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October 28, 2015

FOR PUBLIC RELEASE

SUBJECT: Advisory Opinion—A16-15

The School Ethics Commission (Commission) is in receipt of your request for an advisory opinion on behalf of the Board of Education (Board). You have verified that you copied the Board members, who are the subjects of this request, thus complying with N.J.A.C. 6A:28-5.2(b). The Commission notes that these Board members did not submit comments and, therefore, the Commission will provide its advice based solely on the information included in your request. The Commission's authority to issue advisory opinions is expressly limited to determining whether any proposed conduct or activity would constitute a violation of the School Ethics Act. N.J.S.A. 18A:12-31.

You inform the Commission that seven (7) members of the nine (9) member Board have relatives employed by the District *or* who are members of the NJEA in other districts. The nature of the relationships are as follows:

- 1) A daughter who sporadically works as a per diem substitute in the District;
- 2) A wife who is a member of the NJEA and a teacher in the District;
- 3) An aunt who is a member of the NJEA and a teacher in the District;
- 4) A sister who is a member of the NJEA but works in another district;
- 5) A wife who is a member of the NJEA and a teacher in the District;
- 6) A wife and a daughter who are members of the NJEA; the wife is a secretary in the District and the daughter is a teacher in the District; and
- 7) A daughter who is a member of the NJEA but works in another district.

In-District Relatives

With respect to the conflicts of Board members based upon relatives being employed by the District, those conflicts apply to any matter touching upon the relatives' employment, including negotiations with the local bargaining unit of which the relative is a member or, if not a member, who receives the benefits of the bargaining. (i.e. a teacher who declines to be in the local union but nonetheless receives the same contract negotiated by the union.) In addition, this

conflict also means the Board member may not be involved in the hiring or evaluation of the Superintendent, and any other officials or staff members who oversee the relative.

Out-of-District Relatives

Given the recent level of interest in out-of-district conflicts for school officials¹ under the School Ethics Act (Act), N.J.S.A. 18A:12-21 et seq., the School Ethics Commission (Commission) has determined to review the issue in greater depth. It offers the following guidance to assist school officials in analyzing this issue.

In its review, the Commission must first consider the purpose of the Act and those protected by its authority. In adopting the School Ethics Act, the Legislature found:

[I]t is essential that the conduct of members of local boards of education and local school administrators hold the respect and confidence of the people. These board members and administrators must avoid conduct which is in violation of their public trust or which creates a justifiable impression among the public that such trust is being violated. N.J.S.A. 18A:12-22(a).

It is essential that each set of circumstances be viewed from the perspective of what the reasonable members of the public might perceive as a Board member's attempt to benefit himself, his immediate family or others, which includes relatives. If a Board member's conduct violates the public trust or creates a justifiable impression that its trust has been breached, then that conduct violates the Act.

Second, the Commission must examine the nature of the relationship between the Board member and the individual to determine whether there is a conflict sufficient to require the member to recuse from matters dealing with that individual and to abstain from any vote involving that person, singularly or as a member of a class.

The applicable provision of the School Ethics Act, N.J.S.A. 18A:12-24(b), prohibits a school official from using or "attempting to use his official position to secure unwarranted privileges, advantages or employment for himself, members of his immediate family or others." "Member of the immediate family" is defined in the Act as the "spouse or dependent child of a school official residing in the same household." N.J.S.A. 18A:12-23. While "others" is not defined by the Act, the Commission has construed it to be a fact-specific determination based on the relationship between the "other" and the Board member. To add some clarity to this, the Commission has stated on many occasions that "others" includes relatives as defined in the Act, but is not limited to that definition.

¹ N.J.A.C. 6A:28-1.2 defines "school official" as a board member, a member of the board of trustees of a charter school, an employee or officer of the New Jersey School Boards Association, but not including any member of the secretarial, clerical or maintenance staff of the Association, or an administrator of a district board of education or charter school.

“Relative” is defined by the Act as the “spouse, natural or adopted child, parent, or sibling of a school official.” N.J.S.A. 18A:12-23; however, the Department of Education’s fiscal accountability regulations contain a more expansive definition. Those regulations require each district to implement a nepotism policy that contains a definition of “relative” that is consistent with N.J.S.A. 52:13D-21.2(d). N.J.A.C. 6A:23A-6.2(a)(1). Relative is defined in N.J.S.A. 52:13D-21.2(d) as including an individual’s spouse or the individual's or spouse's parent, child, brother, sister, aunt, uncle, niece, nephew, grandparent, grandchild, son-in-law, daughter-in-law, stepparent, stepchild, stepbrother, stepsister, half brother or half sister, whether the relative is related to the individual or the individual's spouse by blood, marriage or adoption. In order to read all of these provisions consistently, the Commission concludes that an individual who meets the definition of “relative” under N.J.S.A. 52:13D-21.2(d) and N.J.A.C. 6A:23A-6.2(a)(1) will be considered to be an “other” under N.J.S.A. 18A:12-24(b). Therefore, a Board member may not use his official position to secure unwarranted privileges, advantages or employment for any individual meeting the definition of relative covered by the nepotism policy required in N.J.A.C. 6A:23A-6.2(a)(1).

Applying these principles to the question presented, it is clear that a Board member may not participate in the negotiations in-district when a relative is a member of the bargaining unit of the same district, see N.J.A.C. 6A:23A-6.2(a)(5). Nor may the Board member participate in negotiations when an immediate family member is a member of the same Statewide union in another district, see N.J.A.C. 6A:23A-6.2(a)(6). The issue addressed here is whether a Board member can participate in negotiations when he has a relative who is a member of the same Statewide union in another district. In other words, the Commission must consider whether participation by a Board member in such negotiations would enable him to use his official position to secure unwarranted privileges, advantages or employment for his out-of-district relative.

The Commission recognizes that because negotiated agreements in one district may be used as precedent to argue for changes to a negotiated agreement in another district, a Board member’s participation in contract negotiations could have an indirect impact and benefit to a relative employed in another district. But the Commission notes that a Board member has no direct influence on how another district may negotiate a contract with its own local bargaining unit. Another district *may* rely on the contract on which a Board member voted, but that in-district Board member has no involvement in the other district’s contract development. Moreover, any suspicion that the Board member is able to advance the cause of an out-of-district family member is further quelled by the enactment of the statewide property tax cap, which limits negotiators on both sides of a contract to how much salary or reimbursement rates may rise. In the Commission’s view, the in-district Board member’s potential to influence contract negotiations in another district is generally too attenuated to assume that it would automatically have the effect of securing unwarranted privileges, advantages or employment for the relative.

Therefore, *without evidence of additional circumstances*, the Commission cannot find that a Board member who has a relative who is a member of the same statewide union in another district violates N.J.S.A. 18A:12-24(b) if he or she were to participate in the negotiations or vote on the contract with the local education association simply because of kinship. Without more

facts, the reach of those familial bonds is too attenuated to effect a distinct benefit, and the impact of that relationship is too speculative to establish a definable gain.

The situation would be different, however, if the activities of the out-of-district relative involve contract negotiations at the same time as the in-district Board member is negotiating in his district. For example, if the relative in the other district were a leader in that district's union affiliate or a member of the negotiations team for that union, it would be more reasonable for a member of the public to believe it possible for the Board member to discuss negotiation strategies with the relative or to provide other information which may lead to a benefit for the relative. In such a scenario, the Commission finds there would be a violation of N.J.S.A. 18A:12-24(b) and the public trust would be breached.

Thus, while the Commission finds that there is no automatic recusal from participation in labor negotiations when a Board member's relative is a member of the same statewide union, the ultimate determination will necessarily turn on the facts for the specific situation. The following factors, **among others**, should be considered:

1. Is the out-of district relative an officer in the NJEA or local education association?
2. Is the out-of-district relative on the negotiating team for that district?
3. Does the out-of-district relative have some other leadership role in his or her union or district which may influence the outcome of negotiations in the other district?

With this understanding, the Commission states that a Board member who has a relative employed by another district would not violate N.J.S.A. 18A:12-24(b) *per se* if he or she were to participate in the negotiations or vote on the contract with the local education affiliate. Additional information, such as suggested above, would be required to determine whether participation in contract negotiations by an in-district Board member would reasonably lead to the securing of unwarranted privileges, advantages or employment in violation of the public trust and N.J.S.A. 18A:12-24(b) as a result of his familial relationship with an out-of district employee.

While the Commission declines to comment on previously issued advisory opinions which involve out-of-district conflicts, it suggests that affected Board members and Board counsel discuss the terms included here within the context of each separate and unique situation. Any previously issued advisory opinions, public or not, involving out-of-district conflicts are hereby duly modified.

Sincerely,

Robert W. Bender, Chairperson
School Ethics Commission