of 3,544 votes cast, which was referred to in Complainant's Opposition To Motion to Dismiss. On November 19, 2021 a lawsuit was filed in New Jersey Superior Court seeking a recount of the vote. On December 10, 2021 a judge ordered a recount, which was held on December 14, 2021. The recount did not change the Referendum result. These facts were also noted in the Opposition to Motion to Dismiss to indicate to the Commission the seriousness of the situation and how close and controversial the Referendum truly was to the community.

LEGAL ARGUMENT

I. The Applicable Legal Standard (Not raised below)

While appellate courts "must defer" to the Commission's "expertise and superior knowledge of a particular field" (Greenwood v. State Police Training Ctr., 127 N.J. 500, 513 (1992)), this Court is not bound by the Commission's interpretation of the School Ethics Act. In re State Bd. of Educ.'s Denial of Petition to Adopt, 422 N.J. Super. 521, 530 (App. Div. 2011); Levine v. State Dep't of Transp., 338 N.J. Super. 28, 32 (App. Div. 2001). The Court must

examine the record to ascertain whether the Commission's decision was "arbitrary, capricious or unreasonable, or that it lacked fair support in the evidence[.]" Dericks v. Schiavoni, No. A-0538-09T1, 2011 N.J. Super. Unpub. LEXIS 1393, at *1, *12 (App. Div. June 1, 2011) (quoting Campbell v. Dep't of Civil Serv., 39 N.J. 556, 562 (1963)). See also N.J.A.C. 6A:4-4.1(a) (in deciding an appeal to the Commissioner from Commission decisions, the Commissioner "shall not disturb the decision unless appellant has demonstrated . . . the Commission acted in a manner that was arbitrary, capricious, or contrary to law").

Based on this legal standard, and for the reasons explained more fully below, the Commission's Decision was arbitrary, capricious and unreasonable and should be reversed.

Second, the Commission erred in summarily dismissing the Complaint. Instead, the Commission should have construed the Complaint with the liberality and generosity required, to ascertain whether a cognizable claim had been even obscurely set forth, and permitted Mr. Spille to pursue his claims.

II. The Commission erred in denying complainant's request to amend his complaint based on new, material information relevant to his complaint (Raised at: Pa13)

As part of the Opposition to Motion to Dismiss, Complainant Spille filed a Certification of certain facts related to his desire to amend his complaint (Certification of Michael Spille, Pa42). In his statement, Mr. Spille indicated that he had filed an Open Public Records Act ("OPRA") request with the District regarding the Referendum. In response, the district sent a "voluminous" number of documents. Mr. Spille summarized what was contained in just a small part of those documents as follows:

> In January 2021 Board members admit they are aware they must be neutral in a referendum;
>
> Respondent Hengst suggests that the Board link property values to the Referendum outcome;
>
> Superintendent Suozzo sent a letter to South Hunterdon High School seniors of voting age to urge them to vote for the referendum to "support[] these important projects";
>
> Statements that Lambertville Public School cannot be renovated;
>
> Purpose of survey is not to get citizen input but to use it as a roadmap to getting "yes" votes;
>
> Respondent Warner statement that Lambertville majority members will not allow any option that includes no school in Lambertville;
>
> Key communicators were formed to get "yes" votes with supervision from the Superintendent and the individual board members; and
>
> From March 2021 through October 2021, Board members and Superintendent removed numerous items from presentations, videos, talking points, etc., that painted the Referendum in a negative light or that may be controversial. (Pa43)

Pursuant to N.J.A.C. 6A: 28- 6.7(c), Complainant Spille requested to amend his complaint based on the information contained in this document

dump, indicating "These emails and documents are directly relevant to the claims of ethics violations in the Complaint. Therefore, Complainant respectfully requests that the Commission permit Complainant to file an Amended Complaint adding allegations relating to the documents produced by the school district in response to the OPRA request" (Pa44).

In its decision to Dismiss the Complaint in its entirety, the sum total of the response from the Commission is shown below:

"At its meeting on April 25, 2023, the Commission considered Complainant's request to amend his Complaint and, ultimately, voted to ***deny*** the request" (Decision on Motion to Dismiss, Pa13).

Here the Commission gives no reason for its denial or consider arguments either way. It merely denies the request.

As indicated by the sample of topics in the request dump, there was every reason to believe that an amendment based on those documents would potentially bolster Complainant's case against the Respondents. However, the Commission choose to deny the request.

Instead, the Commission should have construed the Complaint with liberality and generosity as required by N.J.A.C. 6A:28-8.3, and allowed the Complainant to amend his complaint with the new information. By denying this request, the Commission not only did not use the "liberality and

generosity" litmus test of the statute, they actively denied new incriminating information against the Respondents from coming into the record.

For this reason alone, the Decision to Dismiss should be reversed, the matter remanded back to the Commission, and the Commission ordered to allow an amendment of the complaint based on the OPRA request dump documents.

III. The Commission arbitrarily ignored its own precedents and the evidence when considering violations of N.J.S.A. 18A:12-24.1(e) (Raised at: Pa14)

In its order to dismiss, the Commission lumps all alleged violations of N.J.S.A. 18A:12-24.1(e) into a single decision point(Order to Dismiss, Pa14). Specifically, counts 9, 10, 11, 13, 16, and 17 in the Complaint are dealt with in a group. The Commission's sole insight into its decision here is repeated here in its entirety:

> Other than provide factual averments that the named Respondents made statements and/or publicly advocated and offered their *personal* support for (or opposition to) matters related to the Board, Complainant has not shown how same could have compromised the Board.
>
> Regarding the social media posts, although the Commission concedes that there are circumstances when such activity could violate *N.J.S.A.* 18A:12-24.1(e), the social media activity here was either made in a private/personal capacity, appropriately disclaimed, and/or clearly not in one's official capacity. (ibid)

There are several problems with the above decision by the Commission. First, the Commission does not indicate which portions of their statement apply to which counts ("either made in a private/personal capacity, appropriately disclaimed, and/or clearly not in one's official capacity") - the Complainant must guess. More troubling, none of these statements are part of the standard for review for public posts by Board members. As demonstrated below, Board members private posts can run afoul of *N.J.S.A.* 18A:12-24.1(e), as can "appropriately" disclaimed ones if the content of the post negates the disclaimer, or even times when a Board member is not speaking directly in one's official capacity.

A) The Commission arbitrarily ignored evidence that Gallagher and Koveloski were taking private action that could compromise the board in Count 9 (Raised at: Pa14)

Count 9 deals with Board member Gallagher and Board President Koveloski appearing before the West Amwell Township Committee to attempt to persuade the Township to "stay neutral" in the matter of the Referendum (Complaint, Pa27). Clearly, both Board members were taking private action in attempting to persuade the Township Committee to not act against the referendum. How such an action could compromise the board is obvious - the Township became a vocal opponent of the referendum, challenged the referendum result in court, and ultimately sued the district in

Superior Court, partially due to Mr. Gallagher and Koveloski's conduct. At a minimum, the Commission should have held a hearing and considered further evidence on a charge as serious as Board members interfering with municipal government, and holding themselves as representatives of the board in the process.

B) The Commission ignored their own advisory opinion regarding Board member Gallagher's Facebook post in Count 10 (Raised at: Pa15)

Count 10 considers the Facebook posts of Board member Gallagher regarding the referendum:

> During the week of October 11, 2021, Board Member Jim Gallagher made a number of posts to Facebook regarding the referendum, in particular one purporting to answer a number of open referendum questions (Exhibit H). While he included a disclaimer was speaking as a member of the public and not as a Board Member, Mr. Gallagher intentionally withheld material, non- private information about the Referendum, and attempted to mislead readers about the costs of the referendum and what other options might look like. He also omitted a number of questions entirely from his answers. Mr. Gallagher can voice his opinion as a member of the public, but by misleading the public he broke his trust with the public as a BOE member (Complaint, Pa28)

The Commission's response that "the social media activity here was either made in a private/personal capacity, appropriately disclaimed, and/or clearly not in one's official capacity" is inadequate, flies in the face of Commission precedent, and is on its face, arbitrary and capricious. Given the lack of

public hearing or other venue to probe the Commission's thought process, the complainant is left to guess.

Perhaps more troubling, the Commission's reasoning here flies in the face the face of their recent advisory opinion in School Ethic's Commission that is directly on-point. In the decision, a Board member asks the Commission "whether you would violate the School Ethics Act (Act) N.J.S.A. 18A:12-21 et seq., if "as a private citizen," you "answer operational questions about how [the District] function[s] on social media." (School Ethics Commission, Public Advisory Opinion – A02-22, February 25, 2022). The Commission's response is unequivocal:

> "[A]lthough you want to provide information to the public that stakeholders (and you) feel would be useful and beneficial, because you would be providing information relating to the Board and/or your official duties and responsibilities, any attempt to disclaim your speech (as being in your personal or private capacity) would likely be futile. People in your community are aware of your status as a Board member and would likely attribute any statement from you as being from you in your capacity as a Board member, and/or on behalf of the Board. If you only ever provide links to publicly available information, it is possible that your conduct would be less precarious; however, that would not immunize you from being the subject of an ethics complaint" (ibid 3).

This response is directly on point to Mr. Gallagher's Facebook posts. Despite attempting to disclaim his speech, Mr. Gallagher's posts fall afoul of this advisory opinion. As stated in the amended complaint, "And while Mr. Gallagher does disclaim his post in SEC-approved form, he goes on to

constantly reference the BOE and its activities in such a way to make it clear that he actually *is* speaking as a BOE member".

The Advisory Opinion also properly references Treston (School Ethics Commission Decision I/M/O Treston, Randolph Township Board of Education, Commission Docket No. C71- 18, April 27, 2021 at 12), which found in part that "In addition, even if an appropriate disclaimer is used, a school official must never negate the import of the disclaimer by proceeding, under the purported protection of a disclaimer, to discuss or comment on Board business or matters in a way that leads a member of the public to believe that the individual is speaking on behalf of, and as a representative of, the Board".

As to how Mr. Gallagher's speech could damage the board, that should be clear. Mr. Gallagher chose to weigh in personally in a highly charged referendum debate, and held himself as a district expert on the facilities question. Further, by "spinning" the information he gave, he did a disservice to all residents who read and believed him. Mr. Gallagher's post ultimately severely degraded the community's trust in the Board, especially in West Amwell Township.

It is clear that the Commission acted arbitrarily and capriciously in ignoring its own advisory opinion and its own past precedents.

C) The Commission ignored their own advisory opinion regarding Board President Koveloski's Facebook post in Count 11 (Raised at: Pa15)

The dismissal of Count 11 has similar issues. Count 11 involved a social media post by Board President Koveloski on the West Amwell and Lambertville primary Facebook pages. Mr. Koveloski fails to properly disclaim his speech in the post, and he chooses to insult those against the referendum, and his post shows a reference to the District "Crest" (Complaint, Pa29).

As with Mr. Gallagher's post, the post referenced in Count 11 inflamed the community and increased the amount of distrust the public had for the Board. In Mr. Koveloski's case the violation is perhaps more egregious, in that the sitting Board President decided to go out of his way to alienate voters who were against the Referendum. As such, Count 11 should also be considered a violation per the Commission's advisory opinion A02-22.

D) The Commission ignored their own precedents regarding Board Member Pursell's Facebook post in Count 16 (Raised at: Pa15)

Count 16 involves a Facebook post by Board member Pursell to the West Amwell Facebook site (Pa37). While Ms. Pursell did attempt to disclaim her speech in her opening paragraph, her missive still runs afoul of Advisory Opinion A02-22 and I/M/O Treston in several ways. First, she invited residents to email her at her official email address of

diana.pursell@shrsd.org. As stated in the Complaint, by including her District email address, Pursell gave her post the imprimatur of being an official Board matter. Second, as stated in I/M/O Treston and AO A02-22, Ms. Pursell references a number of complex internal board matters and history that again makes her post appear to be an official district matter and not only personal opinion. The Commission was arbitrary and capricious in ignoring these facts, and not giving Mr. Spille's complaint the weight and consideration it deserved. Further, in a decision entered on May 23, 2022, the Commission found that use of a district email gives the appearance of a communication being official District business and not personal (School Ethics Commission, I/M/O Ardie Walser, Teaneck Board of Education, Bergen County, C75-18, May 23, 2022)[1]. By inviting the public to communicate with her through her Board email and by writing an opinion piece with a great deal of detail about inner workings of the Board and the referendum process, Respondent Pursell negated her disclaimer and transformed her missive from a personal one to a Board matter in the eyes of the public.

[1] From the decision, "Respondent's use of his Board email account to communicate with the public and solicit a meeting with a community member during a time when he would be working with students and families through MAWP, as established in Count 4, violates *N.J.S.A.* 18A:12-24(a), *N.J.S.A.* 18A:12-24(c) and *N.J.S.A.* 18A:12-24(d)"

IV. The Commission failed to properly apply its own standards and precedents when considering violations of N.J.S.A. 18A:12-24.1(f) (Raised at: Pa16)

In considering the two counts involving N.J.S.A. 18A:12-24.1(f), the Commission offers only a single sentence in its order to dismiss: "*It is only when their vote inures a unique and specific benefit to them, to the exclusion of all others, that a violation may be viable*" (Decision on Motion to Dismiss, Pa16). The Commission offers no explanation for this rationale, nor does it cite any precedent, Advisory Opinion, or portions of the statute to support its case.

The text of N.J.S.A. 18A:12-24.1(f) is simple and straightforward, "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". No where in the statute does it mention "a unique and specific benefit to them, to the exclusion to all others". In fact, the statute specifically uses the term "special interest or partisan political groups" and "friends", which on on its face contradicts Commission's claims.

In this case, both counts involve Lambertville Board of Education members advocating for benefits that apply only to Lambertville families, and which exclude those of West Amwell and Stockton. Count 13 involves membership of multiple Lambertville Board members to an organization

called "SaveLPS" (Complaint count 13, Pa31). Count 17, as mentioned, involves Class III officers and the City of Lambertville only along with Lambertville Board members (Complaint count 17, Pa38). In both cases, Board members sought benefits solely in consideration of Lambertville families, with no consideration to those of West Amwell or Stockton. The SaveLPS organization was dedicated to keeping the Lambertville Public School in Lambertville at any cost, and whether it was the right decision for the district or not. As indicated in the complaint, several Board members were elected on SaveLPS platforms. The actions of these board members runs afoul N.J.S.A. 18A:12-24.1(f) because their special interest group (SaveLPS) worked only on behalf of Lambertville families, and then only those families in "walkable" distance to the school.

Likewise, the board members involved in the Class III officer debate were working only for Lambertville families, and refused to consider the opinions and rights of West Amwell and Stockton families. At a minimum, the Commission should not have dismissed these charges but given complainant further consideration in a hearing or other forum instead of dismissing them outright.

V. The Commission failed to properly apply its own standards and precedents when considering violations of N.J.S.A. 18A:12-24.1(g) (Pa16)

In its decision to dismiss the proposed violations of 18A:12-24.1(g) of specific Board members, the Commission indicated:

> "Although it is clear that the named Respondents, in the circumstances described, advocated for a matter or issue of public importance which they felt was in the best interests of the District, Complainant has not pled sufficient facts evidencing unethical behavior by each of the named Respondents. As with the violations of *N.J.S.A.* 18A:12-24.1(g) by the "Board," the claimed violations of *N.J.S.A.* 18A:12-24.1(g) by Respondent Hengst, Respondent Braun- Strumfels, Respondent Warner, and Respondent Todd-Marino are equally unsupported by specific evidence of unethical behavior". (Decision on Motion to Dismiss, Pa16).

Here, the Commission chooses to ignore the Complainant's citations of Citizens to Protect Public Funds v. Parsippany-Troy Hills Bd. of Ed., 13 N.J. 172 (1953), "Citizens") in its entirety, which states:

> The need for full disclosure of all relevant facts is obvious, and the board of education is well qualified to supply all the facts. But a fair presentation of the facts will necessarily include all consequences, good and bad, of the proposal, not only the anticipated improvement in educational opportunities, but also the increased tax rate and such other less desirable consequences as may be foreseen.... The public funds entrusted to the board belong equally to the proponents and opponents of the proposition, and the use of the funds to finance not only the presentation of facts merely, but also arguments to persuade the voters that only one side has merit, gives the dissenters just cause for complaint. The expenditure is then not within the implied power [to publicize facilities improvements] and is not lawful in the absence of express authority from the Legislature" (ibid).

.

This not only goes against *Citizens*, which indicates Districts must not spend public dollars in support one side of a Referendum question over another, it also goes against the Commission's own prior decisions. In a June 19, 2019 decision, while the Commission chose ultimately to dismiss this complaint, it states this as part of its decision: "Without any suggestion that Respondent and/or other members of the Board utilized or expended taxpayer dollars to advocate only one side of the issue, or any suggestion that Respondent – in her capacity as a Board member – endorsed the issue, the Commission is restrained by the provisions of the Act, and its implementing regulations" (Stanley A. Kober, Complainant v. Amy Langevin Ho-Ho-Kus Board of Education, Bergen County, Respondent, Docket No.: C07-19, June 19, 2019). Here, the Commission seems fully aware of *Citizen's* and related cases, and effectively indicates that Board members utilizing tax dollars on one side of a question - or endorsing it in their official capacity - would potentially be construed as an ethics violation. Yet in its decision against Complainant, the Commission seemingly reverses itself and sees no issue at all with Board member advocacy and spending of public monies on one side of a district Referendum. This is not only troubling in this case, but also for future conduct by Board members in the State of New Jersey regarding referendums. The Commission here effectively gives Board members carte blanche to advocate in favor of referendums and spin facts in

their favor without consequence, which flies in the face of both *Citizens* as well as the purpose of the School Ethics Act itself.

This is clearly an arbitrary and capricious decision that should be over turned.

VI. The Commission incorrectly dismissed complaints where all Board members were involved (Raised at: Pa16)

In considering the Alleged Violations of N.J.S.A. 18A:12-24.1(g), the Commission first considered the allegations against all of the Board members. In its decision to dismiss, they state:

> In Counts 1-8, Count 12, Counts 14-15, and Count 18, Complainant submits that "Respondents" violated *N.J.S.A.* 18A:12-24.1(g). At its core, these Counts contend that "the Board" acted unethically because it did not provide accurate information, and/or presented biased or incomplete information to the public regarding the referendum. In its review, the Commission finds that Complainant has not articulated exactly how any of the named Respondents may have specifically violated the confidentiality provision and/or the inaccurate information provision of *N.J.S.A.* 18A:12-24.1(g). Instead, Complainant offers nothing more than general and vague conclusory statements about what the "Board" may have done, but does not offer any detailed facts evidencing how the named Respondents may have engaged in unethical conduct. Because such generalized accusations are wholly insufficient to satisfy Complainant's burden of proof, the Commission finds that the alleged violations of *N.J.S.A.* 18A:12-24.1(g) in Counts 1-8, Count 12, Counts 14-15, and Count 18 should be dismissed. (Decision on Motion to Dismiss, Pa16).

As with other sections of its order to dismiss, the Commission chooses to lump several disparate charges into one convenient bucket to dismiss en masse, without any analysis of the individual charges or detailed reasoning for their decision. It appears (but is not entirely clear here), that the Commission rejects ethics complaint that charge the entire Board with unethical behavior. What the Commission fails to consider here is its responsibility when, in fact, an entire board conspires to act unethically, in this case all Board members acting in concert to influence voters in the District.

Counts 1-8, 12, 14, 15, and 18 all involve actions the Board members, collectively, embarked on to deceive taxpayers about the nature of the facilities referendum; to hide material information about the state of the Lambertville Public School; to falsely indicate that the West Amwell School could not be renovated; and to spend vast sums of money on the "yes" side of the referendum and disenfranchising those who were against the referendum in the district.

As can be seen in its decision, the Commission entirely ignored the rich judicial history in New Jersey regarding Board conduct during referendums. As mentioned in earlier in this brief, the New Jersey Supreme Court set forth

the standard of conduct for school board members who publicize a referendum that they sponsored in *Citizens*.

What the Commission fails to consider is a situation where all Board members decide to act in concert in an unethical matter on a vital issue for a school district. In this case, all nine members knowingly entered actions to promote the Referendum, to deceive the public on certain facts, and to sow discord in the community among those who did not favor the Referendum.

By dismissing these counts en masse, the Commission gives Board members an "out" from ethic rules by merely conspiring to act together unethically. This oversight is arbitrary and capricious, and should be overturned.

VII. The Commission failed to review the facts in the light most favorable to the complainant (Raised at: Pa1)

The Commission's rules provide the standard for review of a motion to dismiss a Complaint: "In determining whether to grant a motion to dismiss, the Commission shall review the facts in the light most favorable to the complainant and determine whether the allegation[s], if true, could establish a violation of the Act." N.J.A.C. 6A:28-8.3. Therefore, the only inquiry before the Commission on this motion is whether Complainant has stated facts that, if true, constitute violations of the School Ethics Act.

The Court should reverse the Commission's arbitrary, capricious and wholly unreasonable decision as the Commission clearly did not apply this standard in its decision. In count after count, the Commission gives no reasoning or analytical framework for why it is dismissing a count; the Commission merely asserts there is no violation in most cases without further explanation. In the few cases were a brief explanation is given, it is clearly arbitrary and contradicts past similar Commission decisions.

Further, the Commission makes no references to how *Citizens* and related decisions regarding expenditures of public money during school referendums may apply to potential ethics violations. In fact, the Commission tacitly endorses Board members to freely violate *Citizen's* at will.

This court has had to reverse the Commission in similar past decisions. In Fisher v. Hamilton, Docket No. A-4441-11T3, 2013 N.J. Super. Unpub. LEXIS 1773 (App. Div. July 17, 2013), the Commission dismissed in its entirety an ethics complaint filed against a member of the Hamilton Township Board of Education, after the school board member allegedly accepted private contact and engaged in private conversation with a candidate for the board's interim superintendent position**.** Id. at *1.

The Commission determined that the complainant in Fisher had "failed to provide a sufficient factual basis in his [amended] complaint from which the

Commission could find that [the school board member's] action was of such a nature that it had the potential to compromise the Board." Id. at *4. The Commission thus dismissed the allegations that the school board member violated N.J.S.A. 18A:12-24.1(e). Id.

This Court reversed the Commission's determination and remanded the case for reinstatement of the complaint. Id. at *12. In reaching this decision, the Court noted the Legislature's purpose in enacting the School Ethics Act. The Act "is not only aimed at preventing the actual violation of the public trust by school board members but also ensuring that board members will avoid conduct 'which creates a justifiable impression among the public that such trust is being violated.'" Id. quoting N.J.S.A. 18A:12-22.

This Court in Fisher also emphasized the importance of reading a complaint's allegations liberally and generously, stating as follows:

> [A] reviewing court searches the complaint in depth and with liberality to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim, opportunity being given to amend if necessary. At this preliminary stage of the litigation the Court is not concerned with the ability of plaintiffs to prove the allegation contained in the complaint. For purposes of analysis plaintiffs are entitled to every reasonable inference of fact. The examination of a complaint's allegations of fact required by the aforestated principles should be one that is at once painstaking and undertaken with a generous and hospitable approach.

Id. at *11 (quoting Printing Mart-Morristown v. Sharp Electronics Corp., 116 N.J. 739, 746 (1989)).

These principals apply here as well. Respondent's actions in regards to the Referendum were highly controversial and divisive within the community. The Commission should have read the complaint liberally and generously and given an opportunity for Mr. Spille to prove the allegations of Referendum misconduct, both individually and collectively of the Board.

VIII. The Commission's Decision Ignores the Objectives of the School Ethics Act to Maintain the People's Confidence and Trust (Not raised below)

The Commission's summary dismissal of Mr. Spille's Complaint goes directly against the very purpose of the School Ethics Act. This law made it clear that it was "essential" that the conduct of school board members "hold the respect and confidence of the people." N.J.S.A. 18A:12-22. School board members "must avoid conduct which is in violation of their public trust or which creates a justifiable impression among the public that such trust is being violated." Id. "To ensure and preserve public confidence," the Legislature declared that school board members "should have the benefit of specific standards to guide their conduct." Id.

The School Ethics Act thus includes a Code of Conduct for School Board Members (N.J.S.A. 18A:12-24.1), which provides in pertinent part as follows: "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." N.J.S.A. 18A:12-24.1(e).

All of the named Respondents, as Board members at the time, violated that trust and thereby violated their ethical obligations. The meaning of "private action" under the School Ethics Act is "action taken by a board member that is beyond the scope of his authority and duties as a board member." Persi v. Woska, No. A- 6038-11, 2013 N.J. Super. Unpub. LEXIS 2915, *1, *14 (App. Div. Dec. 11, 2013).[18] This interpretation of "private action" is "consistent with several past agency decisions." Id. (citations omitted). See also Messner v. Gray, No. A-5418-13T3, 2016 N.J. Super. Unpub. LEXIS 703, at *1, *11 (App. Div. Mar. 31, 2016) (where a school board member decided "to further her own, purely private purposes" and potentially compromised the board, court affirmed Commission's decision that she violated N.J.S.A. 18A:12- 24.1(e)).

The respondents engaged in "private action" when they decided, as a group and individually, to begin an electioneering campaign and deceive voters about certain aspects of the proposed facilities plans that are at the heart of the Referendum question. Board members duties do not include promulgating "yes" votes on Referendum questions.

As to how such actions can compromise the Board, there are numerous citations in the original complaint, all of which refer back to *Citizens* reference earlier in this brief. In *Citizens*, the Supreme Court has made it clear that it improper for Districts to pursue only one side of a Referendum question and spend money only on that direction. It is clear that all of the Board member Respondents breathlessly electioneered in favor of "yes" votes, and approved the dozens of actions documented in the Complaint that are all in direct violation of *Citizens*. This electioneering not only runs afoul of *Citizens*, but it also created a vast breach of trust between the District and tax payers who were not in favor of the referendum. When the Board President himself goes out of his way to insult and alienate anyone who disagrees with his position on a Referendum outcome, clearly that President and his entire Board is violating the spirit of the School Ethics Act.

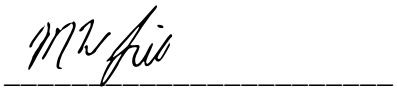
For this reason, the Motion to Dismiss much be reversed.

CONCLUSION

For the foregoing reasons, Mr. Spille respectfully requests that this Court reverse the Commissions decision to dismiss his complaint, and that the Court require the Commission to allow Mr. Spille the opportunity to amend his complaint based on the OPRA request dump documents. Contrary to the Commission's conclusion, the Complaint sufficiently alleged the enumerated

violations of the School Ethics Act, and the case should have proceeded to hearings where Mr. Spille could be given an opportunity to prove his claim.

Respectfully submitted,



Michael Spille

Dated: November 29, 2023

MICHAEL SPILLE,

Appellant,

v.

SOUTH HUNTERDON REGIONAL SCHOOL DISTRICT BOARD MEMBERS: KEVIN KOVELOSKI, FILOMENA HENGST, LAUREN BRAUN-STRUMFELS, MARTHA DENNIS, JIM GALLAGHER, TRACI PACIULLI, DIANA PURSELL, RONI TODD-MARINO AND MEAGAN WARNER,

Appellees.

SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

DOCKET NO. A-003422-22

On Appeal from a decision of the School Ethics Commission

RESPONDENTS' APPELLATE BRIEF

PORZIO, BROMBERG & NEWMAN, PC
100 Southgate Parkway
Morristown, NJ 07906
P: (973) 538-4006
Attorneys for Appellees Kevin Koveloski, Filomena Hengst, Lauren Braun-Strumfels, Martha Dennis, Jim Gallagher, Traci Paciulli, Diana Pursell, Roni Todd-Marino and Meagan Warner

Of Counsel and on the Brief:
Kerri A. Wright, Esq. kawright@pbnlaw.com (018042005)

On the Brief:
Thomas J. Reilly, Esq. tjreilly@pbnlaw.com (245552017)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

ADMINISTRATIVE CODE

RULES

PRELIMINARY STATEMENT

Petitioner Michael Spille alleges that Respondents, South Hunterdon Regional School District Board Members Kevin Koveloski, Filomena Hengst, Lauren Braun-Strumfels, Martha Dennis, Jim Gallagher, Traci Paciulli, Diana Pursell, Roni Todd-Marino, and Meagan Warner violated the School Ethics Act through their actions pertaining to a referendum on the November 2, 2021 election ballot, which proposed a plan to improve two school buildings within the District.

Petitioner filed an 18-count complaint with the School Ethics Commission alleging that Respondents individually, and the Board as an entity, undertook a number of improper actions to support the referendum and ensure its passage. These allegedly improper actions include such innocuous conduct as conducting a public survey regarding the referendum and posting the results online; participating in local grassroots political activities not directly connected to the referendum; posting messages to Facebook regarding the referendum with appropriate disclaimers; creating a presentation regarding the referendum which included information on the financial consequences of the referendum; producing online videos discussing facts relevant to the referendum; sending a postcard to voters within the District encouraging them to vote; holding *too many* meetings regarding the referendum; and not doing enough to remove election lawn signs that Respondents did not create, procure, or distribute.

Despite the fact the referendum at issue is designed to improve local school buildings, Petitioner contends that Respondents have violated the Act because they pursued a "personal benefit" in seeking its passage. It is difficult to see what purely personal gain Respondents stand to receive from a bond referendum, and Petitioner has not alleged one. He claims that Respondents "misled" the public in violation of the Act, but does not allege that they lied to the public or deliberately hid, destroyed, suppressed unfavorable information. At most, he claims that Respondents "skewed" popular opinion by overstating the referendum's benefits. In some cases, he supports these allegations with resort to *rumors* spreading around the district. Even if the rumors are true, Respondents have not violated the Act. He claims some Respondents impermissibly spoke for the District by authoring Facebook posts on the issues, even though all of the posts contained appropriate disclaimers stating that the Respondent at issue was speaking, not in an official capacity, but as a private citizen or "taxpayer."

Perhaps most egregiously, Petitioner faults some of the Respondents for engaging in grassroots political activities which not only are protected by the First Amendment and approved by the School Ethics Commission, but are to be expected of elected officials who represent the public. Petitioner faults some of the Petitioners for being members of a local organization which supports maintaining a "walkable" school in Lambertville. He faults others merely for living in Lambertville, speculating without any evidentiary support that these members of the Board favor Lambertville

to the exclusion of the District's other constituent municipalities. Incredibly, Petitioner appears to believe that elected officials, i.e., politicians, should not engage in political activity.

The School Ethics Commission wisely dismissed Petitioner's extraordinary and untenable claims. Even after assessing the facts in the light most favorable to Petitioner, and accepting the pleaded facts as true, the Commission determined that he could not state a claim under the School Ethics Act. As an administrative agency whose sole purpose is to enforce and adjudicate claims arising under the Act, the Commission's expertise is entitled to a great deal of deference. The Court must review the Commission's decision under a heightened deferential standard, should disturb the decision only if it is arbitrary, capricious, or unreasonable, and can disturb the Commission's fact findings only if they are wholly unsupported by the record.

The Commission's decision here readily meets this deferential standard. The Commission's written decision examines Petitioner's claims in detail, applies the correct standard, and dismisses them through appropriate findings of fact and conclusions of law. Petitioner has presented no reason on appeal why the Commission's decision should be disturbed, other than engaging in second-guessing, citing irrelevant precedent, and expressing overall displeasure with Respondents' support of the referendum. Accordingly, the Commission's decision should be affirmed and Petitioner's complaint dismissed.

PROCEDURAL HISTORY AND STATEMENT OF FACTS[1]

South Hunterdon Regional School District is comprised of residents from the municipalities of Lambertville, West Amwell, and Stockton. There are three schools in the district: Lambertville Public School (pre K-6), located in Lambertville; West Amwell School (K-6), located in West Amwell; and South Hunterdon Regional High School (grades 7-12), located in Lambertville. At the time the events giving rise to Petitioner's appeal occurred, the South Hunterdon Regional High School District Board of Education consisted of members Kevin Koveloski (President), Filomena Hengst (Vice President), Lauren Braun-Strumfels, Jim Gallagher, Traci Paciulli, Diana Pursell, Roni Todd-Marino, Meagan Warner, and Martha Dennis. (9a-21a.[2])

A. The Board's Actions Surrounding The Referendum.

In April 2021, the Board voted unanimously to approve a plan to provide significant structural and other improvements to the District's two aging elementary school buildings. The referendum was placed on the ballot for the November 2, 2021 election, and included a proposal to fund a $33 million project to renovate Lambertville Public School into a pre-K-4 school and to build a new school for students in grades 5-8 on the high school campus. (19a-21a.) The District established

[1] The Procedural History and Statement of Facts have been combined for the Court's convenience because they are inextricably intertwined.

[2] "__a" refers to the Appellate Appendix submitted by Petitioner.

a website to educate the public about the plan, created educational materials which contained factual information and statements from members of the local public, and issued a public survey to District residents regarding the referendum, later providing the results of the survey on the District's website. (128a-172a.)

Among these educational materials were three online videos, a Referendum FAQ, and a short article in the Board's monthly newsletter discussing the referendum. The three videos contained information regarding the financial consequences of the referendum, information regarding the Lambertville Public School's location in a flood zone, and a statement from a disabled student regarding her experiences in the District's schools and their lack of ADA accommodations. (21a-25a.) The Referendum FAQ contained information regarding potential financial consequences of the referendum passing or failing. (21a-25a.) The newsletter contained additional financial information regarding the referendum as well as links to the videos. (21a-25a.) None of these materials asked or demanded that the District's voters vote for or against the referendum.

Several Board members also spoke on the topic in their individual capacities as private citizens. On October 6, 2021, Respondents Gallagher and Koveloski appeared before the West Amwell Township Committee and asked that the Township Committee remain neutral on the matter of the referendum. (259a-260a.) Mr. Gallagher and Mr. Koveloski noted that they were members of the District Board of

Education, but did not say that they were acting on the Board's behalf or that they spoke for the Board as a body. (259a-260a.) Respondent Gallagher also posted information regarding the referendum to Facebook on several occasions. For each post, he provided a disclaimer that he was speaking as a private citizen, not as a Board member. The disclaimer stated: "I am a member of the South Hunterdon Regional High School Board of Education representing Stockton, but [] I am speaking as a private individual and not representing the Board." (263a.)

Respondent Kovaloski posted to the Lambertville and West Amwell Facebook page on October 8, 2021. His post included a disclaimer which stated: "I, Kevin Koveloski, am making this statement as a tax paying resident of West Amwell Township." The posting went on state: "Please do not let the so-called social media experts persuade you in any way with their negativity, false statements, and bad information," and contained a linked to the District's website. (30a.)

On October 12, 2021, Respondent Pursell posted a link to a document on the Lambertville and West Amwell Facebook page regarding the referendum. By Petitioner's own admission, Ms. Pursell "properly disclaimed her membership in the [District Board of Education.]" (38a.) At the conclusion of her post, Ms. Pursell noted: "Please also feel free to reach out to one of your local [Board] members. I can be reached at diana.pursell@shrsd.org." (38a.)

The Board also mailed postcards to District residents on or around October 19, 2021. These postcards contained financial information related to the referendum, and stated: "Remember to VOTE on the District Construction Referendum." (36a-37a.) Around that same time, lawn signs began to appear in neighborhoods around the District. The signs contained the message "Vote YES November 2 On School Funding," and provided a link to the District's webpage containing information concerning the referendum. (35a.) Petitioner does not allege that Respondents or any District administrator created or disseminated these signs, or directed anyone else to do so. Instead, Petitioner alleges merely that Respondents were "fully aware of [the signs'] existence" and "misled[] the public" by "not demanding the signs be changed." (35a.)

The District's voters voted in favor of the referendum during the November 2021 election. A group of voters contested the results, and the Law Division of the Superior Court ordered a recount to be held on December 14, 2021. The recount affirmed the election result approving the referendum. (Pb12.[3])

B. <u>Petitioner's Complaint</u>.

On October 27, 2021, Petitioner filed an 18-count complaint with the School Ethics Commission naming the individual Board members as Respondents. In short, the complaint alleged various violations of the School Ethics Act as follows:

[3] "Pb" refers to Petitioner's Appellate Brief.

- **Count 1**: Respondents violated *N.J.S.A.*18A:12-24.1(g) by distributing a list of "survey questions" regarding the referendum to all District residents, the responses to which were later posted on the District's website and discussed during the June 2021 Board meeting. Petitioner alleges the Board "did not promote" the negative survey results. (21a.)
- **Count 2**: Respondents violated *N.J.S.A.* 18A:12-24.1(g) by creating a "Key Communicator Group" "to influence the electorate regarding the referendum using biased and incomplete information." (21a-22a.)
- **Count 3**: Respondents violated *N.J.S.A.* 18A:12-24.1(g) by publishing a "Referendum Community Presentation" that did not give "voters complete information about the referendum, failed to state known deficiencies in the referendum plan, and us[ed] emotionally charged wording and 'spin' to try [to] influence the electorate." (22a-24a.)
- **Count 4**: Respondents violated *N.J.S.A.* 18A:12-24.1(g) because the Referendum FAQ was "manipulative in nature." (24a.)
- **Count 5**: Respondents violated *N.J.S.A.* 18A:12-24.1(g) because the first referendum video "uses emotionally charged wording, sound and visuals, tries to spin the material to influence the electorate, omits key deficiencies in the referendum plan, and includes the Board President trying to scare the electorate with outsized warnings if the referendum fails." (24a-25a.)

- **Count 6**: Respondents violated *N.J.S.A.* 18A:12-24.1(g) because the second referendum video "is trying to convince the electorate that having [Lambertville Public School] in a flood zone is not as bad as feared, and the Superintendent threatens to cut programs if the referendum does not pass." (25a-26a.)
- **Count 7**: Respondents violated *N.J.S.A.* 18A:12-24.1(g) because the third referendum video is "nothing more than an emotional plea with no additional useful information content." (26a.)
- **Count 8**: Respondents violated *N.J.S.A.* 18A:12-24.1(g) because the newsletter article "contains incorrect facts meant to scare voters, the use of emotionally charged wording to try to persuade the electorate to vote yes, and includes the prior videos which are also meant to influence the electorate." (26a-27a.)
- **Count 9**: Respondent Gallagher and Respondent Koveloski violated *N.J.S.A.* 18A:12-24.1(e) because they "took private action that could compromise the [B]oard by meeting with West Amwell Township and trying to influence their actions," and violated *N.J.S.A.* 18A:12-24.1(g) because they "deliberately gave incomplete information to the Township Committee and withheld information about material deficiencies in the referendum plan." (27a-28a.)
- **Count 10**: Respondent Gallagher violated *N.J.S.A.* 18A:12-24.1(e) because he "took action on Facebook that could seriously compromise the Board," and *N.J.S.A.* 18A:12-24.1(g) because he "deliberately tried to spin all of his

information in a positive light, gave incomplete answers on purpose, and deliberately gave inaccurate numbers that tried to put the referendum in the best light, and withheld answers to questions that could be seen as negative regarding the referendum." (28a-29a.)

- **Count 11**: Respondent Koveloski violated *N.J.S.A.* 18A:12-24.1(e) because he "took action on Facebook that could compromise the [B]oard by asking residents to ignore negative information about the referendum, and also because [he] failed to identify himself as a Board [m]ember and failed to include a disclaimer that he was not speaking for the Board," which was "reinforced by the SHRSD logo."[4] (29a-31a.)
- **Count 12**: Respondents violated *N.J.S.A.* 18A:12-24.1(g) because the Superintendent "is energetically going into our communities in an excessive manner to try to sell this referendum with incomplete and inaccurate information."[5] (31a.)

[4] The District's logo appears in the Facebook post only because Mr. Koveloski included a link to the District' official website, which any person could provide and access. (30a.)

[5] The District Superintendent is not specifically named as a Respondent in this matter. Moreover, the Superintendent cannot be found in violation of any provision of *N.J.S.A.* 18A:12-24 because it applies only to board members and charter school trustees.

- **Count 13**: Respondents Hengst, Braun-Strumfels, Warner, and Todd-Marino violated *N.J.S.A.* 18A:12-24.1(e) because they "are taking private action as part of Save LPS[6] to literally manipulate the Board," and *N.J.S.A.* 18A:12-24.1(g) because they have "grossly distorted the narrative around this referendum, and [have] actively started deleting their social media presence in an attempt to hide their membership and leadership within this special interest group." (31a-34a.)
- **Count 14**: Respondents violated *N.J.S.A.* 18A:12-24.1(g) because the Board, by "allowing" the proliferation of lawn signs throughout the community, "is not only allowing but is encouraging misinformation to be spread about the election and is illegally advocating for the electorate to vote 'yes'" on the referendum. (34a-35a.)
- **Count 15**: Respondents violated *N.J.S.A.* 18A:12-24.1(g) because the postcards mailed on behalf of the Board contained "misleading, emotionally charged material, failed to mention the deficiencies in the proposal, and their exhortation to 'Remember to VOTE' is an attempt to mislead the population and encouraging them to vote Yes." (35a-37a.)
- **Count 16**: Respondent Pursell violated *N.J.S.A.* 18A:12-24.1(e) through her Facebook posting because her "invitation to contact her via her [Board] email

[6] According to the complaint, Save LPS is a local group located in Lambertville dedicate to keeping Lambertville Public School in Lambertville. (32a.)

makes her message sound as if it is an official [B]oard action despite her disclaimer. (37a-38a.)

- **Count 17**: Respondents Hengst, Braun-Strumfels, Warner, and Todd-Marino violated *N.J.S.A.* 18A:12-24.1(e) because there "seems to be a strong indicator . . . that some or all of the [five] Lambertville Board members . . . are working outside of the Board to negotiate on issues with the City of Lambertville . . . [and] [t]his clearly is harmful to the [Board]," and violated *N.J.S.A.* 18A:12-24.1(f) because "it appears that the some or all of the 5 Lambertville Board [m]embers may be captive to a special interest, in this case the City of Lambertville," and that the interests of the City of Lambertville are being held "above the interest of the overall [D]istrict." (38a-40a.)
- **Count 18**: The Board "collectively" violated *N.J.S.A.* 18A:12-24.1(g) because "the totality of this campaign's purpose is to influence the electorate, unduly uses misinformation and emotionally charged slogans, words and videos, and systematically seeks to suppress any negative information about the referendum." (40a.)

Respondents filed a motion to dismiss on November 24, 2021. Petitioner filed a response on December 21, 2021. (2a.) The School Ethics Commission then held the matter in abeyance until a related matter concerning the election was resolved in the Law Division of the Superior Court. (2a.) Petitioner also sought to amend his

complaint based on alleged information he had uncovered through documents produced to him through an Open Public Records Act request. (13a.) Respondents objected to the request -- which was raised improperly through Petitioner's opposition brief -- because the applicable regulations do no permit a petitioner to amend a complaint before the School Ethics Commission to add claims. Moreover, Respondents objected that the matter already had been fully briefed and that their interests would be prejudiced by the inclusion of additional claims at such a late stage in the motion proceedings.

C. The Commission's Decision.

On May 23, 2023, the Commission approved a decision granting Respondents' motion to dismiss in its entirety and denying Petitioner's motion to amend his complaint. (1a-18a.) The Commission issued a written decision to the parties, which contained extensive findings of fact and conclusions of law regarding all of the 18 counts contained in Petitioner's complaint. The decision notes that "a complaint must detail the specific behavior that a school official(s) engaged in for the Commission to find a violation(s) of the Act, and to recommend a penalty or sanction, up to and including removal." (16a.) Petitioner did not do so. With regard to *N.J.S.A.* 18A:12-24.1(e), the Commission found that, even assuming the factual allegations in the complaint were true, Petitioner "failed to provide sufficient factual evidence that the named Respondents made personal promises or took action beyond the scope of their

duties such that, by its nature, had the potential to compromise the Board." (14a.) Similarly, the Commission found that Petitioner's allegations of violations of *N.J.S.A.* 18A:12-24.1(f) by Respondents Hengst, Braun-Strumfels, Warner, and Todd-Marino in Count 13 and Count 17 "should be dismissed" because Respondents did not take any action which "inure[d] a specific benefit to them." (15a.)

Finally, with regard to the alleged violations of *N.J.S.A.* 18A:12-24.1(g), the Commission explained:

> In Counts 1-8, Count 12, Counts 14-15, and Count 18, Complainant submits that "Respondents" violated *N.J.S.A.* 18A:12-24.1(g). At its core, these Counts contend that "the Board" acted unethically because it did not provide accurate information, and/or presented biased or incomplete information to the public regarding the referendum. In its review, the Commission finds that Complainant has not articulated exactly how any of the named Respondents may have specifically violated the confidentiality provision and/or the inaccurate information provision of *N.J.S.A.* 18A:12-24.1(g). Instead, Complainant offers nothing more than general and vague conclusory statements about what the "Board" may have done, but does not offer any detailed facts evidencing how the named Respondents may have engaged in unethical conduct. Because such generalized accusations are wholly insufficient to satisfy Complainant's burden of proof, the Commission finds that the alleged violations of *N.J.S.A.* 18A:12-24.1(g) in Counts 1-8, Count 12, Counts 14-15, and Count 18 should be dismissed.
>
> As for the other violations of *N.J.S.A.* 18A:12-24.1(g) detailed in the Complaint, namely against Respondent Koveloski in Count 5, Respondent Gallagher and Respondent Koveloski in Count 9, Respondent Gallagher in Count 10, and Respondent Hengst, Respondent Braun-Strumfels, Respondent Warner, and Respondent Todd-Marino in Count

13, the Commission finds that even if the facts as asserted are proven true by sufficient credible evidence, they would not support a violation(s) of *N.J.S.A.* 18A:12-24.1(g). Even if Respondent Koveloski went "out of his way" to highlight the "potential negatives" if the referendum did not pass, and did not discuss "the shortcomings of the referendum … itself" (Count 5); even if Respondent Gallagher and Respondent Koveloski attended a West Amwell Township Committee meeting and urged them to "remain neutral" (Count 9); even if Respondent Gallagher, after using a disclaimer noting that he was speaking in his capacity as a private citizen (and not on behalf of the Board), "intentionally withheld material, non-private information" about the referendum (Count 10); and even if Respondent Hengst, Respondent Braun-Strumfels, Respondent Warner, and Respondent Todd-Marino have "grossly distorted the narrative around this referendum" and deleted certain social media posts "in an attempt to hide their membership and leadership within" Save LPS, the Commission finds that Complainant has failed to proffer factual evidence that any of the named Respondents took action to make public, reveal or disclose information that was not public under any laws, regulations or court orders of this State, or information that was otherwise confidential. Moreover, Complainant did not provide any factual evidence that substantiates the inaccuracy of the information provided by Respondents, and evidence that establishes that the inaccuracy was other than reasonable mistake or personal opinion or was not attributable to developing circumstances. Although it is clear that the named Respondents, in the circumstances described, advocated for a matter or issue of public importance which they felt was in the best interests of the District, Complainant has not pled sufficient facts evidencing unethical behavior by each of the named Respondents. As with the violations of *N.J.S.A.* 18A:12-24.1(g) by the "Board," the claimed violations of *N.J.S.A.* 18A:12-24.1(g) by Respondent Hengst, Respondent Braun-Strumfels, Respondent Warner, and Respondent Todd-

> Marino are equally unsupported by specific evidence of unethical behavior.
>
> [16a-17a.]

Petitioner then filed an appeal to this Court, raising eight arguments in support of his position that the Commission's decision must be reversed. Each argument will be addressed in turn.

LEGAL ARGUMENT

I. PETITIONER HAS FAILED TO SHOW THAT THE COMMISSION'S DECISION IS ARBITRARY, CAPRICIOUS, OR UNREASONABLE, PARTICULARLY GIVEN THE HIGHLY DEFERENTIAL STANDARD OF REVIEW APPLICABLE TO AGENCY DETERMINATIONS OF MATTERS WITHIN THEIR EXPERTISE.

Appellate review of administrative agency decisions is limited. A reviewing court generally will not disturb an agency's action unless it was clearly "arbitrary, capricious, or unreasonable." *Brady v. Bd. of Rev.*, 152 N.J. 197, 210 (1997) (citation omitted). The reviewing court "can intervene only in those rare circumstances in which an agency action is clearly inconsistent with its statutory mission or with other State policy." *George Harms Constr. v. Turnpike Auth.*, 137 N.J. 8, 27 (1994). Similarly, judicial review of an agency's factual determinations is highly deferential. *In re Bridgewater*, 95 N.J. 235, 245 (1984). "[I]f substantial credible evidence supports an agency's conclusion, a court may not substitute its own judgment for the agency's

even though the court might have reached a different result." *Greenwood v. State Police Training Ctr.,* 127 N.J. 500, 513 (1992) (citations omitted).

Thus, on appeal, the judicial role in reviewing all administrative action generally is limited to three inquiries: "(1) whether the agency's action violates express or implied legislative policies, that is, did the agency follow the law"; (2) "whether the record contains substantial evidence to support the findings on which the agency based its action"; and (3) "whether in applying the legislative policies to the facts, the agency clearly erred in reaching a conclusion that could not reasonably have been made on a showing of the relevant factors." *Allstars Auto. Grp., Inc. v. N.J. Motor Vehicle Comm'n*, 234 N.J. 150, 157 (2018) (quoting *In re Stallworth*, 208 N.J. 182, 194 (2011)). *See In re Proposed Quest Acad. Charter Sch. of Montclair Founders Grp.*, 216 N.J. 370, 383 (2013). Appellate courts thus defer to an administrative agency's "technical expertise, its superior knowledge of its subject matter area, and its fact-finding role," *Messick v. Bd. of Rev.*, 420 N.J. Super 321, 325 (App. Div. 2011).

The New Jersey Supreme Court summed up this "enhanced deferential standard" in a recent decision, noting:

> We review a decision made by an administrative agency entrusted to apply and enforce a statutory scheme under an **enhanced deferential standard**. *Hargrove v. Sleepy's, LLC*, 220 N.J. 289, 301-02 (2015). We are bound to defer to the agency's factual findings if those conclusions are supported by the record. And "[w]e will defer to an agency's interpretation of both a statute and implementing regulation, within the sphere of the agency's authority, unless the

> interpretation is 'plainly unreasonable.'" *In re Election L. Enf't Comm'n Advisory Op. No. 01-2008*, 201 N.J. 254, 262 (2010) (quoting *Reilly v. AAA Mid-Atl. Ins. Co. of N.J.*, 194 N.J. 474, 485 (2008)). "This deference comes from the understanding that a state agency brings experience and specialized knowledge to its task of administering and regulating a legislative enactment within its field of expertise." *Id.*
>
> [*E. Bay Drywall, LLC v. Dep't of Lab. & Workforce Dev.*, 251 N.J. 477, 493 (2022) (some internal citations omitted) (emphasis added)).]

This heightened standard of review is particularly applicable here. The School Ethics Commission maintains sole jurisdiction to adjudicate matters arising under the School Ethics Act, and adjudication of such disputes is one of its sole statutory responsibilities. *See N.J.A.C.* 6A:28-1.4. The Commission possesses extensive expertise in all matters regarding school ethics and in interpreting the School Ethics Act. Accordingly, its determination here should not be overturned unless it is "***palpably*** arbitrary or departs from governing law." *Dennery v. Bd. of Educ. of Passaic Cnty. Reg'l High Sch. Dist. No. 1*, 131 N.J. 626, 643 (1993) (stating that courts are "not at liberty to interfere with regulatory and administrative judgments of the professionals in the field of public education unless those judgments are ***palpably arbitrary*** or depart from governing law" (emphasis added)).

Petitioner here has provided no reason why the Commission's decision should be overturned. His brief amounts to nothing more than second-guessing of the Commission's findings, citations to irrelevant case law, and a plea to this Court that

the referendum result is unfair and should not stand. None of these arguments, standing alone or together, are sufficient to overcome the strong degree of deference this Court must provide to the Commission regarding matters within its expertise. The Commission examined each of Petitioner's claims and found that they did not state a claim for violations of the School Ethics Act. In particular, the Commission found that "Complainant offers nothing more than general and vague conclusory statements about what the 'Board' may have done, but does not offer any detailed facts evidencing how the named Respondents may have engaged in unethical conduct. Because such generalized accusations are wholly insufficient to satisfy Complainant's burden of proof," the Complaint must be dismissed. (16a.) Not only are those findings beyond reproach, as will be explained in greater detail below, but they are entitled to substantial deference and therefore should stand.

II. THE COMMISSION DID NOT ERR IN DENYING PETITIONER'S REQUEST TO AMEND HIS COMPLAINT BECAUSE THE REGULATIONS DO NOT PERMIT PETITIONER TO DO SO.

In his response to Respondents' motion to dismiss his complaint, Petitioner requested permission "to file an Amended Complaint adding allegations relating to the documents produced by the school district in response to the OPRA request." (Pb15.) The Commission denied Petitioner's request. (13a.) On appeal, Petitioner argues that "the Commission should have construed the Complaint with liberality and generosity

as required by *N.J.A.C.* 6A:28-8.3," and permitted him to amend his complaint. (Pb15.)

The regulations provide no such liberal standard for amendments to complaints. *N.J.A.C.* 6A:28-6.7 provides express limitations on a complainant's ability to amend an ethics complaint. Pursuant to the regulations, "[a] complainant may amend a complaint to cure technical defects or to clarify or amplify allegations made in the original complaint." *N.J.A.C.* 6A:28-6.7(b). The regulations do not permit an amendment to add additional claims. Moreover, "[o]nce a written statement is filed, an amendment to a complaint may be made by the complainant only with the consent of each respondent or by leave of the Commission upon written application." *N.J.A.C.* 6A:28-6.7(c). "Any amendment made by the complainant" must "be submitted in the same manner as the original complaint with one copy, together with a copy for each respondent." *N.J.A.C.* 6A:28-6.7(d).

Petitioner met none of these requirements. At the outset, the regulations prohibit him from amending his complaint to add new claims, which, by his own admission and argument, is what he attempted to do. That fact alone forecloses his argument. Furthermore, he did not seek to amend his complaint before Respondents filed a written statement of response. Thus, he was required to obtain Respondents' consent, which he did not do, or seek the Commission's leave. Petitioner likely would argue he sought leave through the request set forth in his opposition to Respondents' motion to

dismiss, but the regulations expressly require that an amendment be submitted in the same manner as the original complaint. In sum, the regulations prohibit Petitioner from amending his complaint to add new claims, and Petitioner's request to do so did not comply with the procedures required by the applicable regulations. The Commission therefore was correct to deny Petitioner's request to amend his complaint, and its decision should not be disturbed.

III. THE COMMISSION CORRECTLY DETERMINED THAT PETITIONER COULD NOT SHOW THAT RESPONDENTS VIOLATED *N.J.S.A.* 18A:12-24.1(e) BECAUSE PETITIONER DID NOT PLEAD OR OTHERWISE SHOW THAT RESPONDENTS MADE "PERSONAL PROMISES" OR TOOK "PRIVATE ACTION" THAT COMPROMISED THE BOARD.

Petitioner argues that the Commission "ignored its own precedents and the evidence" in finding that Respondents did not violate *N.J.S.A.* 18A:12-24.1(e). Section (e) is part of the Code of Ethics for School Board Members under the School Ethics Act, and requires that school board members abide by a personal code of ethics. Section (e) in particular 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." For complaints alleging a violation of the Code of Ethics for School Board Members, the complainant has the burden to factually establish a violation. *N.J.A.C.* 6A:28-6.4(a). Factual evidence of a violation of section (e) "shall include evidence that the respondent made personal promises or took action beyond

the scope of the respondent's duties such that, by its nature, had the potential to compromise the district board of education." *N.J.A.C.* 6A:28-6.4(a)(5).

Petitioner alleges that Respondents violated section (e) in counts 9, 10, 11, 13, 16, and 17 of the complaint, but does not provide any particularized allegations that Respondents made "personal promises" or "compromised the board" in any way.

A. Respondents Gallagher's and Koveloski's Appearance Before The West Amwell Township Committee Did Not Violate Section (e).

In Count 9, Petitioner alleges that Respondents Gallagher and Koveloski violated section (e) when they appeared before the West Amwell Township Committee during its meeting on October 6, 2021. Petitioner's complaint quotes minutes from the Committee meeting, but neither Mr. Gallagher nor Mr. Koveleski made any promises nor did or said anything which might have compromised the Board. Respondent Koveloski asked that the Committee "stay neutral and allow the taxpayers to vote on [the referendum]." Respondent Gallagher "stressed the importance of the referendum passing which he believes would be beneficial to all the students." (259a-260a.)

Petitioner thus has failed to include any sufficiently credible facts to support a finding that either of these Respondents made any "personal promises" at this meeting. A request that another government entity remain neutral and allow the issue to be presented to the voters is not a "personal promise." Further, there are no facts that

could support a finding that either "took private action" that might compromise the Board. Indeed, Petitioner does not allege their appearance before the Township Committee had any effect whatever on the Board.

Moreover, the Board's decision to place the referendum on the ballot before the voters was unanimous. Even if it had not been unanimous, it was a final decision made by a majority of the Board. Accordingly, any Respondent taking action publicly to support the referendum cannot be considered to have taken private action "that may compromise the board." Certainly, board members frequently appear before local municipal councils to present on items that will be placed on the ballot, such as budgets and other similar measures. Petitioner has not cited to a single case in which a board member's appearance before a municipal body was deemed to be a violation of section (e), nor would such a conclusion be tenable given that such appearances are common and, frankly, expected.

The Commission typically finds a violation of section (e) where a board member takes some form of official action for no reason other than a personal benefit or to carry out a private promise or assurance to another person, and which therefore compromises the board's integrity. *See In re Roman and Thomas*, SEC Dkt. No. C28-20 (Comm. Ed. Jan. 25, 2022) (discussing section (e)) (Ra29-41.[7]) Petitioner has pled no such facts that would constitute a cognizable cause of action under section (e).

[7] "Ra" refers to Respondents' Appellate Appendix.

Instead, Petitioner merely faults Respondents for speaking publicly regarding the referendum. These allegations, standing alone, are insufficient.

B. Respondents' Facebook Posts Do Not Violate Section (e).

The same logic applies to Petitioner's arguments regarding Respondents' Facebook posts. In *Andersen v. Fernandez*, C03-22 (SEC June 28, 2022) (Ra22-28), the Commission considered a matter in which a board member publicly responded, via a Facebook message sent to community members, to an individual's comment made in front of the board at a public meeting. The board member wrote a disclaimer before the post to establish she was speaking in her capacity as an individual, not as a board member. Specifically, the board member stated in her message: "I am on the . . . [board] but I am reaching out to you tonight as an individual, fellow parent, alum of [the district], and taxpayer." *Id.* at 5.

The Commission dismissed the complaint, finding that the board member had not violated section (e). The Commission noted that board members do not lose their First Amendment rights simply by operation of becoming board members, and remain "free to publicly address any matter which is of importance to them." *Id.* at 4. Moreover, the board member in *Andersen* made it "abundantly clear" her speech was that of a private citizen and not made as a member of the board, even if the member was providing her personal opinion on a board-related matter. *Id.*

The same logic applies here. Petitioner admits that all Respondents, except Mr. Koveleski, provided proper disclaimers. That should be the end of the matter. And even Mr. Koveleski provided a disclaimer that is almost identical to the disclaimer the Commission approved in *Fernandez*, stating that he was speaking as a "tax paying resident." *Compare Fernandez*, *supra*, at 5 ("I am on the . . . [board] but I am reaching out to you tonight as an individual, fellow parent, alum of [the district], and taxpayer.") Moreover, Mr. Koveleski took no action that would have compromised the Board nor did he make any promises. Rather, he provided a link to a public website and provided an opinion, his personal opinion. Even assuming Mr. Koveloski <u>was</u> speaking for the Board, as the Board President he is permitted to speak on behalf of the Board and his statement was not inconsistent with the Board's position, which voted unanimously in support of the referendum. Simply put, Petitioner's alleged facts are insufficient to establish a violation of the Act.

Nor does the fact that Respondent Pursell provided her district email address somehow nullify her use of a proper disclaimer. Petitioner still cannot show that Ms. Pursell made any personal promises or took action beyond the scope of her duties that in any way had the potential to compromise the Board. Further, Petitioner has not cited a single Commission decision holding it a violation of the Act for a board member to use his/her board email address to communicate regarding a topic related to school business or the business of the board. In sum, Ms. Pursell provided an

appropriate disclaimer that she was speaking as a member of the public, provided her opinion, and then informed the public that they could speak with Board members such as herself about the issue. Petitioner has pled no facts to suggest that Ms. Pursell made "promises" or "compromised the Board" merely by providing her Board email address.

C. Respondents' Participation In Local Political Organizations Does Not Violate Section (e).

Finally, Petitioner argues that several board members violated section (e) because they were involved in a grassroots organization called Save LPS. According to the Complaint, Save LPS is an organization that was formed to keep a "walkable" school within Lambertville. (32a.) Petitioner also alleges that the members of the Board who reside in Lambertville have violated section (e) because -- as Petitioner alleges without any supporting proofs -- these Board members seek to place Lambertville's interests above those of the other constituent municipalities within the District. Even assuming these allegations are true, Petitioner does not allege that Respondents made a "personal promise" by joining these organizations, nor are there any pleaded facts explaining how membership in these organizations can be considered "private action" that might compromise the Board. At best, they are nothing more than bald speculation based on little more than Respondents' lawful and constitutionally-protected membership in local organizations.

Even putting aside that these allegations do not state a claim under section (e), they are absurd on their face. Apparently, Petitioner believes that school board

members cannot participate in any form of political action or other group, or represent the interests of the municipality in which they reside. By this logic, school board members could be prohibited even from belonging to political parties or engaging in political activity protected under the First Amendment. In essence, Petitioner wishes to create a rule in which elected officials cannot engage in any form of politicking or political action. The absurdity of that position is self-evident and requires no further comment.

IV. THE COMMISSION CORRECTLY DETERMINED THAT RESPONDENTS DID NOT VIOLATE *N.J.S.A.* 18A:12-24.1(f) BECAUSE THEY NEITHER SURRENDERED THEIR INDEPENDENT JUDGMENT NOR USED THEIR POSITIONS FOR PERSONAL GAIN.

Petitioner next argues that the Commission did not apply appropriate precedent in determining that Respondents did not violate section (f) of the Code of Ethics for School Board Members. Section (f) provides: "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." *N.J.S.A.* 18A:12-24.1(f). Pursuant to *N.J.A.C.* 6A:28-6.4(a)(6), factual evidence of a violation of section (f) shall include evidence that a respondent took action on behalf of, or at the request of, a special interest group or persons organized and voluntarily united in opinion and who adhere to a particular political party or cause; or evidence that a respondent used the schools

in order to acquire some benefit for the respondent, a member of her immediate family, or a friend.

In *Albanese v. Kazan*, No. C33-16 (SEC Oct. 31, 2017) (Ra1-21), the Commission noted that a board member is not expected "to leave her opinions at the door notwithstanding he or she campaigned on specific concerns and issues, and notwithstanding the retention of free speech rights under the First Amendment." *Id.* at 5. In that case, a board member was accused of surrendering her independent judgment "by contributing money to a GoFundMe page . . . in support of full day kindergarten, visiting a fundraising booth . . . to collect donations in support of full day kindergarten, and by being photographed with members of a Facebook group named 'Wayne Says OK to Full Day K.'" *Id.* at 2. The Commission granted the respondent's motion to dismiss the complaint, determining that merely providing evidence that the respondent was a proponent and supporter of full day kindergarten was not sufficient to demonstrate an ethics violation. The Commission explained that the complainant "failed to provide facts to support the position that Respondent took action on behalf of, or at the request of, a special interest group. Instead, Complainants merely provided factual evidence that Respondent was a proponent and supporter of full day kindergarten." *Id.* at 16.

The same is true here. Petitioner does not allege that Respondents took action at the request of any particular special interest group. Rather, Petitioner alleges merely

that Respondents supported the referendum and that some Respondents belong to a grassroots organization within the community. Indeed, it is not even clear whether any of the groups with which certain Respondents are affiliated supported the referendum, much less that any Respondents surrendered their independent judgment to any special interest group. At most, Petitioner has alleged that certain Respondents are involved with a local organization, which Respondents have a First Amendment right to join. Petitioner has not alleged with any particularity that any Respondents were beholden solely to a private interest, or obtained a pecuniary interest in exchange for pursuing the objectives of that private interest. Respondents here voted in favor of placing the referendum on the ballot. Some of the Respondents belong to local political or other organizations which favor certain objectives which may or may not relate to the referendum. Nothing about that is unlawful or unethical.

Indeed, on the contrary, as described above, it is expected that school board members may be politically active, may pursue certain objectives, and may be affiliated with certain political beliefs or ideologies. It is illogical to believe otherwise. Regardless, Petitioner makes no allegation that Respondents -- in their capacity as board members -- encouraged the public to vote any particular way or that they failed to provide disclaimers whenever exercising their First Amendment right to comment on the issue in their personal capacity. There is nothing in Petitioner's pleadings to suggest that Respondents engaged in any conduct beyond protected,

acceptable, and expected political activity. Accordingly, the Commission's decision should be affirmed.

V. THE COMMISSION CORRECTLY DETERMINED THAT PETITIONER CANNOT ALLEGE VIOLATIONS OF THE SCHOOL ETHICS ACT AGAINST THE BOARD AS A WHOLE BECAUSE THE ACT REQUIRES THAT COMPLAINANTS BRING PARTICULARIZED ALLEGATIONS AGAINST INDIVIDUAL BOARD MEMBERS.

Petitioner argues that the Commission was incorrect to dismiss his claims against the Board as a whole, and claims that the Commission's decision has given the Board an "out" by permitting its members to conspire collectively to engage in unlawful conduct. (Pb29.) Petitioner misses the point. The School Ethics Commission consistently has held that a complainant must prove an ethics violation by advancing "specific allegations against individual" board members. The board itself cannot as an entity be subject to an ethics violation, nor can broad or sweeping claims of general misconduct or ethical violations be imputed to every board member. *See Lovett v. Asbury*, C01-09 (SEC Apr. 28, 2009) (Ra42-45). Petitioner here has done nothing more than lump together generalized, vague, and specious claims of misconduct against multiple Board members or the Board as a whole, and in contravention of the Act's requirement that complainant's bring particularized allegations against individual board members.

N.J.S.A. 18A:12-24.1, the Code of Ethics for Board Members, applies to individual board members. It does not apply to administrators or to a board as a whole.

Therefore, Petitioner's allegations in the complaint that the "Superintendent" or "the Board" violated any section of the Code of Ethics must be dismissed. Accordingly, the allegations in Counts 1-4, 6-8, 12, 14, 15 and 18 which allege violations by "the Board" as an entity or "the Superintendent" properly were dismissed.

Petitioner supports his argument that complaints under the School Ethic Act can be brought against the Board as whole, as well as several of his other arguments, by extensive citations to *Citizens to Protect Public Funds v. Parsippany-Troy Hills Board of Education*, 13 N.J. 172 (1953). That case concerned the manner and extent to which a board of education may spend public funds for promotion of the voters' approval of a bond referendum. In particular, the New Jersey Supreme Court held that a board of education could not use public funds to distribute booklets advocating a particular position on a public referendum. The case did not concern the School Ethics Act, which would not be passed for another 40 years, but rather whether and to what extent a board of education may use public funds to advocate for a particular position. There is no issue here regarding Respondents' use of public funds. Even if there was, the School Ethics Commission does not have jurisdiction to decide matters arising outside of the School Ethics Act, such as matters of school board funding. *See N.J.A.C.* 6A:28-1.4. Accordingly, the case is entirely irrelevant.

VI. THE COMMISSION CORRECTLY DETERMINED THAT RESPONDENTS DID NOT VIOLATE *N.J.S.A.* 18A:12-24.1(g) BECAUSE RESPONDENTS DID NOT PROVIDE INACCURATE INFORMATION REGARDING THE REFERENDUM.

Petitioner next faults the Commission for its application of section (g) of the Code of Conduct for School Board Members. Section (g) provides: "I will hold confidential all matters pertaining to the schools which, if disclosed, would needlessly injure individuals or the schools. In all other matters, I will provide accurate information and, in concert with my fellow board members, interpret to the staff the aspirations of the community for its school." For complaints alleging a violation of "the inaccurate information provision of [section] (g)," the complaint must "include evidence that substantiates the inaccuracy of the information provided by the respondent(s) and evidence that establishes that the inaccuracy was other than reasonable mistake or personal opinion or was not attributable to developing circumstances." *N.J.A.C.* 6A:28-6.4 (a)(7).

In Count 1, Petitioner alleges generally that "the Board" violated section (g) by failing to emphasize the negative comments included in the public survey questions. The complaint acknowledges, however, that the survey responses were posted on the district website along with other referendum materials. (21a.) Therefore, even if accepted as true and even if this allegation could be processed against "the Board," which it cannot, Petitioner does not allege in Count I that "the Board" provided inaccurate information to the public regarding the survey. Moreover, he does not

allege that any Respondent individually had any involvement in the posting of these materials. Accordingly, he cannot establish a violation of section (g) of the Code of Ethics.

As to Count 2, even if section (g) could be brought against the Superintendent or the Board as an entity, which, as set forth above, it cannot, it is unclear which portion of the provision applies. Petitioner merely alleges that, with the permission of the Board, the Superintendent put together a "Referendum Key Communicator Group" list, which was used to "to persuade the community to vote 'yes.'" Again, even if accepted as true, this allegation could not establish a violation of any part of section (g) of the Code of Ethics because it does not allege that any of the Respondents communicated *inaccurate* information.

Counts 3 and 4 fail for similar reasons. Petitioner asserts that Respondents violated section (g) of the Code of Ethics when they showed the "Referendum Community Presentation" and published a "Referendum FAQ" because these materials made an appeal to the public's emotion and equated investment in schools as a way to increase property values. However, even if accepted as true, Petitioner did not plead that Respondents provided *inaccurate* information concerning these communications. Accordingly, Counts 3 and 4 and cannot establish a violation of section (g) of the Code of Ethics.

In Count 6, Petitioner alleges, among other unsupported facts, that "Referendum Video #2" misrepresented the impact of flooding at one of the schools at issue in the referendum in order to persuade voters that flooding in the school was not as bad as feared. Rather than alleging facts, complainant unabashedly relies on "*rumors* that the flooding at [Lambertville Public School] was much worse than the Superintendent indicated." (emphasis added) Again, even when reviewing the complaint in the light most favorable to Petitioner, this allegation does not suggest that Respondents (as opposed to the Superintendent, who is not a party to this action) provided inaccurate information in violation of section (g) of the Code of Ethics.

Petitioner's Count 7 concerns "Referendum Video #3," which features a disabled former District student discussing her difficulties navigating the District's schools, along with a message encouraging District residents to vote. Petitioner alleges that the video is nothing more than an "emotional plea" devoid of useful content. Again, even taking these allegations as true, they are insufficient. Petitioner does not allege that Respondents provided in the video any inaccurate information to the public. The allegations contained in Count 7 therefore fail as a matter of law.

In Count 8, complainant alleges that the Board's monthly newsletter published in October 2021 included untrue language meant to "scare the voters away from voting 'no.'" Although Petitioner claims that the newsletter contains untrue assertions, he does not state with specificity which allegations are untrue, as the regulations require.

See N.J.A.C. 6A:28-6.4 (a)(7) (stating that the complaint must "include evidence that substantiates the inaccuracy of the information provided by the respondent(s) and evidence that establishes that the inaccuracy was other than reasonable mistake or personal opinion or was not attributable to developing circumstances"). The allegation therefore fails as a matter of law because it is devoid of any specific facts substantiating the inaccuracy of the provided information or otherwise supporting the claim that the newsletter is misleading.

Petitioner alleges in Count 12 that the Board violated section (g) because it held an "excessive" amount of meetings regarding the referendum in an attempt to sway public opinion and in violation of the Act. Apparently, Petitioner wanted *less* transparency and *less* opportunity for public comment regarding a referendum which he alleges not only is important but was subject to Board manipulation. Petitioner's arguments on the issue are so illogical that they do not warrant extended discussion, except to note that the Board's willingness to hold public meetings on the issue undermines Petitioner's allegations that Respondents were engaged in a nefarious scheme to ram through a self-serving referendum over significant public objection.

In Count 14, Petitioner alleges ethical violations regarding lawn signs despite his admission that he possesses no knowledge as to who was responsible for the creation and dissemination of the signs. His complaint states: "It is not clear if the [Board] created these signs, or if they were created by private citizens." (35a.) Notwithstanding

his critical lack of knowledge regarding the origin of the signs, Petitioner nonetheless alleges that Respondents violated section (g). Even if accepted as true, Petitioner's allegation could not establish violations of section (g) because it fails to include sufficient credible facts to support a finding that any individual board member provided inaccurate information to the public or otherwise violated any aspect of that provision. In addition, the School Ethics Act does not require board members to take any action to disaffirm or otherwise rectify action taken by private citizens on their own accord. Simply put, the dissemination of lawn signs that were not alleged to have been made by any individual board member cannot result in a finding that any board member violated the Act.

In Count 15, Petitioner alleges that the Board violated section (g) when it sent postcards to District residents which Petitioner claims blurred the line between information and advocacy. The Commission's decisions have found otherwise, and, as noted above, make clear that in order to substantiate a violation of the inaccurate information provision of section (g), the evidence must establish that the inaccuracy was not due to reasonable mistake, a matter of personal opinion, or attributable to developing circumstances. *See O'Hara v. Chambers, Pineland Reg. Bd. of Educ.*, No. C13-21 (SEC Aug. 30, 2021) (Ra50-56). Petitioner has set forth no facts whatsoever that would substantiate the inaccuracy of any information provided by Respondents

concerning the postcards. Accordingly, Petitioner cannot establish a violation of section (g) regarding the information contained in the postcards.

Finally, in Count 18, Petitioner asserts that the totality of the Board's actions regarding the referendum amounts to a "campaign to unduly influence the electorate." (40a.) Once again, even if accepted as true, Petitioner fails to plead with any specificity any facts supporting a violation of section (g). In sum, Petitioner's allegations regarding section (g) are insufficient in their entirety and the Commission rightly dismissed them.

VII. THE COMMISSION DID NOT FAIL TO REVIEW THE FACTS IN THE LIGHT MOST FAVORABLE TO PETITIONER, BUT ACCEPTED PETITIONER'S ALLEGATIONS AS TRUE, AND CONCLUDED THAT THEY FAILED TO STATE A CLAIM FOR VIOLATION OF THE SCHOOL ETHICS ACT.

A motion to dismiss a School Ethics Act claim is considered under the standard set forth in *N.J.A.C.* 6A:28–8.3. The regulations require that the Commission review the facts in the light most favorable to the non-moving party, and determine whether the allegation(s), if true, could establish a violation of the Act. The language mirrors the standard for dismissal of a complaint in the Superior Court pursuant to *Rule* 4:6–2(e). The Commission here properly granted Respondents' motion to dismiss in its entirety because Petitioner failed to plead sufficient, credible facts to support a finding that any of the individual Respondents violated *N.J.S.A.* 18A:12-24.1(e), *N.J.S.A.* 18A:12-24.1(f), and/or *N.J.S.A.* 18A:12-24.1(g) as alleged in the complaint.

Petitioner claims that the Commission did not provide an "analytical framework" and faults the Commission because it made no "references to how *Citizens* [*To Protect Public Funds*, 13, N.J. 172] and related decisions regarding expenditures of public money during school referendums may apply to potential ethics violations." (Pb29.) To begin, this argument is irrelevant to the issue of whether the Commission viewed the facts in the light most favorable to Petitioner. Rather, it is a legal argument that the Commission failed to apply the appropriate precedent. Even putting aside Petitioner's conflation of separate legal principles and inartful analysis, the Commission was correct to ignore the New Jersey Supreme Court's *Citizens To Protect Public Funds* decision because, as discussed *supra*, that decision concerns a board's use of public funds to support political advocacy and is entirely irrelevant to this matter. The Commission does not have jurisdiction to consider matters regarding the spending of public funds as considered in *Citizens To Protect Public Funds*, and Petitioner does not (and cannot before the Commission) allege that Respondents misused public funds, only that they violated certain provisions of the School Ethics Act.

Petitioner also argues that the Commission should have reviewed the complaint with "depth and liberality." That is true, but the Commission did so. The Commission's decision states that it "review[ed] the facts in the light most favorable to the non-moving party (Complainant)." (17a.) The Commission assumed the facts pleaded in the complaint were true for purposes of Respondents' motion. Even so, and as explained

above, those pleaded facts do not create a cognizable cause of action under the School Ethics Act.

Moreover, this Court is required to defer to the Commission's findings of fact. The Commission possesses particular expertise regarding claims arising under the School Ethics Act. Indeed, one of its few statutory duties is to adjudicate claims arising under the Act. The Court therefore should defer to the Commission's "technical expertise, its superior knowledge of its subject matter area, and its fact-finding role," *Messick v. Bd. of Rev.*, 420 N.J. Super 321, 325 (App. Div. 2011). *See also Dennery v. Bd. of Educ. of Passaic Cnty. Reg'l High Sch. Dist. No. 1*, 131 N.J. 626, 643 (1993) (stating that courts are "not at liberty to interfere with regulatory and administrative judgments of the professionals in the field of public education unless those judgments are palpably arbitrary or depart from governing law").

The Commission here provided detailed findings of fact and conclusions of law in a written opinion, and found that, even accepting Petitioner's allegations as true, they did not state a cognizable claim for violations of the School Ethics Act. The Court should not disturb that decision.

VIII. THE COMMISISON'S DECISION DOES NOT IGNORE THE OBJECTIVES OF THE SCHOOL ETHICS ACT, BUT RATHER PROPERLY FOUND THAT PETITIONER DID NOT STATE A COGNIZABLE CLAIM FOR VIOLATIONS OF THE ACT.

Petitioner's final point is not a legal argument so much as it is an airing of grievances. He contends, essentially, that Respondents engaged in "private action"

because they pursued a course of action which furthered nothing more than their own private purposes, thus eroding the public's confidence and trust. At the outset, it is difficult to see how a public bond referendum which was approved by the District's voters benefits nothing more than the Respondents' "private interests." Petitioner clearly is passionate about the issues underlying the bond referendum, and it is clear that he strongly disagrees with Respondents' position. That is his right, but it does not mean that Respondents' position is illegitimate, unfair, or born of selfish desire. There are thousands of voters in the District's municipalities who approved the referendum. That Petitioner's position was a losing one does not mean that it fell victim to some greater conspiracy.

Petitioner supports his position with citations to unpublished Appellate Division cases and to the New Jersey Supreme Court decision discussed extensively above, *Citizens To Protect Public Funds*. These cases are inapposite and do not inform the analysis. For example, *Messner v. Gray*, No. A-5418-13 (App. Div. Mar. 31, 2016), concerned a violation of the School Ethics Act where a board member recorded a conversation during a board executive session in order to share it with her personal attorney to further a private cause of action against the board. *Messner*, and indeed all of the cases Petitioner has cited, concern cases in which a board member engaged in misconduct to further a purely private, personal, selfish, and usually pecuniary interest. No such interests are at play here. Petitioner does not allege that Respondents will

benefit monetarily from the referendum, or that it somehow suits nothing more than Respondents' own individual selfish interests.

In fact, any such argument is dispelled by the fact that the referendum passed. The fact that thousands of voters within the District approved the referendum is proof that it served a greater public purpose beyond the selfish interests of the Board's members. This is not a case in which Respondents' cut a back-door deal without the public's knowledge and for nothing beyond Respondents' own personal gain. On the contrary, Respondents went out of their way to present these issues to the public. Petitioner even faults Respondents for having *too many* meetings on the issue. Moreover, Respondents never in their official capacity passed an opinion on which way the public should vote. Whenever Respondents commented on the referendum in their individual capacity, they included an appropriate disclaimer. It is difficult to conceive of what Respondents could have done differently to be more transparent and open to the public regarding the referendum.

Accordingly, the Commission's decision dismissing Petitioner's complaint should be affirmed.

CONCLUSION

For the foregoing reasons, Respondents Kevin Koveloski, Filomena Hengst, Lauren Braun-Strumfels, Martha Dennis, Jim Gallagher, Traci Paciulli, Diana Pursell, Roni Todd-Marino, and Meagan Warner respectfully request that this Court affirm the decision of the School Ethics Commission dismissing Petitioner's complaint.

PORZIO, BROMBERG & NEWMAN, P.C.
Attorneys for Respondents Kevin Koveloski, Filomena Hengst, Lauren Braun-Strumfels, Martha Dennis, Jim Gallagher, Traci Paciulli, Diana Pursell, Roni Todd-Marino and Meagan Warner.

By: 

Kerri A. Wright

Dated: February 7, 2024

Superior Court of New Jersey

Appellant Division

Docket No. A-003422-22

MICHAEL SPILLE,

Complainant-Appellant,

vs.

KEVIN KOVELOSKI, MARTHA DENNIS, DIANA PURSELL, FILOMENA HENGST, JIM GALLAGHER, RONI TODD-MARINO, LAUREN BRAUN STRUMFELS, TRACI PACIULLI , MEAGAN WARNER, SOUTH HUNTERDON REGIONAL BOARD OF EDUCATION, HUNTERDON COUNTY

Respondents-Respondents

ON APPEAL FROM A FINAL AGENCY DECISION OF THE SCHOOL ETHICS COMMISSION

DOCKET NO.: C63-21

RESPONSE BRIEF FOR APPELLANT MICHAEL SPILLE TO RESPONDENTS KEVIN KOVELOSKI, MARTHA DENNIS, DIANA PURSELL, FILOMENA HENGST, JIM GALLAGHER, RONI TODD-MARINO, LAUREN BRAUN STRUMFELS, TRACI PACIULLI , MEAGAN WARNER

02/21/2024, Amended 2/28/2024

MICHAEL SPILLE
APPELLANT
32 HEWITT ROAD
LAMBERTVILLE, NJ 08530
(917) 921-3502
michael.spille@gmail.com

TABLE OF CONTENTS

Section **Page**

TABLE OF AUTHORITIES

Cases: **Page(s)**

Statutes & Rules:

School Ethics Commission Opinions:

PRELIMINARY STATEMENT

Respondents create a strawman argument in their respondent's brief, erroneously stating that "Petitioner contends that Respondents have violated the Act because they pursued a "personal benefit" in seeking its passage". Appellant does not claim this in his brief or his complaint. In fact, Respondents do not acknowledge that the School Ethics Act is much broader than just covering acts involving "personal benefit". In forming the School Ethics Act, the legislature found "it is essential that the conduct of members of local boards of education and local school administrators hold the respect and confidence of the people".

The heart and soul of the appellant's ethics complaint is that the named respondents violated the public trust when they decided, individually and as a group, to deceive the voting public about particulars regarding the referendum, inventing positive attributes of their plan that were not accurate, suppressing negative aspects of the referendum plan, and even inventing negative outcomes for alternatives to the referendum plan. What Respondents label as "innocuous" behavior is in fact behavior found to be improper by the New Jersey Supreme Court.

Respondents further mischaracterize the facts, in many cases claiming cases they disclaimed their speech when a plain reading of what was uttered makes it

clear their "disclaimers" did not meet the standard created by the School Ethics Commission ("Commission"). Respondents appeared to go out of their way to *not* disclaim their speech properly, perhaps to enjoy the added punch of making their comments as a Board Member without suffering the consequences.

Respondent's actions included insulting tax payers who disagree with Board actions; attempting to influence municipal governments regarding a monumental $33 million referendum; and lying outright to tax payers. These are not innocuous acts, but rather are actions that considerably reduce "the respect and confidence" the public has in the Board members.

Respondents also erroneously indicate that this court must defer to the Commission because "[a]s an administrative agency whose sole purpose is to enforce and adjudicate claims arising under the Act, the Commission's expertise is entitled to a great deal of deference". This is not the case. The deferential standard has been found to be valid only when an agency is involved in complex, technical domains where they are plain experts in the field, and where additionally the court may lack expertise. This is not the case here. The School Ethics Commission is a part time committee that meets only once a month; has no true career staff leading it; whose members include members of the Public, School Administrators, and School Board members. Its primary purpose is only to rule on cases relevant to the

School Ethics Act, an area where this court does have expertise. In short, the nature of the Commission does not require the deference of this court.

Finally, respondents under play role they had in electioneering for the referendum, how close the final results were, and how divided our communities were in the process. After the Board's herculean effort and large outlays of taxpayer money to engineer a "yes" vote, the referendum passed by only 2 votes. And while the referendum vote was 1,230 "Yes" vs. 688 "No" in Lambertville, the results were reversed in West Amwell, with only 381 "Yes" and a staggering 1,002 "No" votes. This disparity in results reveals the controversy the board engendered in our community, creating immense dis-satisfaction in West Amwell as the voting public could clearly see the Board members biased towards favoring Lambertville over the other two municipalities.

Had the Respondents not lied so vigorously to the voting public and spent so much tax payer money to deny the voices of those on the "No" side of the question, the referendum would surely have never passed.

PROCEDURAL HISTORY

I refer to the Petitioner's Brief for the procedural history of this matter (Pb4).

STATEMENT OF FACTS

I refer to the Petitioners Brief for the Statement of Facts (Pb7).

LEGAL ARGUMENT

I. PETITIONER HAS ADEQUATELY SHOWN THE COMMISSION'S DECISION IS IN FACT ARBITRARY AND CAPRIOUS, AND THE DEFERENTIAL STANDARD INDICATED BY THE RESPONDENTS DOES NOT APPLY TO THE COMMISSION.

Petitioner's claim that this court must be highly deferential to the School Ethics Commission ("Commission") decision (BOE-Db17[1]). This claim ignores the fact that Appellant Court deference does not apply equally to all agencies, but only where the agency has a peculiar competence that the court may lack (*Bergen Pines Hosp. v. Dept. of Human Serv*, 96 N.J. 456, 478 (N.J. 1984) ("Since the reimbursement rates of health care facilities are within the *peculiar competence* of the agency that promulgated the rules and not the special competence of the courts, we must accord substantial deference to the administrative determinations.", emphasis added). See also *Saint Peter's University Hospital v. Lacy*, 185 N.J. 1, 13 (N.J. 2005) ("Such deference is appropriate because it recognizes that "agencies have the specialized expertise necessary to enact regulations dealing with technical matters and are `particularly well equipped to read . . . and to evaluate the factual and technical issues that . . . rulemaking would invite.'"").

The School Ethics Commission is not a body that requires such deference. The Commission is a body that meets only once a month to consider its cases, and

[1] References to the collective South Hunterdon Regional School District Board of Education respondents' brief are prefixed as BOE-Db.

consists of five people not associated with public schools, two school board members, and two school administrators (N.J. Stat. § 18A:12-27 ("There is hereby established in the State Department of Education a commission to be known as the "School Ethics Commission." The commission shall consist of nine members, not more than five of whom shall be from the same political party: two shall be board members; two shall be school administrators; and five shall be persons who are not school officials."). The Commission not only does not have any peculiar expertise, but by law must include a majority of laymen in the makeup of Commissioners. The Commission's primary purpose is to simply interpret the School Ethics Act with regards to complaint. This court is fully equipped with expertise to judge complaints in regard to the plain reading of statutes.

II. PETITIONER HAS THE RIGHT TO AMEND HIS REQUEST BASED ON NEW INFORMATION RECEIVED AND TO AMPLIFY HIS ALLEGATIONS.

Respondents incorrectly assert that the plaintiff is allowed to amend his complaint (BOE-Db20). Respondents quote the school ethics act stating "[a] complainant may amend a complaint to cure technical defects or to clarify or amplify allegations made in the original complaint." The regulations do not define what "clarify or amplify allegations" means in the context of amending a complaint before the Commission. Given the liberality and generosity required by N.J.A.C. 6A:28-8.3 given a Motion to Dismiss, the Commission should have

allowed plaintiff to amend his complaint with additional information unearthed by the response to his OPRA request (Pb16). In addition, even if this court finds that adding additional counts is not allowed by statute, at a minimum the Commission should have allowed Petitioner to amend his complaint to amplify and strengthen his existing claims, which clearly is allowed by the statute.

III. PETITIONER CLEARLY SHOWED VIOLATIONS OF N.J.S.A. 18A:120-24.1(e) THAT HAD POTENTIAL TO COMPROMISE THE BOARD.

BOE Respondents claim that the plaintiff does not provide any "particularized allegations that Respondents made "personal promises" or "compromised the board" in any way" (BOE-Db22). We note that the statute does not require evidence that actions "compromised the board", but instead indicates board members may not "any private action that may compromise the board". *N.J.S.A.* 18A:12-24.1(e). Plaintiff specifically claims the indicated board members took private action that had the potential to compromise the board. Plaintiff does not claim Respondents made "personal promises".

IV. Respondents Gallagher's and Koveloski's Appearance Before the West Amwell Township Committee was a violation of Section (e).

Respondents claim that the appearance and actions of board members Gallagher and Koveloski before the West Amwell Township Committee was not a violation of Section (e) of the School Ethics Act. Despite Respondent's claims, attempting to influence municipal governments is not a function or duty of School Board

Members. As mentioned in the appellant brief, Gallagher and Koveloski's statements helped spur the West Amwell Township government to directly oppose the referendum and ultimately sue the School District (Pb18).

V. Respondent Gallagher's Facebook post is a clear violation of section (e).

In arguing that Gallagher's Facebook post could not be a violation of section (e) because he "provided the proper disclaimers", Respondents are claiming a disclaimer is a magical incantation that erases all responsibility of the Board member. It is not. The Respondents completely ignore a recent School Ethics Commission Advisory Opinion which stated in part ""[A]lthough you want to provide information to the public that stakeholders (and you) feel would be useful and beneficial, because you would be providing information relating to the Board and/or your official duties and responsibilities, any attempt to disclaim your speech (as being in your personal or private capacity) would likely be futile." (Pb19, School Ethics Commission, Public Advisory Opinion – A02-22, February 25, 2022). In this case, despite Mr. Gallagher's disclaimer, he engaged in lengthy discourse with members of the public regarding internal school matters, and deliberately spun "facts" regarding the referendum, and omitted material information.

VI. Membership in SaveLPS was a clear violation of Section (e).

Respondents effectively claim that board members can belong to any organization they wish as a First Amendment right, and say anything they wish as

such a member (BOE-Db26). Plaintiff asserts that while Board members have a First Amendment right in general regarding 3rd party organizations, Board members are in fact restricted regarding organizations that exist strictly to impact School Boards, and are further banned from giving miss information to the public as a member of such organization. The Board Members belonging to SaveLPS deliberately mislead the public regarding material aspects of the referendum, a clear violation of section (e).

VII. Membership in SaveLPS was a clear violation of Section (f).

Respondents indicate that Board member membership in the SaveLPS organization was innocent and protected under the First Amendment (BOE-Db28). While board members may join 3rd party organizations as a matter of right under the First Amendment, Board Members are not completely unrestricted in regards to their behavior. Board Members are clearly enjoined in section (e) not to "surrender my independent judgment to special interest or partisan political groups" and to not use "the schools for personal gain or gain of friends". N.J.S.A. 18A:12-24.1 (e). In this case, the Board Members belonging to SaveLPS clearly attempted to gain an advantage strictly for Lambertville residents who favored a walkable school for reasons such as increasing property values for Lambertville residents only. SaveLPS board members worked extensively to favor only Lambertville residents, ignoring and attempting to silence the complaints of West Amwell Residents,

Stockton Residents, and those in those in Lambertville who had issues with Lambertville Public School (such as presence in a flood zone, structural issues, asbestos contamination, etc).

VIII. Respondents erroneously claim *Citizens* is not relevant to School Ethics Commission cases.

Regarding *Citizens to Protect Public Funds v. Parsippany-Troy Hills Board of Education*, 13 N.J. 172 (1953), Respondents claim "the School Ethics Commission does not have jurisdiction to decide matters arising outside of the School Ethics Act, such as matters of school board funding. *See N.J.A.C.* 6A:28-1.4. Accordingly, the case is entirely irrelevant" (BOE-Db31). This assertion claims that Board members may freely violate *Citizens* and not face any ethical consequences. This is nonsense on its face. The School Ethics Act concerns board member actions that may compromise the public's trust in the individual members and the Board as a whole. Certainly Board Member actions which violate NJ Supreme Court precedent regarding mis-use of public funds would qualify as a violation of Ethics Act. It should also be noted that Respondents do not offer any proof that they did not violate *Citizens* by spending lavishly in favor of the Referendum.

Further, Respondents ignore the possibility of Board Members colluding as a group in an unethical manner. Plaintiff asserts that the Board members knowingly all colluded together to spend public funds to influence the electorate towards a

"yes" vote on the referendum, facts which are bolstered by the OPRA response emails which demonstrate this collusion in detail.

IX. RESPONDENTS VIOLATED *N.J.S.A.* 18A:12-24.1(g) WHEN THEY AUTHORIZED INACCURATE INFORMATION TO BE RELEASED TO THE PUBLIC AND ACTED IN CONCERT TO DECEIVE THE ELECTORATE.

As with the previous section, Respondents assert that merely by acting unethically as a group they can escape all consequences (BOE-Db32). Respondents do not even deny promoting inaccurate information regarding the referendum, or omitting material information. To be clear, Respondents claim here is that Boards of Education are free to publish inaccurate information to the voting public, in this case regarding a $33 million referendum question, and are completely free to undermine the public trust by acting in unison on a controversial matter. Further, if the Commission had allowed the plaintiff to amend his complaint with the OPRA response materials, there was substantial evidence in the form of emails of Board members actively editing materials to mislead the public and omit material facts.

X. RESPONDENTS IGNORE HOW THE REFERENDUM WAS PASSED AND THE BOARD ACTIONS REGARDING IT.

Throughout the history of this complaint, Respondents have claimed their actions were innocent and entirely in keeping with their roles as Board Members. Respondents indicate "[t]here are thousands of voters in the District's municipalities who approved the referendum" (BOE-Db40). What Respondents

ignore is that the referendum passed by a mere 2 votes (Pb1), and was only approved after the extensive unethical actions of the board members, both individually and collectively. Respondents disenfranchised voters on the "no" side of the issue, spent large sums of public money to engineer "yes" votes, and actively mislead voters to achieve their ends.

CONCLUSION

For the foregoing reasons, Mr. Spille respectfully reiterates his requests that this Court reverse the Commissions decision to dismiss his complaint, and that the Court require the Commission to allow Mr. Spille the opportunity to amend his complaint based on the OPRA request dump documents.

Respectfully submitted,

Michael Spille

Dated: February 21, 2024, Amended Date: February 28, 2024