

January 13, 2012

**FOR PUBLIC RELEASE**

SUBJECT:                   Advisory Opinion—A20-11

Pursuant to your request for an advisory opinion filed on behalf of members of the Board of Education (“Board”), and consistent with its authority under N.J.S.A. 18A:12-28(b), the School Ethics Commission discussed this matter at its December 20, 2011 meeting. Initially, the Commission notes that you properly verified that the Board members whose conduct is the subject of the advisory opinion request were copied on the request, thus complying with N.J.A.C. 6A:28-5.2(b). Because the Board members did not submit comments, the Commission bases its advice on the facts 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 (“Act”). N.J.S.A. 18A:12-31.<sup>1</sup>

You have stated that the Board is preparing to commence contract negotiations with the Education Association (“Association”), which is a local chapter of the New Jersey Education Association (“NJEA”). You indicate that the Board consists of seven members. You have provided the following information as to six of the members:

- Member A is prohibited from participating in both the negotiations and the vote on the collective bargaining agreement (CBA) because his spouse is employed in the District and is a member of the Association. See, Advisory Opinion A01-93 (October 26, 1993).
- Member B, Member C and Member D are all employed in other districts and are members of the NJEA. Therefore, in accordance with Advisory Opinion A14-00 (November 28, 2000), these Board members may not participate in the negotiations with the Association or in any closed session discussions prior to signing the MOA. They may, however, vote on the agreement after the memorandum of agreement (MOA) is struck. See, Advisory opinion A34-07 (February 26, 2008).

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<sup>1</sup> As such, the Commission specifically notes that it cannot reconcile any potential conflicts with its interpretation of the Act, as against the Accountability Regulations, N.J.A.C. 6A:23-1.1 *et seq.*

- Member E and Member F are without any conflicts. These two members will serve on the negotiations team.

You have asked: (1) Whether Member G may participate in either the negotiations phase or the subsequent vote on the approval of the CBA, after the MOA is struck. In this connection, you state that Member G has two children who are currently employed as teachers in other school districts and who are members of the NJEA. Neither child lives with the Board member; both are financially independent; (2) Whether the Board may (or should) invoke the Doctrine of Necessity with respect to its upcoming negotiations phase with the Association; and (3) Whether the Board may (or should) invoke the Doctrine of Necessity in its Post MOA/voting phase on the CBA. Each question is addressed below.

The Commission agrees that this matter implicates N.J.S.A. 18A:12-24(c), which provides:

No school official shall act in his official capacity in any matter where he, a member of his immediate family, or a business organization in which he has an interest, has a direct or indirect financial involvement that might reasonably be expected to impair his objectivity or independence of judgment. No school official shall act in his official capacity in any matter where he or a member of his immediate family has a personal involvement that is or creates some benefit to the school official or member of his immediate family;

### The Status of Member G

Member G's children, because they are not dependent, do not fall within the definition of "immediate family members." Rather, these adult children are "relatives" under the Act. See, N.J.S.A. 18A:12-23. In Advisory Opinion A23-94 (January 23, 1996), the Commission determined that a Board member may *vote* on the collective bargaining agreement when the board member has a child or son-in-law who is a member of the same statewide general union, but not a member of the local bargaining unit.<sup>2</sup> Later, in Advisory Opinion A19-05 (July 22, 2005), the Commission determined that a Board member whose *sister* is a teacher in another school district and a member of the statewide general association may participate in negotiations with the local education association. The Commission advised:

In applying the standard of what "might reasonably be expected to impair objectivity," the Commission must determine whether the public might reasonably perceive that the board member's objectivity is impaired by his relationship to a sister who teaches in another school district, is not a member of the local bargaining unit,

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<sup>2</sup> At the time the advisory was issued, N.J.S.A. 18A:12-24(c) read: "No school shall act in his official capacity in any matter where he, a member of his immediate family, or a business organization in which he has an interest, has a direct or indirect financial or personal involvement that might reasonably be expected to impair his objectivity or independence of judgment."

but is a member of the same statewide union with which the board will be negotiating. The board member's sister does not fall within the definition of "immediate family member," but, as you noted, falls within the definition of "relative," which means "the spouse, natural or adopted child, parent, or sibling of a school official." See, N.J.S.A. 18A:12-23. In A08-98, the Commission reasoned that a board member's relationship with a child is different from that of a spouse's sibling. **Although a board member's child and sister both fall within the definition of relative, the Commission believes that a board member's relationship with a child is different from that with a sister. The public could reasonably expect or perceive that a board member would have a great interest in his child's financial well being that would conflict with his duty to the board.**

Consistent with the language in A19-05, the Commission herein advises that Member G would violate N.J.S.A. 18A:12-24(c) if she were to participate in negotiations. However, Member G may vote on the CBA, after the MOA is struck. See, Advisory opinion A34-07 (February 26, 2008).

#### Invoking the Doctrine of Necessity in the Negotiations Phase

The Commission has previously advised that a Board would not invoke the Doctrine of Necessity to allow all members to negotiate where three of the nine Board members did not have a conflict, but their terms could conclude during the course of the negotiations. Advisory Opinion A55-95 (January 23, 1996). In Advisory Opinion A03-98 (April 1, 1998), the Commission advised that invoking the Doctrine of Necessity would be appropriate during the negotiations phase where there were two vacancies on the eight-member Board and only one (fairly new) member was able to negotiate because other members were conflicted.

Here, based on the facts and analysis set forth above, the Board has only two members, Member E and Member F, who may participate in the negotiations phase. While the Commission recognizes that this is not an ideal situation, and it further acknowledges that these two members "do not want the burden of having to formulate the strategies, parameters and goals of the negotiations without input from the Board as a whole," (Counsel letter at p. 5) the Commission declines to advise that the Board must resort to invoking the Doctrine of Necessity under these circumstances.

#### Invoking the Doctrine of Necessity in the Post MOA Phase/Vote

The Commission has previously ruled that when more than a quorum of the Board members has a conflict preventing the Board from voting on a collective bargaining agreement, the entire Board may vote on the contract pursuant to the Doctrine of Necessity. I/M/O Edward DeYoung et al, Vernon Township Bd. of Ed., C07-96 (July 23, 1996). However, based on the facts and analysis set forth above, the only member who may *not* vote in the post MOA phase is Member A. Accordingly, the Board has its quorum of non-conflicted members to vote on the contract once the MOA is struck. To the extent Member B, Member C and Member D elect to recuse themselves,

the Commission cautions that its advisories do not compel this action and, therefore, it will not recommend invoking the Doctrine of Necessity as to the voting phase.

We trust that this opinion answers your inquiry.

Sincerely,

Robert W. Bender, Chairperson