No. 17147

The University of the State of New York

The State Education Department

Before the Commissioner

Application of the BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF BUFFALO for the removal of Carl Paladino as a member of the Board of Education of the City School District of the City of Buffalo.

The Law Firm of Frank W. Miller, attorneys for petitioner, Frank W. Miller, Christopher M. Militello, and Jay Worona, Esqs., of counsel

Lippes Mathias Wexler Friedman LLP, attorneys for respondent, Dennis C. Vacco, Jennifer Persico, and Stacey Moar, Esqs., of counsel

I. Introduction

Petitioner, the Board of Education of the City School District of the City of Buffalo ("petitioner" or "board") seeks the removal of Carl Paladino ("respondent") as a member of the Board of Education of the City School District of the City of Buffalo. The application must be sustained for the reasons set forth below.

II. Facts and Procedural History

Respondent was elected to a three-year term as a member of the board on May 21, 2013 and was subsequently re-elected on May 17, 2016.

On October 12, 2016, respondent attended a regular meeting of the board. The entire board, including respondent, attended, as well as the district's superintendent and the deputy general counsel. In

executive session, the board discussed collective negotiations pursuant to the Taylor Law ("collective negotiations") with the Buffalo Teachers Federation ("BTF").

On October 17, 2016, the board held a special meeting. The board entered executive session to discuss collective negotiations with the BTF despite respondent's objection to discussing the matter in executive session instead of the public session of the meeting. Following the executive session, the board approved a collective bargaining agreement with the BTF in a 7-2 vote. Respondent and another board member opposed the measure.

On December 21, 2016, respondent attended another regular meeting of the board. The entire board, including respondent, was present as well as the board's counsel. The board entered into executive session at this meeting and discussed pending litigation involving a former contractor.

On December 22, 2016, respondent sent an e-mail to board president Barbara Seals-Nevergold and several members of the local media. The e-mail disclosed certain information about the pending litigation discussed during executive session on December 21, 2016.

On December 23, 2016, Artvoice[1] magazine published comments by respondent which responded to four survey questions the publisher posed to individuals in the Buffalo community. Respondent's comments made reference to the former President and First Lady of the United States and, by respondent's own admission, caused a "public uproar" (Jun. 27, 2017 Tr. pp. 235-36)[2].

On December 29, 2016, the board held a special meeting. At the meeting, the board adopted a resolution demanding that respondent resign within 24 hours and that, if he did not, the board would "retain outside legal counsel to file a 306 petition" seeking his removal (Joint

[1] According to the record, Artvoice is a "local magazine" in the Buffalo area (Jun. 22, 2017 Tr. p. 69).
[2] All references herein to "Tr." are to a particular date/volume of the transcript of the five-day hearing.

Ex. 22).[3] The resolution passed 6-2. Respondent did not receive notice of the meeting and did not attend. Respondent did not resign following this meeting.

On January 4, 2017, the board met and, by a 7-0 vote, authorized the hiring of outside counsel - the attorneys who represent the board in this proceeding - "to file a 306 Petition with the NYS Commissioner of Education" in a 7-0 vote (Joint Ex. 23). Respondent and another board member were absent from this meeting.

On January 5, 2017, respondent published an article in Artvoice magazine entitled "How Union President Rumore Co-opted the Buffalo School Board and Rigged the Teacher's Contract." Petitioner contends that this article disclosed confidential information regarding collective negotiations which respondent received during the October 12, 2016 executive session.

On January 14, 2017, respondent published a second article in Artvoice magazine entitled "The Morally Bankrupt Board of Education of the Public Schools." In the article, respondent addressed "accusations against [him]" concerning his disclosure of allegedly confidential information in the January 5, 2017 Artvoice article.

This application ensued. Petitioner's request for interim relief was denied on February 3, 2017. Subsequently, respondent's request for interim relief was denied on April 12, 2017. Respondent made three applications to submit additional evidence pursuant to 8 NYCRR §276.5 which were granted in part and denied in part, and my rulings in connection therewith are part of the record.

III. The Parties' Contentions

Petitioner contends that respondent violated General Municipal Law §805-a, as well as the board's code of conduct, by disclosing confidential information which he obtained in the course of his official duties. Petitioner asserts that the above information was not public and that

[3] All references herein to "Ex." are to the exhibits accepted into evidence at the hearing.

the board did not authorize its release. Petitioner seeks an order removing respondent from office pursuant to Education Law §§306 and 2559.

In his verified answer, respondent generally denies the allegations in the petition, but admits that he attended a board of education meeting on December 21, 2016; that he sent the December 22, 2016 e-mail to board president Barbara Seals-Nevergold; and that "there was an Art Voice article on January 5, 2017." Respondent contends that the information he disclosed was not subject to confidentiality and/or was a matter of public interest or concern or already made public by third parties. Respondent also contends that his actions were "taken with the intent to prevent crime or fraud"; that the instant proceedings are pretextual, retaliatory and "infringe upon and chill constitutionally protected speech"; that his actions were taken in good faith; that he does not have a pecuniary or material interest furthered by any of the alleged disclosures, which he asserts is required for a violation of General Municipal Law §805-a; and that the board violated the Open Meetings Law (Public Officers Law §100 et seq.) when it convened the executive sessions which are at issue in this case.[4]

On April 14, 2017, based upon the application, answer and supporting evidence in the record, I ordered the parties to show cause as to why respondent should or should not be removed from office as a member of the Board of Education of the City School District of the City of Buffalo. At a prehearing conference on May 12, 2017, the parties presented their positions regarding witnesses and evidentiary matters and stipulated as to certain exhibits and witnesses. I also advised the parties of my intention to take judicial notice of certain items and afforded the parties an opportunity to respond or object to such notice. I issued a letter order setting forth my rulings on these issues on May 19, 2017.[5]

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[4] See section D below for a complete discussion of respondent's defenses.

[5] A second prehearing conference was held on June 15, 2017, during which logistical details pertaining to the hearing were discussed.

The hearing commenced on June 22, 2017 and concluded after five days on June 28, 2017. Petitioner presented board president Dr. Barbara Seals-Nevergold, general counsel Nathaniel Kuzma, superintendent Dr. Kriner Cash, BTF president Philip Rumore, and board members Dr. Theresa Harris-Tigg, Sharon Belton-Cottman and Paulette Woods as witnesses. In addition to testifying on his own behalf, respondent presented the direct testimony of board members Patricia Pierce and Lawrence Quinn. During the course of the hearing, I made various rulings on evidentiary objections raised by the parties, including those related to matters of relevancy, attorney-client privilege and the confidential nature of matters discussed in executive session. The parties submitted closing briefs on July 12, 2017 and reply briefs on July 19, 2017; therefore, the record closed on July 19, 2017. On the entire record, including my observation of the demeanor and credibility of the witnesses, I make the following decision.

IV. Applicable Law

A member of the board of education or a school officer may be removed from office pursuant to Education Law §306 when it is proven to the satisfaction of the Commissioner that the board member or school officer has engaged in a wilful[6] violation or neglect of duty under the Education Law or has wilfully disobeyed a decision, order, rule or regulation of the Board of Regents or Commissioner of Education (Application of Kolbmann, 48 Ed Dept Rep 370, Decision No. 15,888; Application of Schenk, 47 id. 375, Decision No. 15,729). Further, Education Law §2559 provides in part that "[w]ilful disobedience of any lawful requirement of the commissioner of education, or a want of due diligence in obeying such requirement or wilful violation or neglect of duty, is cause for removal." To be considered wilful, the board member's actions must have been intentional and with a wrongful purpose (see Application of Nett and Raby, 45 Ed Dept Rep 259, Decision No. 15,315).

In the course of its duties, a school board is required to discuss and debate difficult and sensitive

[6] The term "wilful" is used herein, consistent with the spelling used in Education Law §306.

issues, including personnel matters, collective bargaining tactics and litigation strategies. The law specifically recognizes the delicacy of these matters by permitting them to be discussed in private as an exception to the general public nature of such meetings (see Public Officers Law §105). The purpose of this exception is to enable public officers to deliberate freely and speak frankly in ways they might not if the discussions were held in public (see Application of Nett and Raby, 45 Ed Dept Rep 259, Decision No. 15,315).

Moreover, school board members, as public officers, take an oath of office to uphold the law and faithfully discharge their duties (N.Y. State Constitution Art. XIII, §1; Public Officers Law §10; Application of Nett and Raby, 45 Ed Dept Rep 259, Decision No. 15,315). Among other things, school boards are responsible for educational standards, budget matters, management issues and health and safety (Application of Nett and Raby, 45 Ed Dept Rep 259, Decision No. 15,315). In carrying out these duties, individual board members have a fiduciary obligation to act constructively to achieve the best possible governance of the school district (see Application of Nett and Raby, 45 Ed Dept Rep 259, Decision No. 15,315; Application of Kozak, 34 id. 501, Decision No. 13,396).

In addition to a board member's general duties and responsibilities, General Municipal Law §805-a(1)(b) specifically provides that no municipal officer or employee (including a school board member) shall "disclose confidential information acquired by him [or her] in the course of his [or her] official duties or use such information to further his [or her] personal interests." The seminal decision in Application of Nett and Raby held that, within the public school system, the term "confidential," means "[i]nformation that is meant to be kept secret" (45 Ed Dept Rep 259, Decision No. 15,315, citing Black's Law Dictionary [8th Ed. 2004]).[7] As this

[7] In a memorandum dated December 9, 2005, State Education Department Counsel and Deputy Commissioner for Legal Affairs notified school personnel, including school board members, of the Nett and Raby decision and expressly indicated that the Commissioner's decision differed from the interpretation of the term "confidential" offered by New York State's Committee on Open Government. Official notice of this memorandum was taken pursuant to my May 18, 2017 letter order in this matter.

decision recognized, it is the sole province of the Commissioner of Education to define the meaning of the word "confidential" within the public school system and ensure its uniform application in this context (see Komyathy v. Bd. of Educ. of Wappinger Cent. School Dist. No. 1, 75 Misc2d 859).

It is well-settled that a board member's disclosure of confidential information obtained at a properly-convened executive session of a board meeting violates General Municipal Law §805-a(1)(b) and may constitute grounds for a board member's removal from office pursuant to Education Law §306 (see Application of Nett and Raby, 45 Ed Dept Rep 259, Decision No. 15,315; Applications of Balen, 40 id. 250, Decision No. 14,474; Application of the Bd. of Educ. of the Middle Country Cent. School Dist., 33 id. 511, Decision No. 13,132; Appeal of Henning and Rohrer, 33 id. 232, Decision No. 13,035). While a board member's violation of a board policy, in and of itself, is not grounds for removal pursuant to Education Law §306, it may be relevant to a determination of whether he or she engaged in a wilful violation of law (see e.g. Application of Jones, et al., 55 Ed Dept Rep, Decision No. 16,823; Application of Simmons, 53 id., Decision No. 16,596; Application of Malgieri, et al., 52 id., Decision No. 16,482).

The Commissioner has recognized that a board of education may only enter into an executive session for those purposes set forth in Public Officers Law §105 (Application of Nett and Raby, 45 Ed Dept Rep 259, Decision No. 15,315; Matter of Leber, 19 id. 519, Decision No. 10,235). The Commissioner has also recognized that disclosure of confidential information may not form the basis of a removal application where: (1) information learned during the course of a properly convened executive session warranted referral to a District Attorney, the Attorney General or other appropriate law enforcement authority for investigation and possible action, and such referral was made; (2) a board collectively decided to release confidential information from an executive session; or (3) an individual board member was compelled to disclose confidential material pursuant to law in the context of a judicial proceeding (Application of Nett and Raby, 45 Ed Dept Rep 259, Decision No. 15,315; Application of Nett and Raby: Disclosure of Confidential Information From Executive

Session, SED Office of Counsel, Dec. 9, 2005, available at http://www.counsel.nysed.gov/memos/nett).

In an appeal or removal application to the Commissioner, a petitioner has the burden of demonstrating a clear legal right to the relief requested and the burden of establishing the facts upon which petitioner seeks relief (8 NYCRR §275.10; Application of Nett and Raby, 45 Ed Dept Rep 259, Decision No. 15,315). In addition, a respondent bears the burden of proof to establish any affirmative defenses (8 NYCRR §275.12[a]; see also Appeal of Kenton, 54 Ed Dept Rep, Decision No. 16,649; Application of Simmons, 53 id., Decision No. 16,596; Appeal of Mogel, 41 id. 127, Decision No. 14,636).

V. Discussion

A. Litigation Disclosure

Turning first to respondent's alleged disclosure of confidential information concerning pending litigation, petitioner has not met its burden to show that respondent's December 22, 2016 e-mail disclosed any confidential information obtained from the December 21, 2016 executive session.

The record reflects that the board filed a lawsuit against a former contractor in Supreme Court, Erie County on January 29, 2016, and that, prior to the December 21, 2016 board meeting, the court dismissed the case in part.[8] On December 21, 2016, the board convened an executive session where it discussed the litigation regarding the former contractor. Petitioner contends that, at this meeting, the board received confidential information from outside counsel about the litigation.[9]

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[8] The reasons for this dismissal are not revealed in the record.

[9] In this regard, I note that, in its application for removal, petitioner asserts that the litigation was discussed during a "properly-convened executive session" on December 21, 2016. In its post-hearing brief, petitioner asserts that this portion of the December 21, 2016 meeting was instead a "private meeting with legal counsel" that falls within the exception contained in Public Officers Law §108(3) and that, therefore, "there was no requirement to call this session an executive session." In either case, based on the record before me, petitioner has failed to establish that respondent disclosed either confidential executive session information or confidential attorney-client communications from this meeting.

On December 22, 2016, respondent sent an e-mail to the board president, copying several members of the local media, which contained the following statement:

> When [the contractor's] defense collapses, all of the [contractor's] acolytes will be racing for a deal and the truth will come out.... It's certainly stupid for us to discuss that issue in executive session, out of the purview of the public, when we all know that [the contractor] will know the next day everything we discussed in the meeting.

(Joint Ex. 3A). Petitioner argues that this e-mail disclosed two pieces of confidential information. First, petitioner contends that the mere fact that the litigation involving the former contractor was discussed during executive session was confidential. Under the facts of this case, I disagree. The record reflects that the litigation against the former contractor was filed approximately 11 months prior to December 21, 2016, and the judge presiding over the case dismissed the board's complaint in part prior to the executive session. Both the complaint and the judge's order were public documents, and it was reasonably foreseeable that the board would discuss the judge's decision or the feasibility of an appeal soon thereafter. Therefore, I find that, under the circumstances presented here, the mere fact that the board discussed this lawsuit, which was a matter of public record, in executive session on December 21, 2016 was not confidential information within the meaning of General Municipal Law §805-a(1)(b) (see Appeal of Henning and Rohrer, 33 Ed Dept Rep 232, Decision No. 13,035) or an attorney-client privileged communication.[10]

Next, petitioner argues that respondent's reference to the contractor's "defense collaps[ing]" was confidential information. Again, I disagree. At the outset, I note that respondent testified that he was referring to the former contractor's defense in a separate, pending criminal

[10] I note that, under other circumstances, revelation of the identity of a party to current or potential litigation could be confidential within the meaning of General Municipal Law §805-a or otherwise protected from disclosure by law.

investigation. Nevertheless, even assuming that respondent's comments were in reference to the board's civil litigation against the former contractor, this lawsuit was a matter of public record and it was foreseeable that the former contractor would assert defenses to the board's claims. Respondent's statement amounts to a mere prediction that the former contractor would be unsuccessful in the litigation. Without more, under these circumstances, I cannot conclude that respondent's prediction that the former contractor's "defense" would "collapse" constitutes confidential information within the meaning of General Municipal Law §805-a(1)(b) or constitutes an attorney-client privileged communication. Therefore, respondent's reference to such information does not constitute an impermissible disclosure.

B. Personnel Matter Disclosure

Next, petitioner contends that respondent disclosed confidential information in the January 5, 2017 Artvoice article about a principal who was the subject of a disciplinary proceeding pursuant to Education Law §3020-a when he published the following statement:

> Still, it doesn't take a genius to learn how incompetent principals like ... the principal at East High School [] upped his graduation statistics, pushing kids through by changing grades, having phony classrooms, etc. He admitted to me at one time that he put 135 kids on the streets to improve the stats for that cohort. Board member Sharon Cottman [sic] provided him cover until she couldn't anymore, as the cheating principal's actions became more notorious and impossible to hide.

(Joint Ex. 3B).

Upon review of the record, I find that petitioner has failed to meet its burden of proof in this instance as well. First, petitioner failed to prove from which executive session the disclosure allegedly originated.

Although board members testified that the principal is the subject of a §3020-a proceeding and that such charges would have been approved and/or discussed by the board in executive session, the record is devoid of any proof as to when, or what aspects of, the personnel matter were discussed by the board in executive session. Therefore, the record does not establish the necessary link between any confidential discussions and the specific information contained in respondent's article. Under these circumstances, petitioner's failure to connect the information revealed by respondent to any specific executive session is fatal to its argument (see Appeal of Henning and Rohrer, 33 Ed Dept Rep 232, Decision No. 13,035).

Moreover, respondent explained that he learned of the information that he published from a discussion with the principal which was unconnected with any official meeting or executive session of the board. According to respondent, he spoke with the principal at an event at a high school soon after he assumed a seat on respondent's board. According to respondent, the principal "walked up to" respondent and the former board president during a break in the event "and blurted ... out" the information which respondent subsequently published in the January 5, 2017 Artvoice article (Jun. 27, 2017 Tr. p. 255-56). Additionally, board member Patricia Pierce testified that she did not learn about the allegations against the principal from any executive session. Petitioner offers no evidence to rebut respondent's evidence that the information he published was voluntarily conveyed to him by the principal himself outside of an executive session. Therefore, I find that petitioner has failed to meet its burden to establish that the information respondent disclosed concerning the principal was confidential, and that respondent's reference to such information does not constitute an impermissible disclosure (see Appeal of Henning and Rohrer, 33 Ed Dept Rep 232, Decision No. 13,035).

C. Collective Negotiations Disclosure

Petitioner next argues that respondent unlawfully disclosed confidential information pertaining to collective negotiations in the January 5, 2017 Artvoice article. Upon

review of the record, I agree with petitioner and sustain this allegation.

It is first necessary to place respondent's disclosure in context. The record indicates that the board negotiates with nine bargaining units. One of these units is represented by the BTF and its membership consists of the district's teachers. Before October 17, 2016, the board and the BTF had not ratified a new agreement since June 2004. After an impasse and an administrative law judge's finding against the district on an unfair practice charge, the parties resumed negotiations in September 2016. The union had also published an "all call" (Jun. 23, 2017 Tr. pp. 12-13, 153-54) notice in the summer of 2016 to its members to attend a meeting on October 17, 2016. The parties held approximately six to eight meetings between September 2016 and October 17, 2016, when the contract was approved by the board and ratified by the BTF membership at the "all call" meeting. The superintendent served as the district's "[c]hief negotiator" (Jun. 23, 2017 Tr. p. 73) in these discussions.

As noted above, at a board meeting held on October 12, 2016, the board went into executive session to discuss collective negotiations. Board member Lawrence Quinn made a motion to enter executive session, which was seconded by board member Paulette Woods. Meeting minutes indicate that the board remained in executive session for an hour and fifty minutes. During this executive session, the board received information and/or advice from its counsel about the BTF contract negotiations, and those present discussed the board's bargaining strategy and what it would take to settle the contract.

In the January 5, 2017 Artvoice article, respondent wrote the following about the October 12, 2016 executive session:

> The Board met with ... our in-house deputy general counsel, giving him instructions on what terms would be acceptable. I advised, on many occasions, that we should not bargain against ourselves, which means that when we put a proposal on the table, we don't improve the proposal without [the

president of the BTF] first putting his proposal or counter proposal on the table. From day one [the superintendent] was on the defensive, getting nothing substantive from [the president of the BTF], but upping our proposal....

This is where [the president of the BTF] showed his real talent. Publicly he announced a date for a meeting of the BTF to vote on a proposed contract, but privately, he and others leaked to the [n]ews that the union intended an illegal strike if a contract was not signed by the date of [a public] meeting. Tiffany Lankes at the Buffalo News reported the potential illegal strike. This panicked [the superintendent] and created the illusion that time was short and chaos was looming.

[The superintendent] did not want to be at the helm if there was a strike and the poor children had no one to teach or babysit them....

In an executive session on the Wednesday before [the president of the BTF's] scheduled meeting, [counsel] brought the Board up to date on what terms had been agreed to. [The superintendent] said he needed authority for more money from the reserves. He said he needed another $10 million and he was certain he could get the return of the management prerogatives and even end lifetime health care for new hires, but he had to put the money on the table to avoid a disastrous strike.

I asked "What is with this nonsense about a strike?"

> [The board's counsel and superintendent] both said we couldn't risk [the strike]; it would be terrible for Buffalo....
>
> I pleaded with [the superintendent] to disregard the illegal strike talk and stop panicking over it because even if [the teachers] went on strike, no one would care. We would just put a bunch of babysitters in the schools and [the president of the BTF] would go to jail for a few days. How sick it is to sit in an executive session, ostensibly held to keep the discussion private, but knowing full well that within minutes, [the president of the BTF], our adversary, would know from treacherous Board members everything discussed in the meeting.

(Joint Ex. 3B). At the hearing, the board's president and its general counsel confirmed the accuracy of respondent's disclosures with respect to the discussion that occurred during the October 12, 2016 executive session. Both witnesses stated that it was their expectation that this information was, and would indefinitely remain, confidential.[11]

Respondent's article disclosed, for example, both the superintendent's and counsel's responses to a specific

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[11] While respondent complains in his post-hearing brief that several witnesses "refused to testify to the substance of the discussions in executive session," six board members, in affidavits submitted with petitioner's application herein, confirmed that the information published in the January 5, 2017 Artvoice article concerning collective negotiations originated from the October 12, 2016 executive session. Moreover, while some witnesses were hesitant to answer questions at the hearing due to fear of disclosing confidential information, respondent neglects to mention that, at the hearing, I determined that petitioner had partially waived the right to assert privileges as to the executive sessions at issue. Counsel for respondent was permitted to question witnesses generally as to what topics were or were not discussed during the relevant executive sessions and in sufficient detail so as to allow comparison of the executive session discussions with the alleged disclosures.

negotiation tactic, i.e., the threat of a strike.[12] Specifically, respondent disclosed that this caused the superintendent to "panic []" and that it was the opinion of both the superintendent and counsel that the board "couldn't risk" a strike. These disclosures revealed potential vulnerability on the part of the superintendent - the "chief negotiator" for the district in the BTF negotiations - and are of obvious relevance not only to the BTF, but also to the eight other bargaining units with which the district negotiates (Jun. 23, 2017 Tr. p. 50). Indeed, the president of the BTF testified that respondent's disclosures were a boon to him and the BTF because they showed that the district would easily acquiesce during contract negotiations in response to pressure. The board president additionally testified that, at the time of respondent's disclosures, the board "had other contracts with other bargaining units that [were] still in the process," and that respondent's disclosures "put [] us in a difficult position" (Jun. 22, 2017 Tr. p. 246).

Respondent's argument that the facts of the BTF contract were made public is unavailing. It is not respondent's disclosure of factual data that was ultimately included in the final contract that constitutes a breach of his legal duties under these circumstances; rather, it was the revelation of, among other things, the board's internal discussion regarding negotiating strategies during executive session.[13] Thus, whether the BTF contract was published on the BTF's website is irrelevant.

The purpose of bestowing confidentiality upon discussions regarding collective negotiations is identical to the purpose of the "pending litigation" exception, which is "to enable a public body to discuss pending litigation privately, without baring its strategy to its adversary through mandatory public meetings" (Weatherwax v. Town of

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[12] I need not resolve whether, in fact, the president of the BTF threatened a strike. In his testimony, the president of the BTF denied making such a threat, and in this regard, the only relevant factor is the subjective perception of the superintendent and counsel that a strike was imminent.

[13] Relatedly, respondent's contention that the details of the BTF contract were public knowledge is unavailing since, as petitioner correctly argues, the internal deliberations of the board as to negotiating strategies had not been, nor should they have been, released to the public.

Stony Point, 97 AD2d 840, 841; Matter of Concerned Citizens to Review Jefferson Val. Mall v. Town Bd. of Town of Yorktown, 83 AD2d 612, 613). The need to avoid baring one's strategy, which allows for free and open internal discussion, is at least as significant in the context of collective negotiations given the ongoing relationship between a school board and a bargaining unit. Indeed, respondent himself stated that the prohibition on disclosing confidential information concerning collective negotiations "is designed to keep the strategies, negotiating posture and techniques of the Board during the negotiations private from the union adversaries..." (Joint Ex. 3C).

I am unpersuaded by respondent's legal argument that General Municipal Law §805-a only prohibits the disclosure of confidential information if one derives "a direct or indirect pecuniary or material benefit" from the disclosure. Section §805-a(1)(b) provides that:

> [N]o municipal officer or employee shall ... disclose confidential information acquired by him [or her] in the course of his [or her] official duties or use such information to further his [or her] personal interests [emphasis added].

This subsection contains two prohibitions separated by the conjunction "or." The first clause prohibits disclosure, while the second prohibits "use [of] such [confidential] information to further ... personal interests." The clauses thus prohibit two separate practices: (1) the disclosure of confidential information; and (2) the use of confidential information for personal gain. These provisions have consistently been interpreted as separate prohibitions, and respondent cites no legal authority to the contrary (Application of Nett and Raby, 45 Ed Dept Rep 259, Decision No. 15,315; Applications of Balen, 40 id. 250, Decision No. 14,474; Application of the Bd. of Educ. of the Middle Country Cent. School Dist., 33 id. 511, Decision No. 13,132; Appeal of Henning and Rohrer, 33 id. 232, Decision No. 13,035).

Respondent is correct that the General Municipal Law defines "interest" as "a direct or indirect pecuniary or

material benefit accruing to a municipal officer or employee as the result of a contract with the municipality which such officer or employee serves" (General Municipal Law §801[3]). However, the first clause of §805-a(1)(b) does not use the word "interest" and simply prohibits the disclosure of confidential information obtained in the course of one's official duties. Thus, under the plain language of the statute, a disclosure of confidential information acquired in the course of official duties violates General Municipal Law §805-a(1)(b), and no showing of personal interest or gain is required in that regard.

Based on the above, I find that respondent disclosed confidential information acquired by him in the course of his official duties in violation of General Municipal Law §805-a.[14]

1. Wilfulness

I further find that respondent's violation of law was wilful. To be considered wilful, the board member's actions must have been intentional and with a wrongful purpose (see Application of Nett and Raby, 45 Ed Dept Rep 259, Decision No. 15,315). It is beyond dispute that respondent's disclosure was intentional, as respondent admits that he wrote the article and submitted it for publication. The record further supports a finding that respondent intentionally disregarded his legal duty to safeguard confidential material, thus acting with a wrongful purpose (see People ex rel. Light v. Skinner, 37 AD 44; Application of the Bd. of Educ. of the Elmont Union Free School Dist., 48 Ed Dept Rep 29, Decision No. 15,783; Application of Nett and Raby, 45 id. 259, Decision No. 15,315; cf. Application of Scala, 31 Ed Dept Rep 159, Decision No. 12,604 [holding that disclosed information was not confidential but that, even if it was, the board member's remarks "were made extemporaneously, in the midst of an uproar created by the announcement of the superintendent's resignation" and there was no indication that such remarks were made with a wrongful purpose]).

[14] Given this conclusion, I need not address whether the information disclosed by respondent regarding collective negotiations with the BTF also included confidential information covered by the attorney-client privilege.

At the outset, I reject any contention that respondent justifiably relied upon the Committee on Open Government's more restrictive definition of the term confidential information. While the legislature has provided the Committee on Open Government with the authority to issue advisory opinions regarding the Freedom of Information Law, Open Meetings Law and Personal Privacy Protection Law, the authority to define confidential information within the public school system rests solely with the Commissioner of Education (see Public Officers Law §§89, 93, 109; Komyathy v. Bd. of Educ. of Wappinger Cent. School Dist. No. 1, 75 Misc2d 859). As noted above, Application of Nett and Raby explicitly and unequivocally rejected the Committee on Open Government's interpretation of the phrase "confidential information" (45 Ed Dept Rep 259, Decision No. 15,315). Indeed, as noted herein, in a field memorandum dated December 9, 2005, the State Education Department's Counsel and Deputy Commissioner for Legal Affairs notified school personnel, including school board members, about the Nett and Raby decision and expressly indicated that the Commissioner's decision differed from the interpretation offered by New York's Committee on Open Government. That memorandum also explained that a "willful failure by a school board member to comply with the Commissioner's decision [in Nett and Raby] is a basis for removal ... under Education Law §306." Subsequent decisions have affirmed that Nett and Raby remains good law (see e.g. Application of Powell, 50 Ed Dept Rep, Decision No. 16,216; Application of the Bd. of Educ. of the Elmont Union Free School Dist., 48 id. 29, Decision No. 15,783). Thus, it is not reasonable for respondent to disregard the Commissioner's interpretation of the term "confidentiality" and to instead rely on the Committee on Open Government's interpretation of such term, which the Commissioner rejected over 11 years ago (see Education Law §2559 ["[w]ilful disobedience of any lawful requirement of the commissioner of education, or a want of due diligence in obeying such requirement ... is cause for removal"]).[15]

Moreover, the board explicitly informed respondent of his duties regarding confidential information prior to respondent's publication of the January 5, 2017 Artvoice article. The record reflects that, after his election to

[15] I additionally note that respondent is an attorney licensed to practice law in New York State.

the board in May 2013, respondent attended a training session sponsored by the New York State School Boards Association ("NYSSBA"). Board member Theresa Harris-Tigg, who also attended the training with respondent, testified that participants were informed of their legal duty to safeguard confidential information from executive session. Participants in the training also received a written outline which included a section entitled "Duty of Confidentiality" stating that:

> According to the commissioner of education, matters discussed in a lawfully convened executive session are confidential and their disclosure constituted a violation of the General Municipal Law's prohibition as well as a violation of a school board member's oath of office, which subject a school board member to removal from the board.[16]

(Joint Ex. 11A at p. 10).

Additionally, at the time of respondent's January 5, 2017 disclosure, relevant provisions of the board's policies prohibited board members from disclosing confidential information obtained in the course of his or her duties. Board Policy 1311, the School Board Member Code of Conduct, requires board members to "[r]efrain from disclosing confidential information acquired in the course of [their] official duties and from using such information to further [their] personal interests" (Joint Ex. 1A). Board Policy 6110, the Code of Ethics for Board Members and Employees of the Buffalo City School District, contains a similar prohibition (see Joint Ex. 9A). Therefore, I find that the board apprised respondent of his legal responsibilities such that respondent acted knowingly and wilfully in his subsequent improper disclosure of confidential information (see Application of Jones, et al., 55 Ed Dept Rep, Decision No. 16,823; Application of Simmons, 53 id., Decision No. 16,596; Application of

[16] I find that the quoted sentence from the NYSSBA outline, to which the parties stipulated and which was entered as a joint exhibit, accurately summarizes the law regarding confidential information in the public school context.

Malgieri, et al., 52 id., Decision No. 16,482 [violation of board policies is relevant to whether an act was wilful]).

Respondent's testimony at the hearing concerning such legal responsibilities was evasive and demonstrated a lack of regard and appreciation for his responsibilities as a member of a board of education. For example, when asked if he was governed by the board's policies, respondent answered: "I'm governed by it to the extent that I don't disagree with it" (Jun. 27, 2017 Tr. p. 297). Respondent further testified that he "may have" been reading the newspaper for a portion of the NYSSBA training, and when asked if he was paying attention during the training testified: "I don't remember the circumstances" (Jun. 27, 2017 Tr. p. 279). Respondent declined to answer whether he was aware of any board policy prohibiting the disclosure of confidential information, testifying that while he was "responsible to be aware of it," he was "[n]ot specifically" aware of such a policy when he wrote the January 5, 2017 Artvoice article (Jun. 27, 2017 Tr. p. 283). Weighing all of the evidence in the record, any suggestion by respondent that he was unfamiliar with a board member's duties is not credible.

I am also unpersuaded by respondent's contention that he was justified in disclosing confidential information in the January 5, 2017 Artvoice article because he acted in good faith to fulfill his perceived duty to "keep [his] constituents informed of what [he] believe[d] to be a scheming and rigging of a contract" (Jun. 27, 2017 Tr. p. 296). First, despite being afforded ample opportunities, respondent has not pointed to any statute, regulation or case law which supports his argument that he may disclose the confidential information at issue. Moreover, his contention is undermined by the evidence in the record that he considered drafting the January 5, 2017 Artvoice article - which was drafted and published more than two months after the BTF contract was approved by the board and ratified by the BTF membership - only after specifically invited to do so in response to the reaction to his December 23, 2016 Artvoice comments.

Accordingly, I find that the evidence in the record established that respondent's disclosure of confidential information described above was wilful.

2. Crime or Fraud

Similarly, the record does not support respondent's argument that he disclosed confidential information to expose criminal or fraudulent behavior. As noted above, the Commissioner has recognized that it may be justifiable for a board member to disclose confidential information to a District Attorney, the Attorney General or another appropriate law enforcement authority in response to suspected criminal or fraudulent activity (Application of Nett and Raby, 45 Ed Dept Rep 259, Decision No. 15,315). Respondent testified, however, that he has not filed a complaint with any state or local investigative or law enforcement agency, including the police, the comptroller, or the ethics board for the City of Buffalo. Respondent's admitted failure to refer the matter to any investigatory or law enforcement agency belies his assertions and prohibits him from seeking refuge within the narrow crime or fraud exception.

Having found that respondent committed a wilful violation of law warranting his removal from office pursuant to Education Law §§306 and 2559, I will address respondent's claimed defenses.

D. Respondent's Defenses

In his verified answer, respondent listed 32 "Affirmative Defenses." Respondent, however, did not submit evidence supporting several of these defenses with his answer, did not raise or address several of these defenses at the hearing, in his post-hearing brief, or in his reply to petitioner's post-hearing brief, even after petitioner specifically addressed each defense in its post-hearing brief. Under these circumstances, respondent has waived, abandoned or otherwise failed to establish all defenses which are not expressly addressed herein (see Appeal of Kenton, 54 Ed Dept Rep, Decision No. 16,649; Application of Simmons, 53 id., Decision No. 16,596; see also Woods v. Design Ctr., LLC, 42 AD3d 876, 878 ["[D]efendant did not address in Supreme Court or on appeal the issue.... We therefore conclude ... that defendant conceded" the issue]; New York Commercial Bank v. J. Realty F Rockaway, Ltd., 108 AD3d 756, 757 ["the defendants never raised that affirmative defense in their opposition papers and, thus, by their failure to do so, waived it"]; Polite

v. Goord, 49 AD3d 944 ["Although petitioner arguably raised the issue of substantial evidence in the petition ..., he has since abandoned this claim by not raising it in his brief"]).

1. Violation of the Open Meetings Law

First, respondent argues that he permissibly disclosed confidential information which he acquired during the October 12, 2016 executive session because the board failed to properly enter executive session in accordance with the procedure set forth in the Open Meetings Law. This claim falls outside of my jurisdiction and was not presented to a court of competent jurisdiction in a timely manner.

Respondent acknowledges in his post-hearing brief that "the Commissioner typically will not declare an executive session to be void," but urges that, because the question of whether this session was properly convened is an "essential element" in this matter, "in this instance it is necessary" for me to do so. However, Public Officers Law §107 vests exclusive jurisdiction over complaints alleging violations of the Open Meetings Law in the Supreme Court of the State of New York, and it is well established that alleged violations thereof may not be adjudicated in an appeal to the Commissioner pursuant to Education Law §310 or an application for removal pursuant to Education Law §306 (Appeal of McColgan and El-Rez, 48 Ed Dept Rep 493, Decision No. 15,928; Applications and Appeals of Del Río, et al., 48 id. 360, Decision No. 15,886; Application of Schenk, 47 id. 375, Decision No. 15,729; Application of T.D., 41 id. 157, Decision No. 14,646; see also Dombroske v. Bd. of Educ. of the West Genesee Cent. School Dist., 118 Misc2d 800, 801 ["The commissioner ... has ruled and properly so that he has no authority to declare void any action taken in violation of the Open Meetings Law, and that such a declaration must be sought in court by an Article 78 proceeding."]). Therefore, I have no jurisdiction to address the Open Meetings Law allegations raised by respondent herein.

Moreover, there is no evidence that respondent, or anyone else, has ever challenged the legality of the October 12, 2016 executive session before a court of competent jurisdiction within the applicable statute of limitations. Public Officers Law §107(1) permits any

aggrieved person to challenge compliance with the Open Meetings Law via a proceeding pursuant to Article 78 of the Civil Practice Law and Rules ("Article 78"), and the statute of limitations for such a proceeding is four months from the date that the determination to be reviewed becomes final and binding upon the petitioner (see N.Y. CPLR §217[1]). With respect to an action taken at executive session, the statute of limitations in an Article 78 proceeding accrues from the date the minutes of such executive session are made available to the public (Public Officers Law §107[3]). Therefore, any such challenge to the October 12, 2016 executive session at this time would be barred by the applicable statute of limitations.

Although I have concluded that I do not have jurisdiction over respondent's arguments in this regard, I note that, upon review of the record, the purpose of the October 12, 2016 executive session was abundantly clear. In a video recording of the public portion of the October 12, 2016 board meeting, the president of the BTF and "Mr. Peter Appleby from Albany" (Joint Ex. 16 at p. 1) delivered separate presentations, approximately seven minutes each, identifying the union's position on the BTF contract (Joint Ex. 25). The BTF president indicated that the union and the district had "narrowed the gap" in contract negotiations and that he attributed such success to the superintendent's efforts (Joint Ex. 25).

Following these presentations, a disagreement arose between board member Lawrence Quinn and other members of the board as to whether it was permissible for Mr. Quinn to comment on the BTF's presentation during the public portion of the meeting. The board's then-general counsel opined that Mr. Quinn's comments should be reserved for executive session. The superintendent agreed, stating that "we will bring you up to date in executive session as to where we are with negotiations" (Joint Ex. 25). The board then proceeded to discuss other matters.

Later in the meeting, the board president requested "a motion to go into executive session to discuss matters of negotiations," which was made by board member Lawrence Quinn and seconded (Joint Ex. 25). Following executive session, the board president can be heard on the video recording referencing "a union negotiation matter; a bargaining ... unit negotiation matter" and further stating

that "no action was taken" (Joint Ex. 25).[17] This is consistent with notations in the official board minutes, which indicate that the board went into executive session "to discuss matters of negotiation," and that, following executive session:

> [The board president] stated for the record that the Board met in Executive Session from 7:07 p.m. to 8:57 p.m. and received legal advice and information about a bargaining unit negotiating matter. No action was taken.

(Joint Ex. 16). Therefore, the purpose of this executive session - to discuss collective negotiations under the Taylor Law - was sufficiently specific and would have been readily apparent to those in attendance, including respondent (see Matter of Brander v. Town of Warren Town Bd., 18 Misc3d 477, 487 [holding that the phrase "negotiations and possible litigation" provided "a proper basis for an executive session"]).[18]

2. Retaliation

Next, respondent contends that the board has illegally retaliated against him in violation of the First Amendment, and that the instant removal proceeding is a "pretext" for the board's true motive: to oust respondent for his comments in the December 2016 edition of Artvoice. Respondent further contends that the December 2016 comments were protected speech, and that the board is pursuing the

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[17] The audio does not capture the beginning of the board president's remarks; this appears to have been a recording error.

[18] These facts distinguish the instant matter from a case relied upon by respondent, Doolittle v. Bd. of Educ., No. 81-1942 (Sup. Ct. Chemung Cty., Jul. 21, 1981). In that case, the only evidence in the record regarding the board's invocation of a March 26, 1981 executive session was the word "negotiations," which the court deemed insufficient under the Open Meetings Law, noting that the board "should make it clear that the negotiations to be discussed in executive session involve Article 14 of the Civil Service Law [citations omitted]." In any event, I note that the court in that case did not void any action taken during executive session - relief available only upon "good cause shown" consisting of something more than mere negligence (Public Officers Law §107) - and awarded only prospective, declaratory relief directing the district to comply with the Open Meetings Law as a remedy for such violation (see Matter of Cutler v. Town of Mamakating, 137 AD3d 1373).

instant application solely to punish him for engaging in such speech.

I have long held that an appeal to the Commissioner is not the proper forum to adjudicate novel issues of constitutional law or to challenge the constitutionality of a statute or regulation (Appeal of C.S., 49 Ed Dept Rep 106, Decision No. 15,971; Appeal of J.A., 48 id. 118, Decision No. 15,810; Appeal of Keller, 47 id. 224, Decision No. 15,677), and that a novel claim of constitutional dimension should properly be presented to a court of competent jurisdiction (Appeal of J.A., 48 Ed Dept Rep 118, Decision No. 15,810; Appeal of L.S., 44 id. 142, Decision No. 15,126 [board resolution constituted an impermissible censure, but question of whether board's action violated the federal Constitution by chilling petitioner's First Amendment rights was a novel issue of constitutional law]). Additionally, I note that the First Amendment retaliation framework is ill-suited to the facts presented in the instant proceeding. As petitioner notes, recognition of such a defense would immunize board members who have committed a wilful violation of law from removal if they had happened to engage in protected speech prior to the violation. Additionally, as petitioner notes, respondent's claim of retaliation is the subject of federal litigation filed by respondent on June 14, 2017 in the United States District Court for the Western District of New York which seeks "compensatory and punitive damages [and] affirmative and equitable relief" (Paladino v. Seals-Nevergold et al., No. 1:17-cv-00538-WKS [WDNY Jun. 14, 2017]). Nevertheless, even assuming, arguendo, that respondent's comments in the December 2016 Artvoice magazine constituted protected speech, respondent has failed to prove other elements necessary to sustain a "defense" of First Amendment retaliation and, in any event, the record reflects that petitioner would have sought respondent's removal irrespective of his allegedly protected speech.

For an elected official such as respondent to state a claim for retaliation, he must show that: (1) his actions were protected by the First Amendment; and (2) the board's conduct was in response to that protected activity (Velez v. Levy, 401 F3d 75). Such a claim necessarily also includes analysis of: (3) whether there is a sufficient "causal connection" between the protected activity and the board's conduct; and (4) the capacity in which the board

acted and whether its resulting action can support a First Amendment retaliation claim (id.). Finally, a board may defeat a claim of alleged unlawful retaliation "pursuant to Mt. Healthy City School District Board of Education v. Doyle ..., if [it] can prove that [it] would have taken the same adverse actions in the absence of the protected activity" (Pekowsky v. Yonkers Bd. of Educ., 23 FSupp3d 269, 280 [internal citations omitted]).

Respondent has not proven that he was subjected to "conduct" by the board which could be considered retaliatory. Although the board demanded that respondent resign within 24 hours or face a removal application pursuant to Education Law §306 on December 29, 2016, it is well established that threats of discipline or discharge are not adverse actions which deprive an individual of his or her First Amendment rights (see Perfetto v. Erie Cty. Water Auth., 2006 WL 1888556). Moreover, respondent continued to occupy his position on the board, and respondent has presented no evidence on this record that his right to free speech has been chilled or otherwise impaired. Courts have held that school board members are not subjected to retaliatory conduct if they retain their positions and remain free to express their views (see e.g. Nelson v. Bd. of Educ. of Jamestown City School Dist., 411 FSupp2d 341; see also Curley v. Vill. of Suffern, 268 F3d 65, 73 ["Where a party can show no change in his behavior, he [or she] has quite plainly shown no chilling of his [or her] First Amendment right to free speech"]). Further, the filing of this application did not constitute an adverse action because it merely initiated the removal process (Velez v. Levy, 401 F3d 75, 99 ["though [the board members'] actions ... undoubtedly set into motion [plaintiff's] ouster, those actions cannot ... support a First Amendment retaliation claim."].

Even assuming that petitioner engaged in conduct which may have infringed upon respondent's constitutional rights, the record contains evidence of an intervening causal event - respondent's publication of the January 5, 2017 article - which severed any preexisting causal connection between respondent's speech and the board's conduct (Yarde v. Good Samaritan Hosp., et al., 360 FSupp2d 552, 562 ["In [the Second] Circuit, an inference of causation is defeated (1) if [an] allegedly retaliatory discharge took place at a temporal remove from the protected activity; or (2) if

there was an intervening causal event that occurred between the protected activity and the allegedly retaliatory discharge" [emphasis added]). As noted above, the board held a meeting on December 29, 2016 where various board members and individuals from the community denounced the comments respondent published in the December 2016 Artvoice article. The board also adopted a resolution which demanded that respondent resign within 24 hours or the board would initiate a removal application pursuant to Education Law §306. After respondent did not resign, on January 4, 2017 petitioner voted to retain outside counsel.

On the next day, January 5, 2017, respondent published the Artvoice article which disclosed confidential information from the October 12, 2016 executive session, which had taken place two and one-half months prior. The board had no prior notice that respondent was drafting or intended to publish this article. Thus, while the board may have initially intended to seek respondent's removal for the speech contained in the December 2016 Artvoice article, the publication of the January 5, 2017 Artvoice article provided a new, independent ground for seeking respondent's removal. Following respondent's January 5, 2017 disclosures, the board authorized the instant petition on January 18, 2017 in a 6-3 vote.[19] Thus, any causal link that may have existed between the board's alleged retaliatory motive and its filing of the petition was severed by respondent's January 5, 2017 disclosures (see Yarde v. Good Samaritan Hosp., et al., 360 FSupp2d 552).

Additionally, even if respondent had proven that the board engaged in conduct which infringed his constitutional rights as well as an unbroken chain of causation between his speech and such action, the record reflects that petitioner would have sought respondent's removal irrespective of his allegedly protected speech (see Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 US 274). According to the record, there was one prior incident in recent years in which Jason McCarthy, a former member of the Board of Education of the City School District of the City of Buffalo, allegedly disclosed confidential information which he acquired in executive

[19] To the extent respondent continues to argue that the board did not properly authorize the instant petition, I find that respondent has failed to establish any legal infirmities which would support nullification of the board's action.

session. In response to that disclosure, members of the board, including current board president Seals-Nevergold and board members Harris-Tigg and Belton-Cottman, filed an application pursuant to Education Law §306 for Mr. McCarthy's removal (see Application of Johnson, et al., 56 Ed Dept Rep, Decision No. 17,055).[20] Indeed, board member Lawrence Quinn, called as a witness by respondent, testified:

> [S]ince I have been on the board, it is always threats to remove people. The first meeting I had there was a meeting to remove Jay McCarthy, and a past motion to remove [another individual].

(Jun. 27, 2017 Tr. p. 62).

Moreover, the board president, whose testimony I credit, testified that she "[a]bsolutely" would have brought "the very same petition" regardless of whether respondent had published the December 2016 Artvoice comments (Jun. 22, 2017 Tr. p. 289). On this record, I am persuaded that petitioner would have taken the same action irrespective of the allegedly protected speech (Murphy v. City of Rochester, 986 FSupp2d 257, 276 ["The Second Circuit has explained that 'even if there is evidence that the adverse employment action was motivated in part by protected speech, the [defendant] can avoid liability if it can show that it would have taken the same adverse action in the absence of the protected speech'" [citations omitted]).[21]

I acknowledge that the record contains conflicting evidence regarding the board's motivation in bringing the

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[20] I denied this application as moot and noted that I would have denied the application for lack of personal service and on other procedural grounds.

[21] Moreover, to the extent I am ordering respondent's removal from office, I have not considered the substance of respondent's comments published in the December 2016 edition of Artvoice magazine. I have only considered respondent's publication of such comments to the extent necessary to address his asserted retaliation defense - i.e., to assume for the sake of such defense that the comments constituted protected speech. While the substance of the comments is irrelevant to the issue of whether respondent committed a willful violation, nothing herein should be construed as condoning such comments, which respondent's own counsel characterized during the hearing as "offensive and low."

instant removal application. As noted above, board president Seals-Nevergold testified that she "[a]bsolutely" would have brought "the very same petition" irrespective of respondent's December 2016 Artvoice comments (Jun. 22, 2017 Tr. p. 289). Conversely, board member Patricia Pierce testified that, at the January 18, 2017 board meeting, Sharon Belton-Cottman said to her: "we can't get him on this, but we will get him on that" (Jun. 26, 2017 Tr. pp. 213-14, 230). Ms. Pierce testified that she interpreted this statement to mean that, although the board was legally precluded from removing respondent for the December 2016 Artvoice comments, it could nevertheless effectuate his removal for disclosing confidential information.[22]

Tellingly, however, respondent has disclaimed any notion that the board is seeking his removal as retaliation for the December 2016 Artvoice comments. In an Artvoice article published on January 14, 2017, respondent coined the term "Antis," which he defined as the "hapless, half-witted, progressive School Board majority, the self-loving [president of the BTF] and their gang of loonies and haters." Respondent proceeded to write:

> The reality is that my controversial choice of words in an Artvoice survey is not relevant to the real reasons that the hate-filled Anti's [sic] want me off the Board. They want me removed because no one else will take the time and effort required to expose their rigging of the teachers' contract, the fight for justice in the [former contractor's] swindling of the district in the Joint Schools Construction Project fiasco, or to oppose their other chicaneries.

Respondent offered a similar explanation during his testimony at the hearing. In response to the question: "Why do you think we are here?" respondent replied, in pertinent part:

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[22] I note that, during her testimony at the hearing, Ms. Belton-Cottman, was not questioned regarding this statement.

> [P]eople with very deceptive and diabolical agendas have controlled our education system for a long time.... So I began to expose that right from the beginning. I formed my own agenda. I had my own agenda at the meetings.... They fought me all the way on every question I had. They denied me sessions. They denied me an opportunity to even read out loud my motions, all because they didn't want to - they didn't want anybody exposing the underbelly of the beast (Jun. 27, 2017 Tr. p. 232).

Respondent's admission that the board is seeking his removal based upon a perceived long-standing aversion to his policies or agenda severely undercuts his assertion that the board is retaliating against him for the December 2016 Artvoice comments. Therefore, the totality of evidence in the record establishes that petitioner would have sought respondent's removal regardless of the December 2016 Artvoice comments.

Based on the foregoing, the record does not support respondent's claim of retaliation.

3. Matter of Public Interest or Concern

Finally, respondent contends that his disclosure of information from the October 12, 2016 executive session was justified because disclosure of the board's alleged wrongdoing was a matter of public interest or concern. This, however, is not a defense to a disclosure of confidential information under General Municipal Law §805-a. While issues discussed in executive session are very likely to be of interest to the public, the Public Officers Law permits limited topics to be discussed in executive session, and General Municipal Law §805-a(1)(b) prohibits the disclosure of confidential information gleaned from such sessions. There is no evidence that the legislature intended to grant individual board members license to disclose confidential information that is of public interest or concern, and I decline to read such an exception into the statute. Board members remain free to

discuss issues of public concern, but must do so without revealing confidential information.

Respondent cites Appeal of Henning and Rohrer, 33 Ed Dept Rep 232, Decision No. 13,035 for the proposition that "[c]ertain information discussed in an executive session may instead be a matter of public interest not subject to confidentiality restraints" (Resp. Post-Hr'g Br. at p. 19). Respondent's reliance upon Appeal of Henning and Rohrer is misplaced. In that case, a member of a board of education wrote a letter to several local newspapers complaining that "a number of board members ... meet privately, vote as a bloc, meet outside the district [and] favor a particular candidate personally known to a board member." Petitioners, two fellow board members, alleged that the letter disclosed confidential information from executive session.

The Commissioner held that petitioners failed to meet their burden to show that the information in the letter came from an executive session. The Commissioner further held that the information disclosed in the letter "[wa]s not confidential information, but rather a matter of public interest." Thus, the information in that case was not, in fact, confidential. This distinguishes the matter from the instant appeal, which involves petitioner's internal deliberations concerning a collective negotiation under the Taylor Law, which I have found to be confidential.[23]

While respondent takes the position that the allegations contained in his January 5, 2017 article are of serious concern, respondent had several avenues available to him to address such concerns other than disclosing confidential information from the October 12, 2016 executive session.[24] For example, he could have initiated an appeal pursuant to Education Law §310 as a person aggrieved by the board's alleged illegal conduct.[25] Or, as noted above, were he concerned that the board's actions

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[23] Additionally, Appeal of Henning and Rohrer was brought pursuant to Education Law §310 and did not seek a board member's removal pursuant to Education Law §306.

[24] I express no opinion herein about the appropriateness of the resulting BTF contract.

[25] Indeed, respondent has demonstrated his ability to utilize this process (see Application of Paladino, 53 Ed Dept Rep, Decision No. 16,595; Application of Paladino, 53 id., Decision No. 16,594).

were criminal in nature, he could have referred the matter to an appropriate law enforcement agency for investigation. However, respondent chose, instead, to unilaterally disclose confidential information to the public through a media article.

To sanction respondent's behavior would allow each individual school board member to decide what information is confidential, and whether it should be released to the public. The law cannot tolerate such conduct. As respondent put it, ideally "the discussion of the board becomes one mind. And just like a jury ... those people become one" even as they "argue [and] they debate" (Jun. 27, 2017 Tr. p. 204). Respondent's disclosure of confidential information betrayed this synergistic ideal and eroded the trust which is the foundation of any successful organization. Without confidence that its members will abide by the law, boards of education are reduced to mere assemblages of individuals no greater than the sum of their parts. As explained in Nett and Raby, "[a] single board member cannot be allowed to undermine the effective functioning of a school board by unilaterally disclosing information properly discussed in executive session" (45 Ed Dept Rep 259, Decision No. 15,315).

4. Request for Certificate of Good Faith

One final matter remains. In his reply to petitioner's closing brief, respondent requests that I grant him a certificate of good faith pursuant to Education Law §3811(1). However, Education Law §3811(1) does not provide for reimbursement of legal expenses incurred to defend "a criminal prosecution or an action or proceeding brought against ... [a board member] by a school district ... including proceedings before the commissioner of education...." Respondent, therefore, is not entitled to a certificate of good faith because the application for removal was brought by the school district of which he was an officer (see Application of the Board of Education of the Kings Park Central School District, 52 Ed Dept Rep, Decision No. 16,422; Application of the Board of Education of the Brentwood Union Free School District, 48 id. 12, Decision No. 15,777; Application of the Board of Education of the West Babylon Union Free School District, 21 id. 41, Decision No. 10,592). Accordingly, respondent's request for a certificate of good faith must be denied.

VI. Conclusion

The record demonstrates that respondent disclosed confidential information regarding collective negotiations under the Taylor Law which he gained in the course of his participation as a board member in executive session, and that his disclosures constituted a wilful violation of law warranting his removal from office pursuant to Education Law §§306 and 2559 (Application of Nett and Raby, 45 Ed Dept Rep 259, Decision No. 15,315; Appeals of Hoefer, 45 id. 66, Decision No. 15,263; cf. Applications of Balen, 40 id. 250, Decision No. 14,474; Application of Nett and Raby: Disclosure of Confidential Information From Executive Session, SED Office of Counsel, Dec. 9, 2005, available at http://www.counsel.nysed.gov/memos/nett).

THE APPLICATION IS SUSTAINED.

IT IS ORDERED that respondent CARL PALADINO be, and he hereby is, removed from the office of member of the Board of Education of the City School District of the City of Buffalo.

IN WITNESS WHEREOF, I, MaryEllen Elia, Commissioner of Education of the State of New York, for and on behalf of the State Education Department, do hereunto set my hand and affix the seal of the State Education Department, at the City of Albany, this 17th day of August 2017.

Commissioner of Education