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DEPARTMENT OF EDUCATION
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Acting Commissioner

June 27, 2017

FOR PUBLIC RELEASE

SUBJECT: Advisory Opinion—A19-17

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 on the request, thus complying with N.J.A.C. 6A:28-5.2(b). The Commission notes that no Board member submitted 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 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), the Commission discussed this matter at its April 25, 2017 meeting.

You inform the Commission that the Board, when fully seated, is comprised of seven (7) members. At the time of your request, four (4) of those members have conflicts under the School Ethics Act (Act), N.J.S.A. 18A:12-21 et seq., with the remaining three (3) members serving on the Negotiations Committee (Committee) of the Board to negotiate with the local union affiliates. However, one of the Committee members tendered his resignation to the Board on March 31, 2017, effective immediately. Thus, the Committee was reduced to the two (2) remaining members of the Board who do not have a conflict under the Act. In addition, the Board's overall membership was reduced to six (6) members, and will remain as such until a new individual otherwise meeting the requirements to serve as a Board member is selected by a majority vote of the remaining members of the Board.¹ You state that as of the date of your request (dated April 10, 2017), the Board has yet to take action to fill the vacancy. The Committee, reduced to its two (2) members, includes one member who has been "unable to either attend negotiations sessions on a consistent basis or to participate with the members of the Committee and the administrative and professional staff participating in the negotiations (the Superintendent of Schools, the School Business Administrator and the Board Attorney) as a result of certain professional and personal commitments and circumstances." Thus, per your request, the Committee functionally consists of only one member and, again per your request, "a

¹ N.J.S.A. 18A:12-15(f).

committee of one is not a committee.” Therefore, you pose two (2) questions to the Commission on these circumstances:

1. Whether the Board may, at this time, legally invoke the Doctrine of Necessity in order to permit one, or possibly two, of the Board Members who are presently not on the Negotiations Committee, [due to their conflicts under the Act], to participate in the ongoing negotiations; and
2. Whether the Board may legally invoke the Doctrine of Necessity at this time or, alternatively, whether it should defer invoking the Doctrine of Necessity until a later date, in order to permit the full Board, including those four members of the Board (which is a majority of the Board) who have conflicts, to vote to approve and ratify such Collective Bargaining Agreements as may ultimately result from the three sets of negotiations which are currently ongoing.

The Commission notes that a board of education may invoke the Doctrine of Necessity when a quorum of the board of education has conflicts of interest on a matter required to be voted upon. In other words, if four members of a seven member board of education have conflicts of interest on a matter requiring the majority vote of the full membership, the Doctrine of Necessity may be invoked.

For your first question, the Commission advises that the Board *may not* invoke the Doctrine of Necessity to allow one or more otherwise conflicted Board members to join the Committee because the selection of committee members is not a matter that is required to be voted upon. Stated differently, the Doctrine of Necessity is to be invoked when the board of education is required to vote on a matter and, in this case, the Board is attempting to invoke it in a circumstance that does not warrant its use, i.e., to allow a conflicted Board member to participate in/on a committee that he/she is otherwise conflicted.

The Commission also notes that the two (2) remaining non-conflicted Board members² may obtain the assistance of other individuals in performing its function, including hiring an outside consultant or using the Chief School Administrator or Business Administrator who are already involved in the negotiations. Further, the Commission recommends that in considering candidates to fill the existing vacancy, the Board should take into account whether the candidate has any conflicts that would prevent him/her from serving on the Committee.

As to the second question, the Commission advises that the Board should *wait* to invoke the Doctrine of Necessity until it is necessary, by law, for a majority of the seated Board to ratify the agreement(s) negotiated by the Committee.³

Sincerely,

Robert W. Bender, Chairperson

² The Commission does not consider a non-conflicted Board member’s inability to attend Board meetings or Committee negotiating sessions as relevant to its analysis.

³ The Commission notes that a majority of the vote of the Board is four (4) regardless of whether the Board is fully seated (4/7) or still has one vacancy (4/6) as four votes are required to be a majority of either seven or six votes. Three votes when the Board is reduced to six seats is merely 50%, and a majority vote requires 50%+1.

School Ethics Commission