SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3767-14T2

MELINDO A. PERSI,

Petitioner-Respondent,

v.

DANIEL WOSKA, TOWNSHIP OF BRICK BOARD OF EDUCATION, OCEAN COUNTY,

Respondent-Appellant.

Argued October 19, 2016 – Decided March 10, 2017

Before Judges Fuentes, Simonelli and Carroll.

On appeal from the Commissioner of the Department of Education, Docket No. 48-2/12.

Sebastian Ferrantell argued the cause for appellant (Montenegro, Thompson, Montenegro & Genz, P.C., attorneys; Mr. Ferrantell, of counsel and on the briefs).

Dina M. Vicari argued the cause for respondent Melindo A. Persi (R.C. Shea & Associates, attorneys; Robert C. Shea, of counsel and on the brief; Ms. Vicari, on the brief).

Goeffrey N. Stark, Deputy Attorney General, argued the cause for respondent Commissioner of Education (Christopher S. Porrino, Attorney

General, attorney; Melissa Dutton Schaffer, Assistant Attorney General, of counsel; Mr. Stark, on the brief).

PER CURIAM

Appellant Daniel Woska, a former member of the Brick Township Board of Education (Board), appeals from the March 24, 2015 final agency decision of the Commissioner of Education (Commissioner), which affirmed the October 29, 2014 decision of the School Ethics Commission (SEC) that Woska violated the School Ethics Act (the Act), N.J.S.A. 18A:12-21 to -34.[1] We affirm.

I.

We derive the following facts from the record. Respondent Melindo Persi served as interim superintendent of the Brick Township School District pursuant to an employment contract that began in July 2007, and ended in November 2008. Either party could terminate the contract on thirty days' written notice. Woska was a Board member and was present when the terms of Persi's

[1] Throughout his merits brief, Woska improperly cites to a prior decision of the SEC, dated February 29, 2012, when discussing the substantive findings from which he appeals. However, this appeal only concerns the Commissioner's March 24, 2015 decision. Accordingly, except for Point III, infra, we decline to consider arguments that are based on the SEC's February 29, 2012 decision. See Fusco v. Newark Bd. of Educ., 349 N.J. Super. 455, 461-62 (App. Div.), certif. denied, 174 N.J. 544 (2002); Pressler & Verniero, Current N.J. Court Rules, comment 6 on R. 2:5-1(f)(1) (2017).

employment contract were negotiated. Hence, Woska either knew, or should have known, of the thirty-day notice provision.

On April 15, 2008, three new members were elected to serve on the seven-member Board (the Board members-elect). The Board scheduled a reorganization meeting for April 29, 2008, at which the Board members-elect were to be sworn in.

Woska was dissatisfied with Persi's performance and wanted him terminated. Four days prior to the reorganization meeting, Woska directed School Business Administrator and Board Secretary James Edwards to prepare and send a Rice[2] notice to Persi in order to consider Persi's employment at the meeting. Woska was not the Board President at the time, and he did not notify the Board President, other Board members, or Board counsel, before or after taking such action. Edwards directed Assistant Board Secretary Marie Barnes to prepare and send the Rice notice to Persi. The Rice notice notified Persi that the Board would discuss his employment at the reorganization meeting in a closed session. The Board did not vote to issue a Rice notice to Persi.

[2] Rice notice refers to the right of a public employee to receive notice of the intention of the board of education to consider personnel matters related to them. Rice v. Union Cnty. Reg'l High Sch. Bd. of Educ., 155 N.J. Super. 64, 74 (App. Div. 1977), certif. denied, 76 N.J. 238 (1978).

In addition to directing issuance of the Rice notice, Woska took other actions regarding Persi's employment prior to the reorganization meeting. He privately discussed with the Board-members-elect both Persi's employment and the potential appointment of Mary Ann Ceres, a former assistant superintendent, to replace Persi. He also spoke to Ceres and told her that the Board was dissatisfied with Persi, he was going to raise the issue of Persi's continued employment at the meeting, and the District needed a new interim superintendent. Woska discussed salary and benefits with Ceres, and asked her to attend the meeting.

Persi and Ceres attended the reorganization meeting. Woska was appointed Board president after the Board members-elect were sworn in. In a closed session, the newly-constituted Board discussed Persi's employment, and Ceres's resume was presented. After the Board returned to open session, Woska made a motion to terminate Persi's employment, and a motion to appoint Ceres as interim superintendent, effective immediately. The Board voted five-to-two to terminate Persi's employment, and five-to-two to appoint Ceres as interim superintendent. Woska and the three new Board members cast four of the five affirmative votes in each instance. The Board then adopted a resolution, which had already been prepared, but not by Edwards, and appointed Ceres as interim superintendent.

Persi filed two actions against Woska and the Board. One action, filed in Superior Court, concerned breach of his employment contract. The trial court transferred the matter to the Department of Education, and it was then transferred to the Office of Administrative Law for a hearing as a contested case. The Administrative Law Judge found, and the Commissioner concurred, that Persi had a valid, enforceable contract that required thirty days' notice prior to his termination. As a result, Persi was awarded the $21,000 compensation he would have earned during that thirty-day period.

The other action, filed with the SEC, alleged that Woska's private actions prior to the reorganization meeting violated N.J.S.A. 18A:12-24.1(e),[3] which provides as follows:

> A school board member shall abide by the following Code of Ethics for School Board Members:
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> . . . .
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> I will recognize that authority rests with the board of education and will make no personal promises nor take any private action that may compromise the board.

In a decision dated February 29, 2012, the SEC determined that Woska violated N.J.S.A. 18A:12-24.1(e) by unilaterally

[3] Persi also alleged that Woska violated N.J.S.A. 18A:12-24.1(a), (c), (d), and (f), but the SEC found that Woska did not violate these provisions.

directing issuance of the Rice notice without the consent of the Board president or other Board members. The SEC found that issuing a Rice notice was not an administrative function, but rather, a function of the Board; Woska was not Board President when he directed issuance of the Rice notice to Persi; and Woska did not consult the Board President, other Board members, or Board counsel about the Rice notice. Citing N.J.A.C. 6A:28-7.1,[4] the SEC found that Woska took private action or action outside the scope of his

[4] N.J.A.C. 6A:28-7.1 defined "private action," in pertinent part, as "action taken by a member of a district board of education . . . that is beyond the scope of the duties and responsibilities of a member of a district board of education[.]" The statute was previously contained within Subchapter 7, Definition of Words and Terms Used in the Code of Ethics. Subchapter 7 was repealed as part of R. 2009 d. 163, effective April 21, 2009. Because Persi filed his complaint prior to that date, the SEC followed procedures and rendered its determination in accordance with the regulations in effect at the time of filing. Notwithstanding, N.J.A.C. 6A:28-6.4(a)(5) continues to provide as follows, in pertinent part:

> For complaints alleging a violation of the code of ethics for school board members, the complainant has the burden to factually establish a violation in accordance with the standards set forth below:
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> . . . .
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> 5. Factual evidence of a violation of N.J.S.A. 18A:12-24.1(e) shall include evidence that the respondent made personal promises or took action beyond the scope of his or her duties such that, by its nature, had the potential to compromise the board.
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> [(Emphasis added).]

duties as a Board member in directing issuance of the Rice notice, and his unilateral action compromised the Board by subjecting it to litigation. Citing Dericks v. Schiavoni, Docket No. C41-07 (Sch. Ethics Comm'n Feb. 24, 2009); aff'd Comm'r Decision No. 260-09SEC (Aug. 18, 2009),[5] I/M/O Freilich, Docket Nos. C18-04 and C19-04 (Sch. Ethics Comm'n April 4, 2005); Comm'r Decision No. 156-05 (May 2, 2005),[6] and I/M/O Randie Zimmerman, Rocky Hill Bd. Of Educ., Docket No. C49-02 (Sch. Ethics Comm'n July 22, 2003); Comm'r Decision No. 497-03SEC (Aug. 21, 2003),[7] the SEC found that "this [was] precisely the type of action which the [Act] was intended to proscribe."

The SEC rejected Woska's argument that there was no legal requirement that a Rice notice can be issued only by a Board President or that a Board member first consult with the full membership of the Board. The SEC stated that Woska still had the right to request that the Board review the chief school administrator's employment. The SEC recommended a reprimand,

[5] Available at http://www.nj.gov/education/legal/ethics/2009/C41-07%20C46-07C47-07.pdf.

[6] Available at http://www.nj.gov/education/legal/ethics/2005/C18-04C19-04V.pdf.

[7] Available at http://www.nj.gov/education/legal/ethics/00-03/C4901.pfd.

which is the least severe sanction authorized under N.J.S.A. 18A:12-29(c).

Woska appealed to the Commissioner. In a decision dated June 22, 2012, the Commissioner rejected Woska's arguments that the new Board effectively ratified his decision to issue the Rice notice to Persi, and that it was not his private action, but rather, the vote of the majority of the new Board that resulted in Persi's termination and the resulting litigation. The Commissioner found there was sufficient credible evidence in the record supporting the SEC's decision, and the decision was not arbitrary or capricious. The Commissioner affirmed the decision and sanction.

Woska appealed the Commissioner's decision to this court, arguing that issuance of the Rice notice to Persi did not constitute private action under N.J.S.A. 18A:12-24.1(e). We found that the Commissioner's interpretation of "private action" as action taken by a board member that is beyond the scope of his authority and duties as a board member was consistent with the definition of "private action" in N.J.A.C. 6A:28-7.1, as well as N.J.A.C. 6A:28-6.4(a)(5) and prior agency decisions. Persi v. Woska, No. A-6038-11 (App. Div. Dec. 11, 2013) (slip op. at 12). However, we remanded to the SEC to: (1) clarify who is authorized to issue a Rice notice for the purpose of reviewing a school superintendent's employment; and (2) determine whether Woska's

pre-organization meeting communications with the Board members-elect and Ceres violated N.J.S.A. 18A:12-24.1(e). Id. at 16, 18, 20. We did not direct the SEC to revisit its finding that Woska took private action when he unilaterally directed issuance of the Rice notice without consulting the Board President or other Board members, and this action compromised the Board.

On remand, the SEC concluded that it lacked jurisdiction to determine who is authorized to issue a Rice notice to the chief school administrator, and transferred this issue to the Commissioner. In a decision dated June 17, 2014, the Commissioner noted that Rice requires a board of education to notify an employee of its intention to consider a personnel matter related to them. The Commissioner acknowledged there was no law or regulation that specifically outlined the procedures for issuing a Rice notice to the chief school administrator. However, the Commissioner emphasized that issues relating to a chief school administrator's employment are "serious and time-sensitive" and akin to the type of issues that precipitate a special meeting of the board of education.

The Commissioner cited N.J.A.C. 6A:32-3.1(a), which provides the procedure by which a special meeting may be called:

> (a) The secretary of the district board of education shall call a special meeting of the district board of education whenever:

> 1. Requested by the president of the district board of education;
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> 2. Requested by the chief school administrator when the district board of education fails to meet within two months during the period in which the schools in the district are in session; or
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> 3. Presented with a petition signed by a majority of the full membership of the district board of education requesting the special meeting.

The Commissioner determined that "like calling a special meeting of the board of education, the issuance of a Rice notice to the chief school administrator of a district represents a significant procedural matter and, thus, a substantially similar protocol is appropriate." Thus, the Commissioner concluded that a single board member is without authority to direct issuance of a Rice notice to the chief school administrator of a district; rather, that authority lies with the board president or majority of the full membership of the board.

The Commissioner returned the matter to the SEC to determine whether Woska violated N.J.S.A. 18A:12-24.1(e) by his pre-reorganization meeting communications with the Board members-elect and Ceres. In a decision dated October 29, 2014, the SEC found that Woska had embarked on a course of action through which he secured both the position of Board President and a majority of Board support willing to vote as he wanted to remove Persi and

install a new interim superintendent of his choosing. The SEC noted that in preparation for these events, Woska spoke to the Board members-elect prior to the reorganization meeting and discussed personnel issues related to Persi. The SEC emphasized that because the Board members-elect had not been sworn, they "had no rights greater than those of the public [and] should not have been made privy to [Persi's] employment information." Regarding Woska's communication with Ceres, the SEC found that he prepared for her eventual employment without consulting the Board and without a full vetting of her qualifications, and discussed her potential appointment with the Board members-elect before the reorganization meeting.

The SEC determined that Woska violated N.J.S.A. 18A:12-24.1(e) by taking private action, as defined by N.J.A.C. 6A:28-7.1. The SEC found as follows:

> [Woska's] private action through his discussions with the three [Board] members-elect resulted in his becoming the new Board President, leading to the termination of [Persi's] employment, fully support a finding that he acted beyond the scope of his duties and responsibilities as a Board member. He was not authorized by the Board, Board counsel or Board President to involve these individuals in any discussion regarding the future of [Persi's] employment with the District. In fact, he developed and put his plan in play without any advice or conversation with these principals. He acted alone. Moreover, his plan to hire [] Ceres was similarly developed without the Board's

> knowledge. The other [Board] members learned of her when they received her resume at the reorganization meeting. With [Woska's] vote and the newly sworn[-]in member[s'] votes in the affirmative, [Woska] all but guaranteed [] Ceres the promised position.

The SEC also found that Woska's "singularly [and] self-serving actions compromised the Board and [placed] it at risk for litigation and the concomitant expenditure of public funds such exposure occasions." The SEC again recommended a reprimand.

Woska appealed to the Commissioner, again arguing that the new Board ratified the issuance of the Rice notice to Persi, and it was not his private action, but rather, the vote of the majority of the new Board that resulted in Persi's termination and the resulting litigation. Woska also argued there should be no sanction because there was no law or regulation that specifically outlined the procedures for issuing a Rice notice to the chief school administrator.

In a decision dated March 24, 2015, the Commissioner rejected Woska's arguments, and concluded that the SEC's decision was supported by sufficient credible evidence and was not arbitrary, capricious, or contrary to law. The Commissioner concurred with the SEC's determination that Woska violated N.J.S.A. 18A:12-24.1(e) by taking private action, namely, his pre-organization meeting discussions with the Board members-elect and Ceres, coupled with his plan to terminate Persi and appoint Ceres as

interim superintendent without the Board's knowledge. The Commissioner found that Woska's actions were beyond the scope of duties and responsibilities of a member of a district board of education and compromised the Board by subjecting it to significant litigation.

The Commissioner also accepted the SEC's recommendation that a reprimand was the appropriate sanction, and reprimanded Woska. The Commissioner determined that Woska's unilateral issuance of the Rice notice to Persi, private pre-organization meeting discussions with the Board members-elect and Ceres, and plan to have Persi terminated and Ceres appointed interim superintendent without the Board's knowledge, warranted that sanction. Woska appeals from the Commissioner's decision.

"[We] have 'a limited role' in the review of [agency] decisions." In re Stallworth, 208 N.J. 182, 194 (2011). "[A] 'strong presumption of reasonableness attaches to [an agency decision].'" In re Carroll, 339 N.J. Super. 429, 437 (App. Div.) (quoting In re Vey, 272 N.J. Super. 199, 205 (App. Div. 1993), aff'd, 135 N.J. 306 (1994)), certif. denied, 170 N.J. 85 (2001). "In order to reverse an agency's judgment, [we] must find the agency's decision to be 'arbitrary, capricious, or unreasonable, or [] not supported by substantial credible evidence in the record as a whole.'" Stallworth, supra, 208 N.J. at 194 (quoting Henry

v. Rahway State Prison, 81 N.J. 571, 579-80 (1980)); In re Proposed Quest Acad. Sch. of Montclair Founders Grp., 216 N.J. 370, 385 (2013). The burden of proving that an agency action is arbitrary, capricious, or unreasonable is on the challenger. Bueno v. Bd. of Trustees of the Teachers' Pension and Annuity Fund, 422 N.J. Super. 227, 234 (App. Div. 2011) (citing McGowan v. N.J. State Parole Bd., 347 N.J. Super. 544, 563 (App. Div. 2002)).

As our Supreme Court has instructed:

> In determining whether agency action is arbitrary, capricious, or unreasonable, [we] must examine:
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> (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.
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> [Stallworth, supra, 208 N.J. at 194 (quoting In re Carter, 191 N.J. 474, 482-83 (2007)).]

We "may not substitute [our] own judgment for the agency's, even though [we] might have reached a different result." Ibid. (quoting Carter, supra, 191 N.J. at 483). "This is particularly true when the issue under review is directed to the agency's special 'expertise and superior knowledge of a particular field.'" Id. at 195 (quoting In re Hermann, 192 N.J. 19, 28 (2007)).

Furthermore, "[i]t is settled that '[a]n administrative agency's interpretation of statutes and regulations within its implementing and enforcing responsibility is ordinarily entitled to our deference.'" E.S v. Div. of Med. Assistance & Health Servs., 412 N.J. Super. 340, 355 (App. Div. 2010) (quoting Wnuck v. N.J. Div. of Motor Vehicles, 337 N.J. Super. 52, 56 (App. Div. 2001)). "Nevertheless, 'we are not bound by the agency's legal opinions.'" A.B. v. Div. of Med. Assistance & Health Servs., 407 N.J. Super. 330, 340 (App. Div.) (quoting Levine v. State Dep't of Transp., 338 N.J. Super. 28, 32 (App. Div. 2001)), certif. denied, 200 N.J. 210 (2009). "Statutory and regulatory construction is a purely legal issue subject to de novo review." Ibid. (citation omitted). Applying the above standards, we discern no reason to disturb the Commissioner's decision.

II.

Woska contends in Point II[8] of his merits brief that he did not violate N.J.S.A. 18A:12-24.1(e) because he took no "direct" private action with respect to the Rice notice and Persi's termination.[9] Rather, he merely "requested" that Edwards issue a

[8] Point I merely addresses the standard of review.

[9] We decline to address Woska's argument, improperly raised for the first time in his reply brief, that the Rice notice was valid. Goldsmith v. Camden Cnty. Surrogate's Office, 408 N.J. Super. 376, 387 (App. Div.), certif. denied, 200 N.J. 502 (2009).

Rice notice to Persi; Edwards actually issued and sent the notice; the Board terminated Persi; and the Board's action prompted the litigation.[10] Woska also contends in Points II and IV that he did not violate N.J.S.A. 18A:12-24.1(e) because the Board ratified the issuance of the Rice notice.[11]

The record does not support Woska's stance that he took no "direct" action and merely "requested" issuance of a Rice notice. Rather, the record confirms the SEC's and Commissioner's findings that Woska unilaterally "directed" Edwards to issue the Rice notice

[10] Woska did not address whether the SEC's or Commissioner's decisions that he violated N.J.S.A. 18A:12-24.1(e) by his pre-organization communications with the Board members-elect and Ceres were arbitrary, capricious, or unreasonable, or not supported by substantial credible evidence in the record. An issue that is not briefed is deemed waived on appeal. Sklodowsky v. Lushis, 417 N.J. Super. 648, 657 (App. Div. 2011); Pressler & Verniero, Current N.J. Court Rules, comment 5 on R. 2:6-2 (2017).

[11] We decline to address Woska's additional arguments that the term "private action" is not defined in Title 6A or Title 18A, and that the SEC incorrectly cited N.J.A.C. 6A:28-7.1 in its February 29, 2012 decision to suggest that "private action" is a defined term. This appeal does not concern the SEC's February 29, 2012 decision, and we found in the prior appeal that the Commissioner's interpretation of "private action" as action taken by a board member that is beyond the scope of his authority and duties as a board member was consistent with the definition of "private action" in N.J.A.C. 6A:28-7.1, as well as N.J.A.C. 6A:28-6.4(a)(5) and prior agency decisions. Persi v. Woska, supra, (slip op. at 12-13). If an issue has been determined on the merits in a prior appeal it cannot be re-litigated in a later appeal of the same case, even if of constitutional dimension. Washington Commons LLC v. City of Jersey City, 416 N.J. Super. 555, 564 (App. Div. 2010), certif. denied, 205 N.J. 318 (2011) (citation omitted).

to Persi. Further, Woska's stance is contrary to his own statement in his merits brief that "in anticipation of becoming the Board President, [he] directed the issuance of the Rice notice." (Emphasis added). More importantly, we found in the prior appeal that Woska called Edwards prior to the reorganization meeting "and directed him to prepare a Rice notice to send to Persi so that Persi's employment could be discussed at the April 29, 2008 reorganization meeting." Persi v. Woska, supra, (slip op. at 3) (emphasis added). Accordingly, Woska took direct action with respect to the Rice notice.

Woska's action in unilaterally directing issuance of the Rice notice was not only direct action, it was private action that was "beyond the scope of the duties and responsibilities of a member of a district board of education[.]" N.J.A.C. 6A:28-7.1. Woska wanted Persi terminated and embarked on a course of private action to achieve that goal. In addition to unilaterally directing issuance of the Rice notice to Persi without the knowledge, authorization, or ratification of the then-Board President and then-Board members, Woska had private pre-organization meeting discussions with the Board-members-elect about Persi's employment and appointing Ceres to replace him. Woska's private action ultimately led to Persi's termination, which, in turn, subjected

the Board to extensive litigation. Woska's private action clearly violated N.J.S.A. 18A:12-24.1(e).

We briefly address Woska's argument that he did not violate N.J.S.A. 18A:12-24.1(e) because the Board ratified the issuance of the Rice notice to Persi. Nothing in the record suggests that ratification applies here or that ratification negates a Board member's violation of N.J.S.A. 18A:12-24.1(e). Ratification "relates back to the date of the original act[.]" Casamasino v. City of Jersey City, 158 N.J. 333, 345 (1999). Ratification requires the principal to have the capacity to act when the agent acted. Goldfarb v. Reicher, 112 N.J.L. 413, 416 (Sup. Ct. 1934). It also "requires [the principal's] intent to ratify plus full knowledge of all the material facts." Thermo Contracting Corp. v. Bank of N.J., 69 N.J. 352, 361 (1976) (citation omitted). Here, the new Board lacked the capacity to ratify Woska's acts, as composition of the Board that terminated Woska was different then when Woska engaged in unethical conduct.

Even if the composition of the new Board was the same, a Board's ratification of a member's unethical conduct does not make that conduct ethical. N.J.S.A. 18A:12-24.1 demands that individual Board members obey its provisions and avoid unethical conduct. The statute does not permit a board of education to ratify the unethical acts of its members.

III.

Woska contends in Point III that the Commissioner's affirmance of the SEC's February 29, 2012 decision that only a board of education may issue a Rice notice to the chief school administrator represents a new administrative rule applied retroactively.[12] As we previously stated, this appeal only concerns the Commissioner's March 24, 2015 decision, which affirmed the SEC's October 29, 2014 decision that Woska's pre-reorganization meeting communications with the Board members-elect and Ceres violated N.J.S.A. 18A:12-24.1(e). Nevertheless, for the sake of completeness, we address Woska's contention.

Woska cited to Metromedia, Inc. v. Dir., Div. of Taxation, 97 N.J. 313 (1984) to support his argument that the SEC's decision constitutes rulemaking. However, he did not discuss which of the six factors set forth in Metromedia apply, nor did he explain how the factors establish that the SEC's decision constituted rulemaking.[13] He merely mentioned the six factors then baldly

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[12] Woska cites no authority to support his alternative argument that the alleged new administrative rule should be applied prospectively.

[13] Metromedia sets forth six factors for courts to consider in determining whether agency action constitutes rulemaking:

> [I]f it appears that the agency determination . . . (1) is intended to have wide coverage encompassing a large segment of the regulated or general public, rather than an individual

concluded that the SEC's decision "announced a new rule of law that prohibits an individual board member from seeking review of the chief school administrator's employment[,]" and "[t]he new rule . . . mandated, for the first time, that the full board approve any effort to seek review of the chief school administrator's employment."

Woska's bald conclusions imply, incorrectly, that prior to the SEC's decision, the law permitted individual board members to act on behalf of a board, but without the board's input, to issue a Rice notice to the chief school administrator. The bald conclusions also imply, incorrectly, that the SEC's decision

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> or a narrow select group; (2) is intended to be applied generally and uniformly to all similarly situated persons; (3) is designed to operate only in future cases, that is, prospectively; (4) prescribes a legal standard or directive that is not otherwise expressly provided by or clearly and obviously inferable from the enabling statutory authorization; (5) reflects an administrative policy that (i) was not previously expressed in any official and explicit agency determination, adjudication or rule, or (ii) constitutes a material and significant change from a clear, past agency position on the identical subject matter; and (6) reflects a decision on administrative regulatory policy in the nature of the interpretation of law or general policy.
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> [Id. at 331-32.]

limits a board member's authority to review and discuss a chief school administrator's employment. However, the SEC merely found that issuing a Rice notice to the chief school administrator was a function of the board. The decision does not prohibit individual board members from seeking review of the chief school administrator's employment.

In any event, the SEC's decision did not announce a new rule, as it did not prescribe a legal standard that was not otherwise inferable from the relevant law. N.J.S.A. 18A:12-24.1(e) requires a board member to "recognize that authority rests with the board of education and . . . make no personal promises nor take any private action that may compromise the board." At the time Woska directed issuance of the Rice notice, N.J.A.C. 6A:28-7.1 defined "private action" as "action taken by a member of a district board of education . . . that is beyond the scope of duties and responsibilities of a member of a district board of education[.]" Thereafter, N.J.A.C. 6A:28-6.4(a)(5) provided that evidence that a "[board member] made personal promises or took action beyond the scope of his or her duties" shall support a finding that a violation of N.J.S.A. 18A:12-24.1(e) occurred. Read together, Woska's actions in unilaterally directing issuance of the Rice notice and communicating with the Board members-elect and Ceres clearly violated N.J.S.A. 18A:12-24.1(e).

Further, although there was no authority specifying who may issue a Rice notice to the chief school administrator, N.J.A.C. 6A:32-3.1(a), which provides the procedure by which a special meeting may be called, states, in part, that the board president or majority of the full membership of the board has the authority to call a special meeting. See N.J.A.C. 6A:32-3.1(a)(1), (3). The statute does not authorize individual board members to call a special meeting. A Rice notice concerns a board's review of personnel matters, and permits a board to discuss those matters in closed session. Thus, it follows, that individual board members may not issue a Rice notice.

Nor does the SEC's decision reflect a policy that constitutes a material or significant change from it's previous position. In its decision, the SEC cited opinions to support its determination that an individual board member engages in private action in violation of N.J.S.A. 18A:12-24.1(e) when he or she unilaterally issues or directs issuance of a Rice notice. For example, in Freilich, the SEC held that a Board member violated N.J.S.A. 18A:12-24.1(e) when he unilaterally sent a letter to a donor, which discussed a new short-range technology and erroneously suggested that the Board had approved the plan. Freilich, supra,

(slip op. at 11).[14] The SEC explained it was "immaterial" that the Board later approved the letter's contents because "[t]he fact [they] were not approved by the Board when the letter was sent to the private donor could have compromised the Board." Id. at 9.

In Zimmerman, the SEC held that a Board member violated the Act when she investigated a complaint by a member of the public and drafted a letter that appeared to have the Board's endorsement, but actually lacked it. Zimmerman, supra, (slip op. at 3). Lastly, in Dericks, the SEC held a board member violated the Act when he sent a letter to a newspaper editor, purporting to speak for the Board, but without the Board's full knowledge and consent. Dericks, supra, (slip op. at 25). Accordingly, the SEC's decision did not constitute rulemaking.

IV.

Woska contends in Point IV that no penalty should be imposed given the unique circumstances of this case. We have considered this contention in light of the record and applicable legal principles and conclude there is sufficient credible evidence in the record as a whole supporting the Commission's decision to

[14] We do not cite these unpublished opinions as authority or precedent for our ultimate determination in this matter. See R. 1:36-3. We merely mention these opinions as the authority on which the SEC relied to show that its decision did not reflect a policy that constituted a material or significant change from it's previous position

reprimand Woska. R. 2:11-3(e)(1)(D). We also conclude that Woska's arguments to the contrary are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.