



State of New Jersey

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SCHOOL ETHICS COMMISSION

September 24, 2024

For Public Release

Subject: Public Advisory Opinion A11-24

The School Ethics Commission (Commission) received your request for an advisory opinion regarding a member of the Board of Education (Board). You verified that you copied the Board member, the subject of your request, thus complying with *N.J.A.C. 6A:28-5.2(b)*. The Commission notes that the Board member submitted a response to your request, and therefore, the Commission will issue its advice based on the information included in your request, as well as the information detailed in the Board member's response. The Commission's authority to issue advisory opinions is expressly limited to determining whether any prospective conduct or activity would constitute a violation of the School Ethics Act. *N.J.S.A. 18A:12-31*. Pursuant to *N.J.S.A. 18A:12-28(b)*, your request was preliminarily discussed by the Commission at its Advisory Opinion Committee meeting on September 11, 2024, and again at its regularly scheduled meeting on September 24, 2024.

You inform the Commission that the Board member was elected to the Board in November 2022, and subsequently accepted employment with a law firm in the summer of 2023. You note that prior to the Board member's employment, the law firm was representing the Board member and another District employee in their lawsuits against the District. You further note, the Board member's lawsuit, which was filed in federal court, was "seeking indemnification for attorney's fees"; however, the Board member later "dismissed" the matter. You indicate that the Board member "has acknowledged conflicts of interest in these matters and has excused [themselves] from executive session conversations involving both cases."

You state that you are concerned that the Board member's "involvement in choosing any appointed Board [m]embers creates an unwarranted privilege for both" the Board member and the law firm because it enables the Board member "to influence who would vote on settlements that benefit [the Board member] and [the Board member's] employer." You further state that the Board member "has participated in [the] interviews for the candidates to fill the Board vacancy, which were held in executive session, which gave [the Board member] access to information not generally available to members of the public." You note, "Given [the Board member's] personal stake in the outcome of these matters, [the Board member's] vote to fill the vacant Board seat could be perceived as using [his/her] position for personal gain." You further note that the Board "will be voting on filling the Board vacancy at [the] September 22, 2024, meeting."

Based on the information provided in your request, you seek to determine whether the Board member has a conflict under the School Ethics Act (Act), *N.J.S.A. 18A:12-21 et seq.*, which would prohibit the Board member from “voting on a candidate to fill a Board vacancy where [the Board member] is currently suing the [D]istrict and the newly appointed Board member would have the ability to vote on matters impacting the outcome of that litigation” and from “voting to fill a Board [v]acancy where the Board member is employed as an attorney by a law firm with matters pending against [the District]” at the Board’s meeting on September 22, 2024.

Following submission of your request, the Board member submitted a response initially indicating that the request should be denied because “(1) the [requests for advisory] opinions [(A11-24 and *Advisory Opinion A12-24*)] relate to litigation pending before the Commissioner of Education, (2) the [requests for advisory] opinions relate to conduct which has occurred in the past, and (3) previous public advisory opinions sufficiently address the question raised in the requests.”

The Board member provides, “This matter originates from the *ultra vires* actions of the Board in March 2023.” More specifically, according to the Board member, in March 2023, “the Board, under the leadership of then Vice President, instigated an *ultra vires* usurpation of the Commission’s authority, ultimately putting [the Board member] on trial and convicting [the Board member] for alleged violations of the School Ethics Act” Consequently, the Board member petitioned “the Commissioner of Education to declare the Board’s actions *ultra vires*, vacate the Board’s resolution against [the Board member], and grant indemnification for [the Board member’s] defense against the Board’s actions.” The Board member further provides at that same time, another District employee “initiated a separate action against the Board” and was being represented by the same law firm. The Board member notes when he/she became aware that the employee was represented by the law firm, the Board member “physically recused [] from all [e]xecutive [s]ession discussions related to both [cases].” The Board member maintains that he/she has “never been privy to any information related” to the other District employee’s case “that is not available to the general public and never participated in [e]xecutive [s]ession related to [the other employee’s] litigation.” Moreover, the Board member requested, and the law firm certified, that the Board member “was walled off from computer access, discussion and/or work related to [the employee’s] case, just as [the Board member] was walled off from that case in [his/her] role as a Board member.”

Before more fully responding to your inquiry, the Commission believes it is necessary to address various concerns noted in your request, as well as the Board member’s response thereto. First, the Commission notes that it (the Commission) is the only body that can determine whether a school official has violated a provision of the Act. No other entity, including a board of education, has the authority to find a violation of the Act and/or to impose a penalty for any purported violation of the Act. In a similar vein, the legislature has already prescribed the boundaries and language of the Act, and no other entity, including the Commission, can expand or restrict its terms.

Next, the Commission recognizes that there is a matter pending before the Commissioner of Education, as well as multiple ethics complaints pending before the Commission; however, it is unclear, based on both submissions, whether the matter that was filed in federal court is still pending. Nonetheless, the questions posed in this request do not appear to be related to the pending matters, but rather concern the Board member’s employment with the law firm and whether due to that employment, the Board member can vote on a candidate to fill a Board vacancy.

Last, the Commission notes requests for advisory opinions must clearly set forth in detail the specific conduct or activity that the school official seeks to undertake, and the exact role the official will play in that activity or conduct. *N.J.A.C. 6A:28-5.2(a)*. In short, the conduct which is the subject of a request for an advisory opinion *must be prospective*. It appears, based on your request, that the Board member has already “participated in interviews for the candidates to fill the Board vacancy.” Additionally, according to the Board member’s submission, the Board “already voted” on August 19, 2024, to fill the vacancy, but the “vote was split 4-4,” resulting in the need for another vote at the September 22, 2024, Board meeting. Accordingly, your request for an advisory opinion should have been submitted prior to the initial vote, not after the Board “was split” and a second vote became necessary.

Notwithstanding the above, both your request and the Board member’s response thereto, noted that the Board member has recused “from executive session conversations regarding both cases” as a Board member, and therefore, despite your concerns, it appears that the Board member is already taking the necessary precautions regarding matters related to the Board member’s employer. Moreover, the law firm has certified that the Board member is “walled off” from all information related to both matters.

Therefore, the Commission recognizes the Board member’s efforts to “excuse[] [themselves] from executive session conversations regarding both cases,” and based on the specific facts provided in your request, as well as the Board member’s response, the Commission advises the Board member would not violate the Act if the Board member were to continue to participate in the discussion and/or votes related to a candidate who is being considered to fill a Board vacancy. The Commission further advises the Board member should continue to recuse from any and all future matters concerning the employer and/or all discussions and votes concerning any legal advice/assistance that the employer could potentially provide to a District employee.

The Commission notes that the Board member, as well as any other Board member, may choose a candidate for the Board who may have expressed agreement with, or may hold the same views and interests that they have. Each Board member, including the subject Board member, is permitted as an individual, and as a Board member, to hold views aligned with another Board member and their goals, and those facts alone would not bar the Board member from voting for an individual to fill a Board vacancy. Absent any additional information indicating otherwise, the Board member cannot be assumed to “influence who would vote on settlements that benefit [the Board member] and [the Board member’s] employer.” Nonetheless, when participating in matters related to the selection of a candidate to fill a vacancy on the Board, the Board member is reminded that they must **always** be objective and exercise independent judgment, and must not allow the previous and/or pending matters to impact their decision making as a Board member.

While there is no presumption of a conflict of interest based on the facts and circumstances presented in your request, the Commission cannot determine if a future conflict involving the Board member **may** present itself, or if one of a different nature may develop, but is unknown to the Board member, the Commission, and/or Board counsel at this time.

Finally, as a reminder, school officials must always be cognizant of their responsibility to protect the public trust, to honor their obligation to serve the interests of the public and the Board, and to periodically reevaluate the existence of potential conflicts of interest. In addition, the only way for a

school official to truly safeguard against alleged violations of the Act is to avoid any conduct which could have the appearance, actual or perceived, of being in violation of the Act.

Sincerely,

Robert W. Bender, Chairperson
School Ethics Commission